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## REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

Lambert v. City of Norfolk (Va.) 61 S. E. 776.

Peters v. Lynchburg Traction & Light Co. (Va.) 61 S. E. 745.

Southern R. Co. v. Moore (Va.) 61 S. E. 747.

See End of Index for Tables of Southeastern Cases in State Reports.

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3.

THE  
SOUTHEASTERN REPORTER.  
VOLUME 62.

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**MCCARTY v. PIEDMONT MUT. INS. CO.**  
(Supreme Court of South Carolina. July 31, 1908.)

**1. INSURANCE—WAIVER AND ESTOPPEL.**

The doctrines of waiver and estoppel, arising out of the knowledge and acts of agents, apply to mutual assessment companies as to old line insurance companies, whether the subject-matter of waiver and estoppel relate to the form or the substance of the contract.

**2. SAME.**

It cannot be a basis for waiver of, or estoppel to assert, conditions in a fire policy against incumbering the property without consent written on the policy, that insured, when applying for the policy, told the agent he intended to put on a small mortgage on the property, as he did after obtaining the policy, and that the agent told him this would make no difference; these matters not relating to a known or existing fact, but to something intended to be done in the future.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 908.]

**3. SAME—OVERVALUATION.**

Civil Code 1902, § 1816, provides that no fire insurance company shall issue a policy for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of the insurance to be fixed at or before issuance of the policy, and in case of total loss insured shall be entitled to recover the full amount of insurance. Section 1817 provides that no statement in the application shall prevent recovery, provided, after the expiration of 60 days, the insurer shall be estopped to deny the truth of the statement in the application which was adopted, except for fraud in making the application. *Held*, that where the policy showed the parties agreed on \$5,000 as the value of the property, and \$1,500 insurance was granted, and the fire, resulting in total loss, occurred more than 60 days after issuance of the policy, the court, having submitted the question of fraud, properly instructed, notwithstanding the claim of misrepresentation by insured as to the value of the property, that if insured was entitled to recover he was entitled to recover the full amount of insurance specified in the policy.

**4. TRIAL—INSTRUCTION—CHARGING ON MATTERS OF FACT.**

An instruction as to a matter in respect to which there was no dispute in the testimony is not open to the objection of charging in respect to matters of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

**5. SAME—NECESSITY FOR REQUESTS.**

Where the court gives an instruction which is a proper statement of the law, a party may not, without making requests therefor, complain

that it does not give further and detailed instructions on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 628-641.]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Aiken County; R. W. Memminger, Judge.

Action by H. D. McCarty against the Piedmont Mutual Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Croft & Croft and Carlisle & Carlisle, for appellant. Hendersons, for respondent.

**JONES, J.** This action is upon an insurance policy issued by defendant to plaintiff November 8, 1906, indemnifying him against loss by fire on a dwelling house, a tenant house, and some household furniture, situated in Aiken county, S. C. On March 16, 1907, the property insured was totally destroyed by fire. Recovery was resisted by defendant under two defenses: (1) Placing an incumbrance upon the property after issuance of the policy without the written consent of the defendant; (2) fraudulent overvaluation of the dwelling house. Judgment was rendered for the plaintiff.

The defendant is a domestic mutual insurance company, regulating its business by means of a constitution and by-laws, of which the insured becomes a member on the issuance of the policy. When application was made for the policy, on November 6, 1906, defendant's agent asked plaintiff if there was any mortgage on the property, and plaintiff answered there was not, but that he expected to put a small mortgage on it soon, and asked him if that would make any difference, to which the agent replied that it would not. Upon this assurance the plaintiff, on January 27th following, gave a mortgage to the Bank of Aiken for \$150 without any other consent on the part of the defendant, except what may be deemed involved in the knowledge and representations of defendant's agent in negotiating for the policy. The first question presented under the exceptions is whether the doctrines of waiver and estoppel, arising out of the knowledge and acts of agents, apply to mutual assessment companies as to old-line insurance companies. The decisions in

this state show that mutual insurance companies and fraternal benefit societies are governed by the same rules of law as the old-line insurance companies. *McBryde v. Mut. Ins. Co.*, 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769; *Sparkman v. Supreme Council*, 57 S. C. 16, 35 S. E. 391; *Thompson v. Piedmont Mut. Ins. Co.*, 77 S. C. 486, 58 S. E. 341; *Morrison v. Benev. Ass'n*, 78 S. C. 398, 59 S. E. 27; *Hankinson v. Piedmont Mut. Ins. Co.* (S. C.) 61 S. E. 905; *Plunkett v. Piedmont Mut. Ins. Co.* (S. C.) 61 S. E. 893.

Appellant contends that this rule should not apply to conditions affecting the essence of the contract, the risk assumed, such as a subsequent incumbrance. We see no value in making the distinction contended for by appellant. The mutual insurance company is a distinct entity as a corporation, and, like other corporations, must act through agents. The knowledge acquired by its agents within the apparent scope of their authority ought to be imputed to it, as in the case of any other principal. Certainly until the delivery of the policy the applicant is not a member of the mutual association, and cannot be presumed to even know the constitution and by-laws of the association, much less to be bound thereby, and experience teaches that he acquires very little knowledge of the constitution and by-laws after membership. The agent and applicant are not upon equal terms of knowledge. The applicant is generally ignorant of the powers of the agent and the special rules by which the solicited contract is to be controlled. The agent is generally expert in these matters, and common honesty and fairness demand that the applicant be not misled, to his injury, by the agents in one kind of association as well as the other, whether the subject-matter of waiver and estoppel relate to the form or the substance of the contract.

Another question involved is whether the knowledge and representations of the agent in this case can be the basis of waiver or estoppel, since they did not relate to a known or existing fact, but to something intended to be done in the future. This presents a serious question. Waiver generally involves the relinquishment of a known or existing right. Estoppel by misrepresentation generally involves some misrepresentation of a past or existing fact. Hence, generally, representations de futuro do not form the basis of waiver or estoppel. A leading authority on this subject is *Insurance Company v. Mowry*, 98 U. S. 546, 24 L. Ed. 674, in which the court said: "The previous representations of the agent could in no respect operate as an estoppel against the company. From the circumstance that the policy subsequently issued alone expressed its contract, and estoppel from the representations of a party can seldom arise, except where the representations relate to a matter of fact, to a present or past state of things, if the representations related to something to be afterwards

brought into existence, it will amount only to a declaration of intention, or have been liable to modification or abandonment upon a change of circumstances, of which neither party can have knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." This language is made the basis of the text in 11 Encyc. Law, 423, 16 Encyc. Law, 944, and in 16 Cyc. 752, where cases are collated. Among the cases enforcing the doctrine of *Mowry's Case*, supra, may be cited *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430, distinguishing *Carrugi v. Insurance Co.*, 40 Ga. 135, 2 Am. Rep. 567; *Elliot v. Whitmore*, 23 Utah, 342, 65 Pac. 70, 90 Am. St. Rep. 700; *Gray v. Germania Fire Ins. Co.*, 155 N. Y. 180, 49 N. E. 675.

The point under consideration is not concluded by the case of *Williamson v. Association*, 62 S. C. 405, 38 S. E. 616, 1008. On the former appeal in that case (54 S. C. 593, 32 S. E. 765, 71 Am. St. Rep. 822) the court, in determining what was the contract between the parties, considered the representation of the association, in its certificate of stock and literature, that the stock shall mature in a definite number of months, which was inconsistent with its by-laws. On the appeal in 62 S. C. 405, 38 S. E. 616, 1008, the question arose whether it was error to refuse to instruct the jury that defendant could not be estopped by representations in certificate of stock and literature, as they related to a future fact. The court, at page 405 of 62 S. C. (38 S. E. 616, 1008), held that there was no error, because the representations were not in reference to a future fact. What would have been the result, had the representations related merely to future expectations or intentions with respect to a contract merely proposed, does not appear, except inferentially. It has frequently been held in this state that if an insurance agent, at the inception of the contract, has knowledge of a fact constituting a forfeiture, such knowledge is imputed to the company, and the issuance of the policy as a valid policy estops the company from asserting the forfeiture. *Gandy v. Insurance Co.*, 52 S. C. 228, 29 S. E. 655; *Pearlstone v. Insurance Co.*, 74 S. C. 250, 54 S. E. 372; *Doyle v. Hill*, 75 S. C. 263, 55 S. E. 446; *Fludd v. Assur. Soc.*, 75 S. C. 320, 55 S. E. 762; *Rearden v. State Mutual Ins. Co.*, 79 S. C. 526, 60 S. E. 1106.

Imputing to defendant company the knowledge had by its agent, then the case practically stands as if the agent had incorporated in the application plaintiff's intention to place a small mortgage on the property, and the delivery of the policy was therefore made after knowledge of his intention. But the dis-

inction between knowledge of a fact inconsistent with a valid policy in its inception and knowledge of a mere intention to do something in the future, which knowledge is consistent with the existence of the policy as a valid contract in its inception, is manifest. The intention may never be carried out, or, if carried out, the contract stipulates as to the manner and conditions. Hence to sustain the view that there was waiver of, or estoppel to assert, the conditions of the contract in this case, the court must go further than it has yet gone on this subject. The by-laws of the defendant company do not forbid the placing of an incumbrance upon the insured property. The policy, however, contained a stipulation that if the property be incumbered, etc., without the written consent of the company indorsed thereon, it shall not be held liable, and further provided that the insured shall furnish a correct account of any incumbrance on the property insured, and promptly advise the company of any insurance placed upon it after the policy is issued. In the application it is declared that there is no contract of insurance until the application is accepted by the home office in Spartanburg subject to the charter, by-laws, and rules governing the company. It is also declared in the application that "I understand that no contract is valid, except in writing, signed by the president or secretary, and that the company employs no agents, but solicitors, which I accept as my agent to assist me in making application to the company for said insurance."

The foregoing recitals show that the delivery of the policy as a valid contract is consistent with the imputed knowledge that the insured intended to place a mortgage upon the insured property, for the policy provided what the assured should do in that event. As the mere declaration of intention to do something in the future with respect to a contract not in existence cannot be the basis of a waiver or estoppel to assert a condition of the subsequently executed contract, we must sustain the appellant's contention on this point. This point was not involved, and therefore was not considered, in *Hankinson v. Piedmont Mut. Ins. Co.* and *Plunkett v. Piedmont Ins. Co.*, supra, as in both of those cases the knowledge of the agent, which constituted the basis of waiver or estoppel, was as to existing facts inconsistent with the delivery of the policy as a valid contract, and therefore these cases were governed by the rule in *Gandy's Case*, supra.

Respondent cites *Hagan v. Merchants' & Bankers' Ins. Co.*, 81 Iowa, 321, 40 N. W. 1114, 25 Am. St. Rep. 493, and *Mitchell v. Home Ins. Co.*, 72 Miss. 53, 18 South. 86, 48 Am. St. Rep. 535, to sustain the view of the circuit court. In the former case the agent, at the time of the application, not only knew that the applicant was desirous of concurrent insurance, but he knew he was actual-

ly applying in another named company for a definite amount of concurrent insurance, in conflict with the provision of the litigated policy. In the second case above the agent had full knowledge that the insured had and intended to have no safe and full knowledge that the inventory and books of account had been kept, and were to be continued to be kept, at the store. Both these cases involved to some extent a knowledge of an existing fact, as distinguished from a mere intention. In the case of *Kitchen v. Hartford Fire Ins. Co.*, 57 Mich. 135, 23 N. W. 610, 58 Am. Rep. 344, the agent, at the time of the application, not only knew of the pendency of another application for concurrent insurance, but immediately after such concurrent insurance was obtained was informed of the fact. The continued recognition of the policy after knowledge of such facts was held to estop the company. So that the case last cited may well be supported on the principle, enforced in this state, that any act showing recognition of the policy as valid after knowledge by the company of a fact constituting a forfeiture is evidence of waiver of the forfeiture.

With respect to the question of overvaluation of the dwelling house, the court instructed the jury that, if plaintiff was entitled to recover, he was entitled to recover the amount of the insurance specified thereon in the policy. The contention of appellant is that the plaintiff represented the original cost of the dwelling at \$5,000, that this was a warranty precedent, and that the jury should have been instructed that the knowledge of the agent of defendant company would not amount to a waiver, so as to bind the company to the full amount specified in the policy. The valued policy form attached to the policy shows that the parties agreed upon \$5,000 as the value of the building, upon which insurance to the amount of \$1,500 was granted. Section 1816, 1 Code of Laws 1902, provides: "No fire insurance company or individuals writing fire insurance policies, doing business in this state, shall issue policies for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of the insurance to be fixed by insurer and insured at or before the time of issuing said policies, and in case of total loss by fire, the insured shall be entitled to recover the full amount of the insurance," etc. Section 1817 provides: "No statement in the application for insurance shall be held to prevent a recovery before a jury on said policy in case of total or partial loss: provided, after the expiration of sixty days, the insurer shall be estopped to deny the truth of the statement in the application for insurance which was adopted except for fraud in making their application." The question whether there was any fraud in the

valuation of the property was fairly submitted to the jury under other instructions, and the fire occurred more than 60 days after the issuance of the policy. The instructions complained of were therefore correct.

It is contended that the court charged in respect to matters of fact in stating to the jury: "And the plaintiff would also be entitled to recover three-fourths of the actual value at the time of the fire of the personal property, however, not to exceed \$500." This exception cannot be sustained. There was no dispute in the testimony that there had been a fire which had totally destroyed the property.

The defendant made a number of requests to charge touching the subject of agency, which were given to the jury with the remark: "All of this may be qualified by stating that a principal may ratify the acts of an agent. If the principal acts upon the acts of an agent, and accepts it, of course, it is bound by it." It is not contended that the qualification is not a proper one with respect to the general law of agency, but that the court should have gone further, and have instructed the jury: "That if the principal, after the facts connected with the doing of the unauthorized acts of its agent are brought home to his knowledge, then accepts the benefit of the same, either expressly or impliedly, the principal would be bound by the unauthorized acts of his agent; but if the principal abides the act of his agent, without the facts connected with such act being brought to his knowledge, then he would not be held by his conduct to have ratified the unauthorized act of his agent." If appellant desired more detailed instructions with respect to the law of ratification by principal, requests to that end should have been made.

The foregoing rulings practically dispose of all the material questions raised by the exceptions.

The judgment of the circuit court is reversed.

GARY, A. J. (dissenting). Public policy demands that the agent should not be allowed to place such a construction upon the contract that a person would thereby be induced to take out a policy of insurance, thus enabling the company to get possession of the premium of insurance, as this would be a fraud upon the rights of the party insured. This principle is so fully sustained by the recent cases of *Williamson v. Association*, 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822, *Eastern B. & L. Association v. Williamson*, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735, and *Vought v. Eastern B. & L. Association*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, that I deem it only necessary to cite those cases.

For these reasons, I dissent.

#### MARSHA v. RICHLAND COUNTY.

(Supreme Court of South Carolina. July 28, 1908.)

#### MUNICIPAL CORPORATIONS — BOUNDARIES — LOCATION.

Where the boundary of a city has been actually surveyed and located by commissioners charged with that duty, and their action has been generally recognized and acquiesced in, not only by the public, but by the Legislature, the boundary cannot be overthrown by subsequent measurements not sanctioned or recognized by the Legislature, though such measurements may tend to show some departure from the limits as specified in the charter.

Appeal from Common Pleas Circuit Court, Richland County; Chas. G. Dantzler, Judge.

Action in a magistrate's court by Stephen Marsha against Richland county. Judgment for plaintiff, which on appeal to the circuit court was affirmed, and defendant appeals. Reversed.

Thomas & Thomas, for appellant. James H. Fowles, Jr., for respondent.

JONES, J. The plaintiff brought this action in the court of Magistrate Moorman to recover damages for injuries to his horse and wagon caused by a defective bridge alleged to have been situated several feet outside the eastern limit of the city of Columbia. The defendant contended that the bridge was located within the city of Columbia, and that the defendant was therefore not liable. The magistrate gave judgment for \$89, which on appeal was affirmed by the circuit court; Judge Dantzler presiding. The exceptions of defendant county to this court contend that the undisputed facts show that said bridge was located within the city of Columbia, and that no liability attached to defendant. It is admitted that the bridge is located several feet west of the eastern line of Harden street, and defendant contends that the eastern line of Harden street is the eastern limit of the city of Columbia; whereas, the plaintiff contends that the eastern limit of the city of Columbia is a line parallel to, but 22 feet west of, the eastern line of Harden street, and that the bridge is without the city limits.

By the act of 1786 (4 St. at Large, p. 751) for the purpose of establishing the town (now city) of Columbia, certain commissioners were "authorized and required to lay off a tract of land of two miles square, near Friday's Ferry, on the Congaree river, including the plain of the hill whereon Thomas and James Taylor, Esquires, now reside, into lots of one-half acre each and the streets shall be of such dimensions, not less than sixty feet wide, as they shall think convenient and necessary, with the two principal streets running through the center of the town at right angles of one hundred and fifty feet wide, which said land shall be, and the same is hereby declared to be, vested in the

said commissioners and their lawful successors for the use of the state." Pursuant to this authority, the town was laid off into lots and streets, and the southern, eastern, and northern boundaries fixed, but leaving open the western boundary, which was the subject of litigation in *Columbia Bridge Co. v. City of Columbia*, 27 S. C. 143, 3 S. E. 55, and plat of same made and filed with the Secretary of State. This plat shows Harden street as the eastern boundary of Columbia. There is no evidence tending to show that the eastern line of Harden street as located was different from its location up to the time of the alleged delict. In 1850, Arthur and Moore, as surveyors, under ordinance of the city of Columbia, made a map of the city of Columbia, and the eastern line of Harden street was given as the eastern limit of the city. Plat of the city made by A. Y. Lee in 1869, one by J. G. Guignard, commissioner, one by G. T. Berg, architect and surveyor in 1868, and one by G. McDuffie Hampton and D. B. Miller in 1903, each represents the eastern line of Harden street as the eastern boundary of Columbia. A plat of Shandon gives the eastern line of Harden street as the dividing line between Shandon and Columbia. In 1870, the Legislature passed an act, which, among other things, extended the eastern limits of the city, "on the side of Harden street to embrace all the territory included between Harden street and a line running parallel to said Harden street and distant therefrom 954 feet." 14 St. at Large, p. 354. The boundaries of the city were actually extended pursuant to this act and designated by marks, and the limit thus fixed was commonly recognized by the city and public generally, and under the act of 1871 (14 St. at Large, p. 560) the wards of the city were made to conform to the extended limits. But in 1878 (16 St. at Large, p. 457), the eastern boundary of the city was established and fixed as it was before the passage of the act of 1870. It is admitted that upon the passage of the act of 1878 the eastern line of Harden street was recognized by the public generally as the eastern limit of the city, and that Harden street out to its eastern line was worked and kept in repair by the city authorities.

Now, as against all this, plaintiff offers the testimony of E. N. Chisolm, Jr., city engineer, to the effect that in 1906, at the time this suit was brought, using the map of Arthur and Moore above mentioned, he located the center of Assembly street by monuments established by Arthur and Moore, and measured one mile, or 5,280 feet, along Gervais street, and found that such distance lacked 22 feet of reaching the eastern boundary of Harden street. By another method, measuring one-half of Assembly street at 75 feet, estimating the width of 9 streets at 100 feet each, and estimating 10 squares at 417.31 each, and Harden street as 150

feet, the mile limit would end 18.10 feet west of the eastern line of Harden street. In making the actual measurements, Mr. Chisolm used a 100-foot United States standard steel tape and measured upon the rail of the street railway track. Being a careful and competent surveyor, this single measurement from the assumed starting point was probably more accurate than the measurement by the surveyors of 1786, who, doubtless, used the link chain and marked each chain measurement with a peg stuck in the ground. The lengthening of the chain, possibly several inches, by the mere wearing of its many joints, the slanting of the pegs forward as stuck in the ground, the condition of the country, wood, and field, then as compared with the city streets now, and the personal equation which must necessarily enter every survey, or other causes, may have contributed to make the difference between the old measurement and the new, and yet the difference be perfectly compatible with an honest and faithful effort on the part of the commissioners of 1786 to perform the duty imposed upon them. The point is that the evidence all shows that the old commissioners established the eastern line of Harden street as the eastern limit of the city. Such territory was declared and accepted as the town of Columbia. The establishment of the outer lines was of more importance in carrying out the purpose of the charter than the inner lines of streets and lots, for such outer lines indicated the limit of the grant or dedication and marked the jurisdiction of the municipality. Mr. Chisolm did not ascertain his starting point in Assembly street by any reference to the survey of 1786, but was controlled by monuments said to have been placed by Arthur and Moore elsewhere, for he testified: "I found the center of Assembly using monuments located at intersection of Sumter and Senate, Bull and Senate, and Lady and Sumter. \* \* \* The correctness of my measurements in determining center line of Assembly street depends entirely upon the correctness of location of stone monuments at corner of Senate and Sumter, Bull and Senate, and Lady and Sumter streets. The monuments were placed by Arthur and Moore in 1850." Mr. Chisolm also testified that he found squares in the city irregular in measurement, sometimes more and sometimes less than 417.31 feet. He further testified: "There is a monument at the intersection of Senate and Harden streets. Using this monument and monument at the corner of Gregg and Senate street, turning right angle from that, this line came a few feet to the east of the center line of Harden street and a few feet west of the mile limit as surveyed by myself along Gervais street." If therefore these monuments which are much closer to the locus in quo are correctly located, then if Harden street was located at right angle to Senate street,

according to the adopted scheme, the center line of Harden street should be further east than as now located. Mr. Chisolm also testified that in big fires in cities the boundaries are often left in confusion, and he recalled the historic razing of Columbia by fire in 1865. All this tends to show that there is uncertainty in the accuracy of Mr. Chisolm's location of the center of Assembly street as it existed in 1786, and upon the correctness of this location depends the value of his measurement. Moreover, the measurement by Mr. Chisolm was not made pursuant to any legislative authority to locate the eastern city limit and has never received any public recognition; whereas, Harden street as now located has not only received the general recognition and acquiescence of the public, but the Legislature in 1870, 1871, and 1878 recognized Harden street as the eastern boundary of the city, and, as stated, there is nothing to show that Harden street is now different in width from what it was in 1786, or at any other subsequent period.

In the case of Columbia Bridge Co. v. Columbia, 27 S. C. 149, 3 S. E. 60, the court uses this language: "Where the boundaries are vague and indefinite, the practical interpretation which has been given by the citizens of the disputed territory in exercising municipal privileges, such as voting, etc., may be adopted by the court, and that boundaries may be defined by long use confirmed by legislative recognition." The principle thus stated may be applied to the case at bar, if it be deemed that the eastern boundary of the city was uncertain and indefinite. Instead of being indefinite and uncertain, however, the eastern boundary of the city has been actually surveyed and located by commissioners charged with such duty, and their action has been generally accepted and acquiesced in by those concerned, and this is conclusive of the question of location. A municipal boundary so established and recognized cannot be overthrown or shaken by subsequent measurements not sanctioned or recognized by the Legislature, even though such measurements may tend to show some departure from the limits as specified in the charter. 6 Cyc. 182, and cases cited in note 30. The question is not whether the boundaries of a town as fixed and established by statute can be changed or altered by common recognition and acquiescence; but it is whether the boundaries of a town, located by commissioners appointed for that purpose, and generally accepted as correct, may be changed or altered by a subsequent survey without legislative sanction or recognition. Our conclusion upon the undisputed facts is that the bridge in question is within the limits of the city of Columbia.

The judgment of the circuit court is reversed.

**COLLETON MERCANTILE & MFG. CO. v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of South Carolina. August 4, 1908.)

**COMMERCE—INTERSTATE COMMERCE—REGULATION.**

Act 1903 (24 St. at Large, p. 81), providing a penalty to be paid the consignee by a carrier for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, does not violate the interstate commerce clause of the federal Constitution, in case of a shipment from out of the state into it, part of which was delivered by the final carrier to the consignee at destination, so that, in the absence of explanation, it is presumed the loss occurred while the goods were in the possession of such carrier, from whom recovery of the penalty is sought.

Appeal from Common Pleas Circuit Court of Colleton County; Geo. W. Gage, Judge.

Action by the Colleton Mercantile & Manufacturing Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

P. A. Willcox, for appellant. J. G. Padgett, for respondent.

**JONES, J.** The sole question presented in this case is whether the penalty statute of 1903 (24 St. at Large, p. 81) violates the interstate commerce clause of the federal Constitution in so far as it relates to the failure to adjust claim for loss of freight shipped from a point in New York to Walterboro, in this state. A part of the single shipment of hats was delivered by defendant to plaintiff at destination, and in the absence of explanatory evidence the presumption is that the loss occurred while the goods were in possession of defendant. The statute was designed to effectuate an important public purpose with respect to the duty of common carriers in this state, and the delict penalized occurred in this state. It has been several times decided that the statute in question does not interfere with interstate commerce. *Charles v. Railway Co.*, 78 S. C. 36, 58 S. E. 927; *Venning v. A. C. L. R. Co.*, 78 S. C. 57, 58 S. E. 983, 12 L. R. A. (N. S.) 1217; *Von Lehre v. A. C. L. R. Co.*, 78 S. C. 167, 168, 59 S. E. 1135.

The judgment of the circuit court is affirmed.

**MACON v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina. Aug. 4, 1908.)

**1. CARRIERS—LOSS OF FREIGHT—PENALTY FOR DELAY IN TRANSPORTATION.**

A consignee, having received from the carrier satisfaction for total loss of goods, is no longer such injured consignee or owner of the bill of lading as can maintain an action under 24 St. at Large, p. 671, for penalty for delay in transportation.

**2. SAME.**

24 St. at Large, p. 671, authorizing recovery of a penalty for delay in transportation

of freight, has no application to the case of a total loss of the goods.

Appeal from Common Pleas Circuit Court of Cherokee County; R. C. Watts, Judge.

Action by Eli Macon against the Southern Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

N. W. Hardin, for appellant. W. S. Hall, for respondent.

JONES, J. The plaintiff recovered judgment against defendant before a court of magistrate in Cherokee county for \$70, as penalty for delayed shipment of freight, under the act of 1904 (24 St. at Large, p. 671). On appeal to the circuit court Judge Watts reversed the judgment of the magistrate's court, and dismissed the complaint. The question presented by plaintiff's grounds of appeal to this court is whether the action can be maintained under any view of the facts. The undisputed facts are that on February 7, 1907, plaintiff delivered to the defendant corporation, as a carrier of freight, a lot of household goods, valued at \$70, for transportation from Chester, S. C., to Blacksburg, S. C., a distance of 40 miles, with request for prompt shipment, and received from defendant a bill of lading therefor. The goods were never delivered. Subsequently plaintiff filed with defendant a claim for \$58.73 for the loss of the goods, and on June 13, 1907, received from defendant \$50 in full settlement of all claims on account of said loss. On June 27, 1907, after this settlement, plaintiff brought this action for penalty to the extent of the alleged value of the goods.

That portion of section 2 of the act which is relevant is as follows: "Sec. 2. That any such company failing to comply with the provisions of this act, except for good and sufficient cause, the burden of proof of which shall be on the company so failing, shall be subject, in addition to the liabilities and remedies now existing for unreasonable delay in the transportation of freight, to a penalty of five dollars per day of delay in excess of the time hereinbefore limited, to be recovered by any consignee who may be injured in any way by such delay, or by the owner or holder of the bill of lading, in any court of competent jurisdiction: Provided, that the sum of the penalty recovered shall not exceed the value of the goods and the transportation charges thereon," etc. This action was properly dismissed for two reasons: (1) The plaintiff, having received from the defendant satisfaction for total loss of the goods, was no longer such injured consignee or owner of the bill of lading as could maintain an action under the statute. *Best v. Ry.*, 72 S. C. 479, 52 S. E. 223, holds that action cannot be maintained for penalty alone under 24 St. at Large, p. 81, after receiving compensation for loss or damage to freight. (2) The statute relates to delay in transportation, as dis-

tinguished from loss or damage to goods while in the possession of the carrier, hence has no application to the present case, which was a case of loss of goods. Being a penal statute, it must be construed strictly.

The judgment of the circuit court is affirmed.

AMERKER et al. v. TAYLOR et al.  
(Supreme Court of South Carolina. Aug. 4, 1908.)

1. INTOXICATING LIQUORS — LOCAL OPTION LAW — CREATION OF NEW GOVERNMENTAL SUBDIVISIONS—EFFECT.

In the absence of legislation inconsistent therewith, when a new district is carved out of an old district, the local option law which existed in the old district not only continues in operation in the portion of the old which remains, though with change of name, but also in the new district, especially when no other territory differently affected is embraced therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 35.]

2. SAME.

Act Feb. '16, 1907 (25 Stat. at Large, p. 464), provides that any dispensary in a county shall be continued until voted out under existing law, etc. Act Feb. 14, 1908 (25 Stat. at Large, p. 1279), creates C. county out of territory of L. and O. counties, requires the officers in L. and O. counties to exercise their duties in the territory taken from each until new officers are selected, and declares that all laws in force in other counties shall be in force in C. county, etc. No dispensary was located in the territory taken from L. county, but two dispensaries existed in the territory taken from O. county. *Held*, that since the act of 1907 is a general act, and is, by the express terms of the act of 1908, made in force in C. county, dispensaries are lawfully established in C. county until they are voted out; and, until the Governor appoints, as authorized by section 34 of the act of 1907 (page 475), a dispensary board for C. county, the dispensary board of O. county must continue the dispensaries in the territory forming C. county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 35.]

Petition by T. A. Amerker and others against R. E. Taylor and others for an injunction restraining the county dispensary board of a county from closing dispensaries. Injunction awarded.

Bellinger & Welch, for petitioners. L. K. Sturkey, Wolfe & Berry, and Buyck & Mann, for respondents.

JONES, J. The petitioners, as citizens and taxpayers of Calhoun county, have applied to this court in its original jurisdiction for an injunction restraining and enjoining the county dispensary board of Orangeburg county, and the dispensers concerned, from closing either of the dispensaries located at St. Matthews and Ft. Motte. By Act Feb. 14, 1908 (25 Stat. at Large, p. 1279), Calhoun county was created out of portions of Orangeburg and Lexington counties. Dispensaries existed in both the original counties at the time of the formation of Calhoun county, and have not been voted out since that time.



While no dispensary was located in that portion of Lexington which became a part of Calhoun, two dispensaries existed in that portion of Orangeburg which went into the new county, one of which being established at St. Matthews and the other at Ft. Motte. These dispensaries existed at the time of the approval of Act Feb. 16, 1907 (25 Stat. at Large, p. 464), commonly known as the "Carey-Cothran Act," and section 34 of said act provided: "In any county in this state in which the dispensary has not been voted out by and under existing law and until an election is held in such county as provided by this act, any dispensary now established therein shall be continued as a dispensary in said county under this act." etc. Section 7 of the act creating Calhoun county provides: "Until the officers to be elected at the special election hereinbefore provided shall have been elected and all officers required to be appointed shall have been appointed and duly qualified, all the county officers in Orangeburg and Lexington counties respectively shall continue to perform and exercise the duties of their respective offices in territory taken from each of the old counties," etc. Section 20 of the said act declared: "All laws now of force in the other counties of this state are hereby made of force in Calhoun county when not inconsistent with the provisions hereof." The members of county dispensary boards are declared to be county officers by section 6 of the act of 1907. After the formation of Calhoun county these dispensaries at St. Matthews and Ft. Motte were managed by the county dispensary board of Orangeburg until some time before the commencement of this proceeding, when that board ordered the permanent closing of these dispensaries. To prevent their closing is the object of this proceeding. While conceding the power of the Orangeburg County dispensary board to temporarily close the dispensaries, as the public good may demand, under the authority conferred by section 17 of the act of 1907, the petitioners deny the right of the board to permanently close these dispensaries, contending that such can only be done, under section 35 of said act, after a vote of the people of the county of Calhoun disestablishing or voting out said dispensaries. There has been no election in Calhoun county since its formation voting for the establishment of dispensaries therein, and no dispensary board has been appointed for Calhoun county.

The question presented by the petition and return upon undisputed facts is whether it is the duty of the dispensary board of Orangeburg county to maintain these dispensaries in Calhoun county until the appointment of a dispensary board for Calhoun county or until said dispensaries have been voted out of Calhoun county in the manner provided for the disestablishment of dispensaries under the Carey-Cothran act of 1907.

We think the contention of petitioners is correct. The result of the authorities bearing more or less directly on the principle of law involved may be thus stated: In the absence of legislation inconsistent therewith, whenever a new district is carved out of an old district, the local option law which existed in the old district not only continues in operation in that portion of the old which remains although with change of name (*Jones v. State*, 67 Md. 259, 10 Atl. 216; *Medford v. State*, 45 Tex. Cr. R. 180, 74 S. W. 768; *State v. Cooper*, 101 N. C. 684, 8 S. E. 134), but also in the new district, certainly when no other territory differently affected is embraced therein (*Higgins v. State*, 64 Md. 419, 1 Atl. 876; *Prestwood v. State*, 88 Ala. 235, 7 South. 259; 19 Ency. Law, 511; 23 Cyc. 95; *Black on Intoxicating Liquors*, § 105). In *Ex parte Fields* (Tex. Cr. App.) 86 S. W. 1022, it was held that the mere adding of new territory to a district in which local option is established did not operate to repeal the local option of the original district. In *Lackawanna County v. Stevens*, 105 Pa. 465, it was held that a special act regulating sheriff's fees for the county of Luzerne continued of force in the county of Lackawanna subsequently formed out of Luzerne county.

In the case at bar there is no legislation inconsistent with the existence of the dispensaries at St. Matthews and Ft. Motte, but, on the contrary, the statutes to which reference has been made recognize their existence, and provide for their maintenance by the county board of Orangeburg county until similar officers for Calhoun county are appointed, or until the disestablishment of said dispensaries in the manner provided by statute. The act of 1907, known as the "Carey-Cothran Act," is not only a general act affecting the whole state, but by the express terms of the Calhoun county act is made of force in that county. When Calhoun county was created, the dispensaries then established within its territory necessarily went into the new county, as any other thing, property, or business definitely located within the territory. Every dispensary is located by law at a particular spot or place, and it is only at such a place that intoxicating liquors may be lawfully sold in this state. This condition of things not only became an existing condition in Calhoun county by legislative act, but in legal contemplation was involved in the consent which the people gave when they voted for creation of the new county out of territory in which dispensaries were established, and no new condition was imposed thereby upon the people of the new county, for it is made up entirely of territory from dispensary counties. Since Calhoun county is a county in which dispensaries are lawfully established, and have not been voted out under existing law, the Governor has power, under section 34 of the Carey-Cothran act of 1907 and section 3 of

the Calhoun county act, to appoint a county dispensary board for Calhoun county, but until this is done, it is the duty of the county dispensary board of Orangeburg county to continue the dispensaries at St. Matthews and Ft. Motte under their power in section 7 of the Calhoun county act.

It is therefore adjudged that the temporary injunction, heretofore issued by the Chief Justice, be continued, and the respondents be and are hereby enjoined from permanently closing said dispensaries at St. Matthews and Ft. Motte, and commanded to continue their maintenance until a county dispensary board for Calhoun county is appointed by the Governor, or until said dispensaries are voted out according to law.

LAWRENCE et al. v. LAWRENCE et al.  
(Supreme Court of South Carolina. July 28, 1908.)

1. PLEADING—MOTION TO MAKE DEFINITE AND CERTAIN—NATURE.

A motion to make a complaint more definite and certain is not a pleading, nor an alternative remedy for a demurrer or answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1173.]

2. SAME—TIME FOR FILING.

The object of a motion to require a pleading to be made definite and certain being to enable movant to demur, answer, or reply intelligently, it should be made or noticed, or the right reserved, before the time for answering or demurring has expired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1188.]

3. SAME.

Code Civ. Proc. 1902, § 181, authorizes a motion to have a pleading made definite and certain when the nature of the charge or defense is uncertain. Circuit court rule 20 requires motions for such relief to be noticed before demurrer or answer to the pleading and within 20 days from the service thereof. Code Civ. Proc. 1902, § 164, makes a demurrer or answer the only pleading on defendant's part, and requires it to be served within 20 days after service of the complaint. Section 167 provides that, on amendment of the complaint, a copy thereof must be served upon defendant, who must answer it within 20 days, or plaintiff, upon filing due proof of service and defendant's omission, may proceed to obtain judgment. *Held*, that defendants did not waive the right to demur by moving to make the complaint more definite and certain, in a particular not affected by the amendment; section 167 contemplating an amendment of a complaint allowed by the court after demurrer, and not making an answer the only pleading that may be interposed to an amended complaint.

Appeal from Common Pleas Circuit Court of Charleston County; D. E. Hydrick, Judge.

Action by J. M. Lawrence and others against E. Charlotte Lawrence and another. From an order refusing to require the clerk to put the case on the calendar for judgment by default, plaintiffs appeal. Affirmed.

Plaintiffs' exceptions are as follows:

"The plaintiffs above named except to the order of his honor, Judge Hydrick, refusing to instruct the clerk to put the case on cal-

endar No. 3, for judgment by default, upon the following grounds and exceptions, to wit:

"(1) Because his honor erred in refusing to require the clerk to put the above case on calendar No. 3, for judgment by default, as provided by section 267 of the Code of Civil Procedure of 1902 of this state, in that it appears that the complaint was amended, and that the defendants failed to answer the same within 20 days after the service thereof.

"(2) Because his honor should have held that, where it appears on the face of the original complaint, the capacity in which the plaintiffs were then suing, the defendants should have demurred for such defect, for the want of legal capacity to sue, within 20 days after the service thereof, and, failing to do so, such ground was waived.

"(3) Because his honor should have held that, when a motion is noted to have the complaint made more definite and specific with reference to certain allegations of fraud, looking towards the perfection of the pleadings on the merits, they thereby waived their rights to interpose a demurrer, on the ground that the plaintiffs did not have legal capacity to sue.

"(4) Because his honor should have held that, where a complaint is amended in response to a motion to perfect the same on the merits, the defendants must answer within 20 days after the service of such amended complaint, as provided by section 167 of the Code of Civ. Proc. of 1902, and having failed to do so, the plaintiffs were entitled to judgment by default.

"(5) Because his honor should have held that the plaintiffs were entitled to have this case put on calendar No. 3, where it appears, as in this case, both on the face of the original and amended complaint, that the plaintiffs are suing as heirs and distributees at law of Mary S. Lawrence, deceased, that the defendants should have demurred within 20 days after the service of the original complaint, upon the ground that the plaintiffs had not legal capacity to sue, and having failed to this, such ground of demurrer was waived, under section 169 of the Code.

"(6) Because his honor should have held that, where a pleading is amended, and the same infirmity appears, both on the face of the original and amended complaint, and the defendants do not demur to the original complaint, they are thereafter estopped from interposing a demurrer to the amended complaint on the same ground, and should have adjudged the defendants in default.

"(7) Because his honor erred in discharging the rule to require the clerk to put this case on calendar No. 3, for that it appeared that the plaintiffs were suing as the heirs and distributees at law of Mary S. Lawrence, and no demurrer having been taken to such imperfection, or want of capacity to sue, within 20 days after the service of the original complaint, that the objection to the ca-

capacity in which the plaintiffs were suing was thereby waived, and the demurrer in this case came too late, and his honor should have awarded judgment by default."

W. A. Holman, R. A. Ellis, R. C. Holman, and D. J. Baker, for appellants. Henry Bulst, James Simons, J. P. K. Bryan, and T. Moultrie Mordecial, for respondents.

GARY, A. J. The following statement is set out in the record: "The above-entitled action was commenced on the 7th day of November, A. D. 1907, by the service of the summons and complaint, and within 20 days after the service thereof the defendants gave notice to have the complaint amended in the eighth paragraph, by making the same more definite and specific as to the charges and allegations of fraud contained therein. Said motion came on, and was heard before his honor, Judge Gage, within 20 days, and his honor granted the motion, and required the complaint to be amended in the pursuance of such notice. The plaintiffs were given until the 13th day of December, 1907, to serve such amended complaint. That on the 11th day of December, 1907, the plaintiffs served their amended complaint in compliance with the order of Judge Gage. That on the 30th day of December, 1907, the defendants served on the plaintiffs a demurrer, on the grounds that the complaint did not state facts sufficient to constitute a cause of action, in that it did not appear that administration had been taken out by any of the parties on the estate of Mary S. Lawrence; and, secondly, that the plaintiffs did not have legal capacity to sue, all of which will be more fully set forth hereafter. The plaintiffs returned the demurrer, on the ground that the same was waived, when the defendants failed to demur, within 20 days after the service of the original complaint, when it appeared upon the face thereof the capacity in which the plaintiffs were suing, and, furthermore, that the amended complaint should have been answered within 20 days after the service thereof. The plaintiffs requested the clerk of the court to put the case on calendar No. 3 for judgment by default, which was refused, and a rule was taken out against the clerk to require him to put the case on calendar No. 3 for judgment by default, as required by section 267 of the Code of Civil Procedure of 1902; but, after hearing the return to the rule, his honor, Judge Hydrick, refused to grant the relief asked for, and dismissed the rule. The plaintiffs appealed upon exceptions.

In different form they raise the question whether the defendants had the right to demur to the amended complaint on the ground that there was a defect of parties, when it was shown that more than 20 days had elapsed after service of the original complaint. In other words, whether the defendants waived the right to demur by making a motion that the complaint be made definite and cer-

tain, in a particular not affected by the amendment. Section 181 of the Code provides that "when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

Rule 20 of the circuit court is as follows: "Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being 'so indefinite or uncertain that the precise nature of the charge or defense is not apparent,' must be noticed before demurring or answering the pleading, and within 20 days from the service thereof."

Sections 164 and 167 of the Code are as follows:

"Sec. 164. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days, after the service of the copy of the complaint."

"Sec. 167. If the complaint be amended, a copy thereof must be served upon the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk due proof of the service and the defendant's omission, may proceed to obtain judgment, as provided by section 267."

The foregoing provisions must be construed, if possible, so as to give effect to all. A motion to make the complaint definite and certain is not a pleading. Nor is it an alternative remedy for the demurrer or answer. The object of the motion to require the party to make his pleading definite and certain is to enable the opposite party to demur, answer, or reply intelligently, and, of course, such motion should be made or noticed, or the right reserved, before the time for answering or demurring has expired. *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545; *Whaley v. Lawton*, 53 S. C. 580, 31 S. E. 660; *Allen v. Cooley Co.*, 69 S. C. 353, 38 S. E. 622. The appellants' attorneys contend that section 167 of the Code only permits an answer to an amended complaint. This section is found in the chapter which treats of the demurrer, and contemplates the amendment of the complaint allowed by the court, after there had been a demurrer, as in the case of *Bischoff v. Blease*, 20 S. C. 460. This construction gives effect to all the foregoing sections of the Code, and to rule 20 of the circuit court.

It is the judgment of this court that the order of the circuit court be affirmed.

LANFORD et al. v. DRUMMOND et al.  
(Supreme Court of South Carolina. Aug. 8, 1908.)

SCHOOL AND SCHOOL DISTRICT—SALE OF BONDS—MANDAMUS TO TRUSTEES.

Under Act Feb. 19, 1907 (Laws 1907, p. 522), authorizing trustees of a school district to sell bonds, a majority of the electors having

first voted in favor thereof, mandamus will not lie to compel the trustees to give their signatures for lithographing \$3,500 of bonds, the amount the voters authorized; the trustees considering \$2,000 enough, and they alleging that they have not been able to find a customer at par, the price required by the statute, and there being no evidence that they can get such price.

Jones, J., dissenting.

Original mandamus proceeding by J. W. Lanford, as one of the trustees of Lanford School District No. 10, in Laurens county, and others, individually and on behalf of other taxpayers and residents of said district, against W. H. Drummond and another, as trustees of said district. Judgment for respondents.

This is a proceeding in the original jurisdiction of this court, whereby the petitioners instituted proceedings to secure a writ of mandamus against the respondents upon the following facts: That Lanford School District No. 10, in Laurens county, is composed of  $12\frac{1}{4}$  square miles, and by an act of the Legislature, approved March 9, 1896 (Laws 1896, p. 162), the same was made a body politic and corporate for school purposes, and under an act of the Legislature, approved February 19, 1907 (Laws 1907, p. 522), the public school districts of South Carolina were authorized and empowered to issue and sell coupon bonds of said school districts for school purposes. That in accordance with an act of the Legislature, entitled "An act to provide for the issuing of bonds in public school districts in South Carolina" approved February 19, 1907, an election was held, upon a written petition of more than one-third of the qualified resident electors of said school district, for the purpose of voting on the question of issuing and selling coupon bonds in the sum of \$3,500, and a majority of the qualified electors voted in favor of said bonds. That all the requirements of law have been strictly complied with. That J. W. Lanford and the respondents are the duly appointed trustees of said school district, and T. R. De Shields, J. M. De Shields, O. L. Lanford, and C. L. Waldrep are qualified electors and taxpayers of said district. That the bonds are now ready, but the said trustees W. H. Drummond and M. G. Patterson refused, and still refuse, to sign their names on a card, from which their signatures may be lithographed on the coupons, and state that they will refuse to sign the bonds when presented to them. That J. W. Lanford, one of the trustees, has been and is now ready to sign and do all things necessary to the preparation and floating of said bonds, but by reason of the refusal of the trustees W. H. Drummond and M. G. Patterson to sign the cards, in accordance with the wish of the majority of the qualified electors, the will of the people will be thwarted. That it was the intention of the people that the proceeds of said bonds should be used in the erection of a school building, ready for use

by October 1, 1908. The return of the respondents set forth: That the board of trustees submitted to the duly qualified electors, at an election held therein, the question of issuing coupon bonds in an amount not exceeding \$3,500, and 17 votes were cast for bonds, and 14 against bonds, being 31 in all, whereas 44 persons residing in said district are qualified to vote. Under an act of the Legislature, approved February 19, 1907, the trustees of any school district were authorized to issue and sell coupon bonds at such times and in such amounts as they might deem necessary, and the trustees of said school district, not having sufficient funds on hand for the purpose of erecting a new school building, determined to issue bonds for an amount not exceeding \$3,500. That owing to the excellent advantages of the surrounding schools, the respondents, as trustees, deem it unwise that bonds for a larger amount than \$2,000 be sold. That the petitioners herein, and some other residents near Lanford Station, are the only persons favoring the erection of a large and expensive school building. That the respondents are ready and willing to take steps for the issuance and sale of bonds for an amount not exceeding \$2,000. Further, respondents show that \$3,500 is not in excess of 4 per centum of the assessed valuation of the property, but the respondents and others think that it would be \$1,500 additional burden imposed on the taxpayers. Further, the respondents show, and so allege, that they have been trying to sell said bonds, but have not found a purchaser therefor at par, as required by the act, and the respondents, as a majority of the trustees, have not authorized said bonds to be prepared. The respondents are now, and always have been, willing to have bonds in the necessary amount engraved and furnish their signatures as soon as a sale can be negotiated.

F. P. McGowan, for petitioners.

POPE, C. J. In Abbeville County v. McMillan, 52 S. C. 60, 29 S. E. 540, it was held: "That the act of a majority of a number of persons, appointed by law to perform some public duty, is the act of the whole." In the same case it is held: "Whether an officer has erred in the performance of a public duty in which he has discretion cannot be inquired into under proceedings in mandamus." In Moore v. Napier, 64 S. C. 564, 42 S. E. 997, it was held: "That the court in its discretion will refuse writ of mandamus when the effect of granting it would be to violate the intention of an act of the Legislature." There can be no question that a majority of the taxpayers residing in the bounds of Lanford School District have by their votes declared a willingness to issue bonds to the amount of \$3,500. It is the duty of the three trustees of said school district to carry out the will of their constituency. A majority of such trustees can act validly, and by their

conduct bind their constituency, but let us see what the act of the Legislature requires. At page 523 of the Acts of 1907, under "An act to provide for the issuing of bonds in public school districts in South Carolina," at section 4 of the said act, it is provided: "If a majority of the votes cast at such election be for the issuing of bonds, such trustees shall issue such bonds which shall not run longer than twenty years from date of issue thereof, which shall be sold by such trustees at not less than par, and the proceeds of which shall be used by such trustees for the purpose of erecting buildings," etc. As before remarked, a majority of these trustees could and should carry out the wish of the people. The very object of an election is that the majority of the voters may declare a policy which shall bind them and also bind their officers, but these officers are invested by this act with discretionary powers as to details. It is left to them to say when the bonds fill the requirements of law, and, furthermore, when they are able to sell the bonds at par. They allege they have not been able to negotiate the sale of the bonds at par, and there is no evidence that they can. Whether the trustees shall have the bonds lithographed before having an agreement to sell them is a matter of detail, upon which they may exercise their discretion. Had the petitioners shown that the whole issue of bonds could be sold at par, a very different case would have been presented. In the case we first cited, in an opinion prepared by that eminent jurist, Chief Justice McIver, he made the declaration we quoted; and in the second the words of Mr. Justice Gary are very pertinent. This court would use wise discretion in declining to issue bonds whose terms are at variance with the act of the Legislature. We, therefore, hold that we will not issue the mandamus prayed for, but that we will dismiss the petition.

GARY, A. J. (concurring). This is an application to the court, in the exercise of its original jurisdiction, for a writ of mandamus, requiring the respondents to write their names on a card, for the purpose of having their signatures lithographed or engraved upon certain coupon bonds, to the amount of \$3,500, which the petitioners contend were authorized to be issued by the vote of a majority of the qualified electors of the school district in question, and to compel the said trustees to sign the bonds. The respondents, in their return to the rule to show cause why the writ of mandamus should not issue, allege that "the trustees of the said school district, deeming it for the best interest of the school therein that a new school building be erected in said school district, for the accommodation of the school located at Lanford Station, and not having sufficient funds on hand for the purpose, determined to issue bonds to such amount as they might deem necessary for said purpose, and it was

thought that an amount not exceeding \$3,500 would be ample, though at the time said trustees did not know whether the full amount thereof would be necessary. \* \* \* That they have always been ready and willing, and are now ready and willing, to take such steps for the issuance and sale of coupon bonds of the said district, to an amount not exceeding \$2,000, as may be necessary, but are not willing to issue and sell such bonds in an amount in excess of \$2,000, for the reasons herein stated, the same not being necessary for the best interests of such school district. \* \* \* That no purchaser having yet been found for said bonds, respondents deem it inadvisable to go to the expense of lithographing or engraving such bonds, when the chances would be that a purchaser therefor might not be obtained in a long time, and that, when such purchaser was found, objection might be raised to the manner in which such bonds were lithographed or engraved, and the district be thereby put to great and unnecessary expense." The respondents are ready and willing to issue and sell bonds in an amount not exceeding \$2,000. If bonds to the amount of \$3,500 in proper form had been issued for the purpose of selling the same, and mandamus would not lie to compel the sale of bonds to that amount, then it will not lie to require the respondents to perform acts preparatory to the issuance of bonds in that sum.

The question whether it was the duty of the trustees to issue bonds to the amount of \$3,500 depends upon the construction of the act entitled "An act to provide for the issuing of bonds in public school districts in South Carolina," approved the 19th of February, 1907. Section 1 of that act provides: "That the trustees of any school district in the state of South Carolina are hereby authorized to issue and sell coupon bonds of the said school district, payable to bearer, in such denominations and amount, as they may deem necessary, not to exceed four per cent. of the assessed valuation of the property of such school district, for taxation, and bearing a rate of interest not exceeding six per cent. per annum, payable annually or semiannually, and at such times as they may deem best: Provided, that the question of issuing bonds authorized in this section shall be first submitted to the qualified voters of such school district, at an election to be held upon the written petition or request, of at least one-third of the resident electors, and a like proportion of the resident freeholders of the age of twenty-one years, to determine whether said bonds shall be issued or not. \* \* \* " The first part of section 1 confers upon the trustees full power to issue and sell bonds in such denominations and amount as they may deem necessary; and there is no limitation as to amount, except that it shall not exceed 4 per cent. of the assessed valuation of the property of the school district. The written petition or request, upon which

the election is to be held, is not required to state the amount of the bonds to be issued. And the proviso does not limit the power of the trustees, except in so far as it requires that the question of issuing the bonds "authorized in this section" shall be submitted to the qualified voters of the school district. Unless there are provisions in other sections of the act limiting the discretionary power of the trustees, the petitioners are not entitled to the relief for which they pray; for there is not a single expression in this section which would seem to indicate that the trustees were to be controlled by the result of the election further than as to issuing the bonds.

Section 2 provides for determining whether the bonds authorized by section 1 of the act shall be issued; but again there is a failure to provide that the amount of the bonds shall be determined by the result of the election.

In section 3 the requirement is that the ballot cast must have written or printed on it the words: "For Bonds" or "Against Bonds," but there is no indication that the amount of the bonds was to be submitted to the voters.

Section 4 shows that the act had in contemplation the issuing of bonds, but not the amount thereof.

Section 5 is as follows: "All bonds issued under and in pursuance of this act, shall be signed by the trustees of such school district: Provided, that the signatures of such trustees shall be lithographed or engraved upon the coupons attached to such bonds, and such lithographed or engraved signatures shall be sufficient signing thereof." Neither this nor any of the remaining sections contain provisions manifesting an intention on the part of the Legislature that the amount of the bonds was dependent upon the result of the election.

For these reasons I concur in the opinion of Mr. Chief Justice POPE.

JONES, J., dissents.

## HUNTER v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Aug. 4, 1908.)

### CARRIERS—INTERSTATE COMMERCE—REGULATION—"TRANSPORTATION WITHIN THE STATE."

Act 1904 (Laws 1904, p. 671), entitled "An act to prevent delays in the transportation of freight by railroads in this state," providing, by section 1, that railroads doing business in the state shall transport freight, received for "transportation within the state," without greater delay than specified, and declaring a penalty for noncompliance, does not apply to interstate commerce, and so does not cover a case of transportation partly out of the state; the delay occurring wholly out of the state (citing Words and Phrases, vol. 8, pp. 7503, 7504).

Appeal from Common Pleas Circuit Court of Spartanburg County; R. O. Purdy, Judge.

Action by S. S. Hunter against the Charleston & Western Carolina Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Johnson & Nash, for appellant. S. J. Simpson, for respondent.

JONES, J. This action was commenced before Magistrate J. R. Coan, in Spartanburg county, to recover penalty under the act of 1904 (Laws 1904, p. 671) for delay in the transportation of freight. The defendant is a domestic railroad corporation, with termini in this state. On March 9, 1907, the Ashpoo Fertilizer Company shipped to plaintiff, as consignee and owner of the bill of lading, a carload of fertilizers. The freight was received in Charleston, S. C., by the Atlantic Coast Line Railroad, consigned to plaintiff at Pauline, S. C., to whom bill of lading was issued. "Prompt shipment required" was printed on the bill of lading. The Atlantic Coast Line delivered the freight to defendant company at Yemassee, in this state, on March 12th, and defendant had the car in its possession until March 18, 1907, when it delivered same at Roebuck, S. C., to Glenn Springs Railway, on whose line is situated Pauline, the point of destination. The distance from Charleston, S. C., to Pauline, S. C., is between 200 and 300 miles. Between Yemassee, S. C., and Roebuck, S. C., defendant operates, without impediment or break, through cars, but the line extends into the state of Georgia, via Augusta, for about 21 miles, and the car of fertilizers necessarily came over this line. Augusta, Ga., is the largest city on defendant's line, has the largest freightyard, and handles more freight than any other point. On trains from Yemassee to Roebuck the engine and the train crew are changed at Augusta, but cars and freight are not changed, and were not changed in this particular instance. In explanation of the delay defendant gave evidence of a sympathetic strike of railroad employes, shop and yard men, at Augusta, Ga., during the whole month of February, 1907, which, among other things, prevented prompt repair of defendant's engines, all of which did not get back into service until 10 or 12 days after the 1st of March, and that there was an unusual congestion of the road, due to very large shipments of coal, running through the fertilizer season. The magistrate gave judgment for the defendant, holding that the shipment or transportation was interstate, and that it would render the act of 1904 unconstitutional, as violative of interstate commerce, to construe it so as to apply to a shipment; that the proper construction of the act was to make it apply to "transportation within the state," according to its terms. On appeal to the circuit court the judgment of the magistrate was affirmed by Judge Purdy, under the authority of Sternberger v. R. R. Co., 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105, and Handley v. Kansas City R. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47

L. Ed. 333. Plaintiff renews the contest, by exceptions to this court, but we must affirm the judgment upon the authorities stated.

In *Sternberger v. Railroad*, supra, the freight was shipped from Charleston, S. C., to Tatum, S. C., first over the Northeastern Railroad and the Cheraw & Darlington Railroad to Cheraw, S. C., both roads being entirely in South Carolina; thence from Cheraw over the Cheraw & Salisbury Railroad to Wadesboro, N. C., this road being partly in this state, and terminating at Wadesboro, N. C.; thence over the Carolina Central Railway, being entirely in North Carolina, to Shoe Heel, in North Carolina; thence over the Cape Fear & Yadkin Valley Railway, principally in North Carolina, to Tatum, in South Carolina. Our court held that this was interstate commerce, and therefore the Railroad Commission of South Carolina had no jurisdiction to regulate the freight charges in such case. In *Handley v. Kansas City, etc., R. R.*, supra, the transportation was continuous between Ft. Worth and Grannis, in the state of Arkansas, but the route was 52 miles in Arkansas, and extended, via Spiro, 64 miles in Indian Territory. The Supreme Court of the United States held this to be interstate commerce, and beyond the power of the Railroad Commission of Arkansas to fix rates therefor. The court held that "to bring the transportation within the control of the state, as a part of its domestic commerce, the subject transported must be, within the entire voyage, under the exclusive jurisdiction of the state." The court, referring to the case of *Lehigh Valley R. Co. v. Penn.*, 145 U. S. 192, 12 Sup. Ct. 806, 38 L. Ed. 672, said: "That was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax was determined in respect of receipts for the proportion of the transportation within the state."

The object of the act in question was to prevent delays in transportation. Transportation is a part of commerce, and it must be held that the transportation in this instance was not wholly within the state, but was in part within the state of Georgia, and was therefore interstate transportation. Whatever might be the result if the delay had actually occurred on that part of the line within this state, since it appears that the delay in this case actually occurred in another state, there is no escape from holding that, if the penalty statute be construed to cover such a case, it violates interstate commerce. Such is not the proper construction of the statute. The title is: "An Act to Prevent Delays in the Transportation of Freight by

Railroads in this State." Section 1 provides: "That from and after May 1, 1904, all railroad companies doing business in this state shall transport to its destination all freight received by them for transportation within the state," etc. Construing the words "transportation within the state" according to their exact and natural meaning, they do not embrace interstate transportation. *W. U. Tel. Co. v. Fremont*, 43 Neb. 499, 61 N. W. 724, 26 L. R. A. 698; *State v. Pullman's Palace Car Co.*, 64 Wis. 89, 23 N. W. 871; 8 Words & Phrases, 7503, 7504. The statute, therefore, cannot have operation beyond the territory of the state, and should not be so construed as to interfere substantially with transportation in its interstate feature. Possibly, in case of a transportation beginning and ending in this state, but the necessary route going partly in another state, it would not materially interfere with interstate transportation or commerce to penalize for delay occurring wholly within this state, but such is not the case at bar, and we reserve opinion on that point.

The judgment of the circuit court is affirmed.

#### FRASIER et al. v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Aug. 4, 1908.)

#### CARRIERS—DELAY IN TRANSPORTATION—PENALTY.

Act 1904 (Laws 1904, p. 671), providing a penalty for delay in transportation of freight, having no application in case of interstate commerce, the penalty cannot be recovered where the route is partly without the state, and there is no evidence that the delay occurred within the state.

Appeal from Common Pleas Circuit Court of Abbeville County; Ernest Gary, Judge.

Action by T. B. Frasier and another, partners, against the Charleston & Western Carolina Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

W. N. Graydon, for appellants. W. P. Greene, for respondent.

JONES, J. This action was brought to recover damages and for penalty under the act of 1904 (Laws 1904, p. 671) for delay in the transportation of a car of fertilizers from Yemassee, in this state, to Mt. Carmel, in this state, the necessary route, however, lying partly in the state of Georgia, by way of Augusta. There was no evidence that the delay occurred within this state. Judgment was allowed by consent for \$10 damages, but judgment for penalty was denied by Judge Ernest Gary, who held that the transportation was interstate, and that the statute, being limited to transportation within the state, did not apply. The plaintiffs' exceptions must be overruled, under the cases of *Sternberger v. Cape Fear, etc., Ry.*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105, *Handley v. Kansas City R. Co.*,

187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, and the case of *Hunter v. Charleston & Western Carolina Ry. Co.* (just filed) 62 S. E. 13.

The judgment of the circuit court is affirmed.

DOUGLASS v. SOUTHERN RY. CO. et al.  
(Supreme Court of South Carolina. Aug. 4, 1908.)

# 1. EVIDENCE — OPINION EVIDENCE — ADMISSIBILITY.

Where, in an action against a railroad for injuries to a traveler in attempting to escape colliding with a car at a crossing, witnesses stated that their reasons for their opinion that the crossing was not safe were influenced by what they knew, and one of them had, for 23 years, knowledge and experience of the crossing, the court did not err in permitting them to testify that they did not consider the crossing safe, especially where it announced that it would exclude their opinion if objection was thereafter made, and no objection was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2204.]

# 2. SAME—RES GESTÆ.

A conversation, between a person injured in an attempt to avoid a collision at a railroad crossing, with a lever car, and the operator of the car, occurring on the person injured being restored to consciousness, and resulting from a question addressed by him to the operator, was competent as a part of the *res gestæ*, as against the operator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 370.]

# 3. RAILROADS — CROSSINGS — INJURIES TO TRAVELERS—INSTRUCTIONS.

An instruction, in an action against a railroad for injuries to a traveler at a crossing, that the jury must decide whether the railroad was negligent, and, if its negligence was the proximate cause of plaintiff's injuries, it would be liable, unless it satisfied the jury by the greater weight of the evidence that plaintiff contributed by his own negligence, etc., was not erroneous as placing too great a burden on the railroad to establish the defense of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1196.]

# 4. SAME—EVIDENCE—INSTRUCTIONS.

Where, in an action against a railroad for injuries to a traveler at a crossing, the evidence showed that plaintiff had seen a train pass over the crossing a few minutes before he reached it, that he had met two persons who had just crossed there with safety, and that a lever car making no noise could not be seen until the track was approached, an instruction that, if plaintiff was not guilty of negligence, he had a right to use any means that came to hand to save himself, was not erroneous; for the jury were warranted in finding that plaintiff thought that the crossing was clear.

# 5. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction that, if the railroad was guilty of lack of ordinary care in approaching the crossing, and thereby placed the traveler in a position of peril, impressing him with an imminent danger, and such necessity was not brought on himself by his own negligence, and he used the means at hand to escape the danger, and was injured, there was a natural and proximate injury as the result of the railroad's negligence, was proper, as against the objection that it was a charge on the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-548.]

# 6. RAILROADS—CROSSING ACCIDENT—INSTRUCTIONS.

Where, in an action for injuries to a traveler in attempting to avoid a collision with a car at a crossing, the evidence showed that there was imminent danger of a collision with the car, which justified the traveler in attempting to escape injuries to himself and his wife and child and horse, an instruction that, where plaintiff was placed in a position of peril by the negligence of defendant, and a sudden emergency called on him to act, he would not be held to exercise the same degree of caution as in other cases, etc., was not erroneous as applying to the facts the doctrine of sudden peril, which excuses contributory negligence.

# 7. SAME.

An instruction, in an action against a railroad for injuries to a traveler at a crossing, that culpable negligence of plaintiff contributing to the injury complained of will defeat the action, but that the nature of the primary wrong has much to do with the judgment whether or not the contributing fault was of a negative character, and was of itself caused by the primary wrong, was not erroneous as misleading.

# 8. SAME—CONTRIBUTORY NEGLIGENCE.

A traveler who fails to exercise ordinary prudence while approaching a railroad crossing cannot invoke the doctrine of sudden peril in attempting to avoid a collision with a car, but a traveler exercising ordinary care before entering on the crossing may accept whatever means are apparently necessary to extricate himself from impending danger, and may invoke such doctrine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1027.]

# 9. SAME.

Where, in an action against a railroad for injuries to a traveler, the court submitted the issues of negligence on the part of the railroad, and whether the injuries were caused by such negligence, instructions that a traveler, guilty of negligence in entering on a railroad crossing, could not invoke the doctrine of sudden peril, but a traveler exercising ordinary care might, on discovering the peril of a collision with a car, use whatever means were apparently necessary to extricate himself from the danger, was not erroneous.

Jones and Woods, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Chester County; Geo. E. Prince, Judge.

Action by William R. Douglass against the Southern Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Abney & Muller and J. E. McDonald, for appellants. A. L. Gaston, for respondent.

POPE, C. J. On the 28th day of March, 1906, William R. Douglass, as plaintiff, began his action against the Southern Railway Company and W. A. Stack, defendants, for the recovery of \$10,000 damages. The grounds upon which he claimed damages at the hands of the defendants, were: "That on the 2d day of October, 1905, the plaintiff, in company with his wife and infant child, was driving his horse and buggy along the public road leading from Herbert to Carlisle, in Union county, in this state, and, as he was about to cross the line of the Southern Railway Company's track at a public crossing on said highway nearest Carlisle, a lever car on the track of the defendant Southern Railway Company, and managed and con-



trolled by the defendant W. A. Stack, section master and agent of the defendant, came at a rapid rate of speed, without notice or warning to the plaintiff while in the act of crossing, and plaintiff, endeavoring to escape a collision of the said lever car, and in order to avoid being struck and run over by the said lever car, was compelled to whip his horse, and while so engaged, and while the said lever car was dangerously near and about to run over the plaintiff, the buggy was turned over, and plaintiff was thrown violently to the ground, and the bones of his hip joint were fractured, and his body was bruised, and he has been confined to his bed ever since, to his great suffering and pain, has been put to great expense for medical attention and otherwise, and has suffered from the loss of his time from his work as a farmer, and his earning capacity has been impaired, and while in the full vigor of manhood he has been maimed and injured to his damage and injury." The answer of the defendant admits its corporate character, and on information and belief it admits the statements of the paragraph just admitted, but it alleges that the alleged injuries sustained by the plaintiff were the result of his own carelessness and negligence in failing to stop, look, and listen at the public crossing mentioned in the complaint, and in whipping his horse in the violent manner that the same became unmanageable, and thereby threw the plaintiff from his buggy, which said negligence, carelessness, and willful conduct on the part of the plaintiff caused and contributed directly and proximately to the injuries about which the plaintiff complains in his complaint. The answer of the defendant Stack was practically that adopted by the Southern Railway Company. The cause came on for trial before Judge Prince and a jury, at the November term, 1906, of the court of common pleas for Chester county. The jury rendered a verdict in favor of the plaintiff for \$8,000. A motion for a new trial was refused. The defendants now appeal to this court upon 11 exceptions.

"(1) Because his honor erred in permitting Dr. C. A. Crosby and John C. McAfee, witnesses for the plaintiff, to testify, against the objection of the defendants, that they did not consider the crossing near which the plaintiff was injured to be a safe crossing; the error being that said witnesses were not experts, and they were not entitled to give their opinions." We overrule this exception, because the witnesses both stated their reasons for stating that the crossing was not safe. They were influenced by what they knew. One of them had, for 25 years, knowledge and experience of this crossing. The circuit judge announced that he would exclude their opinions if objection was made afterwards, but according to the testimony, no such objection was afterwards made.

"(2) Because his honor erred in permitting Mrs. Annie Douglass, a witness for the plaintiff, to testify, against the objection of the defendants, as follows: 'Q. Did you ever hear him [referring to defendant W. A. Stack] say anything about how it happened? (Mr. McDonald: You understand, we object to that as to the railroad. Mr. Gaston: It is as to him I am asking the question.) Q. Did he say anything at all? A. Mr. Stack? Q. Yes. A. Well, when we got my husband aroused, he got after him about running in to him. He says: "You have almost killed me." He says: "Well, I don't see why I was so careless." Q. Did he say whether or not he had come near to running into anybody else except on this occasion? (Mr. McDonald: We object to that. Mr. Gaston: It shows his knowledge. The Court: I will permit it as to him.) Q. Did he say whether or not he had? A. Sir? Q. Did he say whether or not he had come near running into anybody else there? A. Yes, sir; he said he had held up there the day before for Mrs. Linder and Mrs. Deaver. Q. He said he had held up there the day before? A. Yes, sir. Q. He said he didn't see why he was so careless on that occasion? A. He said he did not see why he was so careless—the error being (a) that the statements were not part of the res gestæ; (b) because what occurred the day before to Mrs. Linder and Mrs. Deaver was not competent or relevant to this case, and could only have a tendency to mislead and prejudice the jury." Certainly the testimony of Mrs. Douglass was received while present with her husband and Mr. Stack. The conversation referred to occurred as soon as Mr. Douglass was restored to consciousness, and was the result of a question addressed to Mr. Stack by Mr. Douglass. That testimony was certainly competent so far as the party defendant Stack was concerned, and it was only in relation to Mr. Stack that the circuit judge allowed the testimony to be brought out. We consider this as a part of the res gestæ, and on that account it was generally relevant. Under these circumstances this exception must be overruled.

"(3) Because his honor erred in refusing to grant the motion of the defendants for nonsuit, at the close of the defendants' testimony, on the ground that there was no negligence established by the evidence tending to show negligence, on the part of the defendants, which was the proximate cause of the plaintiff's injury; the error being that the undisputed evidence failed to show (a) that the defendants, or either of them, were guilty of negligence; (b) that if the evidence tended to show negligence on the part of defendants, such negligence was not the proximate cause of plaintiff's injuries." We overrule this exception, because we feel that there was some testimony supporting the charge of negligence of the defendants.

"(4) Because his honor erred in charging

the jury as follows: 'You will first decide whether the defendant company, its servants and agents, was negligent in the manner in which it was running that lever car in approaching that highway crossing. If it was—if the defendant company, its agents, and servants were negligent, and the negligence was the proximate cause of the plaintiff's injury—then the defendant would be liable, unless the defendant has satisfied you, by the greater weight of all the evidence in the case, that the plaintiff contributed by his own negligence, as a proximate cause, to his own injury.' And further erred in charging the jury as follows: 'If he was injured through the negligence of the defendant company, its servants, or agents, then he is entitled to recover, unless the defendant company has satisfied you, by the greater weight of all the evidence in the case, that the plaintiff himself was negligent in that regard, or in connection with that crossing, in entering upon the crossing, and if he was negligent, and if his negligence contributed as a proximate cause to his injury, why he cannot recover, even though the defendant company was negligent'—the error being that his honor's charge places a greater burden upon the defendant in establishing the affirmative defense of contributory negligence than that imposed by law; the law being that the defendant is only required to prove his affirmative defense by the preponderance of the evidence upon that issue, and such charge was misleading to the jury." We do not consider that this part of the charge of his honor was either incorrect or misleading. The circuit judge demanded by his charge that these questions should be left open for the jury. There was testimony on the subject, and by the law it is made the duty of the jury to decide the issues so presented. This exception is overruled.

"(5) Because his honor erred in charging the jury as follows: 'But if he was not guilty of negligence which contributed as a proximate cause to his own injury, then he had the right, if he was found upon the railroad crossing—while he was upon the railroad crossing, I will express it, the lever car was rushing upon him under such circumstances as would have justified the belief in a man of ordinary firmness and prudence that he was about to be run over—why he is justified in using whatever means came to hand to save himself. But in order to justify him to use any means except those that a man of ordinary prudence would have used, he must have been without fault in entering upon the crossing. In other words, he must himself have exercised that degree of care and caution and prudence which a man of ordinary prudence and caution would have exercised before entering on the crossing'—the error being that the doctrine of sudden peril, which excuses one from contributory negligence, has no application to cases where a person has been injured at or

near a railroad crossing." We should always have in mind that the plaintiff, as to his prudence, must be judged by the testimony as given. In the case at bar the plaintiff had seen a train pass over that crossing a few minutes before he reached it; not only so, but he met two persons, Mrs. Deaver and another, who had just crossed there with perfect safety, as a man of common sense. The jury must determine whether such facts warranted the inference of the plaintiff that the opening was clear. No witness testified that any noise was heard from the lever car. The very first intimation of its presence on the track was when the horse drawing the buggy suddenly saw the lever car, and immediately afterwards the plaintiff and his wife saw it. It was in testimony that the lever car could not be seen until the track was approached. Therefore the charge of his honor as made was free from all objection. This exception must be overruled.

"(6) Because his honor, the presiding judge, erred in charging the plaintiff's second request, as follows: 'If the negligence of the defendants be the direct and proximate cause of the injury alleged to have been sustained by the plaintiff, then the defendants are liable for damages to the plaintiff. No actual collision is alleged in the suit, and it is not necessary to prove a collision, but if the defendants were guilty of lack of ordinary care and of negligence in approaching the crossing, and by such negligence placed the plaintiff in a position of peril, and created an overweening necessity, impressing him with an imminent danger, and such necessity be not brought upon himself by his own negligence, as the proximate cause, and he use the means at hand to escape an impending and overweening danger, and be injured as the result of the negligence of the defendants, there would be a natural and proximate injury as the result of defendants' negligence'—the error being that by this charge (a) his honor charged as to the weight and effect of the testimony, in violation of the Constitution of this state; (b) he erred in holding and charging the jury that the doctrine of sudden peril, which excuses one from a charge of contributory negligence, has no application to a case where injuries are received at or near a railroad crossing." The plaintiff's second request as charged by the judge was a safe charge. It is true there had been no collision, but there was every evidence of impending danger of such collision; the dumb beast even had felt it; the plaintiff felt it, as evidenced by his frantic efforts to escape it. The jury necessarily found that the plaintiff had used every effort to escape the danger, and dearly has he paid for his effort to accomplish what the utmost prudence demanded at his hands. This exception is overruled.

"(7) Because his honor erred in charging

plaintiff's third request, which was as follows: 'If the plaintiff be placed in a position of peril by the negligence of the defendants, and there be a sudden emergency calling for him to act under peculiar circumstances, he would not be held to exercise the same degree of caution as in other cases, for regard must always be had to the exigencies of the person's position under all the circumstances of each particular occasion. Where human life or human safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort made in good faith to preserve the one or secure the other, unless the circumstances under which the effort was made show recklessness or rashness'—the error being that the doctrine of sudden peril, which excuses contributory negligence on the part of a plaintiff, has no application to accidents or injuries received at, on, or near a railroad crossing, and where there were no contractual relations existing between the person injured and the defendant company." It seems to us that the imminent danger of the collision of the lever car with the plaintiff justified the plaintiff in doing all he did to escape the dire calamity which was impending upon him; 'he wife of his bosom and the child of his loins looked to him for protection; the dumb brute driven by him expected the plaintiff to protect it. The charge of the circuit judge met these issues directly, and in his charge he made no error in this regard. We overrule this exception.

"(8) Because his honor erred in charging from plaintiff's eighth request to charge as follows: 'Culpable negligence of the plaintiff which contributed to the injury must always defeat the action, but the nature of the primary wrong has much to do with the judgment whether or not the contributing fault was of a negative character, such as a lack of vigilance, and was itself caused by or would not have existed but for the primary wrong. It is not in law to be charged to the injured one, but to the original wrongdoer. \* \* \* I think that is right. I will risk charging it, but I don't clearly understand it'—the error being (a) that any negligence of a plaintiff, contributed as a proximate cause of his injury, will defeat his right to recover, no matter what may be the nature of the primary wrong or negligence of the defendant; (b) such charge was clearly misleading to the jury, and should not have been charged, as his honor stated that he did not clearly understand it." We do not think the judge risked too much when he made the charge here complained of; for, while it is true that culpable negligence of the plaintiff which contributed to the injury tends to defeat his action, yet such alleged negligence must be taken into connection with the primary wrong. This exception is overruled.

"(9) Because his honor erred in modifying

the defendants' seventh request, which was as follows: 'The principle of law that a person placed in a position of sudden peril by the negligence of a railway company is not guilty of contributory negligence, unless he acts recklessly or heedlessly, has no application to travelers at a railroad crossing. The rule of sudden peril does not obtain or apply where the danger is one incident to the place, its use of surroundings, for such danger is not a sudden peril within the meaning of the law, but a danger to be anticipated and guarded against by proper care and precaution on the part of a traveler.' The modification was as follows: 'I charge you that a traveler cannot invoke that doctrine if he has been guilty of negligence in entering upon the crossing without taking the necessary precautions to ascertain whether or not the train or car was coming. In other words, if he has failed to exercise that degree of care which a man of ordinary prudence would have availed himself, would have used in like circumstances, he cannot invoke the doctrine that he was placed under an overweighing necessity to do what he did, which resulted in his injury'—the error being that the request to charge contained a correct proposition of law, and his honor should have charged the same without modification; (b) that his honor erred in so modifying the request to charge as to make the doctrine of sudden peril applicable to injuries received by a traveler at, upon, or near a railroad crossing." We do not see any error here by the circuit judge. He met the issues, and his charge as made is sustained by the law.

"(10) Because his honor erred in modifying defendants' eighth request to charge, which was as follows: 'If a person voluntarily goes into a place of danger, without exercising that degree of care required by law (ordinary care), he cannot recover, although after so getting into a place of danger he exercised his judgment to the best of his ability to escape from the danger. Care is required to keep out of danger, as well as to avoid it after getting into it. The rule that sudden peril excuses does not govern where a person, without exercising due care, goes into a place of danger, such as a railroad crossing is, and of which the track is itself a warning.' The modification was as follows: 'I charge you that if he knows he is going upon a railway crossing, why he can't invoke this doctrine; that is, unless he has exercised that degree of care which a person of ordinary prudence would have used before entering on the crossing to ascertain whether or not the train was coming. If he had exercised ordinary care before entering upon the crossing, and failed by the use of ordinary care to discover the approaching train or car until he was upon the crossing, why then he could resort to this doctrine. In other words, if he was without fault in getting into the dilemma, then he could use whatever means were apparently

necessary to extricate himself from impending danger. But if he had been guilty of carelessness in going on that railroad, getting himself into the trouble, he couldn't invoke the doctrine—the error being (a) that the request to charge contained a correct proposition of law, and his honor should have charged the same without modification; (b) because by such modification his honor made the doctrine of sudden peril, exonerating one from the charge of contributory negligence, applicable to the case of a traveler receiving an injury at, on, or near a railroad crossing, when such doctrine has no application to injuries received at, on, or near railroad crossings." It seems to us that the doctrine laid down in the case of *Mack v. Ry. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, completely covers this case: "A railroad company is liable for damages for mental or physical injuries, sustained in consequence of fright caused by its negligence." Of course the question is first submitted to the jury, was there negligence by the defendant? Second, was there mental or physical injuries sustained in consequence of fright caused by its negligence? The judge took great care to have the charge contain these principles of law. Having done so, there was no error. This exception is overruled.

"(11) Because his honor erred in not granting defendants' motion for a new trial on the minutes of the court, on the following grounds, to wit: (1) That the undisputed evidence shows that the plaintiff's injuries were not the result of any negligence on the part of the defendant. (2) That the undisputed evidence shows that plaintiff's own negligence was the cause of his injuries. (3) That the undisputed evidence shows that, even if there was any negligence on the part of the defendants, such negligence was not the proximate cause of the plaintiff's injuries. (4) That the undisputed evidence shows that the plaintiff was guilty of negligence, as a matter of law, in approaching the crossing mentioned in the complaint, and such negligence was the proximate cause of his injuries. (5) That the undisputed evidence shows that the plaintiff was guilty of contributory negligence, as a matter of law, in approaching the said crossing without observing common prudence and ordinary care, by not taking any precautions to ascertain if the track was clear before crossing, and that such contributory negligence was a proximate cause of his injuries—the error being that the undisputed and uncontradicted evidence in the case showed as a matter of law (a) that plaintiff's injuries were the result of his own acts, and of his carelessness, recklessness, and negligence; (b) that the undisputed and uncontradicted evidence shows that if there was any negligence whatever on the part of defendants, the same was not the proximate cause of plaintiff's injuries, but on the contrary, the evidence shows that the plaintiff's

own negligence and recklessness was the proximate cause of his injuries; (c) that the undisputed evidence shows that the plaintiff was guilty of contributory negligence, as a matter of law, in approaching the crossing, that he knew to be dangerous, without observing any care or prudence, and without taking any precaution to ascertain that the track was clear before attempting to cross." We hold that the undisputed evidence shows that the plaintiff's injuries were the result of negligence on the part of the defendants. The undisputed evidence does not show that plaintiff's own negligence was the cause of his injury. The undisputed evidence shows that there was negligence on the part of the defendants, and that such negligence was the proximate cause of the plaintiff's injuries. The undisputed evidence does not show that the plaintiff was guilty of negligence, as a matter of law, in approaching the crossing mentioned in the complaint, and that such negligence was the proximate cause of his injuries. The undisputed evidence does not show that plaintiff was guilty of contributory negligence, as a matter of law, in approaching said crossing. Such being our conviction, there was no error by the circuit judge in refusing a new trial. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be and the same is hereby affirmed.

JONES, J. (dissenting). Without discussing whether the undisputed facts show contributory negligence on the part of plaintiff, I think there should be a reversal for error in charging plaintiff's eighth request. This charge was clearly misleading and confusing on the subject of contributory negligence, and was in violation of the principle declared in *Sanders v. Aiken Mfg. Co.*, 71 S. C. 59, 50 S. E. 679, wherein the court held it was error to instruct the jury that contributory negligence of a negative character, such as lack of vigilance, would not relieve a defendant of liability for negligence. The charge was harmful because of the issue made by defendants that the failure of plaintiff to look and listen before entering upon the railroad crossing was negligence, and proximately contributed to his injury.

WOODS, J. I dissent, for the reasons stated in the opinion of Mr. Justice JONES.

RAULERSON et al. v. HARVEY et al.  
(Supreme Court of Georgia. July 25, 1908.)  
APPEAL AND ERROR—AFFIRMANCE—BILL OF EXCEPTIONS—NOTE OF JUDGE—CONCLUSIVENESS.

A bill of exceptions recited that a petition to establish a copy of a lost deed was filed, that the defendant filed an answer thereto, that upon motion of the plaintiffs' counsel the answer was stricken, except that portion which admitted the making of the deed as alleged, that the

court thereupon entered a judgment establishing a copy deed attached to the petition, and that to the ruling striking the answer the defendants excepted, and upon it assigned error. The presiding judge added a note in the body of the bill of exceptions, stating that upon the call of the case "counsel for respondents stated to the court that he thought the proper disposition of the case would be to strike the plea of the defendants, and let the plaintiffs take a judgment establishing the deed, as prayed for in the petition," and that thereupon the order was taken. *Held*, that the note of the presiding judge is binding and conclusive, and under it an affirmance necessarily results.

(Syllabus by the Court.)

Error from Superior Court, Pierce County; T. A. Parker, Judge.

Action by J. D. Harvey and others against David Raulerson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Estes & Walker, for plaintiffs in error. Jas. R. Thomas, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

CANNADY v. HERRINGTON et al.  
(Supreme Court of Georgia. Aug. 11, 1908.)  
INJUNCTION—DISCRETION OF COURT—RECEIVER.

The judge did not abuse his discretion in granting an interlocutory injunction and appointing a receiver.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by J. L. Herrington and others against William Cannady. Judgment for plaintiffs, and defendant brings error. Affirmed.

Saffold & Larsen, for plaintiff in error. Williams & Bradley, A. F. Lee, Evans & Evans, and Smith & Kirkland, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

DARSEY v. DARSEY et al.

(Supreme Court of Georgia. July 25, 1908.)

1. HOMESTEAD—INCUMBRANCE—DEATH OF HUSBAND—PAYMENT BY WIDOW—DEED TO WIDOW—DEVISE BY WIDOW—TITLE ACQUIRED.

Where land set apart as a homestead under the Constitution of 1868 at the instance of the owner as the head of a family was subsequently deeded by him to secure a debt for money borrowed with which to pay for horses bought to be used on the land, and after the death of the grantor the horses were kept by the widow, who, with several children of the grantor, some of whom were minor beneficiaries of the homestead, worked and made crops on the land for the purpose of discharging the debt and relieving the land of the incumbrance, which crops were used for such purpose, and the debt fully paid off with such crops and the proceeds of the sale of a part of the land made by the

grantee, which sale was made with the consent of the grantor and his wife, and the executor of the grantee several years afterwards, because of the debt having been discharged, deeded the land to the widow and received from the legatee hereinafter referred to the bond for titles made to the original owner by the party holding the security deed, *held*:

(a) The widow did not acquire by reason of such deed a valid title of any nature to such land, or any interest therein, as against the other heirs at law of her husband.

(b) One of such children, as the sole legatee under the will of such widow, to whom she therein devised such land as her own, obtained no valid title or interest in such land under such will, as against such other heirs, except such interest, if any, which she may have acquired as a distributee of her husband's estate.

2. NEW TRIAL—GROUNDS—EXCEPTIONS TO DECREE.

Exceptions to a decree cannot be made the grounds of a motion for a new trial.

3. TRIAL—INSTRUCTIONS.

Under the evidence in this case, the court committed no error in failing to charge the law regarding title by prescription.

4. APPEAL AND ERROR—REVIEW.

The court fairly and fully submitted in his charge to the jury all of the issues involved in the case, the evidence was sufficient to support the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action between T. C. Darsey and J. A. Darsey and others. From the judgment, T. C. Darsey brings error. Affirmed.

Daley & Bussey and Peyton L. Wade, for plaintiff in error. Jas. A. Thomas, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

McELWANEY v. McDIARMID.

(Supreme Court of Georgia. July 21, 1908.)

1. EASEMENTS—EXCEPTION OR RESERVATION.

Where, in a deed by the owner of a tract of 330 acres of land conveying 6 acres thereof, the granting clause contains the following language, "with the exception of a road 12 feet wide on the north line of the 6 acres aforesaid to remain open," *held*:

(a) The fee to the whole of the 6 acres, including the part thereof on which the road was to remain open, passes to the grantee.

(b) An easement by virtue of which the road is to remain open is created, and is appurtenant to the remaining part of such tract of 330 acres. *Stovall v. Coggin Granite Co.*, 116 Ga. 376, 42 S. E. 723; *Taylor v. Dyches*, 69 Ga. 455; *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585; *Nugent v. Watkins*, 124 Ga. 150, 52 S. E. 158.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 40.]

2. SAME—ABANDONMENT OR NONUSER—APPEAL AND ERROR—TRIAL—INSTRUCTIONS—MATTERS NOT IN ISSUE—EASEMENTS—EVIDENCE—ADMISSIBILITY—DECLARATIONS.

Where, upon the trial of a case, the plaintiff claims an easement by virtue of which he contends a road is to remain open, and one of the issues upon such trial is whether or not such easement has been lost, either by abandonment or by forfeiture by nonuser, it is error to charge that "the failure to use it [the road] for several

years would not amount to an abandonment—would not be said to have been lost. To lose it there must be absolute refusal to use it for a long time, so long as to cause the public [to] think and believe that he never intended to use the right, and had abandoned and given up the right entirely." An easement may be lost or forfeited by the owner without his "absolute refusal" to exercise his privileges thereunder. Such easement will cease to exist if there be an abandonment or nonuser thereof by the owner for a term sufficient to raise the presumption of release or abandonment. Civ. Code 1895, § 3068; *Gaston v. Railway Co.*, 120 Ga. 516, 48 S. E. 188.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 77-79.]

(a) An assignment of error that the court erred in not allowing certain named questions on direct examination of a witness answered will not be considered, when it does not appear that the court was informed what answers were expected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1282.]

(b) The court committed no error in failing to charge in reference to the character of a party to litigation, when there was no testimony concerning such character and it was not in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-612.]

(c) Under the facts of this case it was not error to refuse to admit the following testimony in behalf of the defendant: "The defendant offered to have the premises in dispute measured by the county surveyor."

(d) Where there was testimony upon such trial by the plaintiff that there was an "outlet" at one end of said road, it was error to refuse to allow testimony offered by defendant that there was no such "outlet."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 445-458.]

(e) Testimony of statements of the predecessor in title to the property over which the easement is claimed, made while he owned and was in possession of such property, tending to show that he recognized the existence of such easement, was admissible to show the existence of such easement at the time such statements were made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 841, 842.]

### 3. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.

A request to charge, a part of which is that, when a deed is recorded, it "would be binding as to notice from date of record, if he [the party sought to be bound] has actual notice of record," is properly refused, because such record would be notice of its contents, even though such party had no actual knowledge of such record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 513-532.]

### 4. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—SUFFICIENCY.

There were six deeds introduced in evidence upon the trial of the case. *Held*, that an assignment of error that "the court erred in allowing deeds admitted in evidence," without specifying the deeds referred to, or the grounds of objection made to their introduction, is not a good assignment of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3010-3012.]

### 5. TRIAL—INSTRUCTIONS—REQUESTS—ERRONEOUS INSTRUCTIONS.

A party cannot complain that the court erred in failing to deliver in specified language a charge, when such charge, if given in the lan-

guage specified, would not be an accurate statement of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 680.]

### 6. SAME—SUFFICIENCY OF REQUEST.

A request for the court to charge the law as to prescriptive rights and adverse possession is too general and indefinite. *Spence v. Morrow*, 128 Ga. 722, 58 S. E. 356; *Smith v. State*, 125 Ga. 300, 54 S. E. 124.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 646.]

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action between J. F. McElwaney and A. McDiarmid. From the judgment, McDiarmid brings error. Reversed.

W. B. Hollingsworth and Blalock & Culpepper, for plaintiff in error. J. W. Wise, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

### SLOAN v. JONES et al.

(Supreme Court of Georgia. July 15, 1908.)

#### 1. HABEAS CORPUS—CUSTODY OF INFANTS—DISCRETION OF COURT.

While the judge, upon a hearing of a writ of habeas corpus for the detention of a child, is vested with a discretion in determining to whom its custody shall be given, such discretion should be governed by the rules of law, and be exercised in favor of the party having the legal right, unless the evidence shows that the interest and welfare of the child justify the judge in awarding its custody to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 84.]

#### 2. SAME—RIGHTS OF FATHER.

Prima facie the right of custody of an infant is in the father. On the hearing of habeas corpus proceedings against him, if it is claimed that the custody should be taken from him and awarded to its maternal grandmother, the power ought to be exercised in favor of the father, unless he has relinquished or forfeited his right, or the circumstances of the case would justify the court, acting for the welfare of the child, in refusing it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 84.]

#### 3. SAME—CLAIMS OF GRANDPARENT.

The original application for the writ of habeas corpus in this case was made by the mother of the child against the father, but she relinquished her claim to have the custody awarded to her in favor of her mother, to whom it was sought to have the custody of the child awarded, instead of to the father.

#### 4. SAME.

The facts and circumstances, as disclosed by the evidence, did not authorize a judgment taking the custody of the child from its father and awarding it to its grandmother.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Application for writ of habeas corpus by Laura J. Sloan against B. C. Sloan and others. Laura A. Jones intervened. Judgment for relator, and defendant brings error. Reversed.

On January 2, 1908, Mrs. Laura J. Sloan made affidavit for the purpose of having a writ of habeas corpus issued, alleging that her child, a little boy 24 months of age, was illegally detained by its father in his exclusive possession; that he threatened to remove the child beyond the limits of the state, and she apprehended he would do so; that he had no home in the state where he could keep and comfort the child, and "said B. C. Sloan had never supported said child or paid its expenses"; and that the petitioner had a home with her mother, who was able and capable in every way of rearing the child, and who was willing and anxious to do so. The writ of habeas corpus was issued, with an order to the sheriff to take possession of the child and bring him before the court. The writ having been executed, the child brought before the court, and due return made by the officer, and, neither side being ready for trial, the hearing was continued until another day, and in the meantime the child was, by order of the court, placed in the custody of its maternal grandmother until the time set. After this the grandmother filed her petition to intervene in the case, alleging, among other things, that she was entitled to the custody of the child; that she was attached to him, and was willing, ready, and able to take, rear, and care for him. She also alleged that she had sufficient means to insure his maintenance, comfort, and education, and that she had made a will including a provision for him. She prayed that the custody of the child be awarded to her, and that a rule nisi be issued requiring both parties to show cause why this should not be done. This intervention was allowed by the presiding judge. On the hearing the respondent moved to quash the habeas corpus proceedings and the writ, because the original petition did not set forth any sufficient allegations on which to base the issuance of the writ, or to show that the detention was illegal. He moved that the petition or intervention of the grandmother, Mrs. Laura A. Jones, be quashed and stricken from the files, as showing no right on her part to intervene or ground for the judgment prayed for by her. He also moved that the order allowing the intervention be vacated. Each of these motions was overruled. The original petition and the intervention were then answered by the respondent.

So far as necessary to be stated, the evidence on behalf of the applicant and the intervenor was as follows: Mrs. Jones testified in brief: In June, 1906, the respondent, Sloan, was living in Nevada, and his wife was living with her parents in Cartersville. Mr. and Mrs. Jones were very anxious to effect a reconciliation between them. Sloan wrote to Mr. Jones that he would not return to Georgia unless his wife requested him to do so. Mr. Jones insisted that his daughter should write her husband to return, and she did so, though

objecting to doing so. Sloan telegraphed for \$700 to arrange matters. Mr. and Mrs. Jones borrowed that amount from bank and sent it to him; and, after receiving it, he returned to Georgia in the latter part of June, 1906. On his return, Mrs. Jones fitted up a home for them from her own funds. They kept house about six weeks, when Mrs. Sloan was taken sick, and her general health was impaired. Then Mr. and Mrs. Jones took the Sloans to their house, where they lived until the day before the present writ was sued out. While living there, Mrs. Jones furnished all necessary food and clothes for the child, and paid all household expenses. Mr. Sloan had no position, and the witness knew of his doing nothing to secure one. He never talked to her about his business plans, except as to some mineral interests; and she knew of no income that he had. He was out no necessary expenses except for his wearing apparel. He spent most of his time reading. He never offered to pay the witness or her husband any board for himself or for his child. Mrs. Jones never thought of his paying board for his child, for the reason that he did not return to Georgia until the child was six months old; and, as she had supported, cared for, and become attached to the child, she never expected to have any one then or afterwards claim him and deprive her of him. She had never made any request of Mr. Sloan to pay board, because she did not think he was able to do so. The only reference ever made to paying board was one night, after he had been at her house for many months, when he and his wife had heated words, in which she told him he had no right to give her directions, because he had not supported her or paid her board. He turned to Mrs. Jones, and said, "Mother, I didn't know I was expected to pay board." to which Mrs. Jones replied, "No; I didn't expect you to pay." Mrs. Jones said this because she had no grounds to anticipate that he was able to pay, and, as long as he remained in her home without income or position, she did not feel that she could reasonably expect board of him. She knew that her home was the only place where both he and her daughter could enjoy the companionship of their child. He had no home in this state or elsewhere to her knowledge. She never believed that he would attempt to take the child away from her and Mrs. Sloan. He gave her his sacred word of honor that he would not. Mrs. Jones is worth \$100,000, and has an income of \$3,000 from insurance companies. All of her children are grown, married, and self-supporting, except Mrs. Sloan, who is dependent on her. Out of her income she helps her children to some extent, but does not encroach on the corpus. If the custody of the child is awarded to her, she will give him the best education he will accept, and will endeavor to fit him for a useful life. Her husband was a Protestant minister, and loved

his grandson very much. Sloan, the father of the child, is a Catholic; and, if he be allowed to have the custody of the child for the next few years, it is almost certain to become a Catholic. Months before the commencement of the present litigation she made a will, by one item of which she bequeathed certain property to her daughter Mrs. Sloan, for life, with remainder to any child or children who might survive Mrs. Sloan; and, in case of no child or children surviving Mrs. Sloan, the property was to revert to the estate of the testatrix. She also provided in her will that Sam Jones Sloan, the child involved in this controversy, should receive from her estate "a finished education and maintenance," if the income from the property thus devised was insufficient for that purpose.

Mrs. Sloan testified, in brief, as follows: She was married to Sloan on March 29, 1905, and went to Pennsylvania with him, and a little later to West Virginia. During the month of April of the same year she and her husband had several disagreements, and in the latter part of May they had a quarrel which caused her to realize that they could not be happy together. From that time she never lived with him as his wife, though they kept house a few weeks during a subsequent year. She made several visits after this quarrel, and then came to Cartersville to live with her sister, reaching there about July 18, 1905. Sloan went to Nevada in October, 1905. After he reached there he sent her \$50, and at Christmas sent her \$100. On January 1, 1906, she went to her mother's and father's home to live, her baby having been born in December, 1905. After this he sent her \$50 a month until about June, 1906. Her father endeavored to get her and her husband reconciled. Sloan wrote that he would not come unless his wife wrote him to do so. He afterwards telegraphed for \$700. Mr. Jones requested her to write and ask Sloan to come, which she did "simply to fulfill the requirement" of her father, and to gratify him. Sloan returned on June 29, 1906. Mrs. Jones fitted up a home for them, where they kept house about six weeks, when Mrs. Sloan became sick, and they went to live with Mr. and Mrs. Jones, where they remained afterwards without paying board either for themselves or for their child. Since the death of Mr. Jones in October, 1906, the witness and her husband have occupied separate rooms. He has paid none of her expenses and none for the child, except \$5 for a cloak, \$5 for toys at Christmas, and \$3 for underwear. He paid the nurse a part of the time. His association with the child was unrestricted, and he was with the child a large part of the time. Finally he carried the child out one afternoon to see a football game, and, instead of coming back, drove 20 miles through the country with the intention of taking a train and carrying the child to Pennsylvania. Mrs. Sloan sued out

a warrant for "abduction," and caused him and the child to be brought back. She then sued out a writ of habeas corpus, which she did to prevent her husband from taking the child out of the state and away from her. "He is my child, and I have a right to his custody, his company, and his love." She consented to the prayers of her mother's intervention, because the latter had the financial ability to rear and educate him, and was better able to do this than either she or her husband. Sloan is a Catholic, and has told her that it was his intention to place the child in a Catholic institution in Pennsylvania to be brought up. Her father was a Methodist evangelist. In the last conversation she had with him he told her that it was his hope that she might raise her baby so that his mantle might fall on the infant's shoulders. She added: "I feel it my duty, my sacred duty, to do all in my power to obey my father's last injunction, and to prevent my boy from being made a Catholic." There was other evidence tending to show that during his stay in Cartersville Sloan did not have any position or (so far as the witnesses knew) income; that he returned no property for taxes there; and that he had stated that he intended to carry the child to Pennsylvania. Several witnesses testified that Mrs. Jones was a good woman, possessed of considerable property, fond of the child, financially able to rear the child, and a fit person to do so. Some of the witnesses gave their opinion that those who cared for a child in its tender years formed a most lasting attachment for it. One stated (apparently without objection) that he thought she would do all in her power to make the child's life a happy and useful one, if it were awarded to her; and another (also seemingly without objection) expressed the opinion: "I believe she should have the sole custody of the child."

B. C. Sloan testified in brief as follows: He was married to Laura Jones Flournoy, a daughter of Rev. Sam P. Jones, on March 29, 1905. He was then acting in the capacity of superintendent for a firm at a salary of \$1,200 and expenses. Soon after his marriage this was increased \$25 per month. Four months after his marriage the conduct of his wife became such that he could not properly attend to his duties, and, on account of the mental anguish caused by it, he was forced to give up his position. She wanted to return to Georgia and spend a few weeks with her mother. He placed her on the train, giving her a through ticket to Chattanooga and sufficient money to pay all expenses incident to the trip, and enough to last for two weeks after her arrival. Four days later she called him up by long-distance telephone from Louisville, Ky., and informed him that, instead of going to Georgia, she was in Louisville at the Confederate reunion, and requested to be allowed to draw a sight draft on him for \$50, as she was out of



money, to go to her destination. He consented on condition that she leave Louisville that night. She drew on him for \$100, stayed in Louisville several days, and then went on to Catoosa Springs, in Georgia, where her mother was. After the first week he sent her \$20 per week while she was there, and, in addition, she drew on him through bank for \$40. After several weeks, she went to the home of her sister near Cartersville, and there wrote to him requesting him to come to her. He did so, and while there decided to go West, his wife being willing and desirous of going, and thinking that she could do better away from her old associates both in Georgia and in Pennsylvania. He then returned to Pennsylvania, settled his affairs there, and came back to Georgia in September or early in October, 1905. He was informed by his wife's family that she was in no condition to travel, and they arranged for her to stay with her mother. He did not desire for her to be dependent upon her parents, but her mother would not accept money for her board. He went West, leaving with his wife, \$50, and telling her that he would supply her regularly with whatever amounts she needed. He obtained employment, filled several positions, and was earning a good salary by January, 1906. He sent his wife \$25 in October, \$25 on November 16th, \$50 on November 27th, \$25 on December 11th, and \$100 on December 18th. In addition to this, he paid \$25 on an order given by his wife to another person. After their baby was born, on December 11, 1905, he notified the attending physician and the druggist who furnished medicines at Cartersville to send him a statement of their accounts every 30 days, which he paid promptly, the drug bill amounting to \$185.45, and the physician's bill to \$61.50. Before and after the birth of the child Mrs. Sloan was living with her sister, and informed him that she was paying one-half of the living expenses. Between October 15, 1905, and January 19, 1906, he sent his wife in the aggregate \$405. During February he continued to send her money, and her father wrote to him not to send her so much, as she had no legitimate use for it. After that he made her an allowance of \$50 per month until he returned to Georgia. Aside from his salary, he had acquired certain mining stocks, and had bought an interest in a mercantile enterprise. While in this situation his wife's father urged him to return to Georgia, assuring him that his wife had seen the error of her way, and would conduct herself differently thereafter. He informed Mr. Jones of his prospects, and that he desired to remain two months longer, so as to dispose of his holdings and finish paying for an interest in a produce business which he had bought, but expressed a willingness to close up his business and return to Georgia, if his wife was sincere in her promises. Both his wife and her father urged him to come, and Mr. Jones sent him \$700

with which to finish paying for his interest in the produce business. He did this, closed up his affairs, and returned to Georgia. After his return he received some profit from the business, and was then notified that it had been wrecked by his partner. After his return to this state he began housekeeping and paid all expenses. His wife became unwell, and her father carried her over to his house, and prevailed upon him to close up the home where they were living and follow his wife. After the death of Mr. Jones, Mrs. Sloan threw aside all pretense to doing what was right. He pleaded with her to do better for the sake of the child and the memory of her father; but she informed him that she would teach her child to think that what she did was right. He made her certain propositions looking to an amicable separation, which she rejected. He then advised her to seek the advice of counsel as to her rights, as he would protect the child by all means. Later she stated that she knew she had no right to the child, but had forfeited any such right, and asked him to leave the baby with them until it was past the teething age. He expressed an opinion that it would be best for him to go away, but Mrs. Jones urged him not to do so, and begged him not to take the child away until she (Mrs. Jones) became stronger, as she could not bear the separation from the child. He expressed an apprehension that he would lose his standing in the community if he remained, and that he might lose the legal right to the possession of his child, should it ever become necessary to go to court to settle the matter. Mrs. Jones assured him that he need not worry on that ground; that she would protect him; that she would never raise her voice against his taking his boy; and that she would not allow any one else to do so. She made this promise several times. After the death of Mr. Jones, Mrs. Jones urged him to remain with her, and he did so, assisting her in the preparation of a book on the life and sayings of her husband. On two occasions he offered to pay Mrs. Jones board for himself, wife, and baby, but she declined to accept it, saying that the services rendered her by him were such as money could not pay for, and that she did not wish him to mention it again. If he had kept an account of moneys paid out by him, contributions to household expenses paid to Mrs. Jones, Mrs. Sloan, her sister, the servants for groceries, for express parcels and for fire insurance, as he would have done at his own home, he is sure it would in the aggregate have amounted to more than any board charged in Cartersville. In August, 1907, he agreed for his wife and baby to go to Ohio and Kentucky on a visit, and let her have the money for that purpose. She was to remain two weeks. She remained a month, and then made a slight draft on him for \$150, and another on her mother for \$200, and took the baby and nurse and went to California. He went to

Kentucky, and learned that she had gone to San Francisco. He then returned to Cartersville, and in company with her sister went after Mrs. Sloan and the child. Mrs. Jones requested that he do nothing to give publicity to the affair, nor do any one bodily harm, promising at the time that when they returned she would place his wife in a sanatorium, where she could be treated. After his return Mrs. Jones stated that she could do nothing with Mrs. Sloan. He requested her to keep his wife off the streets, which Mrs. Jones promised, but failed to do. Finally, believing that the associations with which the boy was surrounded were detrimental to his proper rearing, respondent decided to take the child to his mother in Pennsylvania until such time as he could establish a home of his own with his sister to keep house for him, and assist in caring for the child, she having agreed to do this. In November, 1907, he told Mrs. Jones that he could not see any hope of getting his wife to do what was right, and that he was going to take his boy home to his mother. Mrs. Jones informed him that she knew that Mrs. Sloan had forfeited all rights, both legal and moral, to the boy, but that it would break her (Mrs. Jones') heart to have him take the child away, but she would stand aside and not interfere. A church conference was then going on or about to commence, the town was filled with strangers, and there were guests at the home of Mrs. Jones. She asked him to leave the boy until after the conference was over. On account of cares and responsibilities placed upon Mrs. Jones by the loss of her husband, and her anxiety touching the condition of her own children, she is not in a condition to properly care for this child. To award the custody of the boy to Mrs. Jones would, in effect, be to deliver it to the exclusive control of Mrs. Sloan, who is wholly unfit for the responsibility.

The respondent introduced a number of canceled checks, some of them payable to nurses for services in caring for his child, some of them payable to Mrs. Sloan, some of them to the druggist, one to the physician who attended her, and one to another physician for attendance on the child, all tending to support many of his statements in regard to money furnished by him. He also introduced a letter sent to him in Pennsylvania by his wife in August, 1905. Among other things it contained the following: "You've been the most generous man on earth in your treatment to me, and I am so grateful to you. There is no way for me to show you until this time of probation is over, but then I will prove to you that my gratitude is sincere, and my promise will remain unbroken. I read mama the parts of your letter that you said you would tell her about your change of plans, and she said she would not hear of me going to stay with Marm, which, of course, you can't blame her for. I will

never be able to tell you how I appreciate your goodness to me. If by dying I could have saved mama and Marm what you have saved them, I would gladly have done so, would now, but I had to live on and I will live to show you my appreciation. \* \* \* You know I'd much prefer going with you, no matter how uncertain your position. I'm not afraid of your not being able to make a living for me ever, and I almost go crazy when I think of your leaving me so far, but it's all right, and I know you have done what you think is best, and your judgment is much better than mine, hard as it is to accept. \* \* \* I don't want you to do anything to get a position that you wouldn't do were I not living. \* \* \* You know that all my gratitude is yours, and your wishes are my first consideration, through all the years to be." She also suggested her making a visit to Pennsylvania and returning with him on his way to the West; and made certain suggestions as to taking a house if she remained in Cartersville during the winter.

A letter to Sloan from Rev. Sam P. Jones, the father of Mrs. Sloan, was introduced, dated May 27, 1906. In it he inclosed a letter from his daughter, Mrs. Sloan, to her husband, and urged Sloan to return to Cartersville immediately, stating that he hoped he would see Sloan in Georgia by the 1st of June, and that the latter would be the happiest man in America. Inclosed in this letter was one from Mrs. Sloan to her husband, which contained the following, among other things: "You will love him [the child] to death when you feel his little arms around your neck, and now is the time for you to come home, and get something to do, so you can be near here, so you can have Sam and me with you. I want you to come, and I do want the past to bury its dead and let's begin anew with our lives centered in the precious little boy God has given us. I want to do what is right. And I am so sorry for all the past. Come back, and I'll atone so far as in my power lies, and my efforts will all be to make your future lives just what they ought to be—what they should have been in the past. Don't wait any longer to come to Sam and me here in the country." It was signed, "Lovingly, Laura."

The respondent introduced a number of witnesses showing his upright character, deportment, and standing in various places where he had lived; that he was a suitable person to have the rearing of the child; that he was moral, sober, industrious, a competent mining and engineering superintendent, and able to earn and command a good salary. His mother and brothers and sisters, who had homes, expressed a willingness to have the child brought to them, and to aid Sloan in caring for and rearing it. One sister stated that she was willing to live with him and assist in making a home for him either in Pennsylvania or Georgia, and stated that her brother was capable of earning suffi-

cient money to provide the necessities of life. Witnesses also testified to the good character of Sloan's mother, and that she was a suitable person to aid in the rearing of the child. In rebuttal one witness testified that Sloan had said that he intended to take the boy, if the custody should be awarded to him, and that none of the Jones family would ever see him again, and that they would have a time getting him back. Mrs. Jones did not deny specifically many of the statements made by Sloan. She testified that "In the summer of 1907, when her daughter Laura, the plaintiff, left home and was living in San Francisco, she paid all the money that was necessary to search for and find her, and to send my other daughter and Mr. Sloan out there after her to bring them back; that, if Mr. Sloan paid any item of this expense, it was not with her knowledge; that she furnished ample means to prevent his doing so on account of her daughter's trip, or her return, or any expenses incident thereto; that Sloan did not render her any services worth \$150 per month, or any other considerable sum. She denies that she ever waived her claim to the child or recognized the rights of the father. She denies that Sloan offered to pay his board repeatedly. She expressly said that, if said child should be awarded to her, she pledged her honor to take full and exclusive control of said child, and that said Laura Sloan shall not be allowed to exert any evil influence over said child."

The presiding judge entered a judgment that the exclusive custody and control of the child, Sam Jones Sloan, be awarded to Mrs. Laura A. Jones until December 11, 1912, and until the further order of the court, with the right to either of the other parties to hereafter move to award such custody and control to them, "when said motion is predicated on a change of conditions." It was further directed that the child should be kept in the state of Georgia, unless an order of the court should be granted Mrs. Jones to take him beyond the limits thereof. It was further ordered that Mrs. Jones should allow each of the parents of the child to be with him as often as they should desire, provided she could conveniently be present during such visits, and that either parent should be allowed to contribute at any time anything for the comfort or luxury of the child. Sloan excepted.

Thos. W. & Watt H. Milner, for plaintiff in error. John H. Wickle, J. T. Norris, and Thos. E. Watson, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The rulings of the trial court in regard to the pleadings and the intervention of the maternal grandmother were of doubtful propriety; but, as the child was produced in response to the writ, the court practically took him into custody by temporarily awarding him to a third person until the hearing

could be had, and the application of the mother set out the ability and willingness of the grandmother to furnish a home for the child and rear him; and, as the presiding judge preferred to hear the case on its merits, and did so, we will pass, without further discussion, from the technical questions of pleading, and deal with the substance of the case.

The right of a father to the custody of his minor child, and the discretionary power of a judge, upon the hearing under a writ of habeas corpus issued at the instance of the wife, to award the custody to a third person, if the welfare of the child so requires, have frequently been the subject of consideration. As early as 1836 in the Matter of Mitchell, Judge R. M. Charlton, of the superior court, filed an able and elaborate opinion on the subject. In the course of it he made use of the following language: "The power ought to be exercised in favor of the party having the legal right, unless the circumstances of the case and the precedents established would justify it [the court], acting for the welfare of the child, in refusing its aid. It becomes important, then, to inquire who has the legal right to the custody of this infant; and it seems to me that the answer that would rise to the lips of any one, however unskilled he might be in the science of the law, would be that such right resides in the father. The law of nature, the feelings which God has implanted both in the man and the brute, alike demand that he who is nearest to it, who is the author of its being, who is bound to its maintenance and protection, and answerable to God for the manner in which it is reared, should have its custody, and the law of man, which is founded upon reason, is not hostile to the assertion of this claim. Lord Ellenborough, in the case of the King v. De Manneville, 5 East, 223, speaking of the father, says: 'He is the person entitled by law to the custody of his child. If he abuse that right, the court will protect the child.' \* \* \* But, notwithstanding this legal right of the father, circumstances may exist which would justify a court in this proceeding in refusing to lend its aid to him in procuring the custody of his child, or even withdrawing the infant from his custody, when its morals, its safety, or its interests seem to require it. All legal rights, even those of personal security and liberty, may be forfeited by improper conduct; and so this legal right of the father to the possession of his child must be made subservient to the true interests or safety of the child, and to the duty of the state to protect its citizens of whatever age." Numerous authorities, both English and American, were cited to sustain the positions announced. R. M. Charlton, 493 et seq. That decision was rendered before the organization of the Supreme Court, but it has been cited several times by this court. It arose on a writ of habeas corpus issued at the instance of Mitchell, the father of the boy whose custody was in controversy, against the child's maternal grand-

father, in whose house it was born and remained, with the father's consent, for some three months, up to the time of the issuance of the writ; the mother having died in childhood. It was contended that the father had promised his wife on her deathbed that the child should remain with her parents during its infancy, though this was denied by him.

In *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. Rep. 48, Mr. Justice Hall, as the organ of the court, delivered a full and carefully prepared opinion touching the subject now before us, in which he reviewed and discussed various earlier decisions, including those of *Mitchell*, R. M. C. 493; *Boyd v. Glass*, 34 Ga. 253, 84 Am. Dec. 252; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 309; *Janes v. Cleghorn*, 54 Ga. 9: Id., 68 Ga. 87; *Smith v. Bragg*, 68 Ga. 650; *Lindsey v. Lindsey*, 14 Ga. 657. After stating that it is indisputable that the father, under the law, has the control of his minor child, and that this can be relinquished or forfeited only in one of the modes recognized by the law, and that it is equally clear that in writs of habeas corpus sued out on account of the detention of a child the court, on hearing all the facts, may exercise its discretion as to the person to whom the custody of the child shall be given, and shall have power to give such custody to a third person (Civ. Code 1895, § 2453), he declared that "the discretion to be exercised in such case is not an arbitrary and unlimited discretion like that confided to the Roman prætors, but, as remarked by Lord Mansfield in *R. v. Wilkes*, 4 Burr. 2527, is such a 'discretion as, when applied to a court of justice, means sound discretion guided by law.'" Again, he said: "The rule of discretion, as applicable to habeas corpus cases, did not originate with the compilers of our Code. They took it from the common law, and in adopting it they adopted also the meaning and limitations placed upon it by the venerable sages and authorized expounders of that noble system. Under the 'discretion' vested in him, no judge has authority to disregard or even to impair any acknowledged or established right of a party by its exercise; and, if he does so, it would seem to follow as a necessary consequence that he abuses that discretion. \* \* \* Prima facie the right of custody of an infant is in the father, and when this right is resisted, upon the ground of his unfitness for the trust or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs. \* \* \* The discretion to be exercised by the courts in such contests is not arbitrary. The rights of the father, on the one hand, and the permanent interest and welfare of the infant, on the other, are both to be regarded, but the right of the father is paramount, and should not be disregarded, unless for grave cause. The breaking of the tie that binds them to each other can never be justified without the

most solid and substantial reasons, established by plain proof. In any form of proceeding, the sundering of such ties should always be approached by courts 'with great caution and with a deep sense of responsibility.'" That case was a controversy between the father of a female child four years old and the maternal grandparents. It appeared that the child's mother, shortly before her death, stated that she wished her mother to take care for and raise the child, and for a time the father allowed the child to remain with her grandparents. In *Taylor v. Jeter*, 33 Ga. 195, 202, 81 Am. Dec. 202, Jenkins, Judge said: "Had the respondent to the habeas corpus intended to rely upon the ground of unfitness for the office in the applicant, the latter should have been notified of it by a distinct allegation in the answer, and there should have been direct, satisfactory proof adduced to sustain it." In *Monk v. McDaniel*, 116 Ga. 108, 42 S. E. 360, it was held that: "While the judge upon the hearing of a writ of habeas corpus for the detention of a child is vested with a discretion in determining to whom its custody shall be given, such discretion should be governed by the rules of law and be exercised in favor of the party having the legal right, unless the evidence shows that the interest and welfare of the child justify the judge in awarding its custody to another." The decision in *Miller v. Wallace*, supra, was cited and approved. In *Lamar v. Harris*, 117 Ga. 993, 997, 44 S. E. 866, 868, Mr. Justice Candler said: "The law does not fly in the face of nature, but rather seeks to act in harmony with it, and to that end encourages the formation and continuance of those ties which, by the inscrutable providence of God, bind man to his own flesh." In *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304, the same justice, in delivering the opinion, again approved this statement. These two cases turned on a contention that the father had relinquished his parental control; and it was held that there must be clear proof to authorize the disregarding of the father's right. See, also, *Carter v. Brett*, 116 Ga. 114, 42 S. E. 348; *Richards v. McHau*, 129 Ga. 275, 58 S. E. 839. In *Williams v. Crosby*, 118 Ga. 296, 45 S. E. 282, Mr. Justice Lamar said: "In a contest between two parties, both of whom are fit and proper persons, the one having the legal right should prevail. If both are proper parties, but neither has a legal right, the one having the stronger moral claim should prevail. But in every case, regardless of the parties, the welfare of the child is the controlling and important fact. This is not intended to nullify the laws of nature; for in most instances it will be found that the legal right of the parent and the interest of the child are the same. But if through misconduct or other circumstances it appears that the case is exceptional, and that the welfare of the child requires that it should be separated even from its parent, the *parens patriæ* must

protect the helpless and the innocent. They are the wards of the court, the hope of the state, and the seed corn of the future." This was said in a case involving a controversy over the custody of a child between its parents who had been divorced. The judgment in the divorce suit awarded the child to the mother. The court, on the hearing of the habeas corpus proceeding, apparently thought that the judgment in the divorce case prevented him entering into the question as to the fitness of the parent or the interest of the child, even on evidence as to those matters since the decree, and the language quoted was used in discussing this ruling.

It will thus be seen that *prima facie* the right to the custody of an infant is generally in the father, if living; but this may be resisted on the ground of unfitness for the trust, or other good cause, and that in reaching his judgment on a habeas corpus proceeding involving the custody of the minor child the presiding judge should award the custody to the person legally entitled thereto, unless it is made to appear that he has lost this right, or that the security, morals, or welfare and interest of the child require another disposition, and that the right of the father should not be disregarded and his child awarded to the custody of one neither the father nor mother (even though a grandparent) save for grave and substantial cause. The rights of nature are not to be lightly overridden on the one hand, nor is the welfare of the child to be disregarded on the other. The case most cited as authority for the discretionary power of the court, and which some of the decisions seem to treat as declaring in favor of an almost arbitrary discretion, is that of *Rex v. Delaval*, 3 Burr. 1434, in which Lord Mansfield said that "the court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint; but they are not bound to deliver them over to anybody, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them. \* \* \* The true rule is 'that the court are to judge upon the circumstances of the particular case; and to give their discretion accordingly.'" In that case a girl of 18 years of age had been debauched by Sir Francis Delaval, and was notoriously his mistress. A writ of habeas corpus was taken for her custody by her father. On the hearing she did not wish to go home with her father, but declared her attachment for Sir Francis. The learned judge thus decided: "Let the girl therefore be discharged from all restraint, and be at liberty to go where she will. And whoever shall offer to meddle with her, *reduendo*, let them take notice 'that they do it at their peril.'" The report does not show what followed, but presumably she returned to Sir Francis, and her father did not "meddle with her." One or two observations may be made in regard to that case. While it is

unquestionably an authority for the use of discretion by the court, the remarks of the same learned judge in *Rex v. Wilkes*, 4 Burr. 2527, *supra*, on the subject of the meaning of discretion and its proper use, show clearly that he did not intend by the employment of that term that courts could disregard entirely legal rights, powers, and duties in its exercise. Again, whatever may be the case with persons of full age or who have sufficient discretion to determine their own actions, it could not be held that a court on the hearing of a habeas corpus proceeding for the custody of a child two years of age could pursue the plan adopted in the *Delaval* Case, and set it free to go where it pleased. Wrongful custody of children may not be in fact against their consent but sometimes as they desire. But the writ of habeas corpus has come to be treated as a method of determining their proper custody. The wrongful custody of a child, especially one of tender years, who cannot in law choose for itself, is considered a sufficient illegal restraint of liberty to authorize the issuance of the writ; and, while the wishes of the child may be heard and considered, its immature will is not controlling on the court. When a child of tender years is brought before the court on such a writ, its custody must be determined and awarded to some person. It is different from a grown person who is entitled to his own custody, and who cannot lawfully be kept in custody or restraint against his will by another, save in certain exceptional cases, such as that of one arrested for a crime or confined as a lunatic, or the like. A child is not entitled to its freedom like a grown person. A parent or guardian is entitled to the custody of the child. Our own statutes recognize this distinction, as do also adjudicated cases. See Civ. Code 1895, § 2502. In such cases the trial court has a discretion, but in its exercise he must consider the natural rights of the parent as well as the dictates of humanity and the welfare of the child. In this connection the remarks of Chief Justice Sharkey in his dissenting opinion in *Foster v. Alston*, 6 How. (Miss.) 406, are worthy of consideration. See, also, Civ. Code 1895, §§ 2453, 2461, 2503 (which was codified in part from the act of 1845 [Cobb's Digest, p. 335] on the subject of awarding a child to its father or mother); Pen. Code 1895, § 1226; *Shaw v. Nachtwey*, 43 Iowa, 653; *Brinster v. Compton*, 68 Ala. 300; *State v. Smith*, 6 Greenl. (Me.) 462, 20 Am. Dec. 324. Those who may be interested in pursuing the subject further will find discussions of it in *Hurd on Habeas Corpus*, 462-521; *Church on Habeas Corpus* (2d Ed.) §§ 423-454; in the opinion, dissenting opinion, and elaborate briefs in *Foster v. Alston*, 6 How. (Miss.) 406; in monographic note to *Smith v. State*, 20 Am. Dec. 330, and in 15 Am. & Eng. Enc. Law (2d Ed.) 187, and notes. There are many cases where infants of tender years

have been awarded to the custody of their mothers, rather than to that of their fathers. There are also cases where the court has refused to disturb the custody of grandparents under habeas corpus proceedings by a parent. It would be useless to cite numerous cases of one character or the other, and show on what special facts each rested. It may be said that where the mother and the father are both fit and proper persons to have the custody of the child, in a controversy between them (where discretion is somewhat more freely used), the necessity for maternal care or nurture in infancy or early childhood, or the sex of the child, has sometimes been a potent circumstance. In some of the cases the father abandoned his child or relinquished his paternal right to its grandparents or others. In some of them he let the child remain in their entire custody and charge for a long period of time, and either he appeared not to be a fit person to rear it, or the facts were such as to show that the welfare of the child required its custody to be left undisturbed. Here the father had the child. The mother instituted proceedings to have it taken from him and delivered to her under a writ of habeas corpus. The maternal grandmother intervened or appeared, and asked that the custody be given to her. When he started to leave with the child, he was arrested and brought back under a criminal warrant, which is spoken of as being for "abduction," a somewhat singular proceeding, unless a father has parted with his parental right to the custody of his child. See *Hunt v. Hunt*, 94 Ga. 257, 21 S. E. 515.

In the light of the foregoing discussion of the principles involved in such cases, let us briefly consider some of the salient facts in the present case bearing on the question between the husband and wife and between the father and the grandmother. It seems to be beyond question that the mother, who was the original applicant for the writ of habeas corpus, is not entitled to the custody of the child, and is not a properly qualified person to have him. When her mother filed her intervention, she alleged that "your intervenor's daughter, the above plaintiff, is physically weak and of a nervous temperament, which prevents her administering to her child at all times with the gentleness and tenderness and discretion of which your intervenor feels and believes she herself is capable." On this intervention the mother of the child signed an acknowledgment of service, and added: "Without waiving any of my rights to hereafter be heard for the custody and control of my child, Sam Jones Sloan, as against any right which may be asserted or claimed by my husband, B. C. Sloan, in this proceeding, or any other proceeding, I hereby consent for the prayers of my mother's intervention to be granted." Thus, while seeking to reserve the privilege of resisting the claims of the father, she practically abandoned any

claim to the custody of the child in favor of her mother. In an affidavit filed by Mrs. Jones, the grandmother, as it is set out in the bill of exceptions, she expressly said that, "if said child should be awarded to her, she pledged her honor to take full and exclusive control of said child, and that said Laura Sloan shall not be allowed to exert any evil influence over said child." Doubtless this fond grandmother was sincere in making this statement. But the testimony discloses that her daughter was living with her, and evidently intended to continue to do so. If there was any evil influence to be apprehended from the mother, it is difficult to see how the grandmother intended to prevent it in the daily contact of mother and child living together. Clearly, under the pleadings and evidence, the original applicant for the writ was not entitled to the custody of the child.

Next let us consider whether the evidence authorized the taking of the child from the father and delivering it to the grandmother. There is no pretense that he had relinquished his parental right by contract; nor is there the slightest intimation that he is a man of vicious, immoral, or dissipated habits. Indeed, no attack is made on his character, while the evidence of numerous witnesses who knew him in the place where he had resided shows him to be upright, industrious, a suitable person to have the rearing of his child, and capable of earning enough at his vocation to amply supply necessities. His mother and sisters, who appear to be good people, offer their homes and services in assisting him. The evidence indicates that he was twice broken up in business by the conduct of his wife; that he sent her money in considerable sums during his absence; that he gave up his business, salary, and prospects in the West, where he had established himself, and returned to Georgia at the urgent request of his father-in-law and his wife in the hope that all differences between them might be reconciled, and he might be with her and his child. His wife's letters to him, which are partly copied in the statement of facts, are couched in terms which utterly repudiate any idea of fault on his part, and show that she admitted that whatever fault there had been was hers. If he did not obtain a position in Cartersville or its vicinity, there is nothing to show that he could have done so in the vocation for which he was fitted. He did not pay board at the house of his wife's parents, where she was taken at their instance, and where he also resided at their request. But it is clear that no board was demanded of him; and whatever may have been the unexpressed thoughts or reasons of Mrs. Jones he was informed at least once that he was not expected to pay, according to her own testimony. We appreciate the inalienable love of Mrs. Jones for her daughter, and her affection for her grandchild. We respect her solicitude for her

child and her child's child. It is sad that the evening of her life should be disturbed by the sorrow arising from the discord between her daughter and her son-in-law, and the consequent necessity for determining the custody of their child. But, so far as the evidence discloses, the disaster was not the fault of Sloan. As fond grandmothers sometimes do, she even feels that she has legal rights to the child superior to those of his father. But, however tender may be her love for her grandchild, God gave the child to his parents, not to his grandparents. In law the father is entitled to the custody, unless he has forfeited or lost that right, or unless the evidence shows that the interest and welfare of the child require that that custody shall be given to another. He is legally bound for the child's maintenance. The grandmother is not so. What she does is voluntary. Even a will drawn is revocable, and does not bind the testatrix while in life, though no present intention to revoke it is shown, but rather the contrary.

In addition to what has been said, and aside from the pathos which is inherent in all such cases, three reasons which may possibly have been considered in taking the child from his father and awarding the custody to the grandmother require notice: First. Because she loves the grandchild and desires his custody. But surely so likewise does the father. In fact, it appears that he was constantly with the child. Second. That she is a woman of considerable means, while he is dependent upon his industry to make a living. But the evidence indicates that he is capable of earning enough to support and care for the child, and he will have the aid of his sister and mother in rearing it. Nor is a difference in worldly circumstances in itself sufficient ground for depriving a father, the natural guardian of his child, of its custody, and awarding it to a third party, where he is a fit person to rear it, and able to do so properly. Poverty alone, save perhaps in extreme cases, furnishes no reason to deprive a parent of his offspring. *Moore v. Dozier*, 128 Ga. 92, 57 S. E. 110. In *Verser v. Ford*, 37 Ark. 27, it was said that, "as against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by any one whatever, however brilliant the advantage he may offer." Under the facts of that case, the trial court declined temporarily to take a female child, nearly three years of age, delicate in health, and whose mother was dead, from the custody of the child's maternal grandparents on application of the father. The ruling was affirmed, but it was said: "Certainly, under the circumstances, if he had been in possession of the child, no chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care." The third reason to be noticed is because the father is a

Catholic, while the grandmother is a Protestant. It does not appear whether the child's mother is a member of any church. Surely, in a country, where the fundamental law of the Constitution (Civ. Code 1895, §§ 5709, 5710, 6014) guarantees the right of religious freedom and to worship God according to one's own conscience, it needs no argument to show that this does not furnish a ground for taking a child from the father's custody and awarding it to another. If it were deemed unfortunate for the daughter of a Protestant evangelist (which Mr. Jones was) to marry a Roman Catholic, and perhaps become the mother of children by him, there is nothing to show that the religious belief and church connection of the prospective husband were not well known before she became his wife. If the intended wife or her parents objected to his faith, it would have been better to raise the objection before her marriage rather than when the father desired the custody of his child. Indeed, it does not seem that this played any part in his matrimonial misfortunes, or was ever mentioned to him as an objection until the custody of his child was involved. Mrs. Jones testified that her grandson (two years old) "had been taught the Protestant faith from the day he was able to understand anything; that it is not her purpose to criticise Mr. Sloan for his faith, but that, on account of the above facts, and on account of the child's first impressions being of the Protestant faith, she feels that he should be allowed to be reared in a Protestant home; that Mr. Sloan, as a Catholic, would feel it his duty, enjoined upon him by his religion, to bring the boy up in his faith; and that if he be allowed to have the custody of the child for the first five years of its life that it will be influenced by the Catholic teaching, and would almost surely become a Catholic." Mrs. Sloan more tersely stated that she felt it to be her duty to do all in her power to prevent the boy from being made a Catholic. But a court cannot lawfully take a child from his father for such a reason.

It is urged that the courts will not allow the child to be taken out of the jurisdiction. This may sometimes be true, as in cases where the court changes the custody, or perhaps in some other cases. But there is no arbitrary rule of law that a father who has and is entitled to the custody of his child cannot be allowed to take him out of the state. Even yet in his pleadings he holds out to his wife the opportunity for reconciliation, saying that he desires to rear and educate his own child in his own home, where he may have the privilege of enjoying association with him and of educating and rearing him, "and there also have the association of his wife, Laura Jones Sloan, should she choose to occupy said home with him, and do her part toward making it a happy home."

We have given this case careful and pains-

taking consideration. We appreciate the importance of the issue involved. Cases concerning the custody of children of tender years always demand the utmost care and the most thoughtful consideration on the part of the courts. They involve the welfare and best interest of the child. They touch upon the tenderest sentiments of human nature. But under the evidence in this case we have been able to come to but one conclusion, which is that the father was entitled to the custody of his child, and that our Brother of the superior court erred in the judgment which he rendered.

Judgment reversed. All the Justices concur.

### ALLEN, Mayor, et al. v. POOL.

(Supreme Court of Georgia. July 22, 1908.)

#### MUNICIPAL CORPORATIONS—FEES OF OFFICERS.

Under the provisions of the act of August 20, 1906 (Acts 1906, p. 176), establishing the city court of Buford, the solicitor of that court was not entitled to have a mandamus issued against the mayor and members of council of the city of Buford to compel them to audit his accounts for costs due him in criminal cases in that court which had terminated by acquittal, orders of nolle prosequi, or the sustaining of demurrers, and to order the treasurer of the city to pay the amount thereof, nor to compel the treasurer by writ of mandamus to pay such claims of the solicitor.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Application of J. V. Pool for writ of mandamus against J. Q. Allen, mayor, and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. V. Pool applied for a writ of mandamus against Allen, as mayor of the city of Buford, Bennett and others, as members of the city council, and Brogdon, as treasurer. The applicant was the solicitor of the city court of Buford. He alleged that as such he had represented the state in a number of misdemeanor cases which had been terminated by verdicts of not guilty, or by orders of nolle prosequi, or by the sustaining of demurrers; that he was entitled to costs in such cases; that he had presented his claim to the mayor and council, who refused it; that there were sufficient funds in the hands of the treasurer, arising from fines, forfeitures, and convict hire, to pay his claim; and he prayed that the mayor and council be required to audit the account and order the city treasurer to pay it, and that the treasurer be required to pay such account. Respondents demurred to the application. The demurrer was overruled, and exceptions pendente lite were filed. Answers were filed, raising issues which were submitted to a jury. Upon their finding the mandamus was made absolute. A motion for a new trial was made and overruled, and the respondents excepted.

E. O. Dobbs and N. L. Hutchins, for plaintiffs in error. I. L. Oakes, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The single controlling question in this case is whether, under the act of August 20, 1906 (Acts 1906, p. 176), the duty of auditing and approving the applicant's claim and ordering it to be paid by the treasurer was imposed upon the mayor and members of the city council, and the duty of paying it was imposed upon the treasurer. The city court of Buford appears to have been the subject of much legislation. On December 17, 1901, an act was approved to establish "the city court of Buford, Gwinnett county, Georgia" (Acts 1901, p. 96). On August 1, 1906, an act was approved amending the act of 1901. Nineteen days later, on August 20, 1906, another act was approved, abolishing the court thus established, and repealing the original act and amendment thereto. On the same day an act was approved establishing "the city court of Buford, in the city of Buford, in the county of Gwinnett." Certain provisions in this last act formed the basis of the present controversy.

Though ample in extent, covering 16 pages, the act of 1906, in so far as it refers to the subject under consideration, is not clear. By section 7 it was declared that "for his services in said court the fees of the solicitor shall be as follows: For every case finally disposed of in said court, founded upon accusation, ten dollars (\$10.00); for every indictment or special presentment finally disposed of in said court, five dollars (\$5.00); for every case for a violation of the gambling laws of the state, finally disposed of, twenty-five dollars (\$25.00); and for all services for which this section does not provide, he shall receive the same fees as allowed by law to solicitors general for similar services in the superior court. The foregoing fees are to be paid out of the fund arising from fines and forfeitures in said court, and the hire of convicts sentenced therein, as hereinafter provided." By section 47 it was enacted that "the mayor and council of the city of Buford shall have power and authority to hire convicts from said city court under and subject to the laws and regulations governing the hiring out of misdemeanor convicts in this state, and that the money arising from such hire, together with all fees and forfeitures which may be imposed by said court, be paid into the city treasury of said city." By section 48 it was enacted that "all fees and costs imposed by said court, which are paid, shall be collected by the sheriff of said court, and, after paying the several officers of the court their costs in the respective cases, he shall pay over the balance to the treasurer of the city of Buford, and that all money arising from forfeitures and fines and hire of convicts, less costs due to the several officers of the court in the respective cases,



shall likewise be paid to the treasurer of the city of Buford." By section 49 it was enacted "that the mayor and council of the city of Buford is hereby authorized and empowered to pay out of the treasury of said city all jury fees and other court expenses, which said fees and expenses said city of Buford shall be liable therefor."

From a reading of the sections of the act above quoted it will be seen that section 7 provided that the fees of the solicitor were to be paid out of the fund arising from fines and forfeitures and the hire of convicts, "as hereinafter provided." The only other sections of the act touching the subject were those numbered 47, 48, and 49, above set out, and to them or some of them only could reference have been made by the expression "as hereinafter provided." Section 47 declared that the mayor and council should have power to hire the convicts from the city court, and that the money arising therefrom, "together with all fees and forfeitures," should be paid into the city treasury. It is probable that the word "fees" was intended for fines, but it is printed as quoted above. There is nothing in this section which imposes on the mayor and council the duty of auditing the solicitor's account and ordering payment thereof from money in the city treasury, nor on the treasurer to pay such amounts as might be demanded of him by the solicitor. Section 48 provides that all fees and costs imposed by the court (possibly meaning fines and costs), which are paid, shall be collected by the sheriff of the court, and that, after paying the officers of the court their costs in the respective cases, he shall pay over the balance to the treasurer of the city of Buford, and that "all money arising from forfeitures and fines and hire of convicts, less costs due to the several officers of court in the respective cases, shall likewise be paid to the treasurer of the city of Buford." There is nothing in this which directs payment by the treasurer on account of insolvent costs, or costs in cases of acquittal, after money has been paid into his hands; nor is there any direction to the mayor and council to audit the account and order the treasurer to make such a payment.

Treating the printed word "fees" as meaning fines, the sheriff is made the collecting officer of fines and costs, and on him is placed the duty of paying to the several officers of court their costs in the respective cases. The act does not state in terms who shall collect the hire due for convicts; but it seems to contemplate that the costs in the respective cases shall be deducted from "forfeitures and fines and hire of convicts" before the balance shall be paid into the treasury. The only distinct provision in the act for making payment from the city treasury is contained in section 49, which declares that the mayor and council are authorized and empowered to pay out of the treasury "all jury fees and other court expenses, which said fees and expenses said

city of Buford shall be liable therefor." Unless the insolvent costs due to the solicitor could be classified as "court expenses," the provision referred to did not authorize payment of them from the treasury. We think it is quite clear that the expenses referred to were the current expenses necessary and proper for the conduct and operation of the court, and incidental thereto, and that they did not include claims of the solicitor for insolvent costs in cases of acquittal. The statement that certain things might be paid from the treasury, after funds had been there received, would rather imply a negation of the payment of other claims, such as those of the solicitor.

Mandamus lies to compel a due performance of an official duty, where there is no other specific remedy. Civ. Code 1895, § 4867. There must be a legal duty before its performance can be compelled by mandamus. Here no duty is imposed by the act on the mayor and council to audit and order payment of this claim to be made out of the treasury, nor upon the treasurer to pay it upon the demand of the solicitor. Under the law relating to the superior court, provision is made for examining and allowing claims for insolvent costs and ordering them to be paid, and for the manner of distribution of fines and forfeitures. Pen. Code 1895, §§ 1085, 1097. There is no provision analogous to this distinctly made in the act of 1906 as to the city court of Buford in regard to convict hire. If such a duty can be implied on the part of any officer before the fund is paid into the treasury, no specific duty of payment by the treasurer to the solicitor can be implied after the fund has reached his hands. See *Patterson v. Taylor*, 98 Ga. 646, 25 S. E. 771; *Holtzclaw v. Riley*, 113 Ga. 1023, 39 S. E. 425; *Pulaski County v. De Lacy*, 114 Ga. 583, 40 S. E. 741; *Sapp v. De Lacy*, 127 Ga. 659, 56 S. E. 754.

From what has been said, it will be seen that the applicant had no right to the writ of mandamus absolute, and its grant was erroneous.

Judgment reversed. All the Justices concur.

#### WATKINS et al. v. GILMORE.

#### GILMORE v. WATKINS et al.

(Supreme Court of Georgia. July 14, 1908.)

#### 1. PARTITION—ESTATES SUBJECT TO PARTITION—LIFE ESTATES.

Where a testator bequeaths to his wife for life a large body of land, and in his will says: "I give all my said property to my children who are then living and to the children of such of my children as are now dead or who may be dead at her death, the grandchildren to take the parts their parents would have taken if living at her death," and "the parts above given to my children they are to have for and during their lives and at their deaths to go to their children," and, "if any of my children should die and have no children, then I give the part given to him to be equally divided be-

tween my children and grandchildren who survive him or her, the grandchildren to take the part their parent would have taken if living"—upon the death of the widow the land may be partitioned among the life tenants for the purpose of allowing each to have, use, and enjoy his or her part during the term of such life interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 41-50.]

## 2. EJECTMENT—EVIDENCE—SUFFICIENCY.

Upon such terms of a will, if all the parties entitled to enjoy the property at the death of the widow were of full age and sui juris, and applied to the ordinary for partition, and all the requirements of the statute in respect to partition were complied with, and if the partitioners made a division of the land, and the executors made deeds accordingly, and the applicants accepted such deeds, put them to record, and went into possession under them, such deeds to each would put into the taker the right of possession during his life; and all the other parties who thus took under deeds made in pursuance of such division in kind could not recover from a purchaser of the part set apart to one of their number by simply showing the death of the party who had sold and without showing that he left no children surviving him.

## 3. WILLS—CONSTRUCTION—ESTATE CREATED.

Whether or not it would be a fair construction of such a will that the testator intended that at the death of his wife the land should be divided between his children then in life, and the children of deceased children per stirpes, and that his grandchildren should succeed in fee to such part of the land as had been set apart to their several deceased parents, *quære*.

## 4. WILLS—TRANSACTIONS AMONG DEVISEES—EFFECT.

Neither by pursuing the statutory method for partition nor by agreement of life tenants can the testamentary scheme be set aside as to parties who may have an interest in the estate, and who were not parties to the partition or agreement.

## 5. EJECTMENT—EVIDENCE—SUFFICIENCY.

Where a child of the testator took, under such circumstances, his part, recorded in his deed, and went into possession, sold the same and died, and the other parties to such partition, who had each accepted a similar deed, and had gone into possession into it, and who made no protest or objection to each of the others doing likewise with his or her share, and who made no offer to restore to the estate or their co-legateses what they severally have thus appropriated, could not recover it from the purchaser, at least without showing that the vendor died without children; and, in the absence of such proof, the court properly directed a verdict for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Ejectment by Joel B. Watkins and others against H. F. Gilmore. Judgment for defendant, and plaintiffs bring error, defendant assigning cross-error. Affirmed on both bills of exception.

X. A. Wright and Jno. R. L. Smith, for plaintiffs in error. Frank Z. Curry and Hall & Hall, for defendant in error.

ELLIS, J. This is a suit in ejectment, brought in the fictitious form wherein Doe, upon the several joint and separate demises of Joel B. Watkins, B. F. Watkins, E. P.

Watkins, James B. Watkins, Mack Watkins, Jr., Mrs. Amanda McDaniels, Mrs. Mollie Smith, Mrs. Ida Hale, Mrs. Martha T. Bledsoe, Mrs. Roxie Millen, and George Thornton, against Roe as casual ejector and H. F. Gilmore as tenant in possession. A joint demise of the whole interest in the premises in dispute was laid by the petition in all of the persons named above as lessors. A joint demise of an undivided ten-elevenths interest in the same was laid by the petition in all of said persons except Mack Watkins, Jr. A separate demise to an undivided one-tenth interest in the same was laid in each of said persons except Mrs. Roxie Millen and George Thornton, and separate demises of an undivided one-twentieth interest therein was laid in the two last-named persons. After defendant Gilmore had introduced a deed from Mack Watkins, Jr., conveying to him the premises in dispute, the plaintiffs filed an amendment, which was allowed by the court, striking the name of Mack Watkins, Jr., in all demises laid in the petition, and striking all demises laid therein in the name of said Mack Watkins, Jr. Thereupon the defendant Gilmore moved the court to strike the joint demise in the name of all of said persons as first laid in said petition, and first herein above mentioned, upon the ground that plaintiffs could not proceed with recovery under said joint demise after one of the joint lessors named therein had been stricken therefrom. The court sustained said motion and ruled that said joint demise must be stricken from the petition, to which ruling the plaintiffs excepted, and they now assign the same as error.

Upon the trial the following facts were proved without contradiction: (1) A. M. Watkins had title to, and was in possession of, a tract of land of which the premises in dispute were a part at the time of his death. (2) Defendant Gilmore held under a chain of conveyances, properly executed and duly recorded, of the premises in dispute, from G. W. Watkins down to himself, including in said chain a quitclaim deed from Mack Watkins, Jr., as follows: Watkins & Hale, executors of A. M. Watkins, to G. W. Watkins, G. W. Watkins, by his trustee in bankruptcy, to Mack Watkins, Jr., Mack Watkins, Jr., to defendant Gilmore. (3) All of plaintiff's lessors are children of said A. M. Watkins, except Mrs. Roxie Millen and George Thornton, who are grandchildren, being the children of a child of said A. M. Watkins, who was dead at the date of the death of said A. M. Watkins. Mary A. Watkins, the widow of the said A. M. Watkins, died before the division of the land hereinafter set forth. Said G. W. Watkins scheduled the premises in dispute as his property when he was adjudged bankrupt, and it was sold by his trustee to Mack Watkins, Jr. (4) At the time of his death A. M. Watkins left no children surviving him, except those mentioned as lessors, except G. W. Watkins and Sallie A. Scott; and, except

Mrs. Millen and George Thornton, there were no grandchildren of A. M. Watkins whose parents were dead at the time of the death of said A. M. Watkins, and since his death none of his children had died except G. W. Watkins, through whom the premises in dispute came, and Mrs. Sallie A. Scott. Mrs. Mary A. Watkins, widow of A. M. Watkins, died before the death of G. W. Watkins, or Mrs. Scott. (5) There is no evidence in the record as to whether Mrs. Sallie A. Scott or G. W. Watkins left any child or children. It was admitted by counsel of all parties that all parties claim title under A. M. Watkins.

A certified copy of the will of A. M. Watkins was introduced in evidence by plaintiffs, and the material parts of it were conceded to be as follows:

Item 1: "I give all the property that I may own at my death, both real and personal, to my wife, Mary A. Watkins, for and during her life or widowhood. At her death or marriage I give all my said property to my children who are then living and to the children of such of my children who are now, dead or may be dead at her death, the grandchildren to take the parts their parents would have taken at her death."

Item 2: "The parts above given to my children they are to have for and during their lives, and at their deaths to go to their children."

Item 4: "If any of my children should die and leave no children, then I give the part given to him to be equally divided between my children and grandchildren who survive him or her, the grandchildren to take the part their parent would have taken if living."

Item 5: "I appoint my son, Joel Watkins, and my son-in-law Samuel Hale, executors of this will."

Defendant introduced certified copies of some proceedings in the court of ordinary of Butts county:

A petition to the ordinary, signed by the two executors, in which it was recited (a) that all the debts of the deceased had been paid or were in process of payment; (b) that the estate was ready for distribution, that the residue of the estate can be readily divided in kind, and that there is no need for a sale of the residue; (c) that it is practicable to make distribution in kind of the residue of the estate which consists of 450 acres (more or less) of land in the 612th militia district of Butts county; (d) that the parties at interest in this state are Joel B. Watkins, Sarah Scott, Amanda McDaniel, B. F. Watkins, Mary A. Smith, A. M. Watkins, E. P. Watkins, Ida Z. Hale, Jas. B. Watkins, Roxie Millen, and George Thornton, and residing out of this state Mrs. Martha T. Bledsoe. This petition prayed for an order of distribution of the estate in kind, pursuant to the statute for such cases made and provided. Notice in writing was given of the filing of this application for an order of distribution in kind, and that the same

would be heard at the regular December term, 1899, of said court of ordinary. This notice was dated October 30, 1899, and was signed by Joel Watkins and S. J. Hale as executors. Acknowledgment in writing of service, and waiver of copy and of all further service by an officer, was made by all plaintiff's lessors and by G. W. Watkins and Sallie A. Scott. At the December term, 1899, said court of ordinary passed the following order: "Upon hearing the application of Joel B. Watkins and S. J. Hale, executors of A. M. Watkins, at this term for the appointment of persons to distribute the estate of said A. M. Watkins, in their hands, amongst the lawful distributees of said estate, and being satisfied that due notice as required by law had been given to the parties at interest of their said application, and the court being satisfied such distribution is practicable, it is therefore ordered by the court that E. P. Newton, J. R. Watkins, Abel Lemons, and Cornelius McClure, all freeholders of said county, make a distribution of said estate according to law." After the passing of the foregoing order, the ordinary issued a commission to the four commissioners appointed, in which he recited the final order, and by virtue of it directed them, or a majority of them, after taking a proper oath, "to proceed to make such a just and equal partition and division of the land described among the legal heirs [naming them] as you shall judge to be in proportion to their share or interest of each, \* \* \* they, the said heirs at law, having each an equal interest in said land, except that Roxie Millen and George M. Thornton take one distributive share." This order was dated December 5, 1899. E. P. Newton, J. R. Watkins, and Cornelius McClure took the prescribed oath, qualified, and proceeded to execute the order. The commissioners filed a report in due form, setting forth that, by virtue of the order of the court of ordinary, they had made a fair division of the estate of A. M. Watkins, then in the hands of the executors, among his lawful distributees, that they had arranged the property as nearly as possible in twelve equal lots numbered from 1 to 12 inclusive, each adjudged to be of the value of \$1,320. The report or distribution showed that the lots were drawn for by chance, and a description of the several allotments is given. A surveyor's plat was attached, showing the several parcels allotted. On the coming in of this report the court of ordinary at the January term, 1900, made the return the judgment of the court, and in the judgment it was said: "Let deeds be executed by said executors to each of the several parties, for the land assigned to them, respectively."

Defendant also introduced a deed from the executors of A. M. Watkins to G. W. Watkins, in which they conveyed to him that part of the land set apart to him. The deed recited that it was made "by virtue of a division made by commissioners which division

is a judgment of the court of ordinary of said county, rendered at the regular term January, 1900," and the consideration is stated "for and in consideration of a division in kind of the real estate of said deceased," and the deed proceeds to say that said executors "grant, bargain, sell and convey (so far as the office of executors authorizes us) unto G. W. Watkins [here follows a description of the property in dispute] to have and to hold the same, together with all the rights, members and appurtenances thereunto belonging, unto the said G. W. Watkins, his heirs and assigns, forever, in as full and ample a manner as the same was seised, possessed, and enjoyed by said A. M. Watkins at the time of his death." It was admitted by plaintiffs that deeds identical in form and substance were made and delivered by the executors to each of the parties named in the writ of partition, conveying to each the share allotted to him or her, and that each immediately went into possession. An attempt was made to show that this division in kind was intended by the parties thereto to be a family settlement of the estate, and to show that all agreed to it and in fact divided the land in fee. The evidence on this question, as set out in the record, does not appear to have established this contention; and one of the errors complained of is that the trial court ruled that the case was controlled by the documentary evidence, and that it was one for the direction of a verdict.

Another error assigned is that the court overruled an objection to the admission of this documentary evidence. The objection was urged on the ground that the proceedings in the court of ordinary could not in any manner affect the title to land, and that, if the statutes authorizing division of estates in kind could be held to affect the title, then such statutes, in so far as they purport to vest the ordinary with such jurisdiction, are void, because such jurisdiction is by the Constitution exclusively vested in the superior courts. It was also urged that, in so far as said statute purported to vest courts of ordinary with such jurisdiction, said statute was void as contrary to that provision of the Constitution fixing the venue of cases respecting titles to land in the county where the land lies, in such cases fixing the jurisdiction in the superior court of the county where the land lies. The court overruled said objections and admitted the evidence. The court of ordinary had jurisdiction over the proceedings filed to partition the land among the life tenants. A large body of land capable of division in kind left by a testator by will to his wife for life, and, at her death, to his children for their lives, with remainder in fee to his grandchildren, may be partitioned at the death of the widow among the children. There is no good reason in law why the life tenants should hold the land as tenants in common, if it is to their advantage to have it divided between them, and if such

division can work no injury to those entitled in remainder. Such division is within the contemplation of the statute providing for partition, and in our view of the case such statute is not unconstitutional. The evident purpose of the proceedings before the court of ordinary was to divide the land in question among the children and the children of a deceased child or children in such manner as to allow them the separate use of the allotted shares during the time they were allowed to enjoy it under the terms of the will. The will of A. M. Watkins, after providing that his wife should have all his real and personal property, which he owned at the time of his death, for and during her life or widowhood, uses the following language: "At her death or marriage I give all my said property to my children who are then living and to the children of such of my children as are now dead or who may be dead at her death, the grandchildren to take the parts their parents would have taken if living at her death." Here it will be observed that the grandchildren are to take the "parts" their parents would have taken if living, etc. If the will had stopped with this provision, it is perfectly clear that the widow would have taken an estate for life or widowhood, and that, upon her death or marriage, the children and children of deceased children would have taken the estate in fee. In that event, there is no question that partition of the property in kind could have been made in the usual way; but the will goes further and provides: "The parts above given to my children they are to have for and during their lives, and at their deaths to go to their children." Here again the testator uses the word "parts," and not interest or even shares in the estate. And again: "If any of my children should die and leave no children, then I give the part given to him to be equally divided between my children and grandchildren who survive him, or her, the grandchildren to take the part their parent would have taken if living."

What does all this mean? Does it mean that each of the 12 children or the representatives of the children should become tenants in common, and have an undivided and indivisible one-twelfth part of the estate, and that a tract of farm land capable of separation should never be divided during the succeeding generation, and that their children should be born into a final right to possess an undivided interest in the whole? Or does it mean that the land might be fairly divided into separate and equal parcels, and that the children of each child should finally come into the inheritance in fee of that part which fell to or was assigned to their parent, whether by voluntary agreement or legal proceedings under the statute authorizing partition, and that, upon the death of any child of the testator without children, his or her share should revert to his fellow life tenants, and through them descend in fee to the

grandchildren? To take the construction that the estate could not be divided in kind would create the probable contingency that this estate would soon come into the position that it would be held under a situation that some of the parties entitled to possess it would be remaindermen, and some of them owners in fee. In fact, there could come about a situation where for years, possibly until the death of the last survivor of the twelve, there would never be any certain ownership of any particular part of the property, and the hardship would arise of never being able to sell or safely improve any part of it. Following the rule of the intention of the testator as a primal point in the construction of a will, would it not appear that A. M. Watkins more probably intended to leave his undivided estate to his wife, and at her death to go to his children and their representatives per stirpes in equal shares, and then to entail upon the children of his children the remainder in fee of that part which came through their several parents? But, aside from such a construction of the will, let us see where the real plaintiffs in this case stand. So far as the record discloses, all the parties at interest in the life estate after the death of the widow were *sui juris*. They, in the usual way, and following the statute in such cases made and provided, instituted in the court of ordinary proceedings for partition of the land in kind. These proceedings went forward in the regular way, and resulted in an award, or division, which set apart to each petitioner his or her share. The executors made deeds accordingly and conveyed each separate part to him or her who was entitled to receive it. The deeds purported to convey to each distributee all the right, title, and interest A. M. Watkins had at the time of his death; but there is a recital that they grant and convey so far as the office of executors authorize them to do. In our opinion the executors under these partition proceedings could not by any recitals convey a greater interest than the parties thereto had in the estate, and as against the right of any person not a party to the partition there could not have been conveyed by them more than a life estate; but can even this question be made by persons who, while being *sui juris*, brought about the partition, acquiesced in it, went into possession under it, recorded their deeds made by virtue of it, and permitted others to act and acquire rights by reason of it and their own conduct in respect to it? Civ. Code 1895, §§ 5151, 5152; Brice v. Sheffield, 121 Ga. 216, 48 S. E. 925.

Let us inquire as to the effect of these proceedings in partition on the parties to them. Each one of the parties applied for partition, each one of them took his or her share, each went into possession of his or her share, and each one allowed every other one to go into possession without protest or objection. Can parties so act and not be estop-

ped? G. W. Watkins took his deed, went into possession, put his deed on record, and, upon being adjudged bankrupt, scheduled the land set apart to him as part of his estate. So far as the record discloses, none of the plaintiffs took any action in respect to the sale by the trustee in bankruptcy. None of them objected, and one of them became the purchaser at the trustee's sale. Can the other parties retain their shares, not offer to undo the division, and place the property where it stood before, complain now and take away from Gilmore the land he purchased, under all the circumstances, from Mack Watkins, one of the petitioners for partition? We think not. But, aside from all this, can the plaintiffs recover this land until they show that G. W. Watkins died leaving no children? He was entitled to hold the land at least for life, and, if he died leaving child or children, they were entitled to succeed to whatever estate he had and to own it in fee, and, outside of any question of equitable estoppel, his brothers and sisters, who took part in the division and consented to have this land set apart to him, could only be entitled to recover it from an apparent owner by showing that he left no children, and that, by reason of that fact, the land reverted to them in certain proportions, or back into the corpus of the estate. The record is silent as to whether or not G. W. Watkins left children, and there is no presumption either way, and, in the absence of such proof, there could have been no recovery by the plaintiffs, or either of them, whether they sued separately or jointly; and the direction of a verdict by the court was therefore proper.

We think that the refusal of the court to admit parol evidence as set out in the record, even if error, was cured by the subsequent ruling admitting it, but the evidence when admitted was not sufficient to establish any further concert of action among the plaintiffs than is exhibited by the partition proceedings, and their joint and several acts and doings under and by virtue of it. If the action of the plaintiffs, they being of full age and in every way competent to contract, estopped them to deny the right of Mack Watkins, Jr., to the land set apart to him, or if such conduct could be shown as matter of defense, then the evidence sought to be introduced, and subsequently admitted, was competent to illustrate the question of equitable estoppel. In the case of *Watkins v. Gilmore*, 121 Ga. 488, 49 S. E. 598, this court had under consideration this will of A. M. Watkins, and Chief Justice Simmons, in delivering the opinion of the court, said: "After the death of the widow, the first life tenant, and the assent of the executors to the devise to the second life tenant, G. W. Watkins, the latter's title to the life estate became perfect. This assent of the executors not only served to perfect the life tenant's inchoate title to the life estate, but inured to the benefit of the remaindermen provided for in the will. The

life tenant having left no children, the remainder went to his brothers and sisters, who were in life and to the children of his deceased brothers and sisters." In the case then before the court there was, unlike this case, proof that G. W. Watkins died leaving no children, and the case turned upon the right of the executors to recover the land as part of the estate of A. M. Watkins. The court held that having assisted to the division in kind, and having in furtherance of such assent made a deed to G. W. Watkins, the estate conveyed to him passed out of the executors or their control, and ceased to be a part of the estate of A. M. Watkins, and they could not recover it. The ruling in the case named was that, upon the death of G. W. Watkins, his part of the estate passed to his brothers and sisters, and to their children. That view of the case is concurred in now, except that we have here for consideration the division in kind with all attendant circumstances which intervene between the brothers and sisters and the two grandchildren, all of full age, who participated in the division, and this defendant. That case was determined solely on the ground that the executors, having parted with their control of this property, could not maintain suit to recover it. We have seen that no act of the executors nor of the parties to the partition could affect the rights of the remaindermen not parties thereto; and, in the event that any such parties, as, for instance, grandchildren of A. M. Watkins, other than the two named as plaintiffs herein, should survive their parents and become entitled to sue for their remainder interest in this part of the property, or any other part named in the partition, there would be a different case for determination from the one at bar, which we are now called upon to decide.

The exception to the judgment of the court in ruling that the joint demise originally in all the plaintiffs in error and Mack Watkins, Jr., should be stricken after by amendment of plaintiffs the name of said Mack Watkins, Jr., had been stricken therefrom is immaterial, because, in the view we have taken of the case, the direction of a verdict was proper, whether the cause proceeded on the joint or separate demises of any or all the plaintiffs.

Judgment affirmed on each bill of exceptions. The other Justices, except BECK, J., concur.

Hon. MARCUS W. BECK being disqualified, Hon. W. D. ELLIS, judge of the superior court of the Atlanta circuit, was appointed to preside in his stead.

#### OSTEEN et al. v. WYNN et al.

(Supreme Court of Georgia. July 25, 1908.)

#### 1. DEED—CONSTRUCTION—DESCRIPTION.

A description of land, located in a county which is laid off by government survey into

square land lots, as all of a named lot except 50 acres in the southeast corner, means all the land included in the lot except 50 acres, located by taking the southeast corner as a base point from which two sides of the excepted land shall extend equal distances so as to include by parallel lines 50 acres, and is sufficiently definite.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 816-835.]

#### 2. SAME—REPUGNANCY IN DESCRIPTION.

Where a deed contains two descriptions of the land conveyed, one general and the other particular, if there is any repugnance, the latter will prevail. So where a deed conveys several lots of land by number, and all of a named lot except 50 acres in the southeast corner, followed by the words, "known as the Wooldridge plantation," the latter words are but matter of further description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 816-835.]

#### 3. BOUNDARIES—METHODS OF ESTABLISHMENT—ACQUIESCENCE.

An unascertained or disputed boundary line between coterminous proprietors may be established: (1) By oral agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed; or (2) by acquiescence for seven years by the acts or declarations of the owners of adjoining land, as provided in Civ. Code 1895, § 3247.

(a) If the line be established by oral agreement, and possession be held to it, it is not necessary to the validity of such agreement that the possession continue for 20 years.

(b) In order that a line may be established by acquiescence for seven years by the acts or declarations of the owners of adjoining land, it is not essential that the acquiescence be manifested by a conventional agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 232-242.]

#### 4. SAME—BINDING EFFECT.

When a line has been located by an executory parol agreement between the coterminous proprietors, or established by seven years' acquiescence, as provided by Civ. Code 1895, § 3247, the line thus located and established is binding on the grantees of the coterminous proprietors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 232-242.]

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; W. A. Little, Judge.

Action by E. J. and R. L. Wynn against J. W. Osteen and others. Judgment for plaintiffs, and defendants bring error. Reversed.

E. J. and R. L. Wynn filed their petition against J. W. Osteen and others to recover damages for trespass already committed by reason of defendants having entered upon described land of plaintiffs with their sawmill and sawed timber thereon, and to enjoin defendants from further trespass. Plaintiffs allege that they are the owners of a certain tract of land containing all of lot No. 140 in the Thirty-Third district of Chattahoochee county, except 50 acres in the southeast corner. Defendants purchased the timber on the 50 acres of this lot, which was excepted in plaintiffs' conveyance, but have not confined their operations to the 50 acres so purchased, having located their mill beyond the borders of the 50 acres, and have cut, or are proceeding to cut, timber belonging to plaintiffs immediately surrounding the 50-acre tract.

They pray for damages for the timber cut, and for an injunction to prevent further trespass. Defendants filed a demurrer to the petition, which was overruled, and they accepted pendente lite. They answered, admitting that they had a sawmill located in the southeast portion of lot No. 140, but denying that their mill was located on plaintiffs' land, or that they had sawed any of their timber. They allege: That all the timbered land in the southeast corner of lot No. 140 belongs to Dr. C. N. Howard, and that plaintiffs' line runs on the edge of the timber, but does not embrace any of it; that plaintiffs' predecessors in title agreed to the outside edge of all this woodland to be the line between these two tracts of land, and have recognized this boundary to be the line for more than seven years.

On the trial the plaintiffs introduced a deed from James B. Moore to R. L. Wynn, dated February 1, 1893, recorded February 10, 1893, upon a consideration of 1,500, to "all of lots of land Nos. 148 and 149, of 202½ [acres] each, more or less, and all of lot 147 except 12 acres off the northeast corner, all of lot 140 except 50 acres off the southeast corner thereof, and all of lot 141 except 38 acres off the northern one-fourth of said lot, said tract of land aggregating 850 acres, more or less, and being in the Thirty-Third district of originally Lee, now Chattahoochee, county, Georgia." Also, a deed from R. L. Wynn to E. J. Wynn, dated April 13, 1895, recorded December 2, 1895, consideration \$750, conveying a one-half interest in the same land, similarly described, except that it concluded with these words: "Said lands known as the Wooldridge plantation on the Cusseta and Jamestown Road." E. J. Wynn testified that he and his brother had been in possession of the land so conveyed since the dates of their respective deeds, and, along with other lands, had cultivated a considerable portion of lot 140, that he had considered he owned all the lot except 50 acres in the southeast corner, and that, while he did not know where the line ran, he claimed all the land conveyed to him, which was all the lot except 50 acres in the southeast corner. Recently he had the 50 acres measured off, and found defendants had located their mill on plaintiffs' land, and there were between 19 and 21 acres of timber cut by defendants beyond the line of Howard's 50 acres, as shown by a survey thereof. The testimony of Howard tended to show that at the time he purchased, in 1872, Mr. Wooldridge, the common grantor of the predecessors in title of both plaintiffs and defendants, had owned two places, one known as the "Hardaway Place," and the other as the "Wooldridge Home Place"; a part of lot 140 being in each of these places. He and his brother purchased what was known as the Hardaway place, and at the time they purchased it Mr. Wooldridge pointed out the line as going to the edge of the woods, which were on the Hardaway place, and were at that time sur-

rounded by a fence which remained for many years until it rotted or was burned down, and the line of the place which he had thus purchased included all the woods in the southeast corner. Mr. Wooldridge had previously deeded his home place to his wife and children when he sold the Hardaway place to Howard and his brother, and the line as pointed out had always been recognized by them. He went into possession of the Hardaway place in 1872, and the fence was not wholly destroyed for 12 or 15 years thereafter, and as recently as five years ago there were signs of rails around the woods. He had returned it for taxes as 50 acres of lot 140, and did not know there were more than 50 acres until recently, when it had been surveyed and measured. Under his purchase he had acquired from Wooldridge all the Hardaway place, and the timber in dispute was and had always been recognized as a part of the Hardaway place, and never as part of the Wooldridge home place. By a number of other witnesses, including several of the children of Mr. Wooldridge, it was shown that until they parted with the title and possession of the land, some time prior to R. L. Wynn's purchase in 1893, they had always regarded the edge of the woods as the boundary line between the Wooldridge home place and the Hardaway place, and that Howard's land included the woods, and his line extended to the edge of the woods. The deed from Wooldridge to the Howards described the land as "lying and being in the Thirty-Third district of Chattahoochee county, known and distinguished in the plan of said district as the following lots and parts of lots," naming them, and including "fifty acres in the southeast corner of lot No. 140," which was followed by other matters of description. The jury returned a verdict for the plaintiffs. The defendants filed a motion for a new trial, which being overruled, they excepted.

Gotchins & Chappell, J. E. Chapman, C. C. Minter, and Herbert Howard, for plaintiffs in error. S. B. Hatcher and J. H. Martin, for defendants in error.

EVANS, P. J. (after stating the facts as above). 1. The demurrer raises the question of the sufficiency of the description of the land upon which the trespass was alleged to have been committed. The petition alleged that the plaintiffs were the owners of land lot No. 140 in the Thirty-Third district of Chattahoochee county, except 50 acres in the southeast corner, and that the defendants had cut, and were proceeding to cut, the timber thereon immediately surrounding the excepted 50 acres. Judicial notice will be taken that, as to lots of land laid out by state survey in this county, each contains 202½ acres, and is in the form of a square. *Huxford v. Southern Pine Co.*, 124 Ga. 182, 52 S. E. 439. A conveyance of 50 acres in the southeast corner of such a lot of land has been held to contain a sufficient description. The corner of the

lot is to be taken as a base point from which two sides of the tract of land shall extend equal distances, so as to inclose by parallel lines the quantity of land conveyed. *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50; *Wilkinson v. Roper*, 74 Ala. 140; *Walsh's Lessee v. Ringer*, 2 Ohio, 327, 15 Am. Dec. 555. The petition therefore describes the land as lot 140 except a square in the southeast corner containing 50 acres, and the timber which it is alleged is being wrongfully removed was described as located on this lot of land immediately surrounding the quadrangular area excepted in the defendant's deed, and the description was sufficiently definite.

2. The first ground of the amended motion complains of the following charge to the jury: "The deed from R. L. Wynn to E. J. Wynn had the legal effect of vesting in E. J. Wynn one-half undivided interest in all the land which R. L. Wynn had in the lots mentioned, among others in all of lot 140 except 50 acres in the southeast corner of the lot. These lands are designated as the Wooldridge plantation on the Cusseta and Jamestown Road, and those words—that is, that they are known as the Wooldridge plantation on the Cusseta and Jamestown Road—are matters of further description of the land." The error alleged is that the deed described only conveyed such interest of R. L. Wynn "in so much of lot 140 as was included in what was known as the Wooldridge plantation, whether more or less than 50 acres of lot 140, and because the reference to the Wooldridge plantation was not a further description of the 50 acres, but 50 acres was a further description of the Wooldridge plantation," and the description, "known as the Wooldridge plantation," was one of higher dignity, and should prevail over the description "50 acres in lot No. 140." Where a deed contains two descriptions of the land conveyed, one general and the other particular, if there is any repugnance, the latter will prevail. *Hannibal, etc., R. Co. v. Green*, 68 Mo. 169; 2 *Devlin on Deeds* (2d Ed.) § 1039; 5 *Cyc.* 880; *Tyler's Law of Boundaries*, 29; *Shackelford v. Orris*, 129 Ga. 791, at page 794, 59 S. E. 772. The description here was of definite lots and parts of lots, and under *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50, all of lot 140 was conveyed except a square, embracing 50 acres in the southeast corner. The added words, "known as the Wooldridge plantation," were a general description, and must yield to the previous definite and particular description. It was therefore not error for the court to charge that this deed conveyed all of lot 140 except 50 acres in the southeast corner, and that the words "known as the Wooldridge plantation" were matter of further description. Nor do we, in the light of what has just been said, find any errors in the second, third, fourth, sixth, seventh, and ninth grounds of the amended motion complaining of certain charges of the court relative to the effect of the descriptions in the several deeds.

Nor do we think he erroneously construed the contentions of the parties, or diverted the minds of the jury from the real contentions.

3. The eighth, tenth, and twelfth grounds of the motion complain of charges of the court that if there was any agreement between the coterminous proprietors as to a dividing line, and that agreement continued for a period of 20 years, the effect of the agreement would be to establish the agreed line as the dividing line between the two tracts. These charges are alleged to be an erroneous statement of the law concerning conventional boundary lines, in that it includes, as an element necessary to the validity of such an agreement, an observance of it for a period of time not less than 20 years. On the subject of acquiescence, the court charged: "In order for acquiescence to be binding on the parties, it must be shown by the evidence, in the first place, that there was an acquiescence, that is, both parties agreed that a particular place was the line between the 50 acres of lot 140, and not only having agreed to it, but that the agreement continued for a period of 7 years or more, and possession was respectively had under such agreement." This charge is said to be erroneous, because it makes an agreement and possession under such agreement for 7 years necessary to acquiescence, and because it confounds acquiescence with agreement. In *Farr v. Woolfolk*, 118 Ga. 277, 45 S. E. 230, this court pointed out the distinction between a dividing line established by acquiescence for 7 years by acts or declarations of adjoining landowners as provided in Civ. Code 1895, § 3247, and a parol agreement between coterminous proprietors that a certain line shall be the true dividing line. Where there is room for controversy as to the location of a dividing line, the coterminous proprietors, independently of the cited Code section, may orally agree upon the line, and if the agreement is accompanied by possession to the agreed line, or is otherwise duly executed, such agreement will be valid and binding, and the line thus defined will thereafter control their deeds. However, it is not necessary that possession under the agreed line should be had for 20 years, to give validity to the agreement, though the agreement derives additional weight from long acquiescence. A parol agreement between adjoining landowners to fix a boundary line between their respective tracts theretofore unascertained, uncertain, or disputed, is not within the operation of the statute of frauds, for the reason that no estate is created. When a boundary line is established by consent, the coterminous proprietors hold up to it by virtue of their title deeds, and not by virtue of a parol transfer of title. *Hagey v. Detweiler*, 35 Pa. 409. A line is not fixed or located by verbal agreement unless actual possession is had up to the line, or something be done to execute the agreement in the direction of physical identification, as the erection of monuments, fen-



ces, marking of trees, or the like. But when adjacent landowners make a consentible line between their respective tracts, it is not necessary that possession be had to the line for 20 years in order to establish the agreed line as the divisional line. In some jurisdictions a parol agreement between adjoining proprietors as to a dividing line is considered within the statute of frauds, and will not be enforced unless acted upon up to such an extent as to make it inequitable for either party to set up the true boundary. *Meyers v. Johnson*, 15 Ind. 261. But in this state, on the authority of the cases cited in *Farr v. Woolfolk*, supra, and upon the strength of their reasoning, we have accepted the doctrine that, in the case of disputed or uncertain boundary between coterminous landowners, an executed parol agreement is not within the statute of frauds, and will suffice to establish a dividing line. The charges to which exception are taken conflict with the view herein expressed, and to that extent are erroneous.

4. But it was insisted, on the argument, that, even if the court did err in his instructions on the subject of establishing a dividing line by acquiescence or agreement, the errors were harmless, because the plaintiff purchased his land without notice that any divisional line had been established either by acquiescence for seven years by acts or declarations of his predecessor in title, or by any executed parol agreement. There was evidence that at the time the plaintiff acquired his title, and even up to the trial, there were indications of the former existence of the fence along what the defendant claims is the line agreed to and acquiesced in by the plaintiffs' predecessors in title. Indeed, there was no serious conflict in the evidence that the line which the defendants claim to was acquiesced in by the declarations and acts of the plaintiffs' predecessors in title while clothed with the title for more than seven years. Nor is it disputed that Mr. Wooldridge pointed out this line to Dr. Howard as the boundary between the Wooldridge home place and the Hardaway place at the time he bargained the latter tract to Howard. Although Mr. Wooldridge made a deed to his wife and children a few months before he executed the Howard deed, yet the trade with Howard was consummated the previous year. There can be no doubt, in a contest of boundary between two parties who have purchased adjoining tracts from a common vendor, that the line which their vendor had caused to be run as the dividing line between the two tracts before he sold them will be recognized as the dividing line between the parties immediately deriving title from him. *Tyler on Boundaries*, 335. Will such dividing line also bind their successors in title? If we are right as to our premise that an executed parol agreement between coterminous proprietors fixes the location where the estate of each owner is

supposed to exist under his deed, and that each owner holds thereto by force of his deed, then the conclusion is irresistible that the consentible line identifies the boundary as defined in the contesting titles. *Wood v. Crawford*, 75 Ga. 733; *Ingram v. Fisher*, 70 Ga. 745. As was said in *Miller v. McGlaun*, 63 Ga. 435: "If there had been any dispute on the point where the true dividing line of the two lots ran, and by agreement of the coterminous owners thereof a line had been fixed on as such true line, whether the creek or any other, it cannot be doubted that the parties could do so by verbal agreement, and such agreed line would bind subsequent holders under either, and that proof thereof could be made by parol." And it has been elsewhere held that an agreement fixing the location of a disputed boundary line between two adjoining landowners is binding on their respective grantees. *Bartlett v. Young*, 63 N. H. 265; 4 Am. & Eng. Enc. L. (2d Ed.) 860; 5 Cyc. 940. By parity of reasoning, where the dividing line is located by the law, i. e., by acquiescence for seven years by acts or declarations of adjoining landowners (Civ. Code 1895, § 3247), such line becomes established as the true line between the adjacent tracts, and is binding on subsequent grantees. It would emasculate the force of the statute to hold that a line becomes established by seven years' acquiescence, but that subsequent grantees must have notice that the line has been acquiesced in before they will be affected. When the line is once established so as to bind the present owners, their respective grantees will likewise be bound. Both parties claim under a common grantor; the plaintiffs' deeds cover all of lot 140 except 50 acres in the southeast corner, and Howard's deeds (under whom the defendants claim) cover the excepted 50 acres. Their respective title deeds embraced the whole of lot 140, and, if the lines of demarcation have never been established or acquiesced in, the true line as ascertained by a survey would control the rights of these litigants. On the other hand, if the divisional line has been fixed either by an executed parol agreement or the coterminous proprietors, or by seven years' acquiescence by acts or declarations of the adjoining landowners, then the boundary line located by the agreement, or by acquiescence, as provided by the statute, will be taken as the dividing line between the two properties. *Riley v. Griffin*, 16 Ga. 141, 60 Am. Dec. 728.

Judgment reversed. All the Justices concur.

#### WIGGINS v. BREWSTER.

(Supreme Court of Georgia. July 24, 1908.)

##### 1. ADVERSE POSSESSION—CONTINUITY—DEED—FORGERY.

The evidence was insufficient to establish a prescriptive title in the plaintiff or his pred-

ecessors in title, or to prove the alleged forgery of one of the defendant's muniments of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 682-690.]

#### 2. SAME—EVIDENCE.

Where it becomes a material part of a case to determine whether the possession of land by a person is in his own right or that of another, evidence is admissible to show that at the time such person held a bond for title to the land.

#### 3. QUIETING TITLE—EVIDENCE—RELEVANT.

The execution docket was irrelevant to any issue made in the case.

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Action by J. S. Brewster against J. H. West and John Cheeks. E. A. Wiggins was made party defendant. Judgment for plaintiff, and defendant Wiggins brings error. Reversed.

Mundy & Mundy, for plaintiff in error. Bunn & Bunn and W. H. Trawick, for defendant in error.

EVANS, P. J. On July 26, 1902, J. S. Brewster filed his equitable petition against J. H. West and John Cheeks, alleging that he was in possession of a described lot of land, and praying that the defendants be restrained from trespassing thereon and that their claim of title thereto be canceled. West and Cheeks filed an answer, denying that the plaintiff had either title or possession of the land, and averring that they were in possession as the agents of Miss E. A. Wiggins, who was the true and lawful owner. By amendment Miss Wiggins was made a party defendant, and she filed an answer, denying the plaintiff's title and possession, and averring herself to be the owner of the premises. She also filed a cross-petition praying affirmative relief. The case came on for trial, and a verdict was returned in favor of the plaintiff. A motion for a new trial was made by the defendant, which was denied, and she excepted.

1. The plaintiff submitted evidence tending to show that in 1885 or 1886 J. T. Garner and T. A. Berry bargained for the land in controversy from J. O. Rogers, taking Rogers' bond for title. Soon after their purchase they cut the timber from the land. On December 2, 1890, Rogers executed a deed to J. T. Garner and T. A. Berry. Towards the close of the year 1888 Garner and Berry verbally bargained the land to James Diamond, who moved on the land, cleared about two acres, and built an inexpensive house. After two years' occupancy Diamond rescinded his contract of sale with his vendors' consent, and moved off the land. When Diamond vacated the land J. H. West moved a tenant into the house. Garner and Berry heard about it, and went on the land to forbid West's occupancy of the house. A dispute arose over the right to the posses-

sion, which culminated in a fistic encounter between Garner and West. After the combatants were separated an agreement was reached whereby Garner and Berry sold their interest in the land to W. M. & J. H. West for \$55, and gave their bond to W. M. & J. H. West, conditioned to make them title on the payment of \$55 on the 15th of November thereafter. The bond was dated August 29, 1892, and was afterwards assigned as follows: "Messrs. Garner and Berry: Please make deed to the within as W. A. Camp may direct. This March, 1893. [Signed] W. M. & J. H. West." This transfer was signed by J. H. West. W. M. West was the father of J. H. West, and they were partners in their farming operations. Pursuant to this transfer Garner and Berry, on March 21, 1893, conveyed the land to Lillie M. Camp at the direction of W. A. Camp. On April 1, 1893, Lillie M. Camp conveyed this, with other land, to the Travelers' Insurance Company to secure a loan, and on February 22, 1896, she made her warranty deed to the Travelers' Insurance Company. Brewster purchased from the Travelers' Insurance Company, and claims the right of possession under a bond of title from his vendor. The defendant Wiggins exhibited paper title from the state, the last link of which was a deed from W. M. West to herself, dated January 2, 1890. This latter deed was attacked as a forgery.

The defendant Wiggins, having traced title in herself from the state, would be entitled to prevail in the trial, unless the evidence established that she lost her title by the adverse possession of the plaintiff or his predecessor in title. The evidence leaves an interval of two or more years from the cutting of the timber by Garner and Berry to the sale of the land to Diamond. This break in the continuity of possession prevents the possession under Diamond from being tacked to the possession evidenced by cutting the timber. From the time that Diamond left the land, in 1890 or 1891, J. H. West controlled the land, though his possession was more remittent than continuous. If we admit the soundness of the argument of the defendant in error that the bond for title from Garner and Berry to W. M. & J. H. West, and its transfer by West to Camp, was sufficient to establish that during this time the possession of J. H. West inured to Garner and Berry, still, after Garner and Berry had conveyed to Camp, the possession of West, in the absence of proof, would not be referable to a title or claim of title which he had previously transferred. The date of the transfer of the bond for title from Garner and Berry to Camp was less than seven years from the beginning of Diamond's occupancy of the land. No witness testified that West was asserting title to the land, or claiming possession under any title which

he attempted to set up. On the contrary, West testified that Miss Wiggins was a member of his household, and that at all times he was protecting and asserting her title, by putting tenants in possession and collecting the rents for the benefit of his principal. In order to be effective, the adverse possession of an occupant of land must be hostile to the true owner and under a claim of right. There must be no recognition of title in any other person save the prescriber. From a careful perusal of the brief of evidence we think the evidence falls by this test, and is insufficient to show a prescriptive title in the plaintiff or his predecessors in title. There was an attack of forgery made on the deed from W. M. West to E. A. Wiggins, dated January 2, 1890. The deed was not recorded until a short time before the institution of the suit. It appears that on the interlocutory hearing the court ordered the deed impounded, and on the trial of the case the original deed could not be found. The only witness offered to prove the forgery was the attesting magistrate, who was unable to remember the transaction, but who said that he would not deny that he may have witnessed the deed. On the part of the defendant the other witness to the deed was introduced, and he testified that he saw the maker and attesting magistrate sign the deed, and that he signed it as a witness. Another witness also testified that the signature of both maker and witnesses were genuine. The evidence was insufficient to show that the deed was a forged instrument.

2. The defendant objected to the bond for title from Garner and Berry to W. M. & J. H. West, with the transfer thereon, being received in evidence. The plaintiff contended that his predecessors in title had been in adverse possession of the land under color of title for more than seven years. It appeared that from the date of the transfer J. H. West had put certain tenants in the house. The defendant contended that West was acting as her agent in this regard, as the plaintiff contended that West's possession was by virtue of the bond, and therefore consistent with the plaintiff's title. The evidence illustrated this issue, and was therefore admissible.

3. The court allowed the plaintiff to introduce the execution docket, showing the record of eight or ten executions against W. M. & J. H. West, over the objection of irrelevancy. Upon the disclaimer of title by J. H. West, and the coming in of the answer of Miss Wiggins, the suit proceeded against her. We do not see how her title could be affected by the liens against third parties. We think the evidence should have been repelled as irrelevant.

Judgment reversed. All the Justices concur.

A. B. BAXTER & CO., Inc., v. ANDREWS. (Supreme Court of Georgia. July 22, 1908.)

1. GARNISHMENT—PROPERTY SUBJECT—TAX DUE BY NONRESIDENT.

A debt due by a resident of this state to a nonresident may be reached by garnishment proceeding sued out upon a tax execution issued by a tax collector for a special tax due the state by such nonresident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 146, 147.]

2. SAME.

This is true notwithstanding the debt due the nonresident may have been payable in the state where the creditor of the garnishee resided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 146, 147.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; J. H. Martin, Special Judge.

Garnishment proceedings by D. A. Andrews, tax collector, against A. B. Baxter & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

A. B. Baxter & Co., Incorporated, the plaintiff in error, was in the year 1904, from January until some time in February, engaged in Columbus, Ga., as brokers or dealers in futures. In February of the year 1904, Baxter & Co. failed. The tax collector issued a *f. fa.* for the special state tax of \$1,000 for that year. This *f. fa.* was levied upon the office furniture of Baxter & Co., which was sold, and the proceeds applied to the execution. No other property was found. While Baxter & Co. were engaged in business, and up to the time and date of their failure, they transacted their banking business with the Fourth National Bank of Columbus, Ga., as a depository. E. W. Wood was the local agent or manager up to the time of failure, and deposits were made in said bank in the name of A. B. Baxter & Co., Inc., and additional deposits were made in the name of E. W. Wood, manager of A. B. Baxter & Co., thus making two deposits. The deposit in the name of A. B. Baxter & Co. was not subject to the check of the local manager, E. W. Wood, but it is set forth in the answer of the garnishee, the bank, that it was payable in New York, the residence of A. B. Baxter & Co., by New York draft, and sometimes by wire, upon the order of Baxter & Co. from New York. The deposit was general and not special. "The money would be forwarded to Baxter & Co. by New York check or by wire. The deposit was not checked against, but this garnishee, after such deposits were made, and after notification to the defendant in New York, would pay the same by its check on its New York correspondent, or by wire, as requested." The deposit to the account of E. W. Wood, as manager of A. B. Baxter & Co., was subject to check by the local manager, though the deposit belonged to Baxter & Co., residents of New York. An-

draws, tax collector, upon the *fi. fa.* issued for this special tax, issued garnishments which were served upon the Fourth National Bank as garnishee, who answered, in substance, as above stated, but somewhat more in detail. Baxter & Co. were nonresidents of Georgia and residents of New York. At the time of the service of the garnishments they had ceased to do business in Georgia. They had no agents in Georgia. The answer and the amended answers were not traversed or denied. The defendants specially appeared and protested against the jurisdiction of the court, and moved for a dismissal of the garnishment proceedings upon the grounds therein set forth, which are, in substance, as follows:

(1) That it appeared from the answer of the garnishee that Baxter & Co. were nonresidents of Georgia. That the garnishee was indebted to these nonresidents on a general deposit payable in New York, which debt was sought to be reached by the garnishment proceedings. That the debt was a general deposit in the garnishee bank, constituting a loan. That the situs of the debt, the chose in action, due to Baxter & Co. by the garnishee bank, was with the creditor, Baxter & Co., in a foreign state, and was not within the jurisdiction of the trial court, the defendant having done nothing to enable the court to acquire jurisdiction of its personal property. (2) That the trial court was without jurisdiction to render a binding judgment condemning the debt or chose in action due to a nonresident defendant. The court overruled the motion, and the defendant excepted. Andrews, tax collector, introduced in evidence the tax *fi. fa.* with the entries of levy thereon of the service of garnishments, and of the sale of personal chattels under the levy and the application of the proceeds to the reduction of the *fi. fa.*, and, there being no other evidence, moved for a judgment against Baxter & Co. and the surety on the bond dissolving the garnishment and a judgment against the funds in the hands of the garnishee. Baxter & Co., still specially appearing for such purpose, objected to such judgments being rendered, upon the ground that the answer of the garnishee had not been traversed, and that Andrews, tax collector, was not entitled to judgment upon such answer, that the defendant was a nonresident of Georgia, residing in the state of New York, and the debt due by the garnishee was due and payable in New York, and that the court was without jurisdiction of the defendant and without jurisdiction to seize such debt. The court overruled the objections, and rendered judgment against the defendant and against the debt due by the garnishee. To this judgment defendant excepted.

Charlton E. Battle, for plaintiff in error.  
T. T. Miller, for defendant in error.

BECK, J. (after stating the facts as above).  
The plaintiff in error, in the maintenance of

the position taken by it, contends that under the laws of Georgia the situs of a debt is with the creditor, and that, where it appears that the creditor is a nonresident, the courts of this state are without jurisdiction to entertain garnishment proceedings which seek to seize or hold the debt due to such nonresident. It is insisted that the rule just stated, relative to the situs of a debt, is general and capable of universal application under the decisions of our court. However varied and conflicting may be the decisions of other courts in this country, touching the universal applicability of that rule, and several decisions of our court cited in support of the theory advanced, an examination of those cases shows that each of them which touches the question under consideration was an attachment case; but in several of them very broad language is used, broad and general enough in fact to support counsel for plaintiff in error in the position taken in his brief. In the case of *High v. Padrosa*, 119 Ga. 648, 46 S. E. 859, it was said: "In the case of *Central Railway Company v. Brinson*, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382, which was followed in *Johnson v. Southern Railway Company*, 110 Ga. 303, 34 S. E. 1002, each being a decision by six justices, the rule that the residence of the creditor fixes the situs of the debt was recognized and applied in garnishment cases. This rule was also applied in the cases of *Henry v. Lennox-Haldeman Company*, 116 Ga. 9, 42 S. E. 383, and *Beasley v. Lennox-Haldeman Company*, 116 Ga. 13, 42 S. E. 385; each being a decision by only five justices. Application is now made to review the two decisions first mentioned. Respectable authority may be found on either side of the questions involved in this case; but, after diligent investigation and mature reflection, the court as constituted when the decisions referred to were rendered adopted and followed the line indicated in the opinions in those cases." But the case of *High v. Padrosa* is a case in which summons of garnishment issued in proceedings begun by attachment and the cases cited in the decision under consideration were of a similar nature, and the rulings there made are not necessarily controlling in the present case. So far as we are advised, it has never been ruled in this state, in a suit where there has been personal service such as would authorize the rendition of a judgment and an execution in personam against the defendant, that, although the defendant might have been a nonresident of this state, a debt due him by a resident of this state, upon whom summons of garnishment could have been served, was not liable to be seized or held by garnishment proceedings properly sued out. Under the circumstances last supposed, the authorities for holding that garnishment proceedings could be maintained to seize and hold such a debt are numerous, and the reasons in support of them seem sound and conclusive. "For most purposes—taxa-

tion, distribution, etc.—it has long been a recognized and established fiction of law that their situs is at the domicile of the owner. It would seem almost impertinent to remark that this is a fiction merely, and that it is impossible, from the nature of things, for intangible property to have an actual location, were it not for the fact some courts and text-writers have at times appeared oblivious to it. Thought it is not discussed in the opinion, Chancellor Kent, as early as 1809, seems to have taken it for granted that this fiction does not apply to debts when they are sought to be reached by garnishment in a jurisdiction where the owner does not reside, and the same doctrine has been recognized and applied tacitly, or positively and directly asserted, in almost every court of last resort in America to which the question has ever been submitted since that time, so that, notwithstanding some dissent, and more obiter, we may lay it down as a general proposition that the residence of the defendant does not affect the question as to whether the debt should be considered as having a situs within the jurisdiction of the court for the purposes of garnishment, whether such principal defendant was personally served with process within the jurisdiction or not." Rood on Garnishment, § 242. The writer from whose work the above extract was taken cites a large number of decisions directly in point. The same writer, in a subsequent section of his work, said: "It is impossible to bring harmony out of chaos. Let us for a moment consider the reason and nature of things. In its essential elements, a garnishment suit is a suit brought by the principal defendant against the garnishee in the name and for the benefit of the plaintiff. The plaintiff is empowered by law to step into the shoes of the garnishee's creditor and acquire his rights; no more, and no less. Whatever he could do, the plaintiff, under the statutory novation of garnishment, may do, as his assignee and attorney in fact, by operation of law. Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it. Other states must recognize this right, if they recognize garnishment at all. This would seem to follow as of course, and the writer offers it as his humble opinion that this is the only true solution of the matter. The following cases declare the doctrine, and to these the reader is referred." In addition to submitting several sound reasons for the conclusion reached, Mr. Rood again cites a large number of cases in support of the position taken by him. With a large number of strong authorities and well-reasoned cases holding that a debt due to a nonresident may be reached by garnishment proceedings, we are unwilling to extend the ruling made by this court in attachment cases, unless the issue in the case at bar is of such a nature as will necessarily bring it within the rulings made in those cases, and, after a careful

examination of the decisions by this court above referred to and the reasoning upon which they are based, we are of the opinion that they are not controlling upon the question raised in this record.

In the absence of personal service or notice, an attachment is a quasi proceeding in rem, or similar to such a proceeding. It depends entirely upon being levied by seizure or by garnishment. If no property can be seized, it is of no effect. The process is mesne, and, if a levy is made, the cause must proceed to final judgment. A tax execution is final, not mesne, process. No further proceeding is necessary upon it than to levy and collect it. It is more nearly analogous to an execution issued upon judgment in a common-law suit. The garnishment issued upon it is more like a garnishment based upon a final judgment. After this court had held that, in attachment cases, debts due to a nonresident did not have such a situs as to authorize seizure by garnishment as a basis for further proceedings, the Legislature passed an act declaring that they should have a situs sufficient for that purpose. Thus the Legislature evinced an intention to fix the situs of a debt due by a resident debtor as sufficiently in this state to be subject to garnishment. Acts 1904, p. 100. It is true that the act of the Legislature only in terms referred to attachment cases, but that was doubtless because the situs had only been declared in attachment cases not to be sufficiently located in Georgia to support a seizure by garnishment. The act of the Legislature went as far as the decisions had gone. We hardly think that it was the legislative intent to declare that the situs of the debt should be in Georgia to such an extent as to furnish the basis for the entire litigation, and yet not sufficiently here to furnish a basis for a garnishment based upon final judgment, or upon a tax execution more nearly analogous thereto than to an attachment process. Moreover, it has been held that where a nonresident had an agent in Georgia who sold goods to him partly on a credit, took notes, and forwarded them to the principal office, and they were collected there, or, if collected in this state, the proceeds were sent to the principal office out of the state, there was sufficient situs to authorize the taxation of such debts in this state. *Armour Packing Co. v. Clark*, 124 Ga. 369, 52 S. E. 145. In the present case the execution was for taxes on account of the very business of the defendant in Georgia. The money (which apparently arose from the business) was deposited in a bank in this state. It does not appear that there was any specific contract for its payment elsewhere, but that the bank would telegraph to the defendant and would pay the money as directed, or honor its draft. Thus, there was a tax due on account of the business in Georgia, final process issued therefor, on which a garnishment could be based under the statute, and money of the

defendant deposited in a bank in this state. This was on general deposit, and therefore might be called a debt of the bank; but we think that there was such situs in this state as to authorize a garnishment to be served upon the bank and to subject the accounts of such deposit.

Judgment affirmed. All the Justices concur.

### HICKS v. BEACHAM.

(Supreme Court of Georgia. July 20, 1908.)

#### 1. LANDLORD AND TENANT—SUMMARY PROCEEDINGS—AFFIDAVIT.

A lease for a term of 14 years from January 1, 1902, at a stipulated rental payable in lint cotton, to be delivered at any warehouse in a named city which the lessor might designate, contained a provision that if the lessee should fail to pay the rent as therein stipulated, or fail to perform the other covenants in the lease, then the lessor should have the right to declare the lease terminated at the end of any year pending the same. An affidavit was made by the lessor's grantee for the purpose of obtaining a summary warrant to dispossess, which merely alleged that the rent became due for the year 1906, and that the lessee "refused and failed to pay the same," and that, under the terms of the contract, the lessor's grantee canceled and declared the lease at an end and void from the end of the year 1906, but neither alleged any demand for the rent as a basis of forfeiture of the term, nor showed that such demand was made unnecessary by the terms of the lease, nor alleged that there was any designation of the place of delivery of the cotton, nor that the failure or refusal to pay rent existed at the time the affidavit was made, as a basis for proceeding for nonpayment of rent. *Held*, that such affidavit and the warrant based upon it were subject to a motion to dismiss.

#### 2. PLEADING—DEMURRER—ORAL ADMISSIONS.

Oral admissions of fact by a party or his counsel are not proper matters for consideration in passing on a demurrer to pleadings or a motion to dismiss in the nature of a demurrer.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by T. B. Hicks against J. H. Beacham. Judgment for defendant, and plaintiff brings error. Affirmed.

Hicks made affidavit for the purpose of obtaining the issuance of a warrant to dispossess Beacham as his tenant. The affidavit alleged, among other things, as follows: On October 28, 1901, Beacham leased from a grantor of the land, under whom Hicks derived title, a certain described tract of land. Under the terms of the lease, the lessee was to have possession for a term of 14 years, provided he performed his obligations under the contract, one of which was the payment of rent on the 15th day of September of each year. The rent became due for the year 1906, and the lessee "refused and failed to pay the same," when, under the terms of the contract, Hicks canceled the lease and declared it at an end and void from the end of the year 1906. Beacham continued to hold possession beyond the terms for which he is entitled to hold it under the contract. Subsequently, on Janu-

ary 1, 1907, Hicks, desiring possession, personally demanded it from Beacham, and the latter refused to deliver it. Attached to the affidavit was a copy of the contract. It provided for a lease of 14 years' duration by one Conrad to Beacham, from January 1, 1902. The lessee agreed to pay for the rent, on the 15th day of September of each year, certain specified amounts of lint cotton "packed in merchantable bales, and deliver at any warehouse in the city of Dublin, free of costs to the said Holmes Conrad, Jr., that the said Holmes Conrad, Jr., may designate." There was certain other terms as to clearing land and preparing it for cultivation which are not material. It then provided that, "should the said J. H. Beacham fail to pay the rent as above stipulated or fail to perform the other covenants in this lease, then the said Holmes Conrad, Jr., shall have the right to declare this lease terminated at the end of any year pending the same." When the case came on for trial, a motion was made to dismiss the affidavit and warrant, because the affidavit did not allege that the plaintiff demanded payment of the rent of the defendant, and that the defendant refused to pay it on demand. The court sustained the motion and dismissed the case. The plaintiff excepted.

W. C. Davis, for plaintiff in error. Jas. K. Hines, Jas. B. Saunders, and Peyton L. Wade, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Hicks made affidavit for the purpose of obtaining a warrant to dispossess Beacham as his tenant. On the trial, the court dismissed the affidavit and warrant, because the affidavit neither alleged that the rent had not been paid, nor that there had been a demand and a refusal to pay it. The contract of lease was to extend for 14 years, but contained a provision that if the tenant failed to pay the rent as stipulated, or failed to perform the other covenants of the lease, the landlord should have the right to declare the lease terminated at the end of any year pending the same.

1. At common law a failure or refusal to pay rent did not work a forfeiture of the term, unless the lease contained express conditions of forfeiture in case of such nonpayment. Even where the right of re-entry was reserved for breach of a covenant to pay rent, the rule was that, before there would be a forfeiture for nonpayment, there must be a demand for the rent, and such demand was required to be in strict compliance with the contract. The law does not favor forfeitures and inclines to construe conditions to be remediable by damages rather than by forfeiture, and this rule was applied to forfeitures of leases for nonpayment of rent. An express stipulation in a lease dispensing with the requirement of a demand for rent may be made. The great strictness of the common-law decisions on the subject of re-

quiring a demand, and what character of demand was necessary, rendered it often difficult, and sometimes almost impossible, to enforce a general provision for re-entry upon breach of the covenant to pay rent. The positions above announced will be found supported by the following authorities: Jones on Landlord & Tenant, §§ 502-504; 1 McAdam on Landlord & Tenant (3d Ed.) § 188; 2 Taylor on Landlord & Tenant, §§ 488, 498; 2 Wood on Landlord & Tenant (2d Ed.) § 514; 24 Cyc. 1352, 1354, 1355; 18 Am. & Eng. Enc. Law (2d Ed.) 374, 377. The same general rule has been adopted in America in the absence of any statute or provision in the contract modifying it, or showing a different intent. See *McQuesten v. Morgan*, 34 N. H. 400; *Chipman v. Emeric*, 3 Cal. 273; *Miller v. Sparks*, 4 Colo. 303; *Chadwick v. Parker*, 44 Ill. 326; *McGlynn v. Moore*, 25 Cal. 384; *Buckner v. Warren*, 41 Ark. 532; *Bartlett v. Greenleaf*, 11 Gray (Mass.) 98; *Smith v. Blaisdell*, 17 Vt. 199; *Byrane v. Rogers*, 8 Minn. 281 (Gil. 247); *Bowyer v. Seymour*, 13 W. Va. 12; *Jackson v. Collins*, 11 Johns. (N. Y.) 1. The cases of Ga. R. R. & Banking Co. v. Mayor & Council of Macon, 86 Ga. 585, 13 S. E. 21, *Mayor & Council of Macon v. East Ten. Virginia & Georgia Ry. Co.*, 82 Ga. 501, 9 S. E. 1127, and *Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968, were different from the case at bar. None of them involved the question of forfeiture of lease for nonpayment of rent, but they were based on conveyances of land for a limited use. Of course, the general rules announced are subject to modification by statute or by the terms of the lease. By the act of December 11, 1811 (*Lamar's Comp. Laws*, No. 468, § 5), it was declared that: "If any person leasing or renting land, house or houses, shall fail to pay the rent at the time the same shall become due, it shall and may be lawful for the lessor, immediately thereafter, to enter and retake possession of the premises so by him leased or rented." *Cobb's Dig.* p. 900, § 1. No summary mode of legal procedure was provided by that act. By the act of December 24, 1827 (*Dawson's Comp. Laws*, No. 614, § 1), it was provided that when a tenant held over beyond the expiration of his lease, and refused to deliver possession, the lessor or owner might, on oath setting out the facts, obtain a warrant to have possession delivered to him and the tenant removed. The tenant might file a counter affidavit, and thus cause an issue to be made for trial at the next superior court. *Cobb's Dig.* p. 901. Amendments to the law were made in 1854 and in 1860. Acts 1853-54, pp. 53, 55; Acts 1865-66, p. 35. As codified, the law provides for a summary dispossession of a tenant or lessee in three cases: First, where a tenant shall hold possession of lands and tenements over and beyond the terms for which the same were rented or leased to him; second, if he shall fail to pay the rent when the same shall become due; and, third,

in case of a tenancy at will or by sufferance. On failure or refusal to deliver possession on demand, an oath may be made and summary proceedings had. Civ. Code 1895, § 4813.

The present case does not involve any tenancy at will or by sufferance. If the plaintiff is entitled to recover, it must be on one of the other two grounds. If a landlord bases his right to a summary recovery on nonpayment of rent, as a statutory ground, the rent must remain unpaid when the proceeding is begun. An acceptance of rent after it is due will operate as a waiver of the right of summary dispossession for nonpayment. The landlord cannot accept the payment after the day when it is due and still proceed to dispossess his tenant under the statute, on the ground that it was not paid on such day. If the plaintiff sought to rest his case on this ground, the affidavit was insufficient in not alleging that the rent had not been paid, or showing failure or refusal to pay when the affidavit was made. If the proceeding should be considered as resting on the ground that the tenant was holding over beyond the term of his lease, in order to sustain this position it would be necessary to show that a forfeiture had occurred. His whole term extended for 14 years, and, unless there was a forfeiture, it had not expired. The claim that the plaintiff had a right to proceed by affidavit and warrant to dispossess must depend upon whether it was shown that the lease had terminated, by forfeiture, at the end of the year 1906.

The contract did not provide for a termination of the lease by its own operation upon failure of the lessee to pay his rent, nor within some specified time after such failure, nor did it waive demand for rent as a condition of forfeiture. On this subject its language was as follows: "Should the said J. H. Beacham fail to pay the rent as above stipulated or fail to perform the other covenants in this lease, then the said Holmes Conrad, Jr., shall have the right to declare this lease terminated at the end of any year pending the same." No demand and refusal to pay rent when due was alleged. Thus the plaintiff was not entitled to dispossess the tenant on the ground of nonpayment of rent, because it did not appear that the rent was unpaid when the proceeding was begun, and he was not entitled to recover possession on the ground that the lease had been forfeited and became void at the end of the year 1906, because he did not show that he had taken the steps necessary to avoid it, and thus to place the tenant in the situation of one holding over beyond his lawful term. It will be observed, too, that the rent was payable in cotton to be delivered at such warehouse as might be designated by the landlord, and there was no allegation that any such designation was made. Accordingly, the presiding judge did not err in dismissing the proceeding. No point was raised as to whether the mere allegation that the lessor, who retained the pow-

er of forfeiture, was the "grantor" of the plaintiff, was sufficient to show the existence of the power in the latter.

2. In his order of dismissal the judge of the trial court recited that the plaintiff admitted that the defendant had paid the rent on October 22, 1906, when the plaintiff told him that he (the plaintiff) declared the lease forfeited and would insist on the forfeiture as per the terms of the contract, although he took the rent, and that the plaintiff further admitted that he had not made any demand on the defendant for the payment of the rent before suing out the warrant, and that the defendant had not refused to pay such rent on demand. The sufficiency of pleadings must be determined by what they contain, not by what the plaintiff admits orally. The function of a demurrer or motion to dismiss is to test the sufficiency of the pleading; that of a motion for nonsuit is to test the sufficiency of the evidence to sustain the pleading. On the hearing of the demurrer to the pleadings, or a motion in the nature of a demurrer, it is not proper practice to take into consideration oral admissions made by the plaintiff or his counsel. *Constitution Publishing Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33; *Augusta & Savh. R. Co. v. Lark*, 97 Ga. 800, 25 S. E. 175; *Sasser v. Adkins*, 108 Ga. 228, 33 S. E. 881; *Pattillo v. Jones*, 113 Ga. 330, 333, 38 S. E. 745. While the admissions were not proper for consideration on a motion to dismiss the proceedings for defects appearing on the face of the affidavit, the dismissal was correct, regardless of them.

Judgment affirmed. All the Justices concur, except EVANS, P. J., disqualified.

### PEAVY et al. v. DURE.

(Supreme Court of Georgia. July 22, 1908.)

#### 1. TRUSTS—EXPRESS TRUSTS—CONSTRUCTION.

Where a testator, in his will, directed the executor to raise a given sum from the assets of the estate and invest the same in a home for the testator's daughter, Mrs. R., and declared that he gave said sum, or said place, to the person named as executor "in trust for the sole and separate use of my said daughter, \* \* \* for the life of my said daughter, remainder to her children," and after the will was probated the person named as executor and trustee invested a portion of said fund in land and took from the vendor a deed to the same, wherein the grantor, without referring in any manner to the will or the trust therein declared, conveyed the premises to the grantee as trustee for Mrs. R. and children, the legal title to such land was held by the grantee under the trust created by the deed, and not under the one declared by the will.

Consequently, when the trustee subsequently applied to the judge of the superior court for leave to sell the land and reinvest the proceeds of the sale, and in his petition did not refer to the will or the trust therein declared, but represented himself as trustee for Mrs. R. and her children, naming such children as beneficiaries of the trust, the trust estate which was brought before the court and with which it dealt in granting an order, or decree, in accordance with the application of the trustee, was the one created by the deed.

#### 2. SAME—SALE OF TRUST PROPERTY—TIME OF AUTHORIZATION.

As, under a deed of the character above indicated, the interests of the beneficiaries of the trust estate thereby created in the land is equitable, instead of legal, the superior court, upon proper proceedings by the trustee, during the existence of the trust estate, has jurisdiction at chambers, and even in vacation, to authorize the trustee to sell the land and reinvest the proceeds of such sale.

#### 3. COURTS—PRESUMPTIONS AS TO JURISDICTION.

Such an order or decree, being granted by a court of general jurisdiction, has all the sanctity which attaches to a formal judgment, and every presumption of validity is to be indulged in its favor. It cannot therefore be held to be void because the record of the proceedings upon which it was based does not affirmatively show that service upon the minor beneficiaries of the trust estate was duly perfected.

#### 4. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—EQUITIES AND DEFENSES AGAINST.

While the title to land purchased, as indicated in the first headnote, was, notwithstanding the manner in which it was conveyed by the grantor to the grantee, in equity held by the grantee subject to the provisions of the will, this was a secret equity which could not be asserted against one who, without notice thereof, or any information which could be considered equivalent to such notice, purchased the land, relying, in good faith, upon the title which passed to the trustee under the deed and the order or decree of the court authorizing him to sell the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 580-582.]

#### 5. TRIAL—DIRECTION OF VERDICT.

In no view of the evidence were the plaintiffs entitled to recover, and therefore the trial judge properly directed a verdict for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 378-395.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Mary F. Peavy and others against Leon S. Dure. Judgment for defendant, and plaintiffs bring error. Affirmed.

Mary F. Peavy, Andrew Reynolds, Lee Reynolds, Georgia Slade, and Mattie Thomas brought an action at law against Leon S. Dure to recover a certain tract of land in Bibb county. In the petition it was alleged that the tract sued for was "a part of a certain one-acre lot sold by E. M. Calhoun to Wm. E. Jenkins, trustee of Mary A. Reynolds and her children." Plaintiffs alleged: "That the abstract of their title to said lot is the will of Elias C. Jenkins, on record in the office of ordinary, making W. E. Jenkins trustee of Mary A. Reynolds for and during her natural lifetime, and at her death the property to belong to her children"; that "W. E. Jenkins bought the lot as trustee under said will and held the same during the life of Mary A. Reynolds, and she died in June, 1905, leaving plaintiffs as the remaindermen, they being her only children"; and that defendant "holds said lot under the common grantor, W. E. Jenkins." By an amendment it was alleged that Mary A. Reynolds went into possession of the land under the deed from E. M. Calhoun to W. E. Jenkins, trustee. The



defendant, by his answer, denied that plaintiffs had any right or title to the land. He alleged that the will of Elias C. Jenkins did not devise or refer to this land, that W. E. Jenkins did not purchase it as trustee under the will, and did not so hold it, and defendant did not hold under him as trustee under the will, that W. E. Jenkins purchased the land from E. M. Calhoun, taking a conveyance which vested the title in him as trustee for Mary A. Reynolds and her children as joint usees, that in 1881 said Jenkins, as trustee for Mary A. Reynolds and her children, applied to the superior court for leave to sell the land, and obtained an order of the court authorizing such sale, which order was regularly granted in term time, with the express assent of Mary A. Reynolds and the guardian ad litem of the children, and, acting under and by virtue of such order, Jenkins, as trustee, sold and conveyed the land to Nancy E. Hendricks, under whom defendant holds, and vested the legal title in her. The defendant also alleged that at the April term, 1891, of the court, W. E. Jenkins applied to the court to allow and confirm the sale and conveyance to Nancy E. Hendricks, which application was personally served upon the plaintiffs, and a guardian ad litem was appointed for Andrew and Robert Lee Reynolds, the only ones who were then minors, and that, with the expressed assent of the guardian ad litem and without objection from any one, the court, in term time and in open court, passed an order ratifying and confirming such sale and the acts of the trustee in reinvesting the proceeds thereof. He further set up title by prescription.

Upon the trial Mrs. Peavy, one of the plaintiffs, testified: "The plaintiffs are all children of Mary A. Reynolds, who died in June, 1905. Mary Reynolds, my mother, lived on the land sued for; it being a part of the acre bought by W. E. Jenkins, her trustee, from E. M. Calhoun. The children named in the orders for sale and confirming the sale are the plaintiffs, except Willie Reynolds, who died in childhood. This lot sued for is a vacant lot. My mother left no \* \* \* children living when she died other than the plaintiffs." The plaintiffs introduced the will of Elias C. Jenkins, stating that they relied only on the fourth item thereof. This item was as follows: "It is my will further that my executor hereinafter named shall at his discretion, and as soon as convenient, out of the balance of my estate having special reference to my notes and accounts and my unsold lots on Bassett's hill, raise one thousand dollars and invest it in a home for his sister Mary A. Reynolds. If he and she agree upon a place that shall cost less than one thousand dollars, then she is to have the balance of that sum in money. It being my desire and I hereby give said one thousand dollars (or the said place and said money balance) as well as the remainder above provided for my daughter in the home place

after her mother's death to my son William E. Jenkins in trust for the sole and separate use of my said daughter, freed from the debts or liabilities or control of her present or any other husband, for the life of my said daughter, remainder to her children, with this proviso as to the said one thousand dollar bequest, viz.: That if said balance of my estate from which it is to be raised should turn out less than three thousand dollars, then my daughter is to receive one-third of what said balance of my estate may turn out to be worth." It was also shown that W. E. Jenkins was executor of the will, which was probated on August 30, 1869. The plaintiffs introduced a deed from E. M. Calhoun to "W. E. Jenkins, trustee for Mary A. Reynolds and children," dated November 30, 1869, and duly recorded, conveying to "W. E. Jenkins, trustee as aforesaid, his successors and assigns," the one-acre lot of which the tract sued for is a part. Counsel representing the parties agreed, in writing, "that W. E. Jenkins, as executor, or as trustee, under the will of Elias C. Jenkins, his father, \* \* \* took out of the funds of the estate of his deceased father the sum of \$500, and invested it in the one-acre lot of which the parcel of land in dispute is a part, and took the deed to the same, by virtue of said purchase, from E. M. Calhoun." This agreement was introduced in evidence.

The defendant introduced, from the minutes of Bibb superior court, the application to the judge of that court of Wm. E. Jenkins, as trustee for Mary A. Reynolds and her children, for leave to sell, for the purpose of reinvestment, the one-acre lot purchased by him from E. M. Calhoun, the order upon such application, appointing a guardian ad litem for the children, the acceptance of the person so appointed and his approval of the proposed sale, and the order of the court authorizing the sale and reinvestment. It was agreed that the children named in the order for sale were the plaintiffs in the present case, except Willie Reynolds, who died in childhood. The defendant also introduced the petition of the trustee, dated May 23, 1891, for a confirmation of the sale of the trust property under the order of November 18, 1881; the petition reciting the proceedings which resulted in such order, and that "It does not affirmatively appear from the record of said proceedings \* \* \* that service was ever had on said children as provided for by law, and to this extent petitioner apprehends that the title to this property is defective," that the property was sold in good faith, the purchase money paid, the same being a fair price for the property, that the "lot is now owned by J. J. Cobb," and that the petitioner believed that the "owner of said property should be protected." The petition stated the names and ages of the living children of Mrs. Reynolds. The prayer was that a decree be taken, after proper service upon the minors, "removing

the doubt and uncertainty about the title to said land, and confirming and ratifying the acts of your petitioner as trustee as above set forth, and divesting all title out of Mary A. Reynolds and her children, and vesting the same in J. J. Cobb, the present owner." The whole record of this proceeding was introduced, from which the following facts also appeared: There was personal service upon Mrs. Reynolds and all her living children. A guardian ad litem was appointed to represent two of the children who were still minors. He accepted the appointment and consented that the order authorizing the trustee to sell the property and reinvest the proceeds of sale should be confirmed. The court passed an order confirming the sale and the acts of the trustee as to investments; it being recited therein that evidence had been submitted to the court showing that the cestui que trust had received the entire benefit arising from the sale of the property. The defendant testified that he purchased the land in dispute and paid for it, that he did not know or hear of the will of Elias C. Jenkins when he bought the land, and heard of it only when this suit was filed, and that he never had the title examined and did not know that any money of the estate of Elias C. Jenkins went into this land. Upon this evidence the court directed a verdict in favor of defendant, and the plaintiffs thereupon excepted.

M. G. Bayne, for plaintiffs in error. Nottingham & Cabaniss, for defendant in error.

FISH, C. J. (after stating the facts as above). 1, 2. Under the will of Elias C. Jenkins, the grandfather of the plaintiffs, the trust created was for the life estate of their mother only, the remainder to her children being a vested legal remainder, for the estate in remainder was not conveyed to the trustee named in the will, and no duty in reference thereto was imposed upon him. *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834; *Smith v. McWhorter*, 123 Ga. 287, 51 S. E. 474, 107 Am. St. Rep. 85. As the trust was only for the life estate, if the deed from Calhoun to the trustee, which was executed in 1860, had been in accordance with the provisions of the will, the trust, under the operation of the married woman's act of 1866, would have been executed when the deed was delivered to the trustee, if the life tenant then was, as seems highly probably from the evidence, of age, and, if she were not, it would have become executed when she attained her majority. *Smith v. McWhorter*, supra. So, if the deed had followed the trust declared in the will, there would have been no trust estate for a trustee to represent in 1881, when the trustee applied for and obtained leave to sell the land in which he had invested the trust funds, and the order or decree of the court authorizing such sale would be void for want of jurisdic-

tion over the subject-matter. But the deed from Calhoun to W. E. Jenkins, trustee, did not follow the provisions of the will, nor did it in any manner refer to the will, or indicate the existence of any other instrument whereby the grantee had been created a trustee. It must therefore be construed according to its own terms. So it was held in *Trammell v. Inman*, 115 Ga. 874, 877, 42 S. E. 246, where a deed to one who had by a previous marriage settlement been made trustee for a married woman merely described the grantee as trustee for such woman, without referring in any manner to the marriage settlement, or to any other writing by which he had been made trustee. The common source of title in this case is Calhoun, who in 1860 executed the deed to W. E. Jenkins, trustee for Mary A. Reynolds and children. The title to the land being in Calhoun at the time this deed was executed, when it passed out of him by that conveyance it passed to the grantee named therein as the grantor conveyed it to him. How did the grantor convey it to him? The conveyance was, as before stated, to W. E. Jenkins, trustee for Mary A. Reynolds and children. Before the adoption of our first Code, such a deed might, under the ruling in *Trammell v. Inman*, supra, have conveyed the title to the grantee individually; the words "trustee for Mary A. Reynolds and children" being held to be descriptio personæ only. But as to a deed executed, as this one was, after the first Code went into effect, the rule of construction is different, and such words are held to create a trust in favor of Mrs. Reynolds and her children in life when the deed is executed, for the law as declared by our successive Codes is that no formal words are necessary to create a trust, and, whenever a manifest intention is shown that another person shall have the benefit of the property conveyed, the grantee shall be declared a trustee, and that "the appointment of a trustee, or any words sufficient to create a trust, shall operate to create a separate estate." Civ. Code 1895, §§ 3148, 3150. The deed created a trust in favor of Mrs. Reynolds and her children as joint usees, as, but for the fact that the legal title was conveyed to a trustee, they would under common law have been joint tenants, and under our law tenants in common, and tenants in common they would be whenever the trust became executed. *Loyless v. Blackshear*, 43 Ga. 327; *Lee v. Tucker*, 56 Ga. 9; *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767. But only the children of Mrs. Reynolds who were in life when the deed was executed took any interest thereunder. *Hollis v. Lawton*, 107 Ga. 105, 32 S. E. 846, 73 Am. St. Rep. 114. Ordinarily this fact would be a very important and controlling one in the case, for, although the plaintiffs proved that Mrs. Reynolds, their mother, was dead when the suit was brought, and that they were all of her children, except one who died in childhood, they failed to

prove that they were all in life when this deed was executed, which was necessary in order for any of them to recover in a joint action, as all had to recover or none. In fact, the plaintiffs did not prove that any of them was in life when this conveyance was made, but the evidence offered by the defendant tended to show that two of them were. But we shall treat the case as if the plaintiffs were all beneficiaries of the trust created by this deed, for so it has been treated by counsel for defendant in error both in argument and brief, and the defendant introduced and relied upon the record of the proceedings upon the application of the trustee for leave to sell the land, and the record of the subsequent proceeding by him for a confirmation of such sale and the acts of the trustee thereunder, and it appears from these records that the trustee, in both these applications, represented himself as trustee for Mrs. Reynolds and all her children, and named all the plaintiffs as beneficiaries of the trust. Such a trust as the one created by this deed remains executory during the minority of any one of the cestuis que trust. *Askew v. Patterson*, 53 Ga. 209; *Boyd v. England*, 56 Ga. 598; *McCrory v. Clements*, 95 Ga. 778, 22 S. E. 675; *Clarke v. East Atlanta Land Co.*, 113 Ga. 21, 38 S. E. 323. Upon the face of the proceeding in 1881, wherein W. E. Jenkins, the trustee named in the deed, was granted leave to sell the land, it appears that the children of Mrs. Reynolds were then still minors; a guardian ad litem being appointed to represent them as such. This being true, the trust was then executory, the legal title to the land was in the trustee, and the interest of the beneficiaries therein was equitable. Therefore the question whether the order authorizing the trustee to sell the property should be, as contended by plaintiffs in error, considered as an order granted by the court at chambers, or, as contended by defendant in error, as one granted in term, and in open court, is immaterial, as the court at chambers, and in vacation, would have jurisdiction to authorize the sale of the equitable estate of minors. *Iverson v. Saulsbury*, 65 Ga. 725; *Obear v. Little*, 79 Ga. 386, 4 S. E. 914. See, also, *Sharp v. Findley*, 71 Ga. 656; *Richards v. East Tenn., Va. & Ga. Ry. Co.*, 106 Ga. 614, 632, 33 S. E. 198, 45 L. R. A. 712.

3. This order, however, is attacked upon another ground. It is contended that it is void, because the record of the proceeding in which it was granted does not show any service upon the children of Mrs. Reynolds, who were the minor beneficiaries of the trust. It is true that it is not affirmatively shown by this record that, in this proceeding to sell the land, personal service was perfected upon these minor cestuis que trust; but in *Pease v. Wagon*, 93 Ga. 361, 20 S. E. 637, wherein a trustee had been, in vacation, authorized to execute a mortgage upon the trust property, it was held that: "A judge

of the superior court, though acting in vacation and at chambers in passing lawful orders touching trust estates, acts as a court of equity; that court being always open. Hence, the presumptions which attach in favor of judgments and decrees by a court of general jurisdiction apply to orders of this kind." And in the same case, when it was again before this court, and when the record disclosed that the trust estate involved the interests of minor beneficiaries, it was held that "such an order is not to be treated as void because it fails to recite who are the beneficiaries of the trust, nor because the record of the proceedings upon which it was based does not affirmatively show that service upon all parties at interest was duly made." *Wagon v. Pease*, 104 Ga. 417, 30 S. E. 895. The order here in question was granted in February, 1885. In the opinion, which was then delivered by Lumpkin, P. J., it was said: "Again this order is attacked as void on the ground that as the record of the proceedings had before the judge does not show upon its face that service was perfected upon any of the cestuis que trust, and as there was certainly no waiver of service by the minor beneficiaries, it follows conclusively that there was no service. If this conclusion of fact necessarily resulted from the premises stated, the particular contention now under consideration would undoubtedly be a good one; but, as will have been observed from the above statement of what this record shows, the real truth of the matter is that, while it does not affirmatively appear that service was in fact duly made, there is absolutely nothing going to show the contrary. In other words, the record is merely silent as to this point. This being so, everything is to be presumed in favor of the validity of the order of court, which, as ruled when this case first made its appearance here, is to be regarded as having all the sanctity which attaches to a formal judgment rendered by a court of general jurisdiction. It follows, of course, that, in the absence of proof showing a failure to serve the parties interested in the proceeding, the presumption would be that every one to be affected thereby was properly before the court, else the order would not have been passed." This ruling, made by a full bench, was followed in *Reinhart v. Blackshear*, 105 Ga. 799, 31 S. E. 748, a case involving the validity of an order or decree authorizing the sale of trust property wherein a minor beneficiary was interested; the decision being concurred in by five justices, and Lumpkin, P. J., who delivered the opinion in the former case, being absent. The order involved in *Reinhart v. Miller* was granted in 1865, though no stress was placed, in the ruling made, on the fact that the order was granted prior to the act of 1876, codified in Civ. Code 1895, § 4987. Indeed, the date of the order appears not to have been considered in passing on the point involved. In the opinion as published, the

date of the order is erroneously stated as being in 1896. In *Hughes v. Treadaway*, 116 Ga. 663, at page 672, 42 S. E. 1035, at page 1038, Justice Little delivering the opinion, in discussing the necessity of a trustee bringing before the court all persons at interest, when he seeks the granting of an order authorizing him to exercise powers not conferred upon him by the instrument creating the trust, said: "This whole subject was carefully considered and ably discussed by Mr. Presiding Justice Lumpkin in the case of *Wagon v. Pease*, 104 Ga. 417, 30 S. E. 895, in which prior decisions of this court bearing upon the question in hand were reviewed." The point now under consideration was not involved in *Maryland Casualty Co. v. Lanham*, 124 Ga. 859, 53 S. E. 395. There a minor was sued and personally served. It appeared that no guardian ad litem had been appointed for him. It was held that the suit was not in a proper condition to proceed to judgment by default. Under the former decisions which we have cited, when the order or decree authorizing the trustee to sell the property was shown, the presumption arose that service had been duly perfected upon all the cestuis que trust, and, as no evidence was introduced to overcome this presumption, such order or decree could not be held to be invalid because it was not affirmatively shown by the record that personal service had been perfected upon the minor beneficiaries of the trust in the proceeding in which it was granted. Therefore the sale of the land by the trustee to Nancy E. Hendricks, under whom the defendant holds, in pursuance of the order of the court, must be held to have been duly authorized, and hence the plaintiffs could not recover upon title to the premises in dispute acquired under the deed from Calhoun to W. E. Jenkins, trustee for Mary A. Reynolds and children.

While the defendants introduced—unnecessarily, we think—the record of the subsequent proceedings by the trustee for a confirmation of the sale of the land by him and his acts in connection therewith, there was nothing shown by such record which overcame the presumption of service upon the cestuis que trust in the former proceeding. It is true that the trustee, in his application for an order or decree of confirmation, stated that "It does not appear affirmatively from the record of [the former] proceedings \* \* \* that service was ever had on said children as provided by law, and to this extent petitioner apprehends that the title to this property is defective." But this did not amount to an allegation, or an admission, that there had been no service upon the children of Mrs. Reynolds. It simply appears from these statements, made in an application filed in 1891, that the trustee, some 10 years after the sale, had come to the conclusion that the sale might be defective, because the record of the proceeding in which it was authorized did not show

service upon the minor beneficiaries of the trust, whether they were in fact served or not. Certainly it cannot be held that the defendant, by introducing the record of the proceeding for a confirmation of the sale, in effect admitted that there had been, in the original proceeding to sell the property, no service upon the minor beneficiaries of the trust. Without passing upon the extent to which defendant was bound by the allegations in the petitions for the sale and its confirmation, which were put in evidence by him, it may be safely stated that, upon the question as to such service, he was bound by the statement of the trustee in the application for a confirmation of the sale only to the extent to which it went, viz., that it did not affirmatively appear that such service had been perfected. So, notwithstanding the introduction of the record in the proceeding to confirm the sale by the trustee, the defendant could still rely on the presumption, arising from the existence of the order or decree of the court, authorizing the trustee to sell the property, that all parties at interest had been duly served in the proceeding in which it was granted. For this reason we have not deemed it necessary to consider the effect of the order or decree confirming the sale.

4. Of course, the plaintiffs could not recover, upon a legal title, as remaindermen under the will of Elias C. Jenkins, for the testator did not devise this land in remainder to them, and could not have done so, as he did not own it at his death. Whether, under the form of action which they adopted, they could have recovered upon proof of an equitable title, against one whose legal title was inferior to their equitable one, it is not necessary to determine, for while the original lot purchased by the trustee named in the will with a portion of the fund which the testator had directed should be invested by him in a home for the sole and separate use of Mrs. Reynolds during her life, with remainder to her children, was, in equity, impressed with the trust declared in the will, instead of the one declared in the deed, this was a secret equity, which could not be asserted against a bona fide purchaser of the premises in dispute, who bought the same upon the faith of the title derived from one who had purchased the original lot from the trustee, under a sale duly authorized by the court, in a proceeding in which the court was dealing with the trust estate created by the deed which conveyed the legal title from Calhoun to the trustee. The defendant testified that he did not know of or hear of the will of Elias C. Jenkins when he bought the land, and heard of it only when this suit was filed, and this testimony was uncontradicted. This would have protected him, even if it had been shown that the original purchaser of the land from the trustee was affected with no-

tice of the plaintiffs' equity therein. Besides, the defendant would have been protected even if he himself had notice of the secret equity of the plaintiffs at the time he bought the land, if any one of his predecessors in title was a bona fide purchaser, without notice of such equity, and presumably all of them were; there being no evidence even tending to show that any one of them was not. *Truluck v. Peeples*, 3 Ga. 446; *Colquitt v. Thomas*, 8 Ga. 258; *Lee v. Cato*, 27 Ga. 637, 73 Am. Dec. 746; *Douglass v. McCrackin*, 52 Ga. 596; *Ashmore v. Whitley*, 99 Ga. 150, 24 S. E. 941.

5. It follows from the foregoing that the court did not err in directing a verdict in favor of the defendant, as such a verdict was demanded by the evidence.

Judgment affirmed. All the Justices concur.

**EVANS, LUMPKIN, and ATKINSON, JJ.** (specially concurring). The presumption which the law indulges in favor of a judgment of a court of general jurisdiction, that all prior requisites have been complied with arises only in cases where the pleadings show that the court had jurisdiction of both person and subject-matter. Since the act of 1876 (Civ. Code 1895, § 4987) minors are required to be served personally with a copy of the legal proceedings. This Code section declares that: "When the returns of such service are made to the proper court, and order taken to appoint said minor a guardian ad litem, and such guardian ad litem agrees to serve, all of which must be shown in the proceedings of the court, then said minor shall be considered a party to said proceedings." According to our interpretation of this section of the Code, the court does not acquire jurisdiction of the minor until the return of service, etc., required by the statute has been entered on the proceedings. *Maryland Casualty Co. v. Lanham*, 124 Ga. 859, 53 S. E. 895. And where the proceedings do not show the factum of service, the judgment is prima facie void. But this court, in *Wagon v. Pease*, 104 Ga. 417, 30 S. E. 895, in a decision by a unanimous bench, held that an order granting a trustee power to create a mortgage upon the land of his cestui que trust was not void because the record of the proceedings upon which it was based did not affirmatively show that service on the minors had been made. It is noteworthy of remark that in the opinion section 4987 of the Code is not referred to or construed. We are bound by this decision, and therefore must concur in the opinion of the Chief Justice on this point. The two other cases referred to in the opinion are not conclusive on the point upon which they are cited. In the first (*Pease v. Wagon*, 93 Ga. 361, 20 S. E. 637), it did not appear that the parties to the order were minors, and it was only decided that, as against a general demurrer, an al-

legation that a mortgage created by the trustee by virtue of an order of the superior court empowering the trustee to mortgage was good, where the proceedings were not set out in the pleadings. In the latter case (*Reinhart v. Blackshear*, 105 Ga. 799, 31 S. E. 748), the order was granted prior to the act of 1876.

## PIEDMONT COTTON MILLS v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. July 24, 1908.)

### 1. EMINENT DOMAIN—INJUNCTION—STREET RAILROADS—LOCATION OF ROUTE—ESTOPPEL.

Under the facts of this case, the plaintiff was not estopped from seeking to enjoin the defendant as prayed in its petition.

### 2. SAME—EVIDENCE—ADMISSIBILITY.

Where a railroad company has the right to condemn private property for public uses in the construction and operation of its road, it has a large discretion in the selection of a location for its route over such property, and, unless such discretion has been abused, it will not be controlled or interfered with by the courts.

(a) Upon the trial of a case wherein the owner of the property through which it is proposed to run such road complains that such discretion of the company has been abused by it, it is error to exclude testimony relevant and material upon the issue as to whether or not the company has acted in bad faith in the selection of such location.

(b) Where the route selected and sought to be condemned by such company for the location of its road ran near the cotton mill of the owner of the land, who introduced testimony to show that another route over such land was equally as practicable, feasible, and advantageous to the company and the public as the one selected, and that it contemplated in a short time making an enlargement of its mill, the plant of which was originally designed and constructed with the intention of subsequently making such enlargement, and which would have been designed and constructed at less cost if such intention had not existed, it was error to exclude testimony, offered for the purpose of showing that such company acted in bad faith in selecting the route it did select, to the effect that the portion of the land over which such route was selected was the only location on such land on which its mill could be scientifically and economically enlarged, and that to enlarge their plant at any other location on said land would necessitate the building of a new and independent mill which could not be operated in connection with the existing plant.

### 3. SAME—AMOUNT OF PROPERTY THAT MAY BE TAKEN—INJUNCTION—GROUNDS OF RELIEF—INADEQUACY OF REMEDY AT LAW.

A party having the right of condemning private property for public purposes can only condemn such amount thereof as is useful, needful, and necessary for public purposes.

(a) If such party, in condemnation proceedings, makes an effort to condemn more land than is necessary for public purposes, as the assessors in such proceedings can only determine the amount of compensation to be paid, the owner of such land has the right to have a court of equity intervene and enjoin the condemnation of such of his land as is not necessary for public purposes.

(b) Where a party has a right to condemn land for public purposes, it is not confined to such quantity as may be absolutely necessary or indispensable for public purposes; but such

quantity as may be reasonably necessary may be condemned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 153.]

**4. SAME—INJUNCTION—STREET RAILROADS—LOCATION OF ROUTE—EVIDENCE—ADMISSIBILITY.**

Upon the trial of a case wherein the owner of land seeks to have a party having the right of condemnation enjoined from condemning his land, it is not error to admit testimony of such condemnor that he made an effort before instituting such condemnation proceeding to acquire by contract the property sought to be condemned and failed in such effort.

**5. SAME—POWER TO TAKE—STREET AND SUB-URBAN RAILWAYS.**

Suburban and street railroad companies incorporated under the general law pursuant to Civ. Code 1895, § 2180, have power to condemn private property outside of the limits of incorporated towns and cities.

Holden, J., dissenting in part.

(Syllabus by the Court.)

**6. WORDS AND PHRASES—"STREET CARS."**

"Street cars," accurately speaking, are cars which traverse the streets of a town or city and carry passengers who get off and on at various points along the line. They have been considered as vehicles of street travel.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7906.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Equitable petition by the Piedmont Cotton Mills to enjoin the Georgia Railway & Electric Company from condemning a right of way through a particular part of plaintiff's property, and from an order refusing an interlocutory injunction, plaintiff brings error. Reversed.

Dorsey, Brewster, Howell & Heyman, H. L. Culberson, and Owens Johnson, for plaintiff in error. Walter T. Colquitt and Rosser & Brandon, for defendant in error.

**HOLDEN, J.** The Georgia Railway & Electric Company, the main defendant in this case, was incorporated as a street and suburban railroad. After obtaining its original charter, it sought and obtained from the Secretary of State an amendment thereto, purporting to give it the right to run a branch line from East Point to Hapeville through the property of the plaintiff and others. It attempted to condemn the property of the plaintiff, which filed an equitable petition to enjoin the defendants from condemning, and the defendant Georgia Railway & Electric Company from taking, a right of way through the property of the plaintiff. To the order of the court refusing an interlocutory injunction, the plaintiff filed exceptions.

1. The evidence shows that the defendant undertook to buy from the plaintiff a right of way through its property, and negotiations were had between them to this end. After these negotiations were at an end, the defendant sought to have assessors appointed and a right of way condemned. One assessor was appointed by the plaintiff and one by the defendant, and, upon the failure of these as-

sessors to agree upon a third one, the court appointed the third assessor. These assessors met and adjourned to a subsequent day fixed by them, on which date plaintiff filed its application for an injunction and obtained a temporary restraining order. There was evidence that the defendant had built its line of railway from Hapeville, on one side, and East Point, on the other, almost, if not quite, up to the plaintiff's property. The evidence of the general manager of the plaintiff, who had charge of the matter for the plaintiff, was that he always proceeded in the matter on the information that the plaintiff could not do anything whatever in staying any purpose of the defendant, and that it had a right to run its right of way through the mill if it so desired, and that it was only recently and just before the petition for injunction was filed that he learned that the plaintiff had any redress. It does not appear from the evidence in this case how much work was done by the defendant on its line from Hapeville and East Point towards the property of the plaintiff after the plaintiff had knowledge of the fact that the defendant contemplated running its right of way through the property of the plaintiff; but, even if it disclosed how much work was thus done, it does not appear from the record in this case that the defendant did any work on the faith of anything done or said by the plaintiff's officers, or that the defendant was misled thereby. There being no evidence of intentional deception on the part of the plaintiff, or any conduct which actually misled the defendant, the plaintiff would not be estopped from asserting any of its legal rights in the injunction proceedings. Civ. Code 1895, § 5152; *Tinsley v. Rice*, 105 Ga. 285, 290, 31 S. E. 174; *Evans v. Napier*, 111 Ga. 105, 38 S. E. 426; *Starr v. Newman*, 107 Ga. 395, 33 S. E. 427; *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680; *American Freehold Co. v. Walker*, 119 Ga. 341, 46 S. E. 428.

2. The plaintiff alleged that it originally erected a cotton mill of a stated capacity, which it had since increased, and that it had purchased more land for the purpose of making still further additions to and enlargements of its plant, and contemplated in a short time making such enlargements and additions. The plaintiff further alleged that the place where the defendant seeks to locate its right of way is the only place where such enlargements and additions can be made to the original plant so as to be operated under the same heads of departments, and so that the same steam plant used in connection with the original mill could be used in operating the machinery added, and that the power house of the original mill was originally built with a view to housing such a steam plant as would operate such additions as might be made. It contended that if the additions and enlargements of the original mill were not made at this place, but at some other place

on its property, it would be the same as if it were to erect a new and independent mill, and, owing to various reasons set forth, it would derive no benefit from it as an enlargement and extension of the original mill. The plaintiff further alleged that the physical formation of its land was such that the defendant could locate a right of way at a different place, which, as far as concerns the defendant and the public it serves, was just as feasible, practicable, and advantageous a route as the one it sought, and that this route would be the same to the defendant and the public in every respect, except that it would be about 30 feet longer, and would have a slight curve therein. The plaintiff contended that the defendant's location of its right of way at this particular place that was needed by the plaintiff for the enlargement of its mill was done arbitrarily, capriciously, and without reason or justice. The defendant denied all of these contentions of the plaintiff, and offered proof to show that the route selected by it was the only practicable, feasible, and advantageous route, and that any other route over the plaintiff's property, by reason of the curves such other route would necessitate, would make it dangerous to operate its cars, and offered proof in support of its denial of the other contentions. The plaintiff offered, in support of its contention that the enlargement and addition to the original mill could not be located at any other place on its property than that over which the defendant sought a right of way, without great loss and irreparable damage to the plaintiff, the following testimony of four witnesses who had qualified as experts: "The only place where the new building for the proposed addition to and enlargement of the plaintiff's manufacturing plant, having any intelligent and scientific reference to topography and the lay of the land and the situation of the buildings now on the ground, is the place indicated on the drawing hereto attached marked 'New Building.' \* \* \* If the new building contemplated by said plaintiff were located elsewhere than at the place indicated, a new steam plant would have to be housed and installed, and a new plant from A to Z built, in order to enable the plaintiff to increase its output. \* \* \* The insurance regulations in such cases require that the buildings should be the distance apart that they are shown to be on said plat. \* \* \* Deponent says that, if the railroad is allowed to be built and operated through said site of said new building, it will be simply destructive of the plaintiff's mill site, so far as any intelligent and scientific addition to or enlargement of the plaintiff's present factory are concerned. \* \* \* While the plaintiff, or any other person or company, could go out and secure a piece of land and locate a cotton mill thereon, if a railroad is to be built and operated through and over the place indicated in the drawing hereto attached, the plaintiff will

have no place to add to its present mill, and the present mill will be condemned, for all time, to practically its present capacity."

Where a railroad company has the right to condemn private property, it has a large discretion in the selection of a location for its right of way. 15 Cyc. 634, 635; 1 Rorer on Railroads, 281; 1 Lewis on Em. Dom. (2d Ed.) p. 675, § 279; 3 Elliott on Railroads, p. 1264, § 919; 10 Am. & Eng. Enc. Law (2d Ed.) 1057; Savannah R. Co. v. Postal Tel. Co., 112 Ga. 941, 945, 38 S. E. 353; Georgia R. Co. v. Maddox, 116 Ga. 64, 68, 42 S. E. 315. The mere fact that another location would be equally as feasible, practicable, and desirable would not of itself be sufficient to force the company to change to such location and abandon the location selected. If the company could be made to do this, it might have difficulty in ever securing a location where there existed over the property of one or different persons various routes equally as practicable, feasible, and desirable. A large discretion is vested in a party having the right to condemn, in the selection of the particular property to be condemned, and such selection should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter. 15 Cyc. 634, 635; 10 Am. & Eng. Enc. Law (2d Ed.) 1057. Where any person is given by law the right to exercise a discretion, and abuses such right, the courts may interfere. If the defendant in this case, in the exercise of the discretion given it in the selection of a route for its right of way over the plaintiff's property, acted in bad faith, then the courts would have the right to interfere. One of the contentions of the plaintiff in this case is that the defendant acted in bad faith in the selection of its route, and the plaintiff offered evidence to show that another route through its property was just as feasible, practicable, and advantageous as the one selected. The plaintiff also offered evidence to show that the route selected by the defendant went through that portion of the plaintiff's property which was the only part thereof whereon it could scientifically and economically enlarge its mill. The evidence hereinbefore set out, offered for the purpose of showing these facts, was rejected by the court. If there was over the plaintiff's property a route which the defendant could take equally as practicable, feasible, and advantageous as the one selected, and if the appropriation by the defendant of the one selected would have the effect of preventing the plaintiff from enlarging and adding to its mill in a scientific and economical way, evidence of this latter fact, in connection with the other testimony in the case, would be admissible to illustrate the question as to whether or not the defendant was acting in bad faith in selecting this particular route, and we think the court committed error in excluding this testimony. There was

some testimony before the court, offered by the plaintiff and the defendant, upon the same subject as that embraced in the testimony excluded; but, the testimony of these four experts being excluded by the court and not considered by him upon the trial of the case, it is impossible for this court to determine what effect such testimony, if admitted, in connection with the other testimony in the case, would have had upon the court in deciding one of the questions at issue. Under Civ. Code, 1895, § 5287, the testimony of these experts was admissible, and for the reasons above announced the ruling of the court below in refusing to admit it was error.

3. Another contention of the plaintiff was that the defendant sought to condemn more land than was necessary for its use. The testimony of the plaintiff was that a strip of land 20 feet wide would be sufficient for a single track, and a strip 30 feet wide would be ample on which to lay and operate double tracks, and a strip 60 feet wide would accommodate four tracks. This testimony was undisputed. It does not conclusively appear that the defendant only wanted to lay one track, but, taking into consideration all of the evidence in the case, it would seem to indicate that its only purpose and desire was to lay one track. The notice in the condemnation proceedings stated that the defendant desired to condemn the land for several purposes besides that of simply running a road through it, but in its answer it does not refer to these other purposes, and it nowhere appears in the testimony that the defendant desires to do anything except to operate a line of railway through the property, and the testimony indicates that it only wishes to operate on one track. The engineer, Smith, who testified for the defendant, attached as a part of his affidavit a map which shows the right of way sought to be condemned through the property of the plaintiff, and this map indicates by a single center line where the defendant proposed to lay its track through the property of the plaintiff, and also shows such single center line to extend onto the property adjoining that of the plaintiff on either side. However, there is no testimony conclusively showing that the defendant only desired a right of way for one track, but the only testimony in regard to the matter indicates that it only desired land for one track. It does not appear that the defendant offered any testimony to show how many tracks it expected to lay, or how much land it needed, or the purposes for which it needed land. The plaintiff in its amendment to its petition states that the defendant sought to condemn more land than it needed, or was necessary, and in support of this contention introduced testimony that the strip of land 60 feet wide sought to be condemned was enough to accommodate four tracks of the defendant. If it be true that the defendant only needs land for the purpose of operating one track, or indeed any number of tracks less than four,

the testimony shows without contradiction, that the amount of land sought to be condemned is more than it needs and is more than is necessary. A party having the right to condemn private property can only take such property as is useful, needful, and necessary for public purposes. Civ. Code 1895, § 4658; Savannah Ry. Co. v. Postal Tel. Co., 115 Ga. 554, 580, 42 S. E. 1; Atlantic Railroad Co. v. Penny, 119 Ga. 479, 481, 46 S. E. 665; 10 Am. & Eng. Enc. Law (2d Ed.) 1057; 15 Cyc. 632, 633, 637. In condemnation proceedings the assessors can only determine the amount of compensation to be paid. They cannot determine whether or not the quantity of land sought to be taken is necessary for public purposes. Atlantic Railroad Co. v. Penny, supra. When an effort is made to take more land than is necessary for public purposes, the owner of the property sought to be condemned has a right to ask the courts to intervene. Savannah Ry. Co. v. Postal Tel. Co., supra; Atlantic Railroad Co. v. Penny, supra. The taking of more land than is necessary for public purposes cannot be justified on the principles underlying the right of eminent domain. When more land is taken than is necessary for public uses, it is in effect a taking for private use, or for no use; in either of which instances the right does not exist. The railroad company has the authority, in the first instance, to judge of the matter as to how much land should be taken; but, if it should appear that the land sought to be condemned is more than is necessary for public purposes, then the amount should be reduced by the courts to such an amount as is necessary for public purposes. We do not mean to say that the company is limited to the amount that is absolutely necessary, but it is limited to the amount that is reasonably necessary under all the facts and circumstances regarding the particular matter under consideration. The word "necessary" is not meant to be used in the sense of "indispensable." Necessity for public use is not such an imperative necessity that would render the construction of a railroad impossible without the amount of land in question. 15 Cyc. 633; 10 Am. & Eng. Enc. Law (2d Ed.) 1057. We do not hold, under the evidence in this record, that the court below abused its discretion in refusing to enjoin the defendant on the ground that it was seeking to condemn an amount of land in excess of what was reasonably necessary; but, in view of the entire record in this case and the ruling made in the previous decision of this opinion, we think there should be another hearing, and upon such hearing the court below can hear evidence upon this question and exercise its discretion under the evidence submitted and the rulings we have made above.

4. The court admitted in evidence, over the objection of the plaintiff, testimony of the manager of the defendant company in regard to negotiations with the plaintiff having



in view the acquirement by purchase of the right of way which the defendant afterwards sought to condemn. This testimony was objected to on the ground that it was irrelevant and immaterial, and because the negotiations were had with a view to compromise and settlement between the parties. We do not think this testimony was subject to either of the objections named. It was admissible for several purposes, one of which was to show the bona fides of the defendant in undertaking to locate its right of way at the particular place in question. This testimony was also admissible by reason of the fact that it was proper for the defendant to seek to obtain the land by contract before undertaking to condemn it. Civ. Code 1895, §§ 2170, 4568, 4569; *Bridwell v. Gate City Terminal Company*, 127 Ga. 520, 535, 56 S. E. 624, 10 L. R. A. (N. S.) 909; *City of Elberton v. Hobbs*, 121 Ga. 750, 49 S. E. 779. Indeed, it was necessary for an effort to be made to obtain this property by contract before instituting condemnation proceedings.

5. One of the main contentions of the plaintiff is that the Georgia Railway & Electric Company has no power, under the law, to condemn private property for public purposes outside the limits of incorporated cities and towns. The writer is of the opinion that it has no such power. All of the members of the court, except the writer, are of the opinion that it has such power. The views of the writer on this subject appear later in this opinion. The views of the other members of the court upon this subject, as prepared by Mr. Justice LUMPKIN, are as follows:

In 1892 an act was passed for the purpose of carrying into effect article 3, § 7, par. 18, of the Constitution, in so far as it related to the issuance and granting of corporate powers and privileges to railroad companies by the Secretary of State. It made provision in regard to the incorporation, organization, and powers of railroad companies, including the method of acquiring rights by way of purchase or condemnation. By section 16 of that act it was declared that "the provisions of this act shall not apply to and govern in the incorporation, control and management of suburban and street railroad companies." Acts 1892, p. 37, et seq. In 1894 an act was passed which declared that the sixteenth section of the act of 1892, above quoted, was repealed, and that, in lieu thereof, the following was inserted as section 16 of said act: "And shall become a part of said act and of the general law of this state governing the incorporation of railroads, viz.: 'All the provisions of this act shall apply to and govern in the incorporation, control and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a com-

pany as provided in section 2 of this act, with this additional requirement, that they must in their petition specify what city, town or village, and in what streets thereof, they propose to construct and build said railroad; provided that no street railroad incorporated under this act shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further, that all such street railroad companies incorporated under this act shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time; and provided further, only such of the powers and franchises that are conferred by this act shall belong to said street railroad companies as shall be necessary and appropriate thereto; and in case any street railroad incorporated under this act shall be partly located in an incorporated town or city and partly located in the country, then the provisions of this act which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned." Acts 1894, p. 69.

Thus the sixteenth section of the act of 1892, which had declared that the act should not apply to and govern in the incorporation, control, and management of suburban and street railroad companies, was stricken out, and the act of 1894 took the place of that section as a part of the general law of the state governing the incorporation of railroads. When the act of 1892 and the amending act of 1894 were codified and incorporated in the Code of 1895, the general laws touching the incorporation and powers of railroads were separated into four divisions. At the beginning of the first division was placed the heading "Method of Incorporation," at the head of the second division "Organization and Capital Stock," at the head of the third division "Corporate Powers of Railroads," and at the head of the fourth division "Street Railroads." The act of 1894 was included in the fourth division as section 2180 in the Civil Code of 1895. As thus codified, the language was the same as that of the act of 1894, except that, where the words "said act" or "this act" were there employed, the words "preceding division" or "this division" or "said division" were employed, so that it reads as follows: "All the provisions of the preceding divisions shall govern in the incorporation, control and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with the additional requirement that they must in their petition specify what city, town or village, and in what streets there-

of, they propose to construct and build said railroad: Provided, that no street railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time; and provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriated thereto; and in case any street railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned."

The question arises especially upon the construction of the last clause of the act of 1894, which, as codified, reads as follows: "And in case any street railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it in so far as that portion of its road is concerned." Bearing in mind that the amending act of 1894 was not a separate and distinct provision, apart from the general law for the incorporation of railroads, but became a part thereof and a section of the act of 1892, what is the proper construction of the clause just quoted? Does it confer upon a street and suburban railroad company, a part of whose line extends into the country beyond the limits of an incorporated town or city, the right to condemn land for a right of way, or does it not? There are three possible constructions which may be given to section 2180 of the Code on the subject of the power to condemn land for a right of way: First, that no power of condemnation at all is conferred upon a street and suburban railroad company as to that part which lies outside of an incorporated town or city; second, that, as to the part of such a road which is located in the country outside of an incorporated town or city, such a railroad stands exactly like a general commercial railroad company in all respects, and has the same power and right of condemnation, and has all the same powers and rights as such a company; and, third, that, as to such part of its road, it has a power of condemnation analogous to that of other railroads located in the country, but its exercise is restricted by the nature and character of street and suburban railroad companies, and by what may be necessary and appropriate

for such roads—in other words, that a street and suburban railroad company, as to that portion of its line which is located in the country, has the power of eminent domain, but that the exercise of such power is limited and restricted by the nature and character of the company and by what is necessary and appropriate for the use and operation of such a company. If this clause refers to suburban extensions only, a reasonable, rather than a narrow and restricted, construction should be given to the word "suburban." Considering section 2180 of the Code in its entirety, so as to give effect to it as a whole, and remembering that it is a part of the general law for the incorporation of railroads, we are of the opinion that the last construction above stated is the reasonable and natural one, and carries out the legislative intent.

The statement in the last clause of the section under consideration declares that "the provisions of the preceding division," as to other railroads in the country, shall apply to that portion of a street and suburban railroad which lies in the country. Turning to the preceding division, which is numbered 3 in the Code, we find that it includes section 2167, which declares that said railroad company shall be empowered to cause examinations and preliminary surveys to be made, to receive and hold voluntary grants of property, "to acquire, purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of said road, \* \* \* and to condemn, lease or buy any land necessary for its use; to lay out its road not exceeding in width 200 feet," etc. These are among the provisions of "the preceding division," as declared in the Code, and are among "the provisions of the act," according to the expression employed in the act of 1894. The provision above quoted from section 2167, which is included in "the preceding division," is the only one which declares that a railroad company shall have or exercise any power to acquire property for the purpose of constructing and operating its railroad. Section 2180 does not in terms confer or declare any such power in regard to a street and suburban railroad company. If it has any such power, it must be by reference to the preceding division of the general railroad law. That law, as already shown, includes in a single sentence the right "to condemn, lease, or buy any land necessary for its use." How can it be said that one mode of acquiring land necessary for the use of the corporation may be exercised by the adoption of "the provisions of the preceding division," and that another cannot? It seems to us that to so hold would not be to give effect to the last clause of section 2180.

The Century Dictionary, among other definitions of the word "provision," gives the following: "In law, a stipulation; a rule provided; a distinct clause in an instrument

or statute; a rule or principle to be referred to for guidance; as, the provisions of law; the provisions of the Constitution." In the case of *State v. Lund*, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572, the entire court treated the term "provision" in a Constitution or charter as referring to that which was provided by such Constitution or charter on the subject in hand. The judges differed as to whether there was a "contrary provision" to one previously mentioned included in a charter. The majority of the judges held that certain expressions in the charter amounted to such "a contrary provision." Robinson, J., dissented. In the opinion filed by him he said: "As applied to legislation, the word 'provision' has the well-understood meaning: 'Actual expression in language'; the clothing of legislative ideas in words, which can be pointed out upon the page and read with the eye; not a conjecture, or a supposition, or an inference drawn from other language referring to a different subject or matter." Page 255 of 167 Mo., page 576 of 67 S. W. Whether the opinion of the majority or the dissenting opinion in that case is accepted, the view of either as to the meaning of the term "provision" is sufficiently broad to show that the expression used in the statute now before us would be considered as including the acquirement of property by lease or purchase, or by condemnation, included in the "provisions" of the preceding division.

Cases may be cited to show that there are very material differences between ordinary commercial railroads and street railroads; or street and suburban railroads, and that the conferring of the power of eminent domain generally on "railroads" would not be ordinarily construed as conferring that power upon a street railway, unless there were something to show the legislative intent to do so. *Thomson-Houston Electric Co. v. Simon*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86. Even where a legislative act conferred the power of eminent domain upon a street railway company to condemn property where necessary, it has been held that this did not authorize a general condemnation by it for its line in the city, but that the power would be construed in the light of the character of the corporation and of its business, and limited to condemnation when necessary to carry out its purposes. The case before us differs from the Oregon case (20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86), in that here the Legislature has declared that the provisions of "the preceding division" touching railroads in the country generally shall apply to that part of a street and suburban railroad which lies in the country, and the legislative intent is not left to be determined by a construction of the general law for the incorporation of railroads alone.

The change in modern methods of transportation has been very great. Beginning with the omnibus and street hack as modes

of public conveyance through the streets of a city, there followed the tramway or horse-car line, then cars drawn by a "dummy engine," and finally the electric car. "Street cars," accurately speaking, are cars which traverse the streets of a town or city, and carry passengers, who get on and off at various points along the line. They have been considered as vehicles of street travel, and on this basis they have been declared to create no such additional servitude upon the street as to give a right to damages to owners of abutting land. Within the corporate limits of the city they are subject to reasonable regulations by the municipal authorities. Both by the statute and by the Constitution they are required to obtain the consent of the corporate authorities to their use of the streets. Civ. Code 1896, section 5782. We need not consider how far the Legislature could confer upon them a power of eminent domain other than to use the streets with the consent of the municipal corporation. When the line of such a company is extended beyond the limits of the town or city, it is plain that the provisions of the law referred to touching street railroads within the corporate limits becomes largely inapplicable. What was the legislative intent as to the status of such portion of the line as should lie without the limits of the town or city? Should no law apply to it, or, if any, what law? The Legislature answered this by saying that the provisions touching railroads in the country generally should apply to that portion of the line beyond the town or city; but, construing that legislative declaration in the light of other expressions in the act of 1894, the exercise of the power of eminent domain should be limited by a consideration of the nature and character of the incorporation dealt with, and, if it should attempt such an exercise of power as is not appropriate to its nature and character, it would be enjoined. At the time when the act of 1894 was passed, electrically equipped street railways had not been very long in use, and the extension of such railways beyond the corporate limits and into the suburbs was also of recent origin. Special provisions for the incorporation of companies to operate such roads, and in regard to the powers and franchises thereof, had not been made. Under the then condition of such enterprises, it was considered sufficient to pass a mere general act, analogizing their extension beyond the corporate limits to railroads generally in the country. Since then, with the growth in the use of electricity as a motive power, the number of such roads has rapidly multiplied, the extensions beyond the corporate limits of towns and cities have greatly increased, suburban extensions have lengthened, and frequently grown interurban roads. Under the new and changed conditions, we would respectfully call the attention of the Legislature to the subject, for which accurate provision should be made.

We think that so important a matter should not be left to a mere general act analogizing portions of such roads to railroads in general use as far as practicable or proper.

The foregoing part of this division of the opinion expresses the views of all of the members of the court, except the writer, upon the subject of the right of the defendant company to condemn private property outside of the limits of incorporated towns and cities. The writer does not concur in such views, but it is his opinion that such company does not possess the power in question, and in support thereof he offers the following:

On December 17, 1892, the General Assembly passed an act to carry into effect article 3, § 7, par. 18, of the Constitution of this state, in so far as it relates to the issuing and granting of corporate powers and privileges to railroad companies by the Secretary of State. The provisions of this act, except what was contained in section 16, are now found in divisions 1, 2, and 3 of article 6 of volume 2 of the Civil Code of 1895. Section 16 of the act provided that its provisions should not apply to and govern in the incorporation, control, and management of suburban and street railroad companies. On December 18, 1894, the General Assembly passed an act repealing section 16 of the act of 1892, and substituting in lieu thereof certain provisions which are now embraced in Civ. Code 1895, section 2180, which is a part of division 4 of the article above named. If a street or suburban railroad company has the power to condemn land, it must be found in this section, which is as follows: "All the provisions of the preceding divisions shall govern in the incorporation, control, and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement, that they must in their petition specify what city, town or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time; and provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate thereto; and in case any street railroad incorporated under this division shall be partly located in an incor-

porated town or city and partly located in the country, then the divisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned." The law contained in the preceding divisions referred to relates to the incorporation, powers, rights, and franchises of ordinary railroads; one of the powers conferred thereby being the right to condemn private property. The language in the first part of this section, declaring that the provisions of the preceding divisions shall govern in the "incorporation, control, and management," may not be broad enough to include powers and franchises, within the purview of which latter terms the right of condemnation would fall. If the words quoted are broad enough to include powers, what is hereinafter said in reference to the words "necessary and appropriate," occurring in this section, is relevant to the words "applicable and appropriate" in the portion above quoted.

A part of section 2180 is as follows: "And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate thereto." The power to condemn is conferred on ordinary railroads in division 3, above referred to, along with many other powers and franchises. Section 2180, contained in division 4, says that only such of the powers and franchises as are conferred by the preceding divisions shall belong to street railroads as shall be "necessary and appropriate." The powers and franchises referred to, and conferred on street railroad companies, being restricted to such powers as are necessary and appropriate to them, who is to determine whether or not the power to condemn is a necessary and appropriate power to belong to street railroads? It would be necessary for the courts to determine this question. The Legislature could confer on the courts the authority to decide that street railroads had the franchises given to ordinary railroads in preceding divisions, giving them the right to run on the highways in the county, with the consent of the county authorities, and could confer on the courts authority to decide that street railroads had the right or privilege to buy or lease property for a right of way, and, indeed, that they had any right or privilege (except the power of condemnation), if by the finding of the court such a franchise, right, or privilege was a necessary and appropriate one for street railroads to possess; but the Legislature could not confer on the courts the authority to decide whether or not the power of condemnation should belong to all street railroads because it was one necessary and appropriate for all street railroads to possess. The writer does not think the Legislature would, or could, confer so great a power as that of condemnation in such an uncertain way as to declare that any class of persons or corporations should have the pow-

er if it was necessary and appropriate for them to have it. The Constitution provides that the legislative power is the only one which can delegate for the state to any person or corporation the right to condemn private property. If the Legislature provides that street railroads shall have the power to condemn, if necessary and appropriate for them to possess such power, there is no express or definite conferring of this power by the Legislature; but it is left for the determination of the courts whether the power of condemnation is one necessary and appropriate for street railroads to enjoy. The meaning of this section is that only the powers conferred by the preceding division shall belong to street railroads as shall be necessary and appropriate thereto, and it is not the meaning of this section that they shall have all such powers, but shall only exercise them when necessary and appropriate. If this section meant that street railroad companies should have the power of condemnation, but should exercise it only when necessary and appropriate, the general power to condemn would, of course, exist; but the power to condemn cannot be conferred by the Legislature by providing that a general power of condemnation shall belong to a certain class of corporations if such a power be a necessary and appropriate one for them to possess generally. This would leave it uncertain as to whether the power was granted or not, and the power of condemnation cannot be conferred in any such uncertain way. It must be given in express terms, or by necessary implication. In the case of *Markham v. Howell*, 33 Ga. 506, 511, in speaking of the power of condemnation, the court says: "This is too dangerous and extraordinary power to be conferred by mere implication. It must be expressly granted, and must provide in the grant the mode of compensation," etc. Certainly such power is not conferred in express terms by saying that the power shall belong to a certain class of corporations if such power is necessary and appropriate to them. Nor can it be said that it is necessarily implied when the question as to whether or not the power is conferred is left as a judicial question to be determined by the courts. The judge or jury in trying one case might be of the opinion that it was necessary and appropriate for street railroad companies to have the power of condemnation; whereas, another judge or jury, in another case, might be of a different opinion and decide the contrary.

A full quotation of the latter part of section 2180 is as follows: "And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate thereto; and in case any street railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of

the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned." If the latter part of the section above quoted means that all of the provisions of the preceding divisions applicable to ordinary railroads, without restriction or qualification, apply to street and suburban railroads in the country, then the right of such street railroads to condemn lands in the country (when located partly in a city and partly in the country) on one theory would exist. While the latter part of the section above quoted states that the provisions of the preceding division which apply to other railroads located in the country shall apply to street railroads so far as that portion of its road is concerned which is located in the country, when a street railroad is located partly in the city and partly in the country, is this not qualified by the provision immediately preceding, which is that only such of the powers and franchises that are conferred by the preceding divisions shall apply to street railroads as shall be necessary and appropriate thereto? Is it a proper construction of the latter part of this section to say, when a street railroad is located partly in a city and partly in the country, that, without restriction or qualification, all the provisions of the preceding division, including the provisions relating to powers and franchises, relating to other railroads, shall apply to street railroads, so far as that portion thereof which is located in the country is concerned? If this is a proper construction, on one theory the right to condemn would exist, because the right to condemn is one of the provisions of the preceding division which applies to other railroads; but, if the provisions of the preceding division which apply to other railroads are qualified by the statement immediately preceding, that only the powers and franchises that are conferred by said divisions shall belong to street railroads as are necessary and appropriate thereto, then the power to condemn would not apply to street railroads unless such power was necessary and appropriate to them. The provisions above quoted, to the effect that only such powers and franchises shall belong to street railroads as shall be necessary and appropriate thereto, are followed in the same sentence by the statement that the provisions of the preceding division which apply to other railroads shall apply to street railroads so far as that portion thereof located in the country is concerned, and it would seem that the restriction that a street railroad should have only such powers and franchises as are necessary and appropriate thereto followed them when they left the city and went into the country.

If, instead of the words "and in case," other words had been used, showing a breaking off from the restrictions immediately preceding, and indicating an intention to free what succeeded such words from the qualification.

preceding, and giving notice that what is then to be said is not to be held to the restriction just named, the construction might have been different; but the latter part of this section, beginning with the words "and in case," being the same sentence with what precedes after the word "provided," and being a continuation thereof, the restrictions immediately preceding in the same sentence qualify all provisions in the sentence. These restrictions limit the powers of street and suburban railroads to such as are necessary and appropriate, and, as hereinbefore stated, such power cannot be construed to include the power to condemn private property.

The Legislature, in saying only such powers and franchises conferred by the preceding divisions shall belong to street railroad companies as shall be necessary and appropriate thereto, did not say this provision applied to them only in cities and towns, but made this provision applicable to them generally and undertook to state their powers everywhere, whether in cities or towns or country. There is nothing in the statute from which it can be inferred that the Legislature intended to name what powers they should have simply in towns or cities. This is the only place in the statute where the Legislature undertook to define their powers and franchises. If the Legislature had intended to refer to powers and franchises in cities or towns only, it would have so stated. When the statute says in the succeeding words that the provisions of the preceding division which apply to ordinary railroads shall apply to street railroads in so far as their line is concerned which is in the country, the provisions referred to mean provisions outside of those provisions giving powers and franchises, because the act has just named the powers and franchises which they are to have whether in city or town or country. There are many matters outside of powers and franchises in the preceding division relating to ordinary railroads, and it is these other matters to which the provision referred to relates, and not to powers and franchises. The only theory on which the power of condemnation can be said to be given to street railroads, when part of their line is in the country, is that all the provisions of the preceding division, without qualification, relating to ordinary railroads, shall apply to street and suburban railroads so far as the line of their railroad located in the country is concerned. If this is true, then, before they could operate any line which was located in the country, would they have to obtain a charter as an ordinary railroad, because one of the provisions of the preceding division contains the law providing for the incorporation of ordinary railroads? To give the latter part of the section above quoted this construction, the power of condemnation would not apply to the defendant, because it has never been incorporated under the law as an ordinary

railroad and has never ceased to be a suburban and street railroad.

The latter part of the section of the Code above referred to does not say that in case any street railroad shall be partly located in an incorporated town or city and its suburbs and partly located in the country, but says that in case any street railroad shall be partly located in an incorporated town or city and partly located in the country, etc. Does the word "country" here mean any part of the country, or only such part as is in the suburbs, as distinguished from territory within the corporate limits of a town or city. "Suburb," as defined by the Century Dictionary, denotes: "A region or place adjacent to a city; an outlying district of a city; a town or village so near that it may be used for residence by those who do business in the city; in the plural, collectively, environs; surroundings, outskirts, hence, any adjuncts of a place." Whether the word "country" would ordinarily embrace suburbs, its meaning as used in the section quoted includes suburbs, even if the position above assumed is incorrect. The ordinary meaning of a street and suburban railroad is a railroad in a town or city and the suburbs thereof. A railroad would be denominated a street and suburban railroad and could be given the power to run in any part of the country; but, unless it appears that it was the intention to give this power, the ordinary meaning of a street and suburban railroad should be given it, and, when this meaning is given it, such meaning would be that such railroad would be confined to the city or town and its suburbs. The application for an amendment to its charter granted by the Secretary of State, and the allowance of the amendment itself by him, does not show on its face that the property of the plaintiff through which it wishes to run its railroad is in the limits of an incorporated town or city, or the suburbs thereof. His jurisdiction is limited to grant such charters only as the law permits, and to a street and suburban railroad he would have no authority to grant a charter giving it the power to operate outside of both, and the jurisdictional fact that the property of the plaintiff and others, through which it is to run, is in an incorporated town or city and its suburbs, does not appear either in the application for an amendment or in the order of the Secretary of State granting the same.

There is no law in this state expressly providing for the incorporation of an interurban railroad to do a passenger business only, as street railroads generally do. The only railroad for which a charter can be obtained to do an interurban business is the ordinary railroad, carrying freight and passengers, with power to use public highways, with the consent of the corporate authorities, and to condemn private property. Under section 2167, in the preceding division, railroads have the right to carry property,

receive compensation therefor, and "to do all things incident to railroad business." To hold that the latter part of section 2180 means a street railroad can run in any part of the country, and that all the provisions of the preceding division apply to it when in the country, would carry with it the right, when in the country, to carry freight and passengers, to leave the public highways, condemn land, and do many other things for which provision is made in the case of ordinary railroads. In other words, it would have the right in the country, right up to the corporate limits of a city or town, to run an ordinary railroad, with all their incidents, powers, and rights. If all the provisions of the preceding division apply, and not such only as are necessary and appropriate, then, under Civ. Code 1895, § 2187, par. 7, such roads, when out of the city, could leave highways, condemn residence lots, and go through them, with all their lines operated with engines driven by steam, with all the annoyances incident to noise, cinders, and smoke, to residents in thickly populated suburbs just out of city limits, and there would be no law to prevent this, as the section above quoted absolutely and unqualifiedly gives ordinary railroads this legal right. Ordinary railroads generally want and only have one way through suburbs to a city, but street railroads have many lines, on different highways, in the suburbs. Yet under the law, if all provisions named apply, they could operate all their lines on the different highways in the suburbs with steam, and there would be no law to stop them from so doing. Municipal authorities could prevent them from doing this in the limits of the city, but there is no authority which could interfere with this right in the suburbs. If all of the provisions apply, as above stated, under paragraph 9 of the section above named, so far as concerns the road outside of city limits, the time and manner of transportation of passengers and freight, and the compensation charged therefor, would be subject to the control of the Railroad Commission, though that part of the road in the city at the time this law was passed would not have been under the commission.

The Legislature never intended that a street and suburban railroad should consist of a street railroad inside the limits of the city, and when it left such limits it could go through private property in the suburbs and through the balance of the country to other cities and towns, carrying freight cars, and doing "all things incident to railroad business" performed by ordinary railroads. If such was the intention, every time such railroad passed through an incorporated town or city it would be a street railroad, compelled to run on its streets, and between that town and the next it would be an ordinary railroad. In such case, to obviate its being a street railroad, between its termini it would have to go around any intervening

cities or towns, because, under the laws of the state and the Constitution, it would be street railroads when it was within the corporate limits of the towns through which it was to pass. "Street railroads" ordinarily mean surface roads. They do not usually have their rails above the surface so as to impede or inconvenience travel across them by persons or vehicles, even if they could lawfully do so. Street railroads do not impose additional servitude. Damages cannot be obtained by owners of land abutting on the streets through which they go. This is not true with ordinary railroads. Street railroads are not supposed to do a regular freight business, as ordinary railroads. They do not impede traffic along the streets or cause congestion, but they relieve passenger traffic and prevent congestion, just as hacks and buses do. Their right to run along streets does not depend on the will of the owners of abutting property, but on the will of the city or town authorities. The Constitution itself provides: "The General Assembly shall not authorize the construction of any street-passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities." The kind of railroad intended by this section was the kind named—a street and suburban railroad. When it reached the country, it meant the suburbs, and, while the statute says the provisions applying to ordinary railroads shall apply to street railroads in the country, the restriction preceding still governs, that they shall have only the powers necessary and appropriate. When in the suburbs they have the right to run on the highways, but, to do so, must get the consent of the county authorities as would an ordinary railroad. A street railroad is designed mainly to carry passengers from one part of a city to another, stopping at street crossings and other points and picking up passengers here and there, relieving congestion. This design could not well be carried out by having a passenger train of a street railroad stop at street crossings to carry passengers from one part of an incorporated town to another in towns through which they passed in trying to speed on to other towns and to its final destination. Ordinary railroads generally do not provide a way to convey their passengers on street railroads to another part of the city after they land them in the city. They usually end their obligation and accommodation when they safely land a passenger at their depot or station in the city and afford the passenger a safe way to the street. Nor do they generally carry passengers from any part of a city to their depot or station from which their trains depart. Hence there is no close kinship between the two classes of railroads, and there is no need or desire by one to own and operate the other. The operation or ownership might to some extent conduce to its welfare, but it would be in a very small degree. But the writer does not think it was

ever intended by the law referred to that a street and suburban railroad should connect distant points.

Unincorporated suburbs are sometimes as densely populated as the city near whose limits they lie, and have highways and cross-highways, just as the city. Are street and suburban railways ordinary railroads in these suburbs, with the right to condemn private property and all of the rights and powers incident to ordinary railroads up to the city limits, to become street railroads with all of these powers, rights, and incidents lost when these suburbs are incorporated into the city, or into a separate municipality? But to hold that all of the provisions applicable to ordinary railroads are applicable to street railroads when they are out of the limits of a city or town would make them street railroads when within an incorporated city or town and ordinary railroads when without. The writer does not mean to say that such a corporation could not be created by the Legislature; but the intention to create such a corporation is not manifested in the section above referred to, but rather the intention is shown to create a corporation with its railroad on the streets of a city and the highways to and through suburbs. It was intended that street railroads should run only on the streets of an incorporated town or city, as the name "street railroad" indicates, and as provided for in the section above quoted, which says that the streets on which the street railroad shall run must be pointed out in the application for a charter. If the suburbs of a city are not contiguous to the city, they are very near it, and a suburb must be so thickly populated as to insure some travel, or a street railroad company would not want to operate a line to and through it. A suburb generally has a highway through it to the city limits by the nearest and most practicable route, and along this route would generally be the most practicable and desirable one for a street railroad to run, carrying its passengers to and from the city and portions of the suburbs and space intervening, if there is such space or country intervening. If a suburb is not contiguous to a city, it cannot be far away, or it would not be a suburb. If it is not contiguous to the city, the short distance between having a highway, this highway through the suburbs having residents on its sides would generally make it the most practicable and desirable route for a street railroad to run in order to promote its interests. Street railroads have usually gone routes and to places thickly populated. Generally they have not preceded, but followed, civilization and populated localities.

The act of 1903 (Acts 1903, p. 38), amending section 2180 of the Code, provides that: "Nothing in section 2176 of said preceding division, which provides that the general direction and location of railroads sought to be constructed in this state shall be ten miles

from a railroad already constructed or laid out and selected to be constructed, shall be or be held to be applicable to electric street, suburban or interurban railways, or the selection of the route or the construction of the same." The law provides for the incorporation of two distinct classes of railroads; one as an ordinary railroad, which is an interurban railroad, and the other as a street and suburban railroad. But for the passage of this act no interurban railroad could run within 10 miles of another when 15 miles from its terminus; but, under this act, any interurban railroad which is operated with electricity can run within this distance of another. Here provision is made for an interurban railroad operated with electricity to run in close proximity to another interurban railroad, and it can do the business usually done by street and suburban railroads. An electric street and suburban railroad could likewise run within 10 miles of an ordinary railroad when 15 miles from its terminus, when running to or through suburbs situated 15 miles from its terminus. Here provision is made for the two classes of railroads, the street and suburban, or the interurban, to run within 10 miles of another railroad when such interurban or street and suburban railroad is operated with electricity. The defendant in this case has never been incorporated as an interurban railroad. It has only been incorporated as a street and suburban railroad, and its powers and franchises are confined to those given to street and suburban railroads. Until the defendant is incorporated as an interurban railroad—that is, as an ordinary railroad—it cannot, under its charter, in the opinion of the writer, ever do an interurban business, unless an act of the General Assembly is enacted giving street and suburban railroads the right to do an interurban business. It being incorporated solely as a street and suburban railroad under the law distinctly providing for this class of corporations, it can only do a street and suburban business, and the law never intended for the power of condemnation to be conferred on a street and suburban railroad operating on the streets of a city and the suburbs thereof, and over the different highways and cross-highways of the suburbs. Street and suburban railroads operate on the highways and cross-highways of thickly populated suburbs, and the power of condemnation was never intended to be given them in cities, towns, or suburbs. An interurban railroad does not operate, as a rule, on but one highway in a suburb, or city, and it has the power of condemnation everywhere, whether in the city or out of the city. At the time of the passage of the act of 1894, an interurban railroad doing a business such as a street and suburban railroad does was not in the contemplation of the Legislature, but an electric railroad doing a business of this kind can operate under the act of 1903 in close proximity to another interurban railroad in



going from one city or town to another. To do an interurban business is not a necessary and appropriate business for a street and suburban railroad. The law creates two distinct classes of railroads and provides for chartering them. As two distinct classes, one is an "interurban," which is an ordinary railroad, and the other is a "street and suburban railroad," and there is no law providing that a street and suburban railroad can do an interurban business.

As the power of condemnation cannot be conferred except expressly, or by necessary implication, and as the act says that only such powers and franchises shall belong to street railroads as shall be necessary and appropriate thereto, it cannot be said, according to the ordinary rules of interpretation, that this power is conferred expressly or by necessary implication. The courts would have to decide whether or not such power was a necessary and appropriate power for such railroads to possess. If a railroad possesses the power, authority can be given the courts to decide whether or not in particular instances it is necessary and appropriate for it to exercise it; but authority cannot be given the courts to confer the power of condemnation by deciding that such power shall belong to a certain class of persons because it is necessary and appropriate in all instances for such persons to possess it. The Constitution declares that only the Legislature can confer such power.

The Legislature intended for street railroads to have the right to run on highways to and through suburbs when out of the city or town limits. The writer does not mean to say that they cannot leave the highway when in the suburbs, but when they do they must obtain a right of way by some method other than by condemning property. The provisions of law regarding ordinary railroads in the country necessary or appropriate for street railroads in the country shall belong to street railroads in the country. Street and suburban railroads have no more power of condemnation than persons or companies operating hacks, omnibuses, and automobiles for the purpose of taking passengers from one part of the city or suburbs to another.

Judgment reversed. All the Justices concur, except HOLDEN, J., who dissents in part.

#### SOUTHERN RY. CO. v. HOGAN.

(Supreme Court of Georgia. July 24, 1908.)

##### 1. RAILROADS — INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE.

One who knowingly and voluntarily takes a risk of injury to his person or property, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety and that of his property, cannot hold another liable for damages from injuries thus occasioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1294.]

##### 2. SAME.

Applying this rule to the testimony of the plaintiff and that of the other witnesses introduced in his behalf, and considering all the testimony in the light most favorable to him, a verdict in his favor was without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Actions by W. J. R. Hogan against the Southern Railway Company. The cases were consolidated. Judgment for plaintiff, and defendant brings error. Reversed.

Hogan brought two suits against the Southern Railway Company for damages, one being for personal injuries to himself, and the other for injuries to his wagon, harness, and team, all caused by the same acts of alleged negligence of the defendant. The cases were consolidated and tried as one. A verdict was rendered for the plaintiff, and a writ of error sued out by the defendant brings under review the overruling of its motion for a new trial. According to plaintiff's testimony and that of other witnesses introduced by him, the facts, so far as are here material, were as follows: Plaintiff was shipping wood over defendant's road from one of its stations, and had requested the station agent, Grant, to have a car for the wood placed near the end of a side track. Grant promised to do this, but the car was not left at that place, but on the side track nearly opposite the depot and east of the main line. Prior to the day plaintiff and his property were injured, he had hauled 18 loads of wood to be shipped, and placed it on an embankment opposite to and east of the point where the car in question was left the afternoon before. It was perfectly safe to load the cars from the east, or embankment, side, but required more time than to load from the west side, where the track was level with the ground. The distance between the main line and the side track east of it was estimated by plaintiff to be five or six steps, wide enough, as he testified, to turn a wagon in without driving over either track; but, according to the testimony of several of his witnesses, the space was about eight or ten feet wide, and too narrow to turn a wagon in without driving on the tracks. Plaintiff's witnesses, who testified on the point, all stated that it was obviously dangerous to drive a team between the tracks and to the door of the car that was to be loaded, as trains frequently passed over the main line, and would frighten almost any team standing between the tracks. Plaintiff himself testified: That he did not much like to drive in there, as it would be dangerous, if he did not get warnings, and a train should pass before he could get the team out; that he knew it was a risk he was taking when he drove in there; that before driving in he always inquired of the station agent, or of one or the other of two young men, who it was shown by the evidence of plaintiff's

witnesses were studying telegraphy under the agent at the depot and delivering and receiving freight for the agent in his absence, how long it would be before a train was due to pass; that on the day he was injured, and previous to the occurrence in question, he had hauled five loads and loaded them on the car from between the tracks; that on the morning of the day when he was injured, before driving in between the tracks, he had asked Thompson, one of the young men, how long it would be before a train would pass, and upon the information that he had received had driven in, but it turned out that Thompson was mistaken in his estimate of the time that would elapse before the coming of a train, as one came by sooner than Thompson said it would and frightened a mule of plaintiff's team, but he and the driver succeeded in holding it; and that, before driving in with the last load, he asked Thompson "if the train was due," and he said he supposed "not for 10 or 15 minutes," to which plaintiff replied: "If it don't come before 10 minutes, I can get the load off and out." Neither said anything more. Plaintiff thought he and his driver could unload in 5 minutes, but his driver, Burrell, who was helping him, thought it would take them about 10 minutes to unload. Burrell testified that he told plaintiff that he did not like to load from between the tracks, that it was safer to load on the other side of the car, from the embankment, and that plaintiff replied "he didn't have time to handle it so much." Burrell further testified that plaintiff had been told by his son, that morning, that it would be better to load from the top of the cut, and the son "said something to him about its being dangerous." Plaintiff testified that "it was a little bit dangerous" to load from between the tracks, but that he did not think "it was dangerous with proper warning," and that "it was easier to unload the wood from that side than it was to carry it up on the hill and unload it." After plaintiff had made the inquiry of Thompson, Burrell drove between the tracks, to the door of the car, and he and the plaintiff began throwing the wood from the wagon into the car, and, when they had unloaded about two-thirds of it, a fast train, not scheduled to stop at that station, approached, running about 50 miles an hour. It blew no signal whistle for the station, nor blow-post whistle for the public crossing, a short distance north of the depot. Plaintiff first saw it when it was about 75 or 100 yards away, coming out of a cut and around a curve, and too late to get the team out. The whistle blew when about 75 yards away. The mule which was being held by Burrell became frightened, and, by rearing and plunging in its efforts to get away, backed the wagon on the main line, causing it to be struck and the team killed, and the plaintiff injured. There was nothing in the evidence submitted by the defendant that tended to aid the plaintiff, and it is unnecessary to set forth any of it.

John J. Strickland, for plaintiff in error.  
Thompson & Bell and Arnold & Arnold, for defendant in error.

FISH, C. J. (after stating the facts as above). Under the evidence in this case, viewed in the light most favorable to the plaintiff, we think it clear that a verdict in his behalf was wholly unwarranted. That no person can recover damages from a railroad company for injuries to himself or his property where the same are caused by his own negligence, or where by ordinary care he could have avoided the consequences to himself caused by the company's negligence, are familiar declarations of our Civ. Code 1896, §§ 2322, 3830, which have been applied by this court in a great number of cases. We will refer to only a few of them which we consider to be directly in point here. In *Samples v. Atlanta*, 95 Ga. 110, 22 S. E. 135, at page 112 of 95 Ga., at page 136 of 22 S. E., Justice Lumpkin refers to "the well-known rule of law that one who voluntarily attempts a rash, imprudent, and dangerous undertaking is to be presumed to have assumed the risk incidental thereto, and cannot afterwards complain if he is injured." So, in *City of Columbus v. Griggs*, 113 Ga. 597, 38 S. E. 953, 84 Am. St. Rep. 257, it was held: "One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence." It was said in the opinion: "Certainly a man cannot heedlessly rush into grave peril of the existence of which he is perfectly aware, and then hold any one else, whether negligent or not, responsible for the consequences." Again, in *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, Justice Cobb, delivering the opinion, at page 712 of 113 Ga., at page 308 of 39 S. E. (54 L. R. A. 802), said: "If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to prevent the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed"—citing a number of cases. And, further, the learned justice said: "If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably appre-

hend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained, and if he fails to do this, and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury." Another case directly in point is *Mansfield v. Richardson*, 118 Ga. 250, 45 S. E. 269, wherein it was held: "In cases of personal injuries, the plaintiff as a conscious human agent is bound to exercise ordinary care to avoid the consequences of the defendant's negligence, by remaining away, going away, or getting out of the way of a probable or known danger." And that "He can 'avoid' danger by refraining from going into what he knows is an unsafe place." On the same line are: *May v. Central R. Co.*, 80 Ga. 363, 4 S. E. 330; *Atlanta & Charlotte R. Co. v. Leach*, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47; *Evans v. Charleston R. Co.*, 108 Ga. 270, 33 S. E. 901; *Hicks v. Georgia Southern R. Co.*, 108 Ga. 304, 32 S. E. 880; *Steele v. Central R. Co.*, 123 Ga. 237, 51 S. E. 438, and cases cited.

As to the other features of the present case, the rulings made in the following cases are controlling: In *Coleman v. Wrightsville R. Co.*, 114 Ga. 386, 40 S. E. 247, it was held: "A railroad company is under no duty to a person unloading merchandise from a car on a side track to a wagon, to which a horse is hitched, to comply with the requirements of Civ. Code 1895, § 2224, respecting the giving of signals and checking the speed of the train before reaching a public crossing." And in *Chalkley v. Cen. Ry. Co.*, 120 Ga. 683, 48 S. E. 194, the well-settled rule was stated that: "Where a railroad company's servants make unusual noises in the operation of one of its trains, and there is no necessity for the making of such noises, the company is liable for injuries resulting in consequence thereof. [Citing cases.] But unless it is shown that the noise made was unusual and unnecessary at the time when and place where it was made, the railroad company will not be liable in damages to the person injured, even though such noise was the proximate cause of the injury. [Citing cases.]" In the present case, the plaintiff attempted a rash, imprudent, and dangerous undertaking. He admitted on the trial that he knew that it was risky, and that it was dangerous if he failed to get the usual warnings of the approach of the train. He knew it was perfectly safe to load from the other side, and his driver informed him that he preferred to load from the other side because of the danger of going between the tracks, and testified that plaintiff's son had suggested to him to load from the other side. Plaintiff's witnesses testified that driving

between the tracks to load was obviously dangerous to any one. Plaintiff must have known that, even if the opinion which the young man in the office gave him as to the length of time before another train would pass should be correct, he would have barely time before its arrival in which to drive in between the tracks, transfer the wood from his wagon to the car, and drive his team out to a place of safety. Besides, he had reason to apprehend that the supposition of his informant as to such time might prove to be unreliable, as he had, on the same day, given him wrong information as to the time when the next train would arrive, by reason of which plaintiff had been caught, upon the arrival of the train, in the same close place, and he knew, from his experience then, that it might be impossible to control his mule, if the team were again there when a train passed by. From this very recent experience he ought to have known that he could neither rely upon the supposition given him as to the time before another train would arrive, nor upon his ability to control his mule in case the train should pass while the wagon and team were between the tracks. According to plaintiff's own testimony, there was no necessity whatever for his taking the risk that he did, for he testified that he drove in and loaded from between the tracks, because it was easier for him to load from there, and he could save time by doing so. Failure of the railroad company to comply with the statute as to signals, etc., in reference to public crossings, was not negligence relatively to the plaintiff, and there was no evidence that any unusual and unnecessary noise was made by the train which frightened his mule, whose efforts to run away caused the train to come in contact with the wagon and team, resulting in the damages for which the actions were brought. The plaintiff having knowingly and voluntarily taken the risk of so obvious a danger, and the act of taking it being so manifestly a failure to exercise ordinary care and diligence for his own safety and that of his property, he could not hold the railroad company liable for the resulting damages, and the court should have granted a new trial on the general ground that the verdict was without evidence to support it.

There are many grounds in the motion for a new trial, but it is unnecessary to deal with the others specifically.

Judgment reversed. All the Justices concur.

HENSLEE et al. v. McLARTY et al.

(Supreme Court of Georgia. Aug. 11, 1908.)

#### 1. INJUNCTION—DISCRETION OF COURT.

Under the facts as they appear in the record, there was no abuse of discretion in refusing to grant an injunction in this case.

## 2. SCHOOLS AND SCHOOL DISTRICTS—TAXATION—CONSTITUTIONAL REQUIREMENTS—UNIFORMITY.

The act approved August 23, 1905 (Acts 1905, p. 425), making provision for local taxation for district schools, as amended by the act of August 21, 1906 (Acts 1906, p. 61), was attacked as being unconstitutional on the following grounds: (a) "Because they are in conflict with and violate section 4, art. 8, now section 5909 of the Civil Code of 1895 of said state, as [and] will also conflict with and violate section 3 of the same article of the Constitution of this state (Civ. Code 1895, § 5908). That there is no express or implied power given in this section authorizing a levy or collection of the district school tax, mentioned in either of said acts of the Legislature, and the acts, in so far as they relate to the laying out of the counties in the state into school districts and levying a tax to supplement the public school funds, are unconstitutional and void." (b) "That said act also violates and is in conflict with that part of the Constitution of this state which provides that all taxation shall be uniform within the territorial limit of the property to be taxed. It is not uniform. It is not a levy of tax by the county of Douglas, or by any municipal corporation in said county, or within any other political division recognized or permitted by the Constitution of the state of Georgia. It is not within any county militia district, or any other political division of the state as recognized by the Constitution thereof." (c) "That both of said acts of the Legislature, above set out, are unconstitutional, null, and void, so far as the same relates to district schools, for the reason that the acts establish new political divisions there than those recognized and guaranteed by the Constitution of the state, and in no way recognized by previous or existing political divisions of the state, that can be clothed with authority under the Constitution to levy a tax for school purposes." Such an attack upon the acts in question is without merit, in view of the provisions of the constitutional amendment adopted in 1903, authorizing local taxation for public schools.

## 3. APPEAL AND ERROR—REVIEW.

Other allegations were made in the petition, to show that the acts of the Legislature above referred to were repugnant to the Constitution, but they were too vague and indefinite to raise any constitutional question for decision by this court.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action between M. L. Henslee and others and G. T. McLarty and others. From the decree, M. L. Henslee and others bring error. Affirmed.

J. S. James, for plaintiffs in error. Roberts & Hutcheson, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

BRINKLEY et al. v. BELL et al.

(Supreme Court of Georgia. Aug. 11, 1908.)

## 1. DEPOSITIONS—ADMISSIBILITY IN EVIDENCE.

Where depositions sued out under Civ. Code 1895, § 5316, have been executed and returned to the court, as prescribed in Civ. Code 1895, § 5317, the same are not inadmissible because not signed by the witness, or because it does not affirmatively appear from the commis-

sioner's certificate thereto that he was a sworn officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 266, 267.]

## 2. DEEDS—EVIDENCE—ADMISSIBILITY—DELIVERY.

Where the question under investigation is whether or not a deed was delivered, it is not error to allow a witness, who states that he was present at the time of its execution, to testify: "It [the deed] was signed and sealed, and to the best of my belief it was delivered, February 4, 1867"—and, further: "Simeon Bell, William B. Hankinson, Simeon Wallace, J. P., and Henry Bell, a son of Simeon Bell, were present, and to the best of my recollection Seaborn J. Bell was also there." Franklin v. Macon, 12 Ga. 257.

## 3. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE APPEARING.

Even if the testimony of a witness that the deed under which the plaintiff claims title was inclosed in a wrapper, and "the marking on the back of the wrapper containing the papers was in the handwriting" of the life tenant named in the deed, was incompetent, the error was harmless, where the only purpose of the testimony was to show the delivery of the deed, and there was other and undisputed evidence sufficient to show delivery of the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

## 4. EJECTMENT—EVIDENCE—ADMISSIBILITY.

Where the plaintiff offered in evidence a certain deed, produced by the defendants under notice, for the purpose of showing that both parties claimed from a common source of title, it was no sufficient objection to the admission of the deed in evidence that an order of the ordinary attached thereto, purporting to confirm the deed, was detached when the deed was offered in evidence; the evidence having been offered, not for the purpose of proving the validity or invalidity of the deed, but that the defendant claimed from the same grantor as the plaintiff.

## 5. REMAINDERS—ACTIONS BY REMAINDERMEN—TIME TO SUE AND LIMITATIONS.

Where a suit for land is brought by remaindermen, and the plaintiffs introduce deeds from the life tenant to the defendants, for the purpose of showing a common source of title, and the evidence does not disclose that the defendants had any other title or right of possession except that derived from the life tenant, it is not error to exclude evidence of possession by the several grantees from the life tenant before the falling in of the life estate, where the purpose is to show prescription in the defendants. The remaindermen do not have their cause of action until the death of the life tenant, and prescription does not begin to run against them until that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Remainders, § 10.]

## 6. EJECTMENT—EVIDENCE—ADMISSIBILITY.

An order from the ordinary, purporting to confirm a sale of land, and reciting therein that the land was subject to and liable to be sold under certain liens, "and by the sale aforesaid a portion of the homestead land of said [grantor] is reserved and saved to the use of said family, as well as the expense of a judicial sale of said property by the sheriff," is not admissible in evidence for the purpose of establishing that the grantor in the deed did not know of the existence of the deed under which the plaintiffs claim title, or that, if he did know of such deed, he had refused to accept it.

## 7. SAME.

Under the rulings made in the case when before this court on a former occasion (126

Ga. 480, 55 S. E. 187), and the undisputed evidence submitted on the trial, there was no error in directing a verdict.

(Syllabus by the Court.)

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action between L. G. Brinkley and others and H. O. Bell and others. From the judgment, Brinkley and others bring error. Affirmed.

Johnston & Fullbright and Lamar & Callaway, for plaintiffs in error. Brinson & Davis, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

### JONES v. BANK OF CUMMING.

(Supreme Court of Georgia. July 25, 1908.)

COUNTIES—CONTRACTS—ENTRY ON MINUTES OF ORDINARY—NECESSITY.

A petition for a mandamus to compel the ordinary of a county to issue a warrant to its treasurer in favor of a contractor, who had built and completed a courthouse for the county, in pursuance of a written contract between the ordinary and the contractor, and to deliver such warrant to the petitioner, who had furnished the money to the contractor for the erection of the building, under contract between petitioner and the contractor that the latter would give orders on the ordinary for the delivery to the petitioner of warrants issued by the ordinary for amounts due the contractor, was subject to the ground of a demurrer that set up that it did not appear from the petition that either the contract between the ordinary and the contractor, or the written order given by the latter to the petitioner on the ordinary for the warrants, and accepted in writing by the ordinary, was entered on the minutes of the ordinary, although it did appear that the contractor had fully performed his contract, and that the building had been accepted by the ordinary and used ever since by the county, and that a fund for the payment of the costs of the erection of the courthouse had been levied and collected by taxation, and a sufficiency thereof to pay the warrant was in the county treasury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 183.]

(Syllabus by the Court.)

Error from Superior Court, Forsyth County; Geo. F. Goher, Judge.

Application for mandamus by the Bank of Cumming to be directed to H. V. Jones, as ordinary of Forsyth county. Application granted, and defendant brings error. Reversed.

In August, 1907, the Bank of Cumming applied for a mandamus to compel H. V. Jones, as ordinary of Forsyth county, to issue an order or warrant on the treasurer of such county for the sum of \$3,600, and to deliver the same to the petitioner. The substance of the petition, in so far as here material, was: On January 9, 1905, Jones, as ordinary, entered into a written contract, a copy of which was attached to the petition, with Fred Wagener, under the terms of which Wagener was to build for the county of Forsyth a courthouse, according to drawings and specifications furnished by a named architect, for the price of

\$24,000, which sum was to be paid in six different installments as the work progressed; the ordinary to issue warrants on the county treasurer for the amounts of the installments, and the sixth installment to be paid when the building should be fully completed and accepted by the architect and the ordinary. The building was to be completed by December 1, 1905, but the time was extended to March —, 1906. While the work was in progress, and up to the time of its completion, the bank furnished Wagener with money to enable him to procure material and carry on the work of building, under an express contract with him that the county warrants to be issued to him in payment for the work should be delivered to the bank, collected by it, and applied in payment of any and all advances made by the bank to him. On January 5, 1906, Wagener gave to the bank a written order to Jones, as ordinary, requesting him to pay to the bank the two remaining warrants which would be due Wagener as the fifth and sixth payments on the building. Jones, as ordinary, accepted this order in writing, and therein agreed to issue warrants for the fifth and sixth payments, as soon as due, and deliver the same to the bank. Upon the faith of such order and the acceptance of the same by Jones, as ordinary, the bank advanced to Wagener "the full amount coming to him upon said contract." Wagener completed the building in accordance with the terms of the contract about March 10, 1906, and it was accepted by the architect and the ordinary, and the ordinary and the other officers entitled by law to offices in the courthouse moved into the building, took possession of the same, and it has been occupied and used as the courthouse of the county ever since. The ordinary issued and delivered to the bank a warrant on the county treasurer for the amount due Wagener on the fifth payment, but refused to issue and deliver to it a warrant for the amount due Wagener on the sixth and last installment, though the bank made written demand upon the ordinary to issue and deliver to it such warrant for the last installment, and though the money to pay the same had been raised by taxation during the year 1905, and was then in the treasury and had been since January 1, 1906. The defendant demurred to the petition, and filed an answer denying many of its material allegations. One of the grounds of demurrer was that it did not appear from the petition that either the contract between the ordinary and Wagener for the erection of the courthouse, or the order given by Wagener to the bank and accepted by the ordinary, had ever been registered or entered upon the minutes of the ordinary. By consent of the parties, the case was submitted to the judge, to be heard and decided by him, in vacation, on all questions of law and fact. The judge overruled the demurrer, and upon the evidence granted a mandamus absolute; requiring the ordinary to issue and deliver to the bank a warrant on the treasurer of the coun-

ty for the sum of \$3,600, with interest, the amount due Wagener on the sixth installment, to which rulings Jones, the ordinary, excepted.

Brooke & Henderson, for plaintiff in error. H. L. Patterson, for defendant in error.

FISH, C. J. (after stating the facts as above). In the view we take of the case, it is necessary to deal with only one point, and that is the one raised by the ground of demurrer that it did not appear from the petition that either of the contracts relied on as a basis for the mandamus was entered upon the minutes of the ordinary. It appears from the judgment rendered that the trial judge was of the opinion that, as the bank had furnished the money to Wagener to enable him to erect the courthouse, the ground in question of the demurrer was not meritorious. In view of the prior decisions of this court, we are constrained to differ with our learned brother of the trial bench, who was probably misled by the language of Justice Lewis, in *Milburn v. Glynn County*, 109 Ga. 473, 34 S. E. 848, where, at page 476 of 109 Ga., at page 850 of 34 S. E., he said: "If it were an original proposition before this court, the writer, speaking for himself alone, would not be prepared to say that such an omission of duty upon the part of county authorities in failing to comply with the statute requiring the record of a contract made with the county would operate to render the contract absolutely void. A distinction should be drawn between the exercise of powers by municipal or county authorities that are ultra vires, and the omission of such officers to conform strictly to the law touching the execution of a contract they clearly have power to make. In this case the duty imposed by the law to enter the contract upon the minutes devolves upon the county officials themselves. The party contracting with the county has no custody or control over its minutes, and after making his contract in accordance with law, and complying strictly with its terms, it would, indeed, seem a hard rule that he should be deprived of his compensation, simply because of an omission of duty on the part of a county official. I am inclined to think that a safer rule to adopt in the adjudication of such a case would be to construe the failure to comply with such a provision of the law a mere irregularity, especially as to persons who have acted in good faith; and, from the limited investigation made on the subject, I think that the weight of authority sustains this view." Authorities are then cited tending to uphold the individual view expressed by the learned justice, who then proceeded as follows: "But the question involved in this case is not an open one before this court. In *Pritchett v. Inferior Court*, 46 Ga. 462, it appears that a suit was brought against a county on a bond given, after the adoption of the Code, by the justices of the inferior court. It was there held that the

pleadings must show affirmatively that the contract was entered upon the minutes of the inferior court, and that the contract would not be valid under section 527 of the Political Code of 1862, if good in other respects. Section 527 of the Code, referred to in that decision, is in the exact language of section 343 of the present Political Code of 1895, except that the word 'ordinary' is substituted for 'justice of the inferior court.' The decision in *Akin v. Ordinary of Bartow County*, 54 Ga. 59, does not indicate any modification of this rule laid down in the *Pritchett Case*, above cited. On the contrary, it is expressly declared that contracts with the county must be in writing and entered on the minutes of the court of ordinary, and it will be seen in the opinion, on page 69, that the principle decided in 46 Ga. was adhered to and reaffirmed. In that case it was held that there had been a compliance with the 498d section of the Code."

Section 493 of the Political Code of 1873, referred to in the *Akin Case*, was the same as section 527 of the Code of 1862 and as section 343 of the present Political Code. That section declares: "All contracts entered into by the ordinary with other persons in behalf of the county must be in writing and entered on their minutes." In *Pritchett's Case*, the action was brought in the short, or Jones, form of pleading, on a bond issued to plaintiff's intestate, Conyers, by the inferior court of Bartow county, in behalf of the county. A copy of the bond was attached to the declaration. The following recital appeared in the bond: "Be it known that the county of Bartow owes to Bennett H. Conyers or bearer the sum of nine thousand seven hundred and sixty-five dollars, for the amount paid by him this day into the treasury of said county, for the support of soldiers' families, in accordance with the provisions of an order passed by the inferior court of said county on the 6th day of February, 1863, which sum of money the said county of Bartow promises to pay the said Bennett H. Conyers or bearer on or before the 1st day of January, 1864," etc. "In statutory complaint, the writings declared upon, copies thereof being annexed to the declaration, are a part of the pleadings," etc. *Allen v. Young*, 62 Ga. 617. So in *Pritchett's Case* it was, in effect, alleged in the declaration that the county had received the full benefit of the consideration paid by plaintiff's intestate into the county treasury, which moved the county authorities to execute the bond. Moreover, the justices of the inferior court of Bartow county were expressly authorized to issue the bond sued on by Act Dec. 17, 1861 (Acts 1861, p. 30), and act Feb. 23, 1866 (Acts 1865-66, p. 41), authorizing such justices to settle or compromise the bonds issued under authority of the first mentioned act, was a distinct recognition of the legality of the same. *Akin v. Ordinary of Bartow County*, 54 Ga. 59. The decision in the *Pritchett Case*, sustaining the demurrer

to the declaration, on the ground that it did not appear from the declaration that the bond sued upon had been entered upon the minutes of the justices of the inferior court, is an express ruling that the bond was not valid for that reason, though it might otherwise be a valid contract, and though it appeared from the declaration that the money for which the bond was issued had been paid by plaintiff's intestate into the county treasury; the county thereby getting the full benefit of the consideration for the issuance of the bond. The ruling in Pritchett's Case has never been overruled or modified, but has been followed in *Akin v. Ordinary of Bartow County* and in *Milburn v. Glynn County*, supra, and also in *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533, though it did not appear in any of these cases, except *Akin's*, that the county had received the full benefit of the consideration of the contract sued upon, and in the *Akin Case* it was held that the provisions of the statute were complied with by entering on the minutes of the inferior court of the county the order authorizing and directing the issuance of the bond upon which the suit was based. It did not appear that the order had been so entered in Pritchett's Case.

While the decision in the Pritchett Case does seem, as said by Mr. Justice Lewis in the opinion in the *Milburn Case*, to be a hard rule in a case of the present character, still a reason for so strict a construction of the statute may be found when we consider the purpose of the statute, as he there states it. He says: "The object of the law requiring an entry of such contracts upon the minutes is to give information easily accessible to the public, as to the character of contracts being made by the county authorities." And, we may add, it is desirable that this information should be accessible to the public before the party contracting with the county has entered upon the performance of his undertaking. It is obvious that if the contract can be withheld from the minutes and yet be enforceable against the county, when it has been performed by the other contracting party, this purpose of the statute could be defeated in any and every case in which the authority, or authorities, representing the county and the party contracting with it should desire to do so. Persons contracting with a county are presumed to know the law in reference to such contracts, and they can protect themselves against repudiation of the contract by the county, after performance on their part, by refusing to perform until the ordinary, or county commissioners, as the case may be, have complied with this requirement of the law, and can, if necessary, enforce compliance therewith by mandamus.

A careful reading of *Peed v. McCrary*, 94 Ga. 487, 21 S. E. 232, will show that there is nothing in that case in conflict with the ruling in Pritchett's Case; but, even if the two

cases were in conflict, the older case would be controlling. In the case in 94 Ga., it appeared that the treasurer of a county, upon the recommendation of the grand jury, borrowed \$500 from McCrary, with which to defray lawful expenses of holding court. About a year subsequently, and after this treasurer had gone out of office, the judge of the county court, who had charge of the financial affairs of the county, drew a warrant on the then treasurer, directing him to pay to McCrary the \$500, with interest thereon. Upon the refusal of the treasurer to pay the warrant, McCrary applied for a mandamus to compel him to pay the same. The treasurer answered, setting up that the county judge had no authority to draw the warrant, and attacking the act establishing the county court. It appears from the statement of facts in the case, as reported, that the answer further alleged: "That while the ordinary may have instructed the former treasurer to borrow the \$500 to defray lawful county expenses, there is no order or judgment of the ordinary on record, permitting or directing that this be done by the treasurer or any other person; and it is submitted that, had such order been made, it would have been illegal and void, for, while the Constitution authorizes the General Assembly to confer the right and authority on counties to borrow money, no act of the General Assembly has been passed putting said constitutional provision in force." A mandamus absolute was sustained in that case; but it will be noticed that there was no contention that the contract between the former treasurer and McCrary, under the terms of which the latter loaned his money to the county, had not been entered upon the minutes of the ordinary, or upon the minutes of the county court, and this court, in deciding the case, made no reference whatever to the law requiring contracts entered into by the ordinary with other persons in behalf of the company to be entered on the ordinary's minutes, but merely ruled as follows: "Although it may be true that the Constitution, of its own vigor, does not confer power to borrow money by temporary loans to supply casual deficiencies of revenue, yet where the money of a lender has actually been applied to the legitimate uses of a county—that is, to objects to which county revenue may rightly be devoted—it is lawful to repay the loan out of the county treasury when funds for the purpose are on hand, with 7 per cent. interest thereon." Nor was the point which we have decided is controlling in the present case involved in *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149.

Our conclusion is that the court erred in overruling the ground of demurrer with which we have specifically dealt, and the judgment must therefore be reversed.

Judgment reversed. All the Justices concur.

# ALABAMA GREAT SOUTHERN R. CO. v. HARDY.

(Supreme Court of Georgia. Aug. 11, 1908.)

## 1. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action against a railroad company for the negligent killing of a person, the petition is framed in separate paragraphs consecutively numbered, in which it is plainly and distinctly averred that such person was killed by the operation of the defendant's locomotive and cars, and the answer to these paragraphs only denies the allegations "so far as the negligence of this defendant or its employees is charged," the killing of the person by the defendant's locomotive and cars is not a controverted fact, and any error in receiving evidence tending to establish this fact is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4154, 4155.]

## 2. TRIAL—RECEPTION OF EVIDENCE—RIGHT TO WITHDRAW EVIDENCE.

A party who voluntarily offers the testimony of a witness taken by interrogatories, some of which testimony is beneficial to his adversary, where no objection is made to the interrogatories being received in evidence, will not be permitted, over the protest of the opposite party, to withdraw the interrogatories from the consideration of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 137.]

## 3. RAILROADS — INJURIES TO PERSONS ON TRACK—ACTIONS—INSTRUCTIONS.

The Tennessee statute requiring the observance of certain precautions by railroads at designated public crossings, as construed by the Supreme Court of that state, does not apply to switching operations within the yards of a railroad company; but where there is no evidence that the injury complained of happened in a railroad yard, there was no error in instructing the jury that the railroad company would be liable in damages for a violation of the statute.

## 4. SAME.

Where, in an action based in part on a statute of the state of Tennessee, which requires that every railroad company in approaching a public crossing shall keep the engineer, fireman, or some other person always on the lookout ahead, the defendant introduces evidence tending to show compliance therewith, it is error to charge the jury that: "To comply with this statute the lookout must be in such a position on the locomotive as to enable him to see ahead, and he must be vigilant and watchful. If from that position the object was visible and yet not seen, the jury would be well warranted in finding that the person was not on the lookout; that he was not vigilant on the lookout. If he does not with due care and vigilance see what could have been seen, he would not be in the discharge of his duty." Such an instruction is an expression of opinion as to contested facts.

## 5. SAME.

The charge on the measure of damages was not subject to the criticism made thereon.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Flite, Judge.

Suit by Katherine C. Hardy, as administratrix of Earnest F. Hardy, deceased, against the Alabama Great Southern Railroad Company. Judgment for plaintiff and defendant brings error. Reversed.

This was a suit by Katherine C. Hardy, as administratrix of Earnest F. Hardy, against

the Alabama Great Southern Railroad Company to recover damages for the wrongful death of the plaintiff's intestate, caused by the running of the engines and cars of the defendant. It was alleged that while the deceased was going over a public crossing in the city of Chattanooga, state of Tennessee, in the exercise of due care, "a train of the defendant approached and dashed upon the crossing in a negligent manner and upon and over the decedent and mangled and killed him." Specific acts of the defendant's negligence were alleged. The plaintiff also specially pleaded sections 1574, 1575 of Shannon's Code of Tennessee of 1896, which requires the overseers of every public road crossing by a railroad to place at each crossing a sign marked, "Look out for the cars when you hear the whistle or bell," and requiring the following precautions to be observed by railroads: On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing, and at short intervals till the train has passed the crossing; on approaching a city or town, the bell or whistle shall be sounded when at the distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits. Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the breaks put down, and every possible means employed to stop the train and prevent an accident. Every railroad company that fails to observe these precautions or cause them to be observed by its agents or servants shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur. It was alleged that the defendant failed to comply with the requirements of the foregoing statute. The statute of Tennessee authorizing an action by the personal representative of one whose death is caused by the wrongful act, omission, or killing by another was specially pleaded. The defendant denied that the death of the plaintiff's intestate was caused by its negligence, and pleaded that the injury alleged to have been received by the decedent was occasioned by his own gross negligence. The jury returned a verdict for the plaintiff, and a motion for a new trial was made by the defendant, which being overruled, it brings error.

R. J. McCamy and J. P. Jacoway, for plaintiff in error. Arnold & Arnold and Harvey Hill, for defendant in error.

EVANS, P. J. (after stating the facts as above). 1. Several of the assignments of er-



ror in the motion for new trial complain that the court allowed certain testimony tending to establish that the plaintiff's intestate was killed by the running of the cars of the defendant railroad company. As the only effect of this testimony was to show that the plaintiff's intestate was killed by the operation of the defendant's locomotive and cars, it is immaterial whether the evidence was competent or incompetent for this purpose, because, inasmuch as the allegations of this fact in the petition were not denied in the answer, the truth of it was not an issue in the case. The allegations of the petition were separated in orderly and distinct paragraphs, numbered consecutively. The second, third, fourth, and fifth paragraphs of the petition distinctly and plainly alleged that the intestate of the plaintiff came to his death by being run over by the engine of the defendant, and that the defendant was negligent in divers particulars specifically set forth in these paragraphs. In its answer the defendant denied the allegations of these paragraphs, "so far as the negligence of this defendant or its employees is charged." In no other part of the plea was there a denial that the deceased was killed by the locomotive and cars of the defendant company. Civ. Code 1896, § 4961, declares that, when a petition shall set forth a cause of action in orderly and distinct paragraphs numbered consecutively, any averment distinctly, and plainly made therein, which is not denied by the defendant's answer, shall be taken as *prima facie* true, unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information. The failure of the defendant to deny the allegation which alleged that the plaintiff's intestate was killed by it in the operation of its locomotive and cars, or to explain why it could neither admit nor deny such averment, is an admission of the fact, and in the trial of the case it was not a controverted issue that the locomotive and cars which killed the deceased were those operated by the defendant.

2. Objection was made to the withdrawal of the interrogatories of a witness after the same had been formerly and voluntarily offered in evidence by the plaintiff. Where a witness is offered, and on his examination facts prejudicial to the party who offers him are developed, the testimony of such witness will not be allowed to be withdrawn over the objection of the opposite party. If such a practice were allowable, trials would be interminable, and the cross-examination of an adverse witness, instead of being a beneficial right, would degenerate into the veriest farce. When testimony comes in without objection, it becomes a part of the record, and the party who offers it cannot deprive his adversary of the benefit of such testimony. The rule is different where testimony is allowed over objection. A party who has offered testimony which the court has admitted against objec-

tion by the opposite party may, before the evidence is concluded, ask to have it withdrawn from the consideration of the jury, and the court may grant such motion. The opposite party cannot complain of the withdrawal of evidence allowed over his objection, for such withdrawal would in effect be sustaining the objections made to it. It is always in order to strike out illegal evidence—to eliminate a taint which affects the legality of the whole trial. But where a party introduces a witness who delivers testimony without objection being made to it, he has no right to withdraw it, nor can the court allow it to be withdrawn over the protest of the adverse party. If a witness delivers testimony hurtful to the party introducing him, and if the party offering the witness has been entrapped by him, the remedy which the law gives to avoid the probative value of the testimony is to allow his impeachment, and the rule as to the withdrawal of evidence is the same with depositions and interrogatories where they are put in evidence without objection. A party who voluntarily offers interrogatories of a witness, as a whole, will not be permitted to withdraw them. There is even less reason to insist on the withdrawal of interrogatories than oral testimony delivered on the trial. In the former instance the party offering the testimony knows what is contained in the interrogatories; whereas, in the latter the examination of the witness may disclose unexpected and sometimes surprising information. See, in this connection, *Zipperer v. Savannah*, 128 Ga. 135, 57 S. E. 311.

3. The sixth and eighth grounds of the motion complain of certain charges upon the statute of Tennessee, requiring the observance of certain precautions by railroads at public crossings. These charges are said to be erroneous because the statute does not apply to trains engaged in switching within the limits of a railroad yard. In *Railroad v. Pugh*, 95 Tenn. 419, 32 S. W. 311, this statute was construed, and it was held that the statutory precautions for the preventions of accidents are not applicable to switching operations within the yards of a railroad company. It appeared in the evidence that the plaintiff's intestate was run over and killed by a switch engine upon a public road crossing, but there is nothing in the evidence which remotely suggests that the place of the homicide was within the yards of the railroad company.

4. The court charged: "Now, gentlemen, in this connection I charge you that, to comply with this statute [as set out in the statement of facts], the lookout must be in such a position on the locomotive as to enable him to see ahead, and he must be vigilant and watchful. If from that position the object was visible and yet not seen, the jury would be well warranted in finding that the person was not on the lookout; that he was not vigilant on the lookout. It he does not with due care and vigilance see what could have been

seen, he would not be in the discharge of his duty." This charge is alleged to be error because it is an expression of an opinion as to what would constitute due care on the part of the lookout. It needs no argument to demonstrate that this is a just criticism thereon. The railroad company produced as witnesses the employes who were upon the locomotive and cars which killed the plaintiff's intestate. They testified that they had maintained a vigilant lookout and otherwise complied with the statute, and that they did not see the deceased until the locomotive was within a few feet of him before he was crushed. It was for the jury to say whether, if they had maintained a vigilant lookout, the servants of the railroad company would have seen him earlier, and the court should not have instructed the jury that, if from the position of the person whose duty it was to look out the object was visible and yet not seen, the jury would be well warranted in finding that the person was either not on the lookout, or was not vigilant.

5. Complaint is made that the court erred in charging the jury that: "The mere fact that the party is a trespasser and is injured while unlawfully on the track of a railroad company, while contributing to the injury by his own carelessness or negligence, if the injury could have been avoided by the use of ordinary care and caution by the railroad company, it will be liable for damages; but the amount of the recovery would be reduced in proportion to the amount of default or negligence of the plaintiff." The error assigned is that the instruction does not take into account the relative negligence of the railroad company and the person injured. The Tennessee statute upon which the action in part is based declares that the railroad company failing to observe the statutory precautions shall be responsible for all damages to persons resulting from any accident or collision that may occur. The Tennessee law prescribing the quantum of recovery does not appear in the record, and the criticism upon the charge is, not that the rule given in charge does not conform to the Tennessee law, but that the charge as given fails to take into account the relative negligence of the railroad company and the person killed. It is not open to this criticism.

Judgment reversed. All the Justices concur.

#### OLIVER v. JAMES.

(Supreme Court of Georgia. July 24, 1908.)

##### 1. JUDGMENT—DORMANT JUDGMENTS.

Under the provisions of Civ. Code 1895, § 3761, a judgment becomes dormant when no execution is issued upon it and the same placed upon the execution docket, or when execution has issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, of the last entry upon the execution made by an officer authorized to execute and return the

same. It is in no view a compliance with the law to have such entries recorded on the civil issue docket of the court, instead of the execution docket, and such a record will not arrest the running of the dormancy statute.

##### 2. SAME.

Civ. Code 1895, § 3763, provides that the clerk of the superior court making such entry upon the execution docket shall date said record when the same is made. Therefore, in order to arrest the running of the dormancy statute by a record, on said execution docket, of an entry made on said execution by an officer authorized to execute and return the same, the time when said record was made by the clerk of the court should appear from an inspection of the execution docket.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1568.]

##### 3. SAME.

A bailiff of a county court, as provided by Civ. Code 1895, §§ 4189, 4190, is not such an officer as is authorized to execute and return an execution issued from a justice court, or to make an entry thereon that will arrest the running of the dormancy statute.

##### 4. SAME.

It appearing from the petition filed in this case that all the executions declared on were dormant, the trial court committed no error in sustaining the demurrer.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Equitable action by A. S. Oliver against I. T. James, administratrix of the estate of J. D. James, deceased, to enforce the payment of executions. Judgment for defendant, and plaintiff brings error. Affirmed.

Z. B. Rogers and Jos. N. Worley, for plaintiff in error. I. C. Van Duzer, W. D. Tutt, and Geo. W. Westmoreland, for defendant in error.

ROAN, J. A. S. Oliver, plaintiff in error, held and was the owner of several justice court and county court executions, and one superior court execution; all issuing from judgments rendered in Elbert county, Ga., against J. D. James. James took a homestead against his debts. After his death his widow, Isabella T. James, elected to take a year's support. The property was sold by her as administratrix, and a sufficient sum of the money arising from said sale was claimed by Oliver to satisfy said executions. The administratrix refused payment, whereupon Oliver brought an equitable petition against her to enforce payment by her, from said fund, of said executions. In his petitions he fully described them, with the entries thereon, recorded upon the various execution dockets of the courts from which they issued, made in order to arrest the running of the dormancy statute. Five of said executions were issued from the county court of Elbert county in 1886. All of them had been entered upon the execution docket of said court in that year. At various times thereafter, entries appear upon each of them, made by officers authorized to execute and return them; these entries being sufficient in law to have arrested the running of the

dormancy statute if they had been properly recorded on said execution docket. These entries, instead of being recorded on the execution docket, were recorded only upon the civil issue docket of said county court. It further appears that two executions issuing from a justice's court of Elbert county against J. D. James were included in the executions declared on in this case; one bearing date in the year 1888, and the other in 1891. They were entered on the execution docket of the superior court of said county. Also from time to time entries upon them were made by officers authorized to have executed and returned them sufficient to have arrested the running of the dormancy statute if the entries had been recorded in time upon said execution docket. These entries appear upon the execution docket, but the time of their recordation was not marked thereon by the clerk making the record. The defendant in error insists that, in order for the record upon the execution docket to have arrested the running of the dormancy statute, it should have been dated by the clerk upon the docket at the time he made it. Another *fi. fa.* included in these declared on issued from the superior court of Elbert county in the year 1896. Entries were not made upon this *fi. fa.*, every seven years, by officers authorized to execute and return it. These entries were recorded upon the execution docket, but no date appears on said docket as to when they were recorded, except the entry made on the execution on February 21, 1906, which the clerk recorded on said docket according to the date as he entered it thereon, January 8, 1906. The only remaining execution included in those declared on issued from a justice's court of said county in 1877. Many entries appear upon said execution, some of them made by the sheriff of the county, and others by the bailiff of the county court of said county. If the entries made upon said execution by the bailiff of the county court were made by an officer authorized by law to execute and return said execution, then it is conceded that the judgment from which said execution issued is not dormant; otherwise it is dormant. The defendant filed a general demurrer to the petition, upon the principal ground "that said petition affirmatively shows that the several judgments upon which are founded the executions declared on are dead, and of no force and effect." To the sustaining of this demurrer the plaintiff in error excepted, and this judgment is now here for review.

By Civ. Code 1895, § 3761, it is declared: "No judgment shall be enforced after seven years from its rendition, when no execution has issued upon it and the same placed upon the execution docket, or when execution has issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, of the last entry upon the execution made by an officer authorized to execute and

return the same." According to this section no judgment shall be enforced, if it affirmatively appears that execution issued upon it, and seven years have expired from the time of the record, upon the execution docket of the court from which the execution issued, of the last entry upon the execution made by an officer authorized to execute and return the same. This statute is mandatory, and prohibits the court from enforcing a judgment where it appears that it is outlawed by the terms of the statute. We will examine and deal in this opinion with these executions and judgments in the order in which they appear to be set out in the foregoing statement of the facts.

The five executions first mentioned in a group, issued from the county court of Elbert county in 1886, were all from judgments rendered subsequently to the enactment of the dormancy statute on October 15, 1885. This act is codified in section 3761 of the Code of Georgia 1895. Therefore each of these judgments is controlled by the terms of this act. Neither of these was recorded or entered on any docket except the civil issue docket of said county court, although it appears there was an execution docket for said court. It follows that not only is each of these judgments dormant, but, as a penalty for the delay and inattention of their owners, they are sentenced by the terms of this act to the extreme penalty of the law on this subject, which is death. This court has decided, in the case of *Nowell v. Haire*, 116 Ga. 386, 42 S. E. 719, that an entry made by a proper officer upon an execution issued from a judgment, unless recorded upon the execution docket of the court from which the execution issued, will not, even as between the parties to the judgment, arrest the running of the dormancy statute. This decision is in accordance with the statute (Civ. Code 1895, § 3761), and dooms these five judgments to an everlasting sleep; more than 20 years having intervened between the issuing of the execution and an entry of any kind respecting them on the execution docket of said court.

The two executions issuing from a justice's court of Elbert county against J. D. James, one bearing date in 1888 and the other in 1891, were entered on the execution docket of the superior court of said county. It appears that within intervals of every seven years officers authorized to execute and return them made proper entries thereon. These entries were recorded on the execution docket by the clerk, but the time of these records does not appear upon the docket or otherwise. They were not dated by the clerk, as the law requires, and the execution docket did not affirmatively show in any way that such entries were in fact recorded on such docket within intervals of seven years. These executions were issued from judgments rendered after the passage of the act of October 15, 1885, now codified in sections

3761, 3762, and 3763 of the Civil Code. Section 3763 provides that the clerk or the proper officer making said entry shall date said record when the same is made. This provision of the law is mandatory, and the burden is as much upon the owner of a judgment who desires to preserve its existence to see to it that the clerk dates the entry as he makes it, as it is for him to see to it that the clerk enters it upon the proper docket. Both requirements spring from the same act of the Legislature, and, if section 3763 can be ignored and disregarded without jeopardizing the life of a judgment, why may not sections 3761 and 3762 likewise be disregarded without involving any hurtful consequences arising from the running of the dormancy statute? Doubtless the purpose of the framers of the act of October 15, 1885, was to have the law so changed that the execution docket of the court should affirmatively show, without further investigation or inquiry elsewhere, whether a judgment is alive, dormant, or dead. If the records of such entries, made for the purpose of keeping them in life, were not required to be dated by the clerk, as section 3763 of the Code provides, the holder of an execution might, at any time after actual dormancy, revive his judgment by having the clerk enter any number of entries on the proper execution docket, and in this manner it might be possible for parties so disposed to commit the gravest of frauds, without the least fear of being detected therein. Who, from an examination of the docket, can say when they were recorded? The plaintiff does not undertake to furnish any light on this subject. Suppose such a vital question concerning the dormancy of a judgment were left to the memory of a clerk. How often, do we imagine, could the real truth be established in a court trying the issue, perhaps years after the entry had been made by the clerk, with no date to indicate when it occurred, nothing to rely on except a treacherous memory, with no data to refresh it, and thousands of similar transactions intervening to aid in distracting and beclouding his mind? The Legislature thought it safer, no doubt, to require him to date the time of record so the truth would be there in enduring form, long after the clerk who made it had departed from office or from life. We are satisfied the statute that requires the clerk to date such entries is a wise one, and its purpose was that the record should show when a judgment was alive, dormant, or dead. This burden is upon the one who owns the judgment, and who comes into the court asking it to be enforced. When he asks the court to enforce it, this is equivalent to affirming that it is not dormant or dead, but alive. His pleadings should contain all averments necessary to show that it was alive and enforceable, otherwise a general demurrer thereto should be sustained. Therefore, it appearing from the petition in this cause

that these two executions were recorded on the proper execution docket, but the date of the record not appearing, we hold these two judgments from which these executions issued were dormant, and the court did not err in sustaining the demurrer as to them.

The next execution in the order in which they appear in the statement of facts is one issuing in 1886 from the superior court of Elbert county on a judgment rendered in 1886; nothing appearing of record on the execution docket of any entry made on this execution by an officer authorized to execute and return the same of date sooner than January 8, 1906. The said judgment, for the reasons assigned in dealing with the two justice court judgments, of date, respectively, 1888 and 1891, likewise rendered this judgment dormant and dead and unenforceable in the courts of this state, and the court committed no error in sustaining a demurrer as to this judgment.

The view we have heretofore expressed in this opinion in dealing with the proper construction of the dormancy statute passed by the Legislature on October 15, 1885, is not only demanded by the plain letter of the statute, but is sustained by many decisions rendered by this court. The plaintiff in error asked and obtained permission from the court to review these decisions, and any other that failed to give an equitable construction to said dormancy act, and asked upon review that all decisions of this court which strictly construe the dormancy act, and forbid the equitable construction heretofore put on it, be reviewed and reversed. These decisions cited on the brief of plaintiff in error, especially asked to be reviewed and reversed, are the following: *Hollis v. Lamb*, 114 Ga. 740, 40 S. E. 751; *Easterlin v. Sewing Machine Co.*, 115 Ga. 305, 41 S. E. 595; *Nowell v. Haire*, 116 Ga. 386, 42 S. E. 719; *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 950, 47 S. E. 222; *Rountree v. Jones*, 124 Ga. 395, 52 S. E. 325; *Palmer v. Inman*, 126 Ga. 519, 55 S. E. 229. A careful examination of the decisions cited, and all others sought to be reviewed and reversed, will demonstrate that if they were reversed it could in no wise be helpful or beneficial to the plaintiff in error. Even if the dissenting opinions rendered by the late Justice Turner in *Columbus Co. v. Hanks*, and by Justices Lumpkin and Candler in *Rountree v. Wilson*, supra, were set up and sustained as the law governing this case, it would in no way benefit the plaintiff, as none of these dissenting opinions undertakes to nullify, set aside, and ignore the plain letter of the law as found in sections 3761, 3762, and 3763 of the Civil Code. Equity is ancillary not antagonistic to the law. Hence equity follows the law where the rule of law is applicable, and the analogy of the law where no rule is directly applicable. Civ. Code 1895, § 2923. There is a rule of law directly applicable in this case. It plainly pointed out to the hold-

er of these executions that, if he wanted them not to become dormant, he should have had all legal entries made upon them within the proper time entered upon certain execution dockets, and that the time these entries were made should be dated by the clerk. The plaintiff in error failed to follow this law. No valid excuse appears why he failed. Five of the executions were entered on the civil issue dockets, instead of the execution docket. The plaintiff in error does not contend that this is a compliance with the letter of the statute; but he says that, inasmuch as it was recording the executions on a public docket, under an equitable construction of said act, it should prevent dormancy of the judgments. If the entries thereon had been recorded on a church register, this would have been a public place; but it would hardly be contended that this would in any manner have arrested the running of the dormancy statute. To give such a construction to the act would clearly override this law. A fact worthy of note in this connection is that no decision rendered by the Supreme Court construing the act of 1885 has failed to lean to a strict construction of said act. It not being necessary in the interest of the plaintiff in error for this court to review these decisions or to reverse them, it declines at this time to enter upon this useless task.

The only remaining execution declared on in this case issued from a justice's court of Elbert county in 1877. Entries appear upon the execution from time to time, some of them made by the bailiff of the county court of Elbert county, Ga., and some by various sheriffs of said county. These entries were in law sufficient to have kept the judgment in life, provided the county court bailiff who made some of the entries had authority to execute and return the same. If the bailiff of the county court did not have authority to execute and return the same, then this judgment was dormant and dead. This judgment, antedating the dormancy statute of 1885 (Civ. Code 1895, § 3761), is governed by the law as it stood in 1877. It was not necessary, in order to prevent dormancy of judgment, to enter this execution upon the execution docket. See *Beck v. Hamilton*, 113 Ga. 275, 38 S. E. 754.

What is the proper construction of section 4189 of the Code of 1895? This section thus speaks of special bailiffs: "In cases of emergency, when more than one bailiff is necessary to attend to the business of the county judge, or there is no regular bailiff, or he is sick or absent, or for any other reason he cannot conveniently attend, said county judge may appoint, by order on his docket, a special bailiff, without taking from him bond and security, but in all cases requiring the usual oath administered to constables. These bailiffs when appointed shall have the same authority to serve process, summonses, orders, and other legal papers of the county

judge, over the entire county over which the county judge has jurisdiction, as constables have in their several districts, and shall, for the county in which they are appointed, have all the rights of a constable and be liable to perform all the duties of a constable." It is insisted by the plaintiff in error that the latter portion of this section clothes these special bailiffs with all the powers and makes them liable to perform all the duties that any constable in that county could or should perform. It must be admitted that it is not entirely clear, from the language of this section, what the intention of the lawmakers was in enacting this law; but as the only condition upon which a county court judge is authorized by virtue of this section to appoint a special bailiff is in cases of emergency arising, not in a justice's court, or elsewhere than in the affairs or business of the county court, and the appointment is made only when it is necessary for the transaction or proper disposition or handling of the business of the county court, and he is appointed solely in the interest of the business of the county court, this section, if properly construed, means that the special bailiff, when appointed, the purpose being solely to discharge the duties incident to his appointment, which is the handling of such writs as issue only from the county court, he shall anywhere in the county have all the rights of a constable and be liable to perform all the duties of a constable relative to all the business issuing from the county court. Thus construed, the bailiff of the county court had no authority to execute and return this justice court execution, or to make any entry on it that would arrest the running of the dormancy statute. The codifiers evidently gave this construction to the act of 1872, for in that act the provisions now codified in section 4190 preceded immediately what is now codified in section 4189 of the Civil Code. So one of the sections as now arranged in the Code (section 4190, referring to the regular bailiffs of the county court) does not confer upon a regular bailiff the right and duties of a constable over the entire county, save as to writs and processes issuing from the county court. It would be passing strange if a bailiff appointed for a special emergency arising in the county court should be clothed by virtue of that appointment with more power and dignity than a regular permanent officer of the court, bearing the same title, when he is not under bond and the regular bailiff is. The decision rendered in the case of *Oliver v. Warren*, 124 Ga. 550, 53 S. E. 100, 4 L. R. A. (N. S.) 1020, 110 Am. St. Rep. 188, decided that a bailiff of a county court of Elbert county had no authority to levy an execution issuing from a justice's court. We are asked to review this decision and reverse it. We are satisfied the decision is right and should stand, and hold that a bailiff of a county court, general or special, had no authority to levy an

execution from a justice's court. The case of *Mitchell v. Williams*, 86 Ga. 95, was decided before the act of 1872 became law. Hence that decision, construing a different law, is not controlling in the matter now before the court.

This court is satisfied that no error was committed by the trial court in sustaining the demurrer in this case.

Judgment affirmed. All the Justices concur.

### POTTS et al. v. PRIOR et al.

(Supreme Court of Georgia. July 25, 1908.)

#### 1. APPEAL AND ERROR—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO JUDGMENT—NECESSITY—ESTOPPEL TO ALLEGE ERROR.

Where exceptions to an auditor's report are overruled, and proper exceptions pendente lite are taken to the judgment overruling them, and a final decree is entered adopting the auditor's report, a bill of exceptions assigning error on the pendente lite exceptions, and also on the final decree, will not be dismissed because the assignment of error on the final decree is general.

(a) The final decree was not a consent decree.

#### 2. WILLS—CONSTRUCTION—NATURE OF ESTATE CREATED—FEE-SIMPLE OR LIFE ESTATE.

The construction placed on the will of Asa Prior by the auditor is affirmed.

#### 3. JUDGMENT — CONCLUSIVENESS — MATTERS CONCLUDED.

Where, in a suit to subject trust property, a decree has been rendered adjudging that the plaintiff is entitled to recover a certain amount to be paid from the income, and also adjudging that a stated amount of the income had been added to the corpus in the purchase of a certain house, which house is directed to be sold by the trustee, and from the proceeds of sale this amount shall be paid to the plaintiff, and the balance of the funds is to be held subject to the further order of the court, and where the trust becomes executed before the final decree, in the distribution of the proceeds of the house the amount of the income which had been used in its purchase, which under the former decree was adjudged to be subject to the plaintiff's debts, should be applied to the payment of the judgment, before the remainder of the fund is distributed among its owners.

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Equitable petition by L. S. Ledbetter, as trustee, against J. M. Prior and others, to which petition Asa P. Potts and another filed their answer in the nature of a cross-bill. Judgment for defendants and Asa P. Potts and such other bring error. Affirmed, with direction.

On July 27, 1902, L. S. Ledbetter, as trustee of Sarah A. A. Prior, brought an equitable petition in Polk superior court against his cestui que trust, and against Jas. M. Prior and other remaindermen under the will of Asa Prior, deceased, for direction. He alleged: That the trust estate consisted of a certain brick storehouse and lot, and a certain house and lot in Cedartown, Ga.; that his cestui que trust was about 70 years old, and

very feeble; that she had no children and would have none; that the income from the trust estate was, and had been for a number of years, insufficient for her support; that her condition required constant attention, and he had contracted with Asa P. Potts and Louisa Potts for a number of years to take care of her at the rate of \$150 per year, provided the income from the trust estate was sufficient to pay this sum, or if the court would provide for such payment in the event the income was insufficient; that certain income had been taken in former years and invested along with the corpus of the trust estate in the real estate which represented the entire trust estate; and that this income, when so invested, was in money. Petitioner prayed for direction with reference to the support of his cestui qui trust, that he be allowed to pay Asa Potts and Louisa Potts the amount agreed on, using any previously unused income that had gone into the real estate representing the trust estate, and, if necessary, to encroach upon the corpus of the trust estate for the purpose of such payment, and to provide for her an adequate support. On July 5, 1902, J. M. Hunt, who had accepted the appointment as guardian ad litem for Sarah A. A. Prior, filed his answer, admitting the facts set out in the petition to be true. At the appearance term Asa P. Potts and Louisa Potts filed their answer in the nature of a cross-bill, admitting the allegations of the petition of the trustee, and alleging that the trustee was then due them under his contract a balance of \$348 for their services rendered in the care of the cestui que trust, that the income from the trust estate was insufficient to pay for the support of the cestui que trust; and that \$155.97 of income accrued in former years, and unused, had been invested with the corpus in the real estate representing the trust estate. They prayed for a judgment for the sum due them, and that their contract with the trustee be confirmed, and that the house and lot in Cedartown be sold to pay them. The defendants James M. Prior and the other remaindermen filed their answer admitting the general charges of the petition to be true as to the general history of the trust estate, but they denied the claim of Asa P. and Louisa Potts, and also denied that any of the income from the trust estate had been invested in the realty now composing the corpus of the trust estate, and asked that all the prayers of the petition be denied. The trustee filed an amendment, admitting the allegations in the cross-petition of Asa P. and Louisa Potts, and alleging that the necessities of his cestui que trust required the expenditure of much more than the income from the trust estate, and that he could not pay them the sum due from the income. He made an exhibit of his accounts, asking for a general settlement and for direction whether he could apply the \$155.97, income in former years which had been invested by a former trustee with the

corpus of the trust estate, to the support of his cestui que trust.

On August 23, 1902, Sarah A. A. Prior, for herself, and with Hunt, her guardian ad litem, filed an intervention in the nature of a cross-bill, setting up that she was one of the five deaf and dumb children of Asa Prior, who died in 1853, testate. She attached as an exhibit a copy of her father's will, the material portions of which are as follows: "Item 3. I give and bequeath to my son, Middleton Prior, the use and benefit during his life of [certain described property] as a part of his distributive share of my estate, subject to such limitations as are hereinafter named." Items 4, 5, 6, and 7 devise certain property respectively to his sons Ephriam W. and Lucius A., and to his daughters Angelina and Sarah Ann Abigail, in the same manner and subject to the same limitations as in the devise to Middleton made in the third item. "Item 8. I give, bequeath, and devise to my said deaf and dumb children, to wit, Middleton, Ephriam W., Lucius A., Angelina, and Sarah Ann Abigail, each the use and benefit during their natural lives, of one thousand [dollars] over and above and in addition to the equal distributive share of my said estate, subject to such limitations as are hereinafter named." Item 9 devises the residue of his estate, share and share alike, to all his children, and provides that certain of his other children shall account for named advancements. "Item 10. It is my will and desire, and I hereby direct, that the property which shall go to each one of my said deaf and dumb children, to wit, Middleton, Ephriam W., Lucius A., Angelina, and Sarah Ann Abigail, shall only go to them and rest in them as life estate; and whenever they or either of them shall die such property shall be equally divided among all my children and their legal heirs, unless one or all of them, said deaf and dumb children, shall die leaving a child or children; in that event their said property shall descend in fee simple to their children and be not divided amongst my children; and I desire and direct that my executors hereinafter named shall upon my death appoint a good and solvent trustee or trustees for each of my said deaf and dumb children, to take charge of and manage their property and see that the same is not squandered. Said trustee or trustees having the right to control the same for the support, use, and benefit of my said daughters during their lives, and also do the same for my deaf and dumb sons, holding said trustee or trustees responsible for the property bequeathed as aforesaid to my said deaf and dumb children, and any money or any of the capital sum or natural increase of said property shall not be expended for the support of such children, but limiting their expenditures to the annual income from said property." The remaining items of the will give certain instructions as to dividing his negro property, and appoint his executors. It was

alleged that Sarah A. A. Prior was "entitled absolutely, and distinct from, and not connected with the trust estate created under the will of her father, Asa Prior, for her benefit, to the sum of \$155.97 for her support, which had been derived in former years from her annual income on the trust property, but which had been without and against her consent, put by her then trustee into the corpus and invested along with the corpus into the real estate which now composed the entire trust estate; and that she was further entitled to the sum of \$1,876.33, which belonged to her independently of the trust estate created as aforesaid by the will of Asa Prior, said sum consisting of the sum of \$452.14 going to her under said will and as an heir at law from the estate of her brother E. W. Prior, and the sum of \$565.78 in like way from the estate of her brother Middleton Prior, these aggregating the sum of \$1,017.92 corpus, and of the sum of \$155.97 above referred to, and the balance from the income derived from the estates of her said two brothers who had died without leaving issue." It was alleged that while these sums were hers individually, they had been invested by a former trustee in the corpus of the trust estate. She prayed for a decree that these sums be hers in fee and unconditionally, for a sale of the realty, and for a judgment in her favor from the proceeds in proportion of her special claims to the amount invested in the trust estate. The answer of the remaindermen denied the allegations of this cross-petition, and also set up a plea of the statute of limitations. Upon these pleadings, after hearing evidence, the judge of the superior court, the Honorable Chas. G. Janes, on October 6, 1902, signed a decree, denying the prayer to encroach upon the corpus of the estate, adjudging that the trustee was indebted to Asa P. and Louisa Potts in the sum of \$348, and that \$155.97 of the income of the estate had been withheld from the cestui que trust and invested with the realty then composing the trust estate, which was subject to the judgment rendered in favor of Asa P. and Louisa Potts, and directing, if there was no accumulated income on hand, that the house and lot be sold, and that out of the proceeds they be paid the sum of \$155.97. Under the terms of this decree the trustee was allowed to continue their employment.

Thereafter, and prior to a final disposition of the case, Sarah A. A. Prior died, leaving a will wherein Asa P. Potts was appointed her executor, bequeathing to him her estate, including her claims and rights against the trust estate as set out by her cross-petition. He qualified as executor and filed his intervention in the case, adopting all the allegations of the cross-petition theretofore filed by Sarah A. A. Prior and her guardian ad litem, Hunt, and praying that he be made a party in lieu of his testator and Hunt. He prayed that all the remaindermen be made parties,

and that a full settlement of account be made with Ledbetter, trustee. The trustee filed an amendment, setting up the ending of the trust estate, and praying for an account and settlement, and for his discharge. Potts, executor, was made party in lieu of his testatrix and her guardian ad litem. All the parties joined in the application for sale, and L. S. Ledbetter was appointed by the court as commissioner to sell the land. The land was sold, and the commissioner had the money on hand ready for distribution. At this stage of the proceedings the case was referred to an auditor. On the hearing before him all the issues previously made by the pleadings, save such as were covered by the decree rendered by Hon. Chas. G. Janes, as heretofore stated, were abandoned, "except the issues made by the cross-petition of Sarah A. A. Prior and J. M. Hunt, her guardian ad litem, and which were adopted subsequently by the intervention of Asa P. Potts, as executor of said Miss Prior, and the facts and figures set forth in reference to said estate presented with said cross-bill \* \* \* were admitted to be correct." The report of the auditor was adverse to Asa P. Potts and Louisa Potts and Asa P. Potts, executor, who on March 8, 1906, filed their exceptions of law and fact to the report. These exceptions were overruled by the judge of the superior court on May 28, 1906, and exceptions pendente lite were filed to this ruling. On July 11, 1906, the judge passed a final decree, sustaining the auditor's report, and directing a distribution of the funds in the hands of the commissioner. On January 17, 1907, the following judgment was entered: "By consent of counsel, and on motion made to vacate the within decree [of July 11, 1906], it is ordered and adjudged by the court that the within decree, as signed by Hon. A. L. Bartlett, judge, is vacated and set aside, and the decree is now made the judgment of the court, and is now signed and made effective from and as of this date, and shall be taken as passed by the court on this day. Let the same be filed this day. This January 17, 1907. [Signed] Price Edwards, J. S. C., T. C." Error is assigned upon the pendente lite exceptions, and on the final decree.

C. G. Janes, Janes & Hunt, Bunn & Bunn, W. H. Warwick, and C. O. Bunn, Jr., for plaintiffs in error. Blance & Tison, C. G. Janes, and W. C. Bunn, for defendants in error.

EVANS, P. J. 1. Upon the call of the case in this court the defendants in error made a motion to dismiss the bill of exceptions, upon the grounds: (1) That there is no legal or valid exception to any final ruling of the court below, on which to predicate other assignments of error; (2) that there is no sufficient exception to a final decree on which to predicate the exceptions pendente lite; and (3) because the final decree in the case was rendered by consent. The auditor filed a report adverse to the plaintiffs in error, to

which they filed exceptions of law and fact. These exceptions were overruled by the trial judge. To this ruling exceptions pendente lite were duly made and certified. The final decree was in accordance with the finding of the auditor, and was controlled by that finding. In the bill of exceptions error was assigned generally on the final decree, and specifically on the pendente lite exceptions. In *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 354, 58 S. E. 1048, it was held: "If the ruling complained of as erroneous is one preceding the final judgment, and if it is specifically made the subject of exception and of proper assignment of error, and the final judgment is excepted to, not because of additional error in it, but because of the antecedent ruling complained of, which entered into and affected the further progress or final result of the case, a general exception to the final judgment and a specific assignment of error on the antecedent ruling will suffice \* \* \* to give the reviewing court jurisdiction." Nor is there any merit in the contention that the final decree was entered by consent, and plaintiffs in error are therefore estopped from excepting to it. The final decree was signed by Judge Bartlett on July 11, 1906. A motion was made to set this decree aside, the grounds of which do not appear in the record. On January 17, 1907, Judge Edwards entered the following order: "By consent of counsel, and on motion made to vacate the within decree, it is ordered and adjudged by the court that the within decree \* \* \* is vacated and set aside, and the decree is now made the judgment of the court, and is now signed and made effective from and as of this date, and shall be taken as passed by the court on this day." There is nothing in the face of the decree thus vacated and re-signed that indicates that it is a consent decree, and the order passed by consent was nothing more than a consent that the decree theretofore be set aside and re-signed as of January 17, 1907. The only things consented to were the setting aside of the decree theretofore signed, and the re-signing as of that date the decree previously passed, by the judge then presiding. A case may be by consent submitted to the judge without a jury, to hear and pass upon both questions of law and fact; but a decree reciting such consent could not be construed into a waiver of the right of either party to except to the judgment so rendered. The motion to dismiss is denied.

2. The exceptions to the auditor's report raise two questions. The first is: Did the auditor err in finding that the shares coming to Sarah A. A. Prior, as remainderman under the will of Asa Prior, from the estates of her deaf and dumb brothers, Ephraim W. and Middleton E. Prior, did not come to her absolutely in fee simple; but she had and took therein only an estate for life, which terminated upon her death? Plaintiffs in error contend that these shares came to her in fee, as her individual and absolute



property, and that she took the same independently of the trust. The will of Asa Prior provided three sources from which the estate of his five deaf and dumb children should be derived. The third, fourth, fifth, sixth, and seventh items of the will bequeath certain personal property for their use during their natural lives, subject to such limitations as are made in subsequent part of his will. The eighth item devises to each of them \$1,000 in addition to their equal distributive share of his estate, "subject to such limitations as are hereinafter named." The ninth item devises to them, along with his other children, "an equal distributive share," except that, as above stated, they are to have \$1,000 more than their equal distributive share, subject to the limitations named. The tenth item directs that the "property which shall go to each of one of my said deaf and dumb children \* \* \* shall only go to them and rest in each of them as a life estate; and when either of them shall die, such property shall be equally divided among all my children and their legal heirs, unless one or all of them, said deaf and dumb children, should die leaving a child or children; in that event their said property shall descend in fee simple to their children and be not divided amongst my children"—and directs his executors to appoint a good, solvent, and responsible trustee "to take charge of and manage their property and see that the same is not squandered \* \* \* and any money or any of the capital sum or natural increase of said property shall not be expended for the support of such children, but limiting their expenditures to the annual income from said property." The cardinal rule for the construction of a will is the intention of the testator. The testamentary scheme of the testator is made clear when all the provisions of his will are considered. He had several children, five of whom were mutes. In making a distribution of his estate he gave each of his mute children \$1,000 in excess of his other children. He was careful to limit the interest devised to each mute child to support during life. In order to effectively protect his unfortunate children from the hazards and perils of their unfortunate condition, he provided for the appointment of a trustee, who was to manage the property bequeathed to them and support them from the income. Upon the death of one of them leaving issue, the property devised to such deceased child passed to his or her issue; but, if any one died without issue, the property of the decedent would be divided amongst all of the testator's children; but the portion going to the mutes would not pass to them in fee simple, but would come within the operation of the tenth item of the will, which limited their interest to the income for life, and upon the death of the

last survivor without issue, the trust was to cease, and the property in the hands of the trustee was to be disposed of as provided in the will. The testator's intent was clearly to provide an ample support for these unfortunates during their lives, and to safeguard his benefaction to them, that it should not be squandered or otherwise lost. No part of the corpus of the several bequests was to be encroached on, and the trustee was limited to the income of the property bequeathed for their support. We therefore concur in the finding of the auditor that upon the death of the brothers of Sarah A. A. Prior she did not take in fee simple her share of the funds bequeathed to them, but that such funds passed to the trustee under the trust created by the tenth item of her father's will.

3. The other question raised by the exceptions to the auditor's report is: Did he err in holding and finding that the sum of \$348, due Louisa and Asa P. Potts by the decree of October 6, 1902, was not a lawful charge against the funds from the sale of the trust property? It is contended that the judgment in their favor is conclusive and final, that the undisputed facts show that unexpended income sufficient to pay this judgment had gone into the trust estate, and that there were sufficient funds in the hands of the trustee, received from the income of the trust property, to pay off the judgment. From the record and undisputed evidence it appears that on October 6, 1902, the judge of the superior court, with all the parties before him, rendered a decree setting out that there was in the hands of the trustee the sum of \$155.97 of the income of the trust estate, which had been invested along with the corpus of that estate, to which the cestui que trust was entitled for her support, that the trustee was indebted to Asa P. and Louisa Potts in the sum of \$348, which was adjudged to be a charge upon the income, and that the trustee sell the house and lot "and out of the proceeds of said sale to pay Asa P. Potts and Louisa Potts, or their attorneys, the sum of \$155.97." The finding of the auditor showed that there had been paid on this judgment out of subsequent income from the trust estate the sum of \$169, leaving a balance of \$179, more than enough to absorb the \$155.97 of invested income adjudged to be subject to their judgment. This judgment of October 6, 1902, was unexcepted to, and is conclusive of the right of Louisa and Asa P. Potts to recover the sum of \$155.97 arising from the sale of the property upon their judgment upon which there was an unpaid balance of a larger sum. The auditor therefore erred in not finding in their favor upon this question.

Judgment affirmed, with direction. All the Justices concur.

**GENTRY et al. v. McBRIDE.**

(Supreme Court of Georgia. July 25, 1908.)

**NEW TRIAL—BRIEF OF EVIDENCE—DISMISSAL.**

The court did not err in refusing to approve the brief of evidence submitted, nor in dismissing the motion for a new trial; he being authorized, by the testimony submitted upon the question as to whether or not what purported to be a brief of the evidence was true and correct, to find and hold that it was not, and also to hold that movant had been guilty of laches in submitting for approval a brief of the evidence in the case.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; R. W. Freeman, Judge.

Action by J. M. McBride against G. W. Gentry and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. S. Edwards and Brown & Roop, for plaintiffs in error. E. S. Griffith and H. J. McBride, for defendant in error.

**BECK, J.** This case was tried at the January term, 1906, of Haralson superior court, and a verdict in favor of the plaintiff was found. Thereupon the defendants, during the term, filed a motion for a new trial; a rule nisi being issued and made returnable to the July term, 1906. At the same time an order was passed in which it was provided that "movants have until the final hearing of this motion, whenever it may be, to prepare and file a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation." Nothing further was done in regard to said motion until the January term, 1907, of the court. In the meantime, on the 31st day of December, 1906, the term of office of the judge who tried the case expired, and Judge Freeman, of the superior courts of the Coweta circuit, presiding at the last-mentioned term of Haralson superior court, passed an order setting the hearing of said motion before himself on April 12, 1907; and on this date the hearing of said motion was continued by written order until April 19, 1907, and then, when said motion came on for hearing, counsel for movants presented for approval by the judge "what he claimed was a brief of the evidence in said case, which had been filed in the office of the clerk of the superior court of Haralson county on April 11, 1907." Upon presentation of the alleged brief, it being contended by counsel for respondent that the same was incorrect and imperfect, affidavits and oral evidence were submitted as to whether the brief presented was correct or not. The evidence adduced upon the question as to the completeness and correctness of the brief of evidence was conflicting; and the judge hearing the motion passed an order refusing to approve the brief and dismissing the motion for a new trial, reciting in his order that "on account of the laches of movant in failing to have his brief approved by the presiding

judge, and because I am unable to say whether the brief presented is or is not correct, I cannot approve same or certify as to the amended motion."

We are of the opinion that under the facts and circumstances of the case the judge was authorized to hold that movants had been guilty of laches in preparing and submitting for approval a brief of the evidence; and, the testimony as to the correctness of the brief presented being conflicting, the court did not err in refusing to approve the brief, or to certify as to the correctness of the grounds in the amendment to the motion for a new trial, and then the dismissal of the motion for new trial, which, without the amendment, contained only the general grounds, followed as a matter of course. *Lucas v. Cordele Guano Co.*, 106 Ga. 200, 32 S. E. 120.

Judgment affirmed. All the Justices concur.

**GARNER et al. v. GARNER et al.**

(Supreme Court of Georgia. Aug. 11, 1908.)

**NEW TRIAL—GROUNDS—VERDICT CONTRARY TO EVIDENCE.**

Plaintiff brought an equitable action on a bond and for the setting aside of a conveyance alleged to be fraudulent. Defendants' answer set up an accord and satisfaction, which they averred absolved them from all liability, not only on the bond, but also on certain notes held by plaintiff, for the cancellation of which they prayed. On the trial the plaintiff introduced evidence tending to show liability of the defendants on both the bond and the notes, and that no accord and satisfaction had been had as to either. The evidence submitted by defendants tended to establish an accord and satisfaction as to their liability on the bond, but there was no evidence to show that it covered their liability on the notes; but, on the contrary, it conclusively appeared that the notes were executed more than seven months subsequently to the alleged accord and satisfaction. The jury, in rendering a verdict, by answering questions agreed upon by counsel and propounded by the court, answered, in effect, that there had been an accord and satisfaction which applied to both the bond and the notes. Whereupon a decree was entered that defendants owed plaintiff nothing on the bond or on the notes. Plaintiff's motion for a new trial, on the ground that the verdict was contrary to the evidence and without evidence to support it, was overruled, for the reasons, as recited in the order, that the "notes were not \* \* \* put in controversy or litigation by the pleadings," and, "as pleadings cannot be dispensed with by agreement, the finding of the jury as to said notes amounted to nothing, \* \* \* there being \* \* \* ample evidence to sustain said verdict as to all matters that were in controversy by the pleadings." Held, that the issue of defendants' liability on the notes was raised by the answer, and that the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; L. S. Roan, Judge.

Action between T. S. Garner, as executor, and others and J. A. Garner and others. From the judgment, T. S. Garner, as executor, and others bring error. Reversed.

Hulsey & Field, for plaintiffs in error. Sam J. Winn and F. C. Foster, Sr., for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

**JAKUES & TINSLEY CO. v. CARSTARPHEN WAREHOUSE CO.**

(Supreme Court of Georgia. July 15, 1908.)

**1. GARNISHMENT—PERSONS AND PROPERTY SUBJECT TO.**

Where A. bought from B. a stock of goods in bulk, in part payment of a debt then due by B. to A., without complying with the provisions of the act approved August 17, 1903 (Acts 1903, p. 92), "to regulate the sale of stocks of goods, wares, and merchandise in bulk," etc., A. was liable in garnishment to a creditor of B. for the value of the goods, when the same was not more than the amount of the indebtedness sought to be collected from B., although A. had disposed of the goods before the service of the summons of garnishment.

**2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES—EQUAL PROTECTION OF LAWS.**

The act above referred to is not violative of the provision of the Constitution of Georgia, which declares: "No person shall be deprived of life, liberty, or property except by due process of law." Nor of the provision of the federal Constitution, which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Atkinson, J., dissenting in part.  
(Syllabus by the Court.)

Action by the Carstarphen Warehouse Company against the Jaques & Tinsley Company. On reserved questions. Judgment for plaintiff.

C. H. Hall, Jr., for plaintiff in error. Martin & Morecock and Jas. R. L. Smith, for defendant in error.

FISH, C. J. The Court of Appeals has certified to this court the following questions:

"(1) In a garnishment suit, instituted in a justice's court, when it appears that the garnishee had bought from the defendant in the main action a stock of goods in bulk, in part payment of a debt then due by the main debtor to the garnishee, without complying with the provisions of the act of the General Assembly approved August 17, 1903 (Acts 1903, p. 92), 'to regulate the sale of stocks of goods, wares, and merchandise in bulk,' etc. (this question assuming that act to be constitutional), and that prior to the service of the summons of garnishment the garnishee had sold the stock of goods to a third person and had none of them in his possession, is the plaintiff entitled to a judgment to the extent of the value of the goods against the garnishee, who, by answer, denies

the indebtedness, but admits the facts above set out?

"(2) Is the act of the General Assembly mentioned above violative either of the following provision of the Constitution of the state of Georgia, to wit: article 1, § 1, par. 3: 'No person shall be deprived of life, liberty, or property except by due process of law'—or of the following provision of the Constitution of the United States, to wit: Section 1 of the fourteenth amendment: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

1. As a general rule, a garnishee's liability to a creditor of the principal defendant is conditioned upon his liability to such defendant; in other words, a creditor cannot reach by garnishment any assets which his debtor could not recover from the garnishee. *Tim v. Franklin*, 87 Ga. 93, 13 S. E. 259. This rule is subject, however, to an exception, where the garnishee is in possession of effects of the defendant under a transfer fraudulent as to his creditors. In such a case, though the defendant can maintain no action against the garnishee, yet a creditor of the defendant may subject the effects in the garnishee's hands by garnishment. Such exception to the general rule has in several states been created by statute, but in many jurisdictions the courts have recognized it in the absence of a statute. 14 Am. & Eng. Enc. L. 790; 20 Cyc. 663, 993; *Drake on Attachment*, § 458; *Rood on Garnishment*, § 76; 2 *Shinn on Attachment & Garnishment*, § 546 (m); *Waples on Attachment & Garnishment*, §§ 425, 426. This court has held that assets in the hands of an assignee under an assignment void as to creditors may be reached by garnishment. *Dawson v. Figueiro*, 16 Ga. 610; *Miller v. Conklin*, 17 Ga. 430, 63 Am. Dec. 248; *Norton v. Cobb*, 20 Ga. 44. In such a case the assignor could not have maintained an action against his assignee. Yet it was held that the assignee was liable to the assignor's creditors under process of garnishment. In the cases cited, however, the assignee was in possession of the effects and credits assigned or collections thereon when served with the summons. The ruling in *Phillips v. Wesson*, 16 Ga. 187, is not authority that property held under a fraudulent transfer cannot be reached by garnishment. It was there held that, under the facts alleged in the bill in equity, the remedy by garnishment was not so full and complete as a proceeding in equity, for the reasons: (1) That the time had passed for traversing the garnishee's answer; a satisfactory reason being given why this was not done at the proper time. (2) That the creditors wanted both discovery and relief. And (3) that as the proceeding was a creditor's bill, if there

should be a recovery, a court of equity would be the most appropriate forum for distributing the fund amongst the creditors. It is true that in the opinion a technical difficulty as to the remedy by garnishment was suggested, which it was said could not well be overcome; but evidently the ruling was not based on such technicality, but on the grounds above stated. If the garnishee, at the time he is served with summons of garnishment, has in his hands property or effects held under a transfer fraudulent as to the defendant's creditors, then, as no title passed to the garnishee, as against the creditors, his liability to them would be the same as if he held the property and effects without such transfer.

What is the liability of a garnishee, who held goods of the defendant under a transfer void as to the creditors of the latter, but who sold them prior to the service of the summons of garnishment? In *Hawes v. Mooney*, 39 Conn. 37, *Seymour, J.*, said: "The principle upon which in such cases the creditor may have redress by garnishment is that the transfer, being fraudulent, is as against a creditor void, and, although the title may pass to the fraudulent grantee as between the parties, yet, as against a creditor, the grantee may be treated as mere trustee and bailee of the goods. But in the case under consideration the goods had been sold by the defendant before he was factorized [the factorizing process there being in substance the same as our garnishment proceeding], and the defendant's counsel make the point that the proceeds of the sale are not liable to be taken by this process. But it is difficult to see any sound distinction between the goods themselves and the proceeds of their sale. If the transfer of the goods may be treated by a creditor as void, and the transferee treated as having in his hands the goods of the debtor, then, following out the rule, the proceeds of the sale of the goods are, as against a creditor, the debtor's moneys in the defendant's hands." The factorized defendant, who stands as a garnishee under our process, was held liable for the proceeds of the sale of the goods. The value of the goods fraudulently transferred is stated, and it does not appear what was the amount of the proceeds of the sale by the fraudulent transferee. The question whether the fraudulent transferee was liable for the proceeds of the sale by him, rather than for the value of the goods, was not referred to, and we take it that the court considered the value of the goods as the proceeds of the sale. In *Gutterston v. Morse*, 58 N. H. 529, one to whom the principal defendant had fraudulently and without consideration conveyed personalty was held liable, under a trustee process, substantially similar to our garnishment proceeding, to a creditor of the defendant for the proceeds of a sale of such personalty made by him. It does not appear that the price realized by the transferee was not the real

value of the property, and it seems that the creditor only contended for the proceeds of the sale. In *Risser v. Rathburn*, 71 Iowa, 113, 32 N. W. 198, it was held that a fraudulent vendee of goods, who had sold the same, could not be held liable for the proceeds on garnishment, in a suit against his vendor by a creditor sought to be defeated by the fraudulent transfer. It appears that there was a specific finding by the jury of the actual value of the goods at the time of the fraudulent transfer, and that the judgment of the court against the garnishee was based on such finding. In *Joseph v. Bank*, 132 Ind. 39, 31 N. E. 524, it was held that a fraudulent assignee, who disposed of the personalty assigned and converted the proceeds to his own use, was liable to the creditors of the assignor in proceedings in garnishment, subsequently begun, for the value of the property so conveyed to and disposed of by him, overruling *Joseph v. Kronenberger*, 120 Ind. 49, 22 N. E. 301, in which it was held that the creditor stands in the shoes of the debtor, and, unless the debtor himself could have maintained an action against the garnishee for the money or the debt, the creditor cannot hold him as garnishee. In *Kohn v. Fishback*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941, it was held that one who purchased from a debtor a stock of goods in bulk, without complying with the provisions of the statute regulating sales of stocks of goods in bulk, became a trustee of the goods so purchased, and responsible as garnishee to the seller's creditors for the disposition thereof, and that, when the trial court found that the goods were worth more than the amount due to the garnishing creditor from the vendor, it was immaterial that the value of the goods at the time the same were disposed of was not shown, thereby clearly indicating that such a vendee's liability was the value of the goods at the time he disposed of them. It appeared in that case that the vendee had sold and delivered the goods prior to the service of the writ of garnishment upon him, but it does not appear how much he received for them. *Dunbar, J.*, speaking for the court, said: "It is true the garnishee answered, and probably in accordance with the facts, that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him; but, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the cestui que trust or the creditors for the disposition of such property"—citing *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003. An examination of the garnishment statutes of Iowa, Indiana, and Washington does not disclose any substantial difference between them and the gar-

nishment statute of this state on the point in question.

We are of opinion that the purpose of the statute regulating sales of stocks of goods, wares, and merchandise in bulk was to constitute such goods, etc., sold in bulk without complying with the provisions of the statute, trust property in the hands of the purchaser for the benefit of the creditors of the seller. *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003. And if a purchaser under such circumstances sells the goods, he is liable, if the statute be constitutional, under a subsequent garnishment proceeding, for their value at the time he sells them, provided the value is not more than the amount of the garnishor's debt against the principal defendant. In *Reynolds v. Padgett*, 94 Ga. 347, 21 S. E. 570, the late Chief Justice Simmons said: "All the authorities agree that one who takes and sells personal property belonging to another, without the consent of the owner, is liable for its value in an action upon an implied promise to pay for the property." A direct ruling to the same effect was made in *Buchanan v. McClain*, 110 Ga. 477, 35 S. E. 665 (3), where it was held that such an action is one arising *ex contractu*. The garnishor steps into the defendant's shoes, acquiring his rights, and may ordinarily, subject by garnishment any demands for which the defendant could maintain debt or indebtedness *assumpsit*. *Cook v. Walthall*, 20 Ala. 334; *Godden v. Pierson*, 42 Ala. 370. It has been held that, though the owner of personalty wrongfully sold by another may waive the tort and maintain an action of *assumpsit* for its value, on an implied promise to pay for the property, it does not follow that a creditor of such owner may hold the seller liable in garnishment on such implied promise, for the reason that the creditor has no right to waive the tort, or to surrender the right to recover back the property, or to release the damages against the tort-feasor, as such rights appertain to the owner of the property alone, and his creditor cannot defeat them by garnishing the wrongdoer, and that to allow the creditor to resort to garnishment in such a case might be productive of confusion and wrong, as it would not prevent the owner of the property from suing for its recovery, or for damages, and would yet concede to him the benefit of the appropriation of the value of the property to the payment of his debt. *Lewis v. Dubose*, 29 Ala. 219. We apprehend, however, that these reasons do not apply in a case where the owner, because of the invalidity, as to his creditors, of his conveyance to the garnishee, is estopped from maintaining an action of any character against him.

To the suggestion that the demand for the value of the goods is unliquidated, and therefore garnishment will not lie, we reply it is not every unliquidated claim that is without the reach of garnishment, for where

such claim arises *ex contractu*, and, its amount is susceptible of ascertainment by some standard referable to the contract, it becomes sufficiently certain to be reached by garnishment. 14 Am. & Eng. Enc. L. 764b. The implied contract of one who sells the goods of another without his consent is to pay the owner their value, which may be readily ascertained. Again, it was held, in *Kilgo v. Castleberry*, 38 Ga. 512, 95 Am. Dec. 406: "Where a *f. fa.* against two joint obligors, mutually interested in the consideration, is satisfied by the sale of the property of one of them, the other is indebted to him for contribution according to the equitable rights of the two in the original contract, and the creditors of the obligor whose property has been sold may reach this obligation to contribute, by process of garnishment, and have therefore a remedy at law." Assuming the statute regulating sales of stock of goods in bulk to be constitutional, our conclusion is that the first certified question should be answered in the affirmative.

2. Is the above-mentioned act of the General Assembly violative either of the provision of the Constitution of this state, or of that of the federal Constitution, set forth in the second certified question? The provisions of the act are, in substance, as follows: Every sale or transfer of a stock of goods, wares, or merchandise in bulk, or of substantially the entire business theretofore conducted by the vendor, or every sale or transfer of a stock of goods, wares, or merchandise out of the usual or ordinary course of business or trade of the vendor, shall be conclusively presumed to be fraudulent as to the creditors of the vendor, unless the purchaser shall, before paying any of the purchase price, or giving his note for any portion of the same, demand and receive from the vendor a written statement under oath of the names and addresses of all his creditors, together with the amount of indebtedness due or owing each of them, and unless the vendee shall also, at least five days before the completion of the purchase, notify, personally or by registered mail, each of such creditors of the proposed sale, the price to be paid, and the terms and conditions of the sale, accompanying such notice with a copy of a statement of the assets and liabilities of the vendor as furnished the purchaser by him. The act makes it the duty of the vendor to furnish to the purchaser a verified list of creditors, with their addresses and the amount owing to each, and the statement of the vendor's assets and liabilities above referred to, as well as the cost price of the merchandise to be sold, which shall be arrived at by an inventory taken at the time by the vendor and the purchaser. The act makes it a misdemeanor for the vendor to knowingly or willfully furnish to the purchaser a false statement, or to fail to include the names of all his cred-

itors in the statement furnished. Sales by executors, administrators, receivers, or public officers under judicial process are expressly exempted from the provisions of the act.

Statutes regulating sales of stocks of goods, wares, and merchandise in bulk have, within a comparatively recent period, been enacted in 24 states of the Union, and by Congress for the District of Columbia. These statutes are quite similar in substance, though some of them contain rather drastic provisions which are not to be found in others. Their common purpose is the protection of creditors against a class of sales frequently fraudulent, and which leave creditors without means of collecting that to which they are justly entitled. The question whether such enactments contravene the constitutional provisions against the deprivation of liberty or property except by due process of law, or those against class legislation, have been presented to a number of courts for decision. The adjudications as to the validity of such statutes by the different courts are not uniform. The power of the Legislature to adopt reasonable regulations to prevent fraud in the transfers of property seems to be conceded in all of the opinions pronounced on the subject. The main point of difference is as to the reasonableness of the regulations which have been prescribed by statute. The constitutionality of such enactments has been upheld in the following cases: *Neas v. Borchers*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Walp v. Moorar*, 78 Conn. 515, 57 Atl. 277; *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600; *Williams v. Fourth National Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334; *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330; *Musselman Grocery Co. v. Kidd* (Mich.) 115 N. W. 409. However, the statutes of Tennessee and Oklahoma provide that such sales, made without compliance with the statutory provisions, shall be presumed to be void. In *Thorpe v. Pennock*, 99 Minn. 22, 108 N. W. 940, it was held that a statute entitled "An act to prevent sales of merchandise in fraud of creditors," which declares that sales made without compliance with its provisions "will be presumed to be fraudulent and void," merely prescribes a rule of evidence, and, so construed, it is not unconstitutional. The court said, however, that the weight of authority would sustain the validity of the statute, if it should be so construed as to render fraudulent and void sales made in violation of its terms. The Supreme Court of Indiana, in *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119, after some discussion as to the constitutionality of the statute of that state regulating "sales in bulk," practically leaves the question undecided. The same court, in *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A.

273, 103 Am. St. Rep. 268, held that a statute avoiding a sale of a stock of goods in bulk, in favor of persons who have sold goods or loaned money for continuance of the business, unless certain conditions are complied with, and rendering the vendee liable to pay the claims of such persons, is void, as denying other creditors of the vendor the equal protection of the laws.

In *Black v. Schwartz*, 27 Utah, 387, 76 Pac. 22, 65 L. R. A. 308, 101 Am. St. Rep. 971, it was held: "A statute prohibiting, under a penalty, any merchant, whether solvent or insolvent, from selling or disposing of his stock of goods in bulk, without an inventory thereof, and notification to his creditors, and which applies also to persons acting in a fiduciary capacity and under judicial process, and which does not apply to merchants who are not indebted, is unconstitutional, as depriving a solvent merchant of his property and liberty to contract without due process of law, and as being class legislation." And further: "Statutes which punish criminally one person for the doing of an act which another person in the same line of business may lawfully do are unconstitutional as being class legislation, and as a deprivation of property and liberty without due process of law." The statute there held to be unconstitutional declared that: "Any person willfully selling or buying any stock of goods in any manner other than in this act provided shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be subjected to a fine of not less than fifty dollars, nor more than three hundred dollars." In referring to the above-mentioned decisions rendered by the courts of Massachusetts, Tennessee, and Washington, *Bartch, J.*, who pronounced the opinion in the Utah case, said: "While enactments of similar character have been upheld in those states, an examination shows that they all differ materially in important features from the one here under consideration. The law in Massachusetts exempts all sales from its provisions made by officers acting in a fiduciary capacity or under judicial process, and, while it declares a sale made in violation of its provisions fraudulent and void as against creditors, it does not subject the seller and buyer acting in disobedience of the law to criminal prosecution." He said further: "We apprehend, from a perusal of that opinion, that if there, as here, the determination of the Legislature had gone to the length of applying the provisions of the act to persons acting in a fiduciary or official capacity, or under judicial process, and providing criminal punishment for the persons affected, if they disobeyed such provisions, the court would have hesitated before they pronounced the act constitutional." Attention was called to the fact that, under the statute of Tennessee, a sale made in disobedience of its provisions is only "presumed to be fraudulent and void as against creditors of the seller," and that the provisions of the statute of Washington are

so materially different from those of the act of the state of Utah that the decision in *McDaniels v. Connelly Shoe Co.*, supra, could not be regarded as authority in the case under consideration. So in *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, it was held that "an act to prevent fraud in the purchase, disposition, or sale of merchandise" is unconstitutional, because it applies an unwarrantable restriction upon the right of the individual to acquire and possess property, and because it contains a forbidden discrimination in favor of a limited class of creditors. That act prescribed penalties upon the seller and the purchaser for noncompliance with the duties imposed upon them, respectively, therein, and, as in the Utah statute, no exception was made as to sales by persons or officers acting in a fiduciary capacity or under judicial process.

In *Wright v. Hart*, 103 App. Div. 218, 98 N. Y. Supp. 60, the statute of New York declaring sales of stocks of merchandise in bulk to be void, unless the vendor and vendee comply with certain formalities, was held to be constitutional; two of the five judges presiding dissenting. This decision was reversed by the Court of Appeals; three of the seven judges presiding dissenting. *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338. The New York statute differs in some respects from the Georgia statute. The former requires that the seller and purchaser shall, at least five days before the sale, make a full and detailed inventory showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price of each article to be included in the sale, and that the purchaser shall, at least five days before the sale, in good faith, notify, or cause to be notified personally, or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, not only of the proposed sale and the price to be paid by the purchaser, but also of the stated cost price of the merchandise to be sold. That act also requires the purchaser, at least five days before the sale, to file a truthful answer of each and all the inquiries which the act makes it the duty of the purchaser to make of the seller, at least five days before the sale, as to the names and place of business of each and every creditor of the seller and the amount owing each of them; but the place of filing is not designated. It does not except from its provisions sales made by executors, etc., and judicial sales. In the majority opinion of the Court of Appeals stress is laid upon these drastic provisions of the statute.

While the statute of Georgia makes it a misdemeanor for the seller to knowingly and willfully make or deliver, or cause to be made or delivered, any false statement, or any statement of which any material portion is false, or to fail to include the

names of all his creditors in any statement required of him by the act, it will be noted that it does not make penal the mere failure of the seller or the purchaser to comply with the requirements imposed by the act upon them respectively, as do the Utah and Ohio statutes. If the statute of this state had not made it a misdemeanor for the seller to knowingly and willfully make a false statement under oath, he would nevertheless be punishable for so doing, for the offense of false swearing, under our Penal Code. Granting that the statute under consideration may, as to those coming within its scope, interfere, to some extent with their liberty of contract and the right to use and dispose of their property as they see fit, there are many other statutes whose beneficial purpose is the prevention of fraud and the advancement of justice, which may be subject to the same criticism, the constitutionality of which, if ever questioned, has been sustained. Such are the statute of frauds, insolvent laws, recording acts, statutes regulating assignments, prohibiting usury, declaring titles void when made as part of an usurious contract, prohibiting married women from making binding contracts of suretyship, assuming the debts of their husbands, selling their separate estates, in extinguishment of their husbands' debts, declaring void a sale made by a married woman to her husband or trustee, without being allowed by an order of the superior court of her domicile, denying a husband, after a separation from his wife, the right to transfer any of his property, except bona fide in payment of pre-existing debts, so as to avoid the vesting thereof according to the final verdict of the jury in an action for divorce, creating liens in favor of laborers, mechanics, materialmen, and others, prescribing how deeds, mortgages, and wills shall be executed, requiring the written consent of parents or guardians before liquor or opium can be sold to certain persons, requiring the inspection of fertilizers, etc., before sale, and many other statutes of a similar nature that might be mentioned.

In *Jenkins v. State*, 119 Ga. 430, 46 S. E. 629, it was held to be within the province of the Legislature, in the exercise of its police powers, to make it unlawful to transport seed cotton in or from a named county, or from one place to another therein, between the hours of sunset and sunrise, except when carried from the field where picked to the place of storage on the premises of the owner, and to prescribe a penalty for so doing. In *Bazemore v. State*, 121 Ga. 619, 49 S. E. 701, the accused was charged with a misdemeanor for the violation of an act of the General Assembly making it "unlawful to purchase, sell, barter, exchange, or deliver in the county of Muscogee any cotton in the seed between the 1st day of August and the 20th day of December, without the written consent of the owner of the land whereon

said cotton was produced, or his agent." There was a demurrer to the indictment, on the ground that the act creating the offense was void under the Constitutions of this state and of the United States, in that it deprived a person of the use of his property without due process of law, and deprived a citizen of the rights, privileges, and immunities guaranteed by the Constitutions of this state and of the United States, and was not a valid exercise of the police power of the state. Upon an assignment of error upon the judgment of the trial court overruling the demurrer, this court, in affirming such judgment, held: "(1) Under the police power, laws may be passed for regulating common occupations which from their nature afford peculiar opportunity for imposition and fraud. (2) Because of its value, the ease with which it is taken from the field, and the difficulty of detecting the thief, the state may regulate the sale of seed cotton, and fix a punishment upon the person who buys in violation of the terms of the statute." As said by the Supreme Court of Michigan (*Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330): "It is \* \* \* safe to state as a general rule that where, in the exercise of the police power, a beneficial result is sought, and legislation is enacted in protection of rights which would, but for the enactment, be subject to defeat, such legislation does not infringe the liberty of the citizen in a legal sense or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell."

In testing the validity of the statute which we have under consideration, by the principles announced in the cases cited, we may appropriately quote the apt and vigorous language of Vann, J., in a dissenting opinion delivered in *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, as to the purpose of the statute of New York, regulating the sales of merchandise in bulk. He said: "The object of the act was to suppress a widespread evil, well known to current history and condemned by repeated adjudications in this court and in all the leading courts of this state from time out of mind. That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk, for the purpose of defrauding creditors. Common observation shows that when a dealer has reached a point in his business career where he cannot go on, owing to the claims of creditors, the temptation is strong, and the practice common, of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it. The evil is difficult for the courts to handle, because the evidence to uncover the furtive scheme must, as a rule, be drawn from hostile witnesses, usually relatives or

intimate friends of the seller, who took part in the fraud and shared in the plunder. All those who have had to do with the investigation of such transactions realize how well these frauds are protected by the forms of law, and how frequently they are defended by perjury. The form of the fraud varies with the skill of the perpetrator and his advisers, but the unvarying purpose is to hold and enjoy property which equitably belongs to his creditors. Inadequacy of consideration, absconding with the proceeds of the sale, and the preference of fictitious claims are familiar methods. Many other means of holding on to property and concealing the facts are resorted to, and it is not uncommon to see a dealer in possession of all that he had before he failed, and, acting under another name, carrying on the same business with the same stock, all unpaid for, in unblushing defiance of his creditors. Whatever the method of committing the fraud, its success depends on secrecy and perjury." Considering the peculiar opportunity and facility of those at whom the statute is aimed for the commission of fraud, the difficulty of establishing it, the consequent danger of loss by creditors, and the beneficial result sought, the enactment in question seems clearly a proper exercise of the police power of the state.

Nor is the act class legislation. "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors, or married women, bankers or traders, and the like. \* \* \* If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character and of their propriety and policy the Legislature must judge." *Cooley on Constitutional Limitations* (7th Ed.) 554. The class to which the statute applies is sellers of stocks of goods, wares, and merchandise in bulk, and, as the purpose of the act is the protection of creditors, of course only such sellers as owe debts are brought within its scope.

Another question which is suggested by certain language in the act, but which has not been presented in the argument of the case, is whether, in enacting this law, the Legislature has infringed upon the right of the courts to determine, unhampered by legislative dictation, the sufficiency of evidence to establish a fact upon the existence of which the rights of parties depend, and thus denies due process of law. The language to which we refer is contained in the third section of the act, wherein it is declared that, unless the requirements of the statute as to a sale of stock of goods, wares, and merchandise in bulk are complied with, "such sale or



transfer shall, as to any and all creditors of the vendor, be conclusively presumed to be fraudulent." Did the Legislature, by using in this section the language which we have just quoted, intend to prescribe a conclusive rule of evidence by which the courts were to be governed in ascertaining when fraud exists in the sale of a stock of goods in bulk? If it did, it transcended the power of the legislative department of the government and invaded the exclusive province of the courts, for it is well settled that the Legislature cannot, under the guise of prescribing a rule of evidence applicable to a given class of cases, deprive the courts, in those cases, of their exclusive power to decide when an essential fact has been proven. As said by Nisbet, J., in *Dougherty v. Bethune*, 7 Ga. 90, 92: "The Legislature has no power to legislate the truth of facts. Whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the government. By the Constitution the legislative and judicial departments are distinct." But a statute which in reality deals with some rule of substantive law is not obnoxious to this principle, although it may contain language which, standing by itself, is susceptible of the construction that it prescribes, as a rule of evidence, what shall be deemed and held by the courts to be conclusive evidence of a fact upon the existence of which the rights of parties are dependent. If it were the intention of the General Assembly, in enacting this statute, to prescribe for the courts a conclusive rule of evidence by which they are to be guided in determining whether a sale of a stock of goods, wares, or merchandise has been made for the purpose of defrauding the creditors of the seller, it would seem that the title of the act would have indicated such intention. The statute is entitled: "An act to regulate the sale of stocks of goods, wares, and merchandise in bulk, to provide certain penalties in connection therewith, and for other purposes." Certainly there is nothing in this title to indicate a purpose on the part of the lawmakers to make a new rule of evidence to be applied whenever the question of fraud in the sale of a stock of goods in bulk should arise. While the act was passed with the object of preventing persons in debt, who own stocks of goods, wares, and merchandise, from selling the same in bulk for the purpose of defrauding their creditors, its subject-matter is not fraud in such sales, but is the regulation of them. It prescribes certain duties which must be performed by the buyer, and certain correlative duties which must be performed by the seller. This is regulation, pure and simple. It then, in order to enforce the performance of these duties, declares, in substance, that, unless these duties are complied with, "such sale or transfer shall, as to any and all creditors of the

vendor, be conclusively presumed to be fraudulent." The meaning of this declaration is that the sale shall, as to such creditors, be fraudulent in law, whatever it may be in fact. This is a declaration of substantive law, and not the enactment of a conclusive rule of evidence for the ascertainment of fraud in such sales. In other words, the sale, as to creditors of the seller, shall be void, irrespective of the question whether it was in fact made for the purpose of defrauding them, because the requirements of the statute enacted for their protection have not been complied with. Granting the authority of the Legislature to regulate sales of this character, it follows that it can, when prescribing regulations for such sales, declare that, unless they are made in conformity to the statutory requirements they shall be void, as to the creditors of the seller, and it matters not whether the declaration as to the invalidity of sales not made in conformity to the statute is direct or indirect, if the purpose to declare such sales void is apparent. The purpose of the act is not to provide an efficient means for uncovering fraud already committed, by providing a conclusive rule of evidence by which the fact of its existence may be established; but it is to prevent the commission of fraud, by providing that, in the class of sales with which it deals, certain specified requirements must be complied with, or the sale will be held to be fraudulent in law. It lays its requirement across the threshold of the transaction and, in effect, declares that no contract of sale, valid as to the creditors of the seller, can be entered into unless these requirements are observed. Our construction is borne out by the language of the fifth section of the act, which declares that a sale not made in compliance with the act "shall be deemed a fraudulent transaction or transfer," etc. The Legislature of this state long ago declared that certain "acts by debtors shall be fraudulent in law against creditors and others, and as to them null and void"; among them being: "Every assignment or transfer by a debtor, insolvent at the time, of real or personal property, or choses in action of any description, to any person, either in trust or for the benefit of, or in behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him." Civ. Code 1895, § 2695. The declaration by the statute that such an assignment by an insolvent debtor shall be fraudulent in law against creditors is a declaration of substantive law, and, so far as we know, has always been so considered, and no court would ever inquire whether the assignment was actually made for the purpose of defrauding creditors of the assignor or not. If the statute had declared that such an assignment should be conclusively presumed to be fraudulent as to creditors of the assignor, it would, in our opinion, have meant the same thing. A stat-

utory declaration that a certain act, done under given circumstances, which may or may not be actually fraudulent, shall be conclusively presumed to be fraudulent, as to parties whose rights might otherwise be injuriously affected by it, is equivalent to a declaration that such an act shall, as to such parties, be fraudulent in law, which precludes all inquiry into the actual motives with which it was done. It is hardly necessary to say that the statute which we have been construing is unlike statutes which undertake to make the recitals of mere ministerial officers in tax deeds, etc., conclusive evidence of the validity of the sale. Such statutes are held to be ineffective, in so far as they seek to preclude inquiry by the courts into the question of the existence of the essential pre-requisites to a deprivation of property under the exercise of governmental power. The Legislature cannot make the mere official statement of a public ministerial officer conclusive evidence of the existence of that which may, for the want of a better expression, be called the jurisdictional facts upon which the power to divest one of the title to his property depended.

In view of what we have said, and considering also the declaration of our state Constitution that "the General Assembly shall have the power to provide for the punishment of fraud, and shall provide, by law, for reaching the property of the debtor concealed from the creditor" (Civ. Code 1895, § 5728), our conclusion is that the enactment in question does not contravene the provisions of the Constitution of the United States, or those of the Constitution of this state, which are set forth in the second certified question. The other Justices concur, except ATKINSON, J., who dissents in part.

ATKINSON, J. (dissenting to the ruling made in the second headnote). The substance of the statute under consideration is set forth at the beginning of the second division of the majority opinion, and repetition here is unnecessary. It is sufficient to say that the statute in question is of that class which provides that, as a matter of law, sales of stocks of goods, wares, and merchandise in bulk, made without complying with certain formalities required by the statute, shall, as against creditors, be conclusively presumed to be fraudulent. The question certified is as to whether the statute is void on the ground that it is violative of article 1, § 1, par. 3, of the Constitution of the state of Georgia (Civ. Code 1895, § 5700), which provides: "No person shall be deprived of life, liberty or property, except by due process of law." And also whether it is void on the ground that it is violative of section 1 of the fourteenth amendment to the Constitution of the United States (Civ. Code 1895, § 6030), which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." A case involving the constitutionality of a statute relating specifically to sales of stocks of merchandise in bulk has not been decided either in this court or in the Supreme Court of the United States. Statutes relating to sales in bulk and bearing a varying degree of similarity to the statute under consideration have been under review by courts of other states, and upon the question of their constitutionality there is a marked diversity of opinion. Such cases will be cited, and for convenience will be named in three separate groups, and hereinafter referred to as classes 1, 2, and 3. Statutes which declare sales absolutely void as against creditors, where the parties fail to comply with the formalities required in making the sales, are held to be constitutional, in the following cases (class 1): *Squire & Co. v. Teller*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Walp v. Moorar (Lamkin)*, 76 Conn. 515, 57 Atl. 277; *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330, 9 Ann. Cas. 250; *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600, 8 Ann. Cas. 452; *Musselman Grocery Co. v. Kidd, Dater & Price Co.* (Mich.) 115 N. W. 409. Substantially similar statutes are held to be unconstitutional, in the following cases (class 2): *Block v. Schwartz*, 27 Utah, 387, 76 Pac. 22, 1 Ann. Cas. 550, 65 L. R. A. 308, 101 Am. St. Rep. 971; *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 278, 106 Am. St. Rep. 268; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263. Other substantially similar statutes, with the exception that, for a failure to comply with the requirements, it is provided that only a rebuttal presumption of fraud shall arise, are held to be constitutional, in the following cases (class 3): *Neas v. Borches*, 109 Tenn. 308, 71 S. W. 50, 97 Am. St. Rep. 851; *Williams v. Fourth National Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970; *Thorp v. Pen-nock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229.

An examination of the decisions cited will cover practically the entire body of decisions concerning the constitutionality of statutes of the several states of this country, relating specifically to the regulation of sales of stocks of goods in bulk. The cases are classified in order that attention may be directed in the first instance to the character of the statute involved and the ruling made in each case. It is provided by the Georgia statute under consideration that, unless the parties to a sale in bulk of a stock of goods, wares, and merchandise comply with the requirements

of the statute, the sale shall be conclusively presumed to be fraudulent as against creditors. One of the requirements is that the vendee shall, at least five days before the completion of the sale, inform each of the creditors of the vendor of the proposed sale, the price to be paid, etc. These provisions are made to apply to every sale in bulk of goods, wares, and merchandise, without regard to whether the vendor is solvent or insolvent, or whether the transaction is in fact honest or fraudulent. As they apply to the parties to all sales of the character mentioned, the righteous as well as the unrighteous are affected exactly alike, and, as the presumption of fraud is conclusive, there is no avenue of escape for the righteous. However honest or otherwise legitimate the transaction may be, the five days' notice feature renders it impossible for the parties to perfect a sale within less than five days. It may be to the interest of the parties to conclude their transaction in one day, but their hands will be tied, and they will not be at liberty to contract as they desire for a time which at least is as much as five days. The right which they are thus denied is substantial, and the negation complete. The power to contract is a property right, and the liberty of contract is protected by the fourteenth amendment to the federal Constitution, and cannot be arbitrarily destroyed, even by the exercise of the police power of the state. *Adair v. U. S.*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 486; *Lochner v. New York*, 198 U. S. 45, 53, 56, 25 Sup. Ct. 539, 49 L. Ed. 937; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. In respect to the feature just mentioned, the state Constitution is similar to the federal Constitution, and the authorities cited apply to the former, as well as to the latter, Constitution. The penalty of suspending the legitimate right of contract should not be visited upon the innocent in order to apprehend the guilty. An imposition in that manner is unreasonable and arbitrary. It may be within the bounds of reason for a statute to clothe such transactions with the presumption of fraud, but there ought to be a provision allowing due process of law for the separation of the good from the evil, rather than a provision declaring the presumption conclusive. See, on this point, *Thorpe v. Pennock Mercantile Co.*, *supra*. It would not do to destroy the right of contract altogether or for a day, because, forsooth, some person may abuse the right by making fraudulent sales. Yet, carried to the ultimate, that is the conclusion to which the proposition would lead. The statute is not merely regulative, but for a substantial length of time prohibits entirely, and during that time is destructive of the liberty of legitimate contract.

It is that destructive feature that renders the statute unreasonable and arbitrary. The certified question should be answered in the affirmative.

**JAKUES & TINSLEY CO. v. CARSTARPHEN WAREHOUSE CO. (No. 492.)**

(Court of Appeals of Georgia. July 31, 1908.)

**GARNISHMENT—PROPERTY SUBJECT.**

This case is controlled by the answers of the Supreme Court to the questions which were certified therein by this court to that court.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the Carstarphen Warehouse Company against the Jaques & Tinsley Company. Judgment for plaintiff before a justice was affirmed in the superior court, and defendant brings error. Case certified to the Supreme Court, and, on answers to the questions, judgment affirmed.

C. H. Hall, Jr., for plaintiff in error. J. C. Morcock, for defendant in error.

POWELL, J. Hanmock, a retail merchant of Macon, while indebted to Jaques & Tinsley Company in the sum of \$200.98 and to the Carstarphen Warehouse Company in the sum of \$71.98 for merchandise, transferred his entire stock of goods, amounting to \$71.68, to the former company without complying with the act of August 17, 1903 (Acts 1903, p. 92); the transfer being made in part payment of the debt which Hanmock owed. The Jaques & Tinsley Company immediately sold this stock of goods to a third person. Afterwards the Carstarphen Warehouse Company sued Hanmock (who had in the meantime absconded) by attachment, and levied the same by serving summons of garnishment on the Jaques & Tinsley Company. The above facts appearing to the justice of the peace, he entered judgment against the garnishee for \$71.98 principal, with interest and costs. The Jaques & Tinsley Company except to the overruling of the certiorari in the superior court.

The assignments of error raised two questions. Both of these questions were certified to the Supreme Court, and have been answered as follows: "(1) Where A. bought from B. a stock of goods in bulk, in part payment of a debt then due by B. to A., without complying with the provisions of the act approved August 17, 1903 (Acts 1903, p. 92), to regulate the sale of stocks of goods, wares, and merchandise in bulk, etc., A. was liable in garnishment to a creditor of B. for the value of the goods, when the same was not more than the amount of the indebtedness sought to be collected from B. although A. had disposed of the goods before the service of the summons of garnishment. (2) The act above referred to is not violative of the provision of the Constitution of Georgia which declares: 'No person shall be deprived of life, liberty, or property except by due process of law'—nor of the provision of the federal Constitution which declares: 'No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any state deprive any person of life, liberty, and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." See, also, the full opinion of the Supreme Court in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. —, 62 S. E. 82.

The justice of the peace entered judgment against the garnishee for \$71.98, whereas the evidence shows that the entire value of the Hanmcock stock of goods was \$71.68. The judgment is therefore affirmed, with direction that the defendant in error write off from the judgment obtained in the lower court the sum of 30 cents. This is a small amount, but the plaintiff in error claims the point, "the law allows it, and the court awards it."

Judgment affirmed.

### HOBBS v. SMALL. (No. 1,130.)

(Court of Appeals of Georgia. July 31, 1908.)

**MASTER AND SERVANT—INJURY TO MINOR EMPLOYÉ—ACTION—PETITION.**

The court erred in sustaining a general demurrer to a petition, in an action by a servant against his master for personal injuries received pending the employment, alleging in substance that the plaintiff, a boy 16 years of age, wholly inexperienced, was put to work without instruction or warning upon a machine which was highly dangerous, was lacking in the usual and common safety devices employed on such machines, and was being used to do work of a character for which it was not intended, whereby it was rendered more dangerous; it being also alleged that the master knew all these things and the servant did not, that the master assured him that he could do the work at the machine all right, and that the injury occurred immediately upon his attempting to operate it and before he had the opportunity of discovering its dangers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 821-832.]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Action by A. R. Hobbs, by his next friend, against J. D. Small. Judgment for defendant, and plaintiff brings error. Reversed.

Griffin & Griffin and McDonald & Quincey, for plaintiff in error. L. Kennedy and O. H. Elkins, for defendant in error.

**POWELL, J.** This case comes to us upon the sustaining of a general demurrer, and the allegations of the petition are therefore to be taken as the truth of the case. The defendant, who was the owner and operator of a plant in which lumber, sashes, doors, blinds, etc., were manufactured, directed the plaintiff, a boy 16 years of age, who had been previously engaged at the mill in piling and hauling lumber, to assist another employé in edging boards at a jointer, which is a machine containing a set of rapidly revolving gang saws, a work in which the plaintiff was wholly inexperienced. In response to his

command, the plaintiff told the defendant that he had never worked about machinery and did not know how to do the work he was told to do. The defendant told him to go ahead; that he could operate the machine all right. He was required to hold the boards in such position and to guide them with such rigidity and straightness of direction that a perfect edge should be sawed. He edged the first board without injury, but while holding the second the saws jerked it from the edge-wise position in which it was to be held to a flat position and threw the boy's left hand against the saws, and certain enumerated injuries resulted. The specific acts of negligence alleged against the employer are that he knowingly put an inexperienced minor to work at a dangerous machine, without warning and instructing him how to do the work with safety; also that the machine was not equipped with jointer pegs, or with guides, or with such other safety devices as are in common use on such machines; that the machine was not designed and equipped for the edging of boards of the length of those being worked upon it, and that this fact contributed to bringing about the injury. There were the usual allegations as to the master's knowledge and the servant's lack of knowledge; the latter's freedom from constructive or imputed knowledge being based chiefly on his inexperience and minority.

We may leave the fact of minority out of consideration and rest our judgment on the plaintiff's inexperience, so far as the question of the master's duty and the servant's assumption of the risk and his contributory negligence are concerned. In enumerating certain of the absolute duties of the master to the servant, the Supreme Court, in the case of *Moore v. Dublin Cotton Mills*, 127 Ga. 615, 56 S. E. 842, 10 L. R. A. (N. S.) 772, said: "The master is also bound to instruct inexperienced servants, without reference to their age, in the operation of machinery and appliances with which they are not acquainted." *Labatt's Master and Servant*, § 248, makes the following deductions on this subject: "The mere fact that a servant was inexperienced does not entitle him to recover on the ground that he ought to have been instructed as to the dangers of the work. But it is well settled that a case in which an inexperienced servant is required to use a dangerous instrumentality stands on a different footing from one in which the same instrumentality is handled by a practiced and skillful workman. One deduction drawn from the difference thus recognized is that a complaint is not subject to demurrer if the substance of the averments is that the instrumentality that caused the injury was a dangerous one and that the injured servant was inexperienced and had received no instruction as to its dangerous quality. Another is that the master cannot be pronounced, as a matter of law, free from negligence, where the testimony fairly warrants the in-

ference that the work in question was abnormally dangerous to an inexperienced employé, and that he had received no instruction as to the particular perils to be avoided and the proper means of avoiding them. The essential import of this rule, in a purely logical point of view, is manifestly that the plaintiff is allowed to recover, on the ground of inexperience, in many states of the evidence which, if this element were absent, would be deemed to negative the existence of any obligation to instruct, for the reason that the servant would be conclusively presumed to have understood the dangers involved. Under such circumstances the fact that the person injured was of mature years is not decisive, but is merely a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position." A case similar to the one at bar in many of its juridic concepts, as well as in the character of the machine by which the injury occurred, is that of *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911, and in that case the petition was held good against demurrer. The plaintiff's case may also be sustained on the theory that the defendant put an inexperienced employé to work upon a machine which was dangerous, because not equipped with safety devices in common usage.

In determining whether the injury arose from one of the assumed risks of the employment or from the plaintiff's contributory negligence, it should be remembered that the servant has the right primarily to assume that the work the master instructs him to do in a particular manner can be done safely in that manner and that the machine he is required to operate is in a reasonably safe condition. The servant may rely upon this assumption without an imputation of negligence until such time as he shall discover, or in the exercise of ordinary diligence should discover, to the contrary. The direct order of the master to do an act in the performance of which the servant is injured may be shown by the servant as a circumstance tending to excuse him from that degree of caution which would lawfully be expected of him in the absence of such command. *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 259, 58 S. E. 249, and citations. See, also, *Bush v. West Co.*, 2 Ga. App. 295, 58 S. E. 529. Of course, as to these matters, the inexperience of the servant is of highest relevancy.

Judgment reversed.

#### BUSH v. ROBERTS. (No. 1,146.)

(Court of Appeals of Georgia. July 25, 1908.)

#### 1. APPEAL AND ERROR—DISMISSAL—GROUNDS.

While the fact that the surety upon an appeal bond is also the surety on a certiorari bond in the same case would be good ground, if urged, for dismissing the certiorari in the superior court, it is not a ground upon which a writ of

error, issued upon a bill of exceptions, may be dismissed.

#### 2. JUSTICES OF THE PEACE—CERTIORARI—ALLEGATIONS OF PETITION—PRESUMPTION OF TRUTH.

The real merits of a certiorari are determinable, upon the hearing, by the contents of the answer, and allegations of the petition, not verified by the answer, are worthless; but upon the presentation of a petition for certiorari, for sanction, all allegations of the petition which are clearly set forth are to be presumed to be true where the petition is verified as required by law.

#### 3. PLEADING—BILL OF PARTICULARS—NECESSITY FOR.

Where one is sued for a definite amount of the indebtedness of another, alleged to have been assumed by the defendant as an original undertaking, a bill of particulars specifying items of the account is unnecessary. If one, as an original undertaking, upon a consideration, has assumed to pay a definite amount of the indebtedness of another, it is none of his concern whether the debt thus assumed in behalf of the debtor is greater or less than his actual total indebtedness.

#### 4. FRAUDS, STATUTE OF—"PROMISE TO ANSWER FOR DEBT, DEFAULT, OR MISCARriage OF ANOTHER."

An agreement on the part of A. B. to pay a certain account for C. D. in order to prevent the prosecution of C. D. is a promise to answer for the debt, default, or miscarriage of another, within the terms of Civ. Code 1895, § 2693, and must be in writing.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, § 5676.]

#### 5. EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS.

In the absence of either fraud, accident, or mistake in the procurement of a written contract, parol evidence is inadmissible to contradict or vary the terms of the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1756-1765.]

#### 6. JURY—OBJECTIONS—WAIVER.

Objections propter defectum to a juror are of no avail after verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 504-507.]

(Syllabus by the Court.)

Error from Superior Court, Miller County; W. C. Worrill, Judge.

E. B. Bush presented a petition for certiorari to review a judgment against him by H. J. Roberts, and, the judge of the superior court having refused to sanction it, Bush brings error, and Roberts moves to dismiss the bill of exceptions. Motion to dismiss overruled, and judgment reversed.

P. D. Rich, for plaintiff in error. Bush & Stapleton, for defendant in error.

RUSSELL, J. The plaintiff in error presented a petition for certiorari for sanction, and the judge of the superior court refused to sanction it, and exception is taken to this refusal. A motion is made to dismiss the bill of exceptions because it appears from the record that the surety who signed the certiorari bond signed the appeal bond on the appeal to the jury in the justice's court. This would have been a good ground for a motion to dismiss the certiorari in the superior court, but in the present instance it

is not good ground for dismissing the writ of error, for two reasons—first, because, until a petition for certiorari is sanctioned, there is no necessity for the execution of a bond; and, in this case, the judge having refused to sanction the certiorari, the certiorari bond never became essential. It is well settled that neither the costs need be paid nor the bond given until after the sanction of the certiorari; but even if the certiorari had been sanctioned, so as to require the execution of a bond, while the defendant in certiorari could, upon the hearing in the superior court, have moved to dismiss the certiorari, for the reason that the bond was without security, and the court could properly have sustained this motion, still, if no such motion was made, as the statutory requirement as to security upon the certiorari bond is a provision for the benefit of the defendant in certiorari, his failure to make the motion to dismiss will be considered as a waiver of his rights upon that subject.

For the reasons stated in the fourth and fifth headnotes, we think that the judge of the superior court erred in not sanctioning the petition and ordering the issuance of the writ of certiorari. The two exceptions dealt with in these headnotes, which appear in the petition, are meritorious. Under the rule laid down in *Linder v. Renfro*, 1 Ga. App. 58, 57 S. E. 975, whatever may be the truth as developed by the answer of the magistrate, the allegations of the petition, properly verified, are to be taken as true until the coming in of the answer.

There is no merit in one of the main contentions of the petitioner in certiorari. Where one is sued for a definite amount of the indebtedness of another, alleged to have been assumed by the defendant as an original undertaking, a bill of particulars specifying items of the account is unnecessary. If one, as an original undertaking upon a consideration, has assumed to pay a definite amount of the indebtedness of another, it is none of his concern whether the debt thus assumed in behalf of the debtor is greater or less than his actual total indebtedness.

We are of the opinion that under the statements of the petition, and its statement of the testimony of the plaintiff, Roberts, himself, he would not be entitled to recover upon the terms of Bush's verbal promise to pay the debt of Hardwick; it appearing that the only consideration, according to the testimony of Roberts himself, was his promise not to prosecute Hardwick if Bush would assume Hardwick's debt of \$16.80. This does not appear to be a good consideration to support an original undertaking on the part of Bush, and, unless Bush agreed to pay the debt of Hardwick in consideration of a benefit to himself or a lawful benefit to the debtor, the promise would come clearly within the provisions of the statute of

frauds. Civ. Code 1895, § 2693, par. 2. It is also apparent that Roberts should not have been permitted to deny, in response to Bush's plea of set-off, the express stipulation of the written contract which he admitted he had signed. It was immaterial that the justice erred in allowing Roberts to testify as to the correctness of the account. Nor was there error in allowing the jury to take the original summons with them during their deliberations on the case. The justice properly overruled the objection as made, though, if a motion had been made to cover the judgment, it could properly, and doubtless would, have been granted.

The objection to the juror is without merit. In the petition for certiorari it is insisted that one juror served on the jury whose name was not upon the jury list of the county, and that this fact was unknown to the defendant until after the verdict and judgment. It is too well settled for argument that objections propter defectum to jurors are of no avail after verdict.

The judgment of the judge of the superior court is reversed solely for the reasons stated in the fourth and fifth headnotes.

Judgment reversed.

#### TINSLEY v. STATE. (No. 1,062.)

(Court of Appeals of Georgia. July 31, 1908.)

##### 1. CRIMINAL LAW—NEW TRIAL—CONTINUANCE OF MOTION.

An application to continue a motion for a new trial in order to enable the movant to obtain an affidavit as to alleged newly discovered testimony is addressed to the sound legal discretion of the presiding judge. In the present case there was no abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2407.]

##### 2. SAME—INSTRUCTIONS.

An alleged erroneous instruction of the court to the jury is not to be viewed insularly and apart from the context.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

##### 3. SAME—HARMLESS ERROR.

An erroneous instruction to the jury will not work a reversal, if the verdict as rendered makes it manifest that the finding of the jury was in no wise affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 8161.]

##### 4. SAME.

No reversible error appears.

Russell, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrell, Judge.

Will Tinsley was convicted of assault with intent to kill, and brings error. Affirmed.

Jas. G. Parks, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, J. B. Ridley, and H. A. Wilkinson, for the State.

POWELL, J. The plaintiff in error excepts to the overruling of his motion for new trial, and also to the refusal of the trial

judge to continue the motion in order to enable him to complete an extraordinary ground. At the time set for the hearing of the motion the movant's attorney requested that he be allowed a few days longer in which to prepare an additional amendment, on the ground of newly discovered evidence of one Connor, who was in Quincy, Fla., but was expected to return home in a very short time, and stated to the court that the substance of the newly discovered evidence was that Connor was at the house of Emma Rumney at the time the defendant was accused of shooting the prosecutor, and saw the prosecutor get up from his chair and draw a pistol and advance on the defendant, that the defendant began to back and the prosecutor kept advancing, that he saw him get into a tussle and during the tussle the pistol fired, and that the prosecutor was trying to pull the pistol from the defendant at the time it fired. Movant's counsel admitted that he had not seen or talked with the proposed witness in person. The refusal to allow the additional time in which to submit the proposed amendment and the affidavit of Connor in support thereof was placed upon the ground that the movant had had ample time to prepare his case and upon the further ground that the alleged newly discovered evidence was merely cumulative and impeaching. The court proceeded to hear and determine the motion for new trial.

1. The rule that all applications for continuances are addressed to the sound legal discretion of the court, and that this discretion will not be interfered with unless manifestly abused, is applicable to the hearing of a motion for a new trial. The original motion was filed January 9, 1908. The hearing was first set for January 31, and was continued by proper order until February 8, 1908, which was the date upon which the further postponement was asked. Thus 30 days had elapsed between the original filing of the motion and the hearing, and it was not made to appear that counsel had not had time enough (after he was informed of the nature of Connor's testimony) to procure the witness' affidavit, even though he might have been in Florida. It is true that counsel stated that he had learned of this evidence only a few days before the hearing; but the term "a few days" is necessarily indefinite, and even a few days might be ample time in which to procure the affidavit of a witness in Quincy, Fla., if modern facilities for intercourse, such as mail, telephone, and telegraph, were used. Before we could say that the judge abused his discretion, it would have to appear from the record that Quincy, Fla., was deprived of communication with the outside world, or that its location, as compared with the residence of the defendant's counsel, was so distant, or the definite time intervening between the knowledge of Connor's testimony and the date of

the hearing was so short, that the testimony of the witness could not have been procured by the exercise of ordinary diligence. Comparing the proposed testimony with that produced by the defendant on the trial, it appears that it would have been only cumulative, and for this reason it appears that the court was justified in refusing to delay the hearing of the motion to obtain it.

2. It is insisted in the first ground of the amended motion for a new trial that the court intimated an opinion that the weapon was used by the defendant, although that such was the case was denied by the defendant, and although it is an issuable fact whether the defendant used a weapon, or whether the prosecutor was wounded by the accidental discharge of a pistol. The instruction of which complaint is made is in the following language: "In order to determine the intention with which the defendant acts, you may look at the nature and character of the weapon used by him, you may look to the circumstances under which he used it, and you may look at the manner in which he used it." We have had occasion to remark several times that a criticism upon a disconnected excerpt from a charge to the jury is frequently unfounded, when the extract of which complaint is made is considered by the reviewing court (as it must be by the jury) in connection with the charge as a whole. Viewed thus, the charge is relieved by the context from the imputation of error. The court was charging in general and abstract terms as to the elements of an assault with intent to murder, and upon the element of intention used the language quoted above. It is plain that the "defendant" in the mind of the court was not the particular person on trial, but the hypothetical person who was the actor in the abstract proposition the court was announcing.

3. In the fourth ground of the motion for a new trial it is insisted that the court erred in charging the jury as follows: "If you should believe at the time the assault was made, if any, that the defendant in this case got into a struggle or tussle with the party named in the bill of indictment, namely S. C. Winn, and that he did not shoot at him or intentionally hit him, but that it was an accidental discharge of the pistol, then you would not be authorized in finding him guilty of shooting at another, but under such conditions you would be authorized in finding him guilty of an assault." It is contended that this instruction was unauthorized under the law and testimony in the case. Compared with the indictment in the case, this instruction was erroneous, for the defendant was charged with making an assault only by shooting with a pistol. While as an abstract proposition the charge quoted would have been correct, it was not correct in this case, for the lack of any allegation in the indictment authorizing it. However, it is harmless er-

ror, for the defendant was not convicted of an assault, but of the offense of shooting at another, and thereby it clearly appears that the jury did not adopt that view of the evidence to which alone this charge was applicable. If the jury observed the charge of the court, as we are bound to presume they did, no harm resulted to the defendant from this error.

4. There are other exceptions to the charge. We have considered them carefully. None of them are well taken. Barring the slight blemish already dealt with, the charge was very able, full, and fair.

Judgment affirmed.

RUSSELL, J., dissents.

**BOYER v. STATE.** (No. 1,259.)

(Court of Appeals of Georgia. July 31, 1908.)

**CRIMINAL LAW—APPEAL—REVIEW.**

No error of law appears, and there is some evidence to support the verdict.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Sam Boyer was convicted of crime, and brings error. Affirmed.

T. L. Reese, for plaintiff in error. R. W. Moore, Sol., for the State.

HILL, C. J. Judgment affirmed.

**STAPLES v. STATE** (No. 1,233.)

(Court of Appeals of Georgia. July 31, 1908.)

**BURGLARY—EVIDENCE.**

The evidence authorizes the verdict. No reversible error of law appears.

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Jim Staples was convicted of burglary, and brings error. Affirmed.

W. A. James, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

POWELL, J. The defendant was convicted of burglary, and the evidence is ample to sustain the conviction. Several of the grounds of the motion for a new trial, especially those relating to rulings upon testimony, are not stated with that accuracy essential to a review by this court. None of the other exceptions are meritorious. At least none of them present any error of sufficient importance to justify a reversal.

Judgment affirmed.

**G. H. DOLVIN & CO. v. HICKS.** (No. 1,247.)

(Court of Appeals of Georgia. July 31, 1908.)

**1. ATTACHMENT—AFFIDAVIT—AMENDMENT.**

In an attachment case, the initial affidavit may be amended by adding one or more addi-

tional grounds of attachment to those originally alleged. Civ. Code 1895, § 5122; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. Ed. 211; Brumby v. Rickoff, 94 Ga. 429, 21 S. E. 232; Collins v. Taylor, 128 Ga. 789, 58 S. E. 448.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 334.]

**2. PARTNERSHIP—ACTIONS AGAINST—ADMISSIONS OF PARTNER.**

Testimony that an account made out against a partnership was presented to one of the members thereof and that he acknowledged its correctness is prima facie proof of the correctness of the account, and in case of a denial of the account by the partnership is sufficient to make an issue of fact for the jury.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by J. R. Hicks against G. H. Dolvin & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

Nottingham & Cabaniss, for plaintiffs in error. L. D. Moore, for defendant in error.

POWELL, J. Judgment affirmed.

**McLEOD v. FAIRCLOTH BROS.** (No. 1,099.)

(Court of Appeals of Georgia. July 31, 1908.)

**JUSTICES OF THE PEACE—CERTIORARI—DISMISSAL.**

Section 4644 of the Civil Code of 1895 requires that "the plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable." This requirement of the statute was not complied with, and no reason was shown for a failure to comply therewith. Consequently the judgment dismissing the certiorari on motion of the defendant in certiorari must be affirmed. Johnson v. State, 2 Ga. App. 182, 58 S. E. 415, and decisions of the Supreme Court therein cited.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by Faircloth Bros. against Marilu McLeod. Judgment for plaintiffs before a justice. From an order dismissing a certiorari, defendant brings error. Affirmed.

Herbert L. Grice, for plaintiff in error. W. A. Holt and Hal Lawson, for defendants in error.

HILL, C. J. Judgment affirmed.

**BROWN & BIGELOW, Inc., v. PARIAN PAINT CO.** (No. 1,165.)

(Court of Appeals of Georgia. July 31, 1908.)

**JUSTICES OF THE PEACE—CERTIORARI.**

After a verdict has been rendered by a jury in a justice's court, certiorari is available to the party dissatisfied in all cases, irrespective of the character of the questions involved or the amount in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 762-767.]

(Syllabus by the Court.)



Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Brown & Bigelow, Incorporated, against the Parian Paint Company. Judgment for plaintiff before a justice. On certiorari a new trial was ordered, and plaintiff brings error. Affirmed.

Walter R. Brown, for plaintiff in error.  
Leonard Haas, for defendant in error.

**POWELL, J.** A case involving issues of fact, with the amount in controversy exceeding \$50, was instituted in a justice's court. The verdict was in favor of the plaintiff, and the defendant took the case by certiorari to the superior court. In that court the original plaintiff moved the court to dismiss the certiorari, on the ground that certiorari does not lie to the verdict of the jury in a justice's court in a case involving an issue of fact where the amount involved exceeds \$50. The court overruled the motion, and also ordered a new trial. To both of these rulings exceptions are taken.

This case falls within section 9 of the "rules to determine whether certiorari or appeal is the proper remedy," formulated and announced by the Supreme Court in *Toole v. Edmondson*, 104 Ga. 784, 31 S. E. 28. To quote: "After a verdict has been rendered on appeal in the justice's court, certiorari is available in all cases, without reference to the character of the questions involved." This is but a paraphrasing of section 4149 of the Civil Code of 1895, which provides that, "when either party is dissatisfied with the verdict of a jury in any appeal case tried in the justice courts, such party may apply for and obtain a writ of certiorari," etc. The cases cited by the plaintiff in error—*Ansley v. Farley*, 126 Ga. 425, 55 S. E. 180; *Cook v. Exom*, 125 Ga. 450, 54 S. E. 147; *Benton v. Hynes*, 100 Ga. 95, 26 S. E. 469—refer exclusively to the rights of the losing party as to the trial before the magistrate or county judge, and not to his right in the event of an adverse verdict in the justice's court.

To admit that the case involved a dispute of fact is to admit the right of the judge of the superior court to grant one new trial upon certiorari. *Bailey v. Hooks*, 1 Ga. App. 276, 57 S. E. 924; *Fair v. Insurance Co.*, 2 Ga. App. 376, 58 S. E. 492; *Walker v. Hughes*, 120 Ga. 1079, 48 S. E. 387.

Judgment affirmed.

#### ROGERS v. STATE. (No. 1,175.)

(Court of Appeals of Georgia. Aug. 4, 1908.)

#### 1. CRIMINAL LAW—EVIDENCE OBTAINED BY ILLEGAL SEARCH—COMPETENCY.

The assignment of error based on the ruling of the trial court in admitting incriminating evidence obtained by a search of the defendant's house without a warrant is controlled by the decisions of this court in the cases of *Glover v.*

*State*, 61 S. E. 862, *Croy v. State*, 61 S. E. 848, and *Tooke v. State*, 61 S. E. 917, and the decision of the Supreme Court in *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 877.]

#### 2. SAME—EVIDENCE.

The verdict is fully supported by the evidence, and the judgment refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Warren County; Jos. N. Worley, Judge.

Coot Rogers was convicted of crime, and brings error. Affirmed.

L. R. Massengale and E. P. Davis, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

**HILL, C. J.** Judgment affirmed.

#### FUDGE v. KELLY. (No. 1,147.)

(Court of Appeals of Georgia. July 31, 1908.)

#### EXCHANGE OF PROPERTY—RESCISSION.

Mere breach of warranty will not authorize the rescission of a horse swap. Fraud usually will. Material false representations as to existing conditions are usually fraudulent, as contradistinguished from guarantees for the future, which are merely warranties. *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168; *Johnson v. Harley*, 121 Ga. 83, 48 S. E. 685.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exchange of Property, § 20.]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by John Kelly against Judge Fudge. Judgment for plaintiff. Defendant brings error. Reversed on rehearing.

W. I. Geer, for plaintiff in error. P. D. Rich, for defendant in error.

**POWELL, J.** (upon rehearing). In the original decision of this case (on which a judgment of affirmance was rendered) we made a plain, palpable error. We are glad it has been called to our attention before it is beyond our power to correct it. Indeed, in any case there is nobody's error that we shall be less reluctant to correct than our own, if we shall be able to see the latter in time legally to do so.

The plaintiff in this case claimed that in swapping horses with the defendant the latter represented to him, in substance, that his animal was free from incumbrance. It appears from the record that the horse so received by the plaintiff in exchange for his own was soon after the swap seized by a constable under some sort of process, and the plaintiff thereupon sued the defendant for the horse the latter had received in the trade. In the argument here both sides stressed their respective contentions as to the law governing the case as if there were no question that the process by which the constable seized the horse was an incum-

brance upon it at the time of the trade, and on this hypothesis we decided the case. It is true, however, that the plaintiff in error in his brief has a general statement broad enough to raise the point that the plaintiff failed to make out a case. Upon a closer examination of the brief of the evidence we find that it does not affirmatively appear that the lien or process by which the constable seized the horse was an incumbrance upon it at the date of the trade. The showing of this fact was a prerequisite to a recovery by the plaintiff. The verdict in his favor was therefore contrary to the evidence. The proposition of law announced in the foregoing headnote, which construed the original opinion filed in the case, is sound; but the judgment should be reversed for the reason herein indicated. The judgment of affirmance is therefore withdrawn, and a judgment of reversal awarded instead.

Judgment reversed.

### GEORGIA SOUTHERN & F. RY. CO. v. GOODMAN. (No. 1,157.)

(Court of Appeals of Georgia. July 31, 1908.)  
JUSTICES OF THE PEACE—CERTIORARI—ANSWER—SUFFICIENCY.

It is essential to the maintenance of a certiorari from a justice's court that the answer should show that there has been a final judgment or verdict rendered; but this fact may properly appear, either in the answer in the form of a direct statement or in any other way which will sufficiently verify it. Where, as a part of the answer, the justice sends up a certified copy of the proceedings in the court below, and a final verdict or judgment appears therein, this is a sufficient verification of the existence of such judgment or verdict. *Landrum v. Moss*, 1 Ga. App. 216, 57 S. E. 965; *Brown v. Atlanta*, 123 Ga. 499, 51 S. E. 507.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by O. P. Goodman against the Georgia Southern & Florida Railway Company. Judgment for plaintiff before a justice. From an order dismissing certiorari, defendant brings error. Reversed.

Bule & Knight, for plaintiff in error. J. W. Powell and Watts Powell, for defendant in error.

POWELL, J. Judgment reversed.

### WOOD v. UNITED STATES FIDELITY & GUARANTY CO. et al. (No. 1,019.)

(Court of Appeals of Georgia. Aug. 4, 1908.)  
1. PLEADING—PLEA IN ABATEMENT—VERIFICATION—WAIVER OF OBJECTION.

An insufficient verification of a plea in abatement is a mere matter of form, and is an amendable defect; and, if the plaintiff does not object to the verification of the plea before issue joined, it will be too late for him to do so thereafter. Civ. Code 1895, § 5045; *Ward v. Frick Company*, 95 Ga. 804, 22 S. E. 899.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Pleading, §§ 1416, 1417.]

62 S.E.—7

### 2. APPEAL AND ERROR—HARMLESS ERROR—IRREGULARITY IN PRACTICE.

The better practice is to submit the issue of the plea in abatement before trying the merits of the case; but where both issues are submitted together, and the verdict of the jury is restricted to the finding in favor of the plea in abatement, no harm is done, and the error is not reversible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4212-4218.]

### 3. ABATEMENT AND REVIVAL—EVIDENCE—SUFFICIENCY.

The evidence is sufficient to justify the verdict in favor of the plea in abatement.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by W. W. Wood, ordinary, for the use, etc., against the United States Fidelity & Guaranty Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Ira S. Chappell, for plaintiff in error. Williams & Blackshear and J. S. Adams, for defendants in error.

HILL, C. J. Judgment affirmed.

### CORDELE GROCERY CO. v. THIGPEN et al. (No. 1,218.)

(Court of Appeals of Georgia. July 31, 1908.)  
PRINCIPAL AND SURETY—RELEASE OF SURETY—COLLATERAL SECURITY.

This case is controlled by *Cloud v. Scarborough*, 3 Ga. App. 7, 59 S. E. 202. Where a mortgage on the property of the principal debtor is taken simultaneously with the creation of the suretyship, the creditor owes to a surety the duty of having it properly probated and recorded within a reasonable time, and a failure to do this relieves the surety.

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by the Cordele Grocery Company against Isabella Thigpen and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hal Lawson, for plaintiff in error. M. B. Cannon, for defendants in error.

POWELL, J. Judgment affirmed.

### SEABOARD AIR LINE RY. v. HUTCHINSON. (No. 1,140.)

(Court of Appeals of Georgia. July 25, 1908.)

### 1. GARNISHMENT—AFFIDAVIT—STATEMENT OF AMOUNT CLAIMED TO BE DUE.

A party who institutes garnishment proceedings under the provisions of section 4708 of the Civil Code of 1895, based on a pending suit, may state in his affidavit for garnishment that "the amount claimed to be due in such action" is a less amount than that specified and claimed in the original suit, and the garnishment bond required in such event will be "in a sum at least equal to double the amount sworn to be due," without reference to the amount claimed in the main suit.

## 2. SAME—AMENDMENT OF DECLARATION.

Where garnishment proceedings are instituted under the provisions of section 4708 of the Civil Code of 1895, based on a pending suit, and the plaintiff states in his affidavit that "the amount claimed to be due in such action" is a smaller sum than that specified in the damnum clause in the main suit, he can amend the declaration by reducing the amount therein claimed so as to make it conform to the amount sworn to be due in the affidavit for garnishment. The amendment, when filed, relates back to the time of the filing of the original suit.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by P. H. Hutchinson against the Seaboard Air Line Railway, in which action plaintiff sued out a garnishment. Defendant demurred to the garnishment affidavit and bond and moved to dismiss the garnishment proceeding, and, from a judgment overruling such demurrer and motion, brings error. Affirmed.

Brown & Randolph, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, J. H. Porter, Smith & Hastings, Smith, Hammond & Smith, and Tye, Peeples, Bryan & Jordan, for defendant in error.

HILL, C. J. Hutchinson sued the Seaboard Air Line Railway to recover damages for personal injuries in the sum of \$25,000. Pending the case he sued out garnishment proceedings, stating in his affidavit that he claimed to be due him in his suit the sum of \$10,000. The garnishment bond was in the sum of \$20,000. The defendant filed a demurrer to the affidavit and bond for garnishment and made a motion to dismiss the garnishment proceedings, both based upon the proposition that the variance in the amount sued for in the main suit and the amount claimed to be due in such action as stated in the affidavit for garnishment constituted a fatal defect. Before the hearing of the demurrer and the motion to dismiss, the plaintiff amended his original petition by changing the amount claimed as damages from \$25,000 to \$10,000, so as to make it conform to the affidavit and the bond for garnishment. Two questions of law are presented for the decision of this court: (1) Is an affidavit in a garnishment proceeding, based on a pending suit, which states that "the amount claimed to be due in such action" is a less sum than the amount claimed in the main action, a compliance with the statutory requirements for the issuance of garnishment proceedings? (2) If such variance is material, can it be cured by an amendment of the original suit reducing the amount sued for so as to make it conform to the amount claimed to be due in the affidavit for garnishment?

1. Section 4708 of the Civil Code of 1895, providing for the institution of garnishment proceedings, so far as it relates to the question now under consideration, is as follows: "The plaintiff, his agent or attorney at law, shall make affidavit before some officer au-

thorized to issue an attachment by this Code, stating the amount claimed to be due in such action, or on such judgment"—the words "such action" referring to the pending suit on which the garnishment proceeding is based. The plaintiff in error contends that the proper interpretation of the above language is that the affidavit for garnishment must state, as "the amount claimed to be due," the amount specified in the pending action. The defendant in error insists that the phrase "in such action" applies to the word "due," and not to the word "claimed," so that the party seeking the garnishment is required to state in his affidavit how much he claims is due in the pending action at the time of making the affidavit, regardless of the amount specified in such action as being due. The exact point now under discussion seems never to have been before the Supreme Court, and we will accept that construction of these words of the statute which appears to us to be in harmony with sound judicial policy. A party may, and frequently does, sue for a larger amount than he really claims or expects to recover. Indeed, in suits to recover damages for personal injuries, this is generally the rule. The plaintiff is not required to swear to the amount he claims in his main suit; but, when he wants process of garnishment issued on his pending suit, he must "make affidavit \* \* \* stating the amount claimed to be due in such action." He has already stated the sum claimed as due him in his main suit, and this is a matter of record. No serious injury can happen to the defendant or any one else by the filing of the main suit; but garnishment is a summary remedy which does affect the right of the defendant, and may affect the garnishee. Before the plaintiff can avail himself of this summary statutory remedy, he must state under oath the amount he really claims to be due him in his pending action, so that the rights of the defendant will be protected in the event that the plaintiff fails to recover in his suit, or that the money or property sought to be garnished was not subject to the process of garnishment. Section 4718 of the Civil Code of 1895 provides that garnishments may be dissolved by the defendant by giving a bond "conditioned for the payment of the judgment that shall be rendered on said garnishment." The condition of the bond is not to pay the judgment that is rendered in the main suit, but to pay the judgment rendered on the garnishment proceedings. No greater judgment can be rendered in the garnishment proceedings than the amount which the plaintiff claims to be due him in such proceedings, regardless of the amount of his claim in the main suit. It would seem to be unnecessary to require the plaintiff to give a bond in a larger amount than would be required to protect the defendant because of the garnishment proceedings. Nor will this view impose any hardship upon the defendant, for he can dissolve the garnishment by

filing a bond, as before stated, "conditioned for the payment of the judgment that shall be rendered," not in the main suit, but "on said garnishment." While the practice in garnishment proceedings has been to name in the affidavit the amount claimed by the plaintiff in his original suit, and to execute a bond in double the amount so claimed, yet we see no reason in law or logic why the plaintiff cannot state in his affidavit for garnishment the sum he actually claims to be due him in his main suit, and why a bond in double the amount of the sum so claimed would not be sufficient to meet all the requirements of the statute, and to fully protect the rights of the defendant.

2. But even if not correct in the foregoing construction of the statute on this subject, we think any variance between the amount claimed in the original suit and the amount claimed in the affidavit to obtain garnishment is amendable. Section 4564 of the Civil Code of 1895 allows the plaintiff in attachment to amend his attachment or bond or declaration as in other cases at common law, and the Supreme Court, in *Janet v. Tomlinson*, 30 Ga. 540, held that this act was also applicable to garnishment proceedings. In *Irvin, Adm'r, v. Howard*, 37 Ga. 18, an attachment bond was amended so as to make the amount of the bond twice the sum sued for, and in *Gregory v. Clark*, 78 Ga. 542, it was held, generally, that the provisions of the Code relative to garnishments and attachments should be construed in pari materia, so as to give effect to every part of each of them. It is clear that any variance between the garnishment proceedings including the affidavit and the bond and the main suit may be cured by amending the affidavit or by amending the bond (of course, with the consent of the sureties, when the bond is amended). Certainly there is no more sanctity in the main suit than in the garnishment suit, and no reason why the former could not be amended to conform to the latter, as well as the latter could be amended to conform to the former. The policy of our law is to allow defects in all proceedings to be cured by amendment where no injury results to either party. It is difficult to see how an amendment to a main suit, reducing the amount sued for so as to make it conform to the amount stated in the affidavit upon which the garnishment was based, can work any injury to the defendant, the garnishee, or any other party who may claim the fund garnished. Theoretically the main suit and the garnishment suit based upon the main suit may be entirely different, and each may proceed to judgment for an entirely different amount. Practically, the garnishment suit is dependent upon the main suit. It is an incident of the main suit and can amount to nothing unless success is first reached in the main suit. Therefore any amendment which is not injurious to the opposite party, which has the effect of making the garnishment suit conform to the main suit, or vice versa, should be allowed.

The amendment that was properly allowed in this case, as we think, of the main suit, reducing the amount sued for from \$25,000 to \$10,000, related back to the time of filing the original suit, and took effect as of that date (*A., K. & N. Ry. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106; *Wells v. Wells*, 118 Ga. 812, 45 S. E. 669; *Southern Ry. Co. v. Horine*, 121 Ga. 386, 49 S. E. 285), and it follows that with the amendment the main suit and the garnishment proceedings were in accord on the subject of the amount claimed by the plaintiff.

Judgment affirmed.

#### EAKER v. STATE.

BARTON v. SAME. (Nos. 1,238, 1,260.)

(Court of Appeals of Georgia. July 31, 1908.)

#### 1. CRIMINAL LAW — EVIDENCE — ADMISSIBILITY.

When a crime has been committed which, from its nature or the details of its commission, necessarily or probably involved the participation of more than one person, it is permissible for the state to prove, on the trial of one of the persons charged with committing it, that, shortly after the crime was committed, he was seen in company with another person, and that this other person was by the circumstances of the case and by the indicia of guilt found upon him connected with the crime.

#### 2. SAME — COMPELLING ACCUSED TO CRIMINATE HIMSELF.

Upon reasonable grounds for his suspicion a police officer may without warrant arrest a suspected felon apparently attempting to escape, and after such an arrest may subject the clothing of the prisoner to a reasonable search. Evidence of crime so obtained is not inadmissible against the defendant on the ground that he is thereby compelled to disclose evidence against himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 872.]

#### 3. SAME.

To render evidence inadmissible on the ground that the prisoner was compelled to produce it against himself, it must appear that such compulsion was used as to rob the prisoner of volition in the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 872.]

#### 4. SAME — OTHER OFFENSES.

Evidence which bears a distinct relevancy to the case on trial is admissible against the defendant, though it tends to show also his complicity in another crime.

#### 5. SAME — NEW TRIAL — DISQUALIFICATION OF JUROR.

Where a defendant has been convicted of burglarizing a bank and attempts to have the verdict set aside on the ground that, unknown to him, one of the jurors who tried him was related to a stockholder in the bank, the juror is incompetent to testify to the alleged relationship. The evidence submitted in support of the attack must be such as to show not merely that at the time of the hearing of the motion for a new trial the asserted relationship existed, but definitely that it existed at the time of the juror's service.

#### 6. SAME — APPEAL — REVIEW.

The trial was free from error, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Talliaferro County; Jos. N. Worley, Judge.

J. P. Eaker, alias Horace Thompson, and George Barton, were separately convicted of burglary, and they bring error. Affirmed.

W. N. Maltbie, J. A. Beazley, and B. W. Wall, for plaintiffs in error. David W. Meadow, Sol. Gen., for the State.

POWELL, J. These defendants were separately tried and convicted of burglary. The banking house of the Bank of Sharon was broken into in the nighttime, and the safe blown open by the use of explosives. A few hours later these two men boarded the train of the Georgia Railroad at a station near Sharon. Circumstances raised a suspicion of their complicity in the burglary, and upon telegrams a member of the Augusta police force came upon the train at that point and arrested them as they were leaving it. They were searched, and large pistols and an unusual number of cartridges were found upon them; also, on one of them was found a piece of soap corresponding in character to that used in blowing the safe. As they left the train, one of them was seen to drop a package which upon examination proved to contain dynamite fuses. They were brought back and placed in the jail of Tallahassee county, the county in which the crime was committed. The cashier of the bank, who was acting as prosecutor, asked the sheriff to get him a left shoe from each defendant. The sheriff, without disclosing his purpose, told the men each to give him a shoe. Being handcuffed, they simply lifted their feet, and allowed the sheriff to take off their shoes. The witness who testified to this transaction stated unequivocally that no coercion or intimidation was used to procure the shoes. The shoes so obtained were fitted into the tracks near the bank, and by the correspondence thus established furnished damaging evidence against the prisoners. When the defendants were arrested at Augusta, they claimed to be railroad conductors, and Thompson gave his name as Eaker, producing in corroboration of his statement a railway pass, a membership card in a fraternal order, correspondence, etc., bearing the name of J. H. Eaker. On the trial the true J. H. Eaker appeared and testified that the pass, membership card, etc., were his, and that they had been taken from a satchel in his room at Rock Hill, S. C., a few days before the burglary was committed at Sharon. The prisoner abandoned his contention that he was conductor Eaker, and admitted that his name was Thompson. To the overruling of a motion for a new trial each defendant excepts. The grounds are numerous and will not be taken up seriatim, but a few general rulings will be announced sufficiently broad to cover them all.

1. Throughout several of the exceptions, presented in one form or another, is the point that on the trial of each of these defendants the court admitted testimony which tended

to indicate the guilt of the other. The contention is made that the defendants were separately tried, were not charged as conspirators, and no conspiracy between them was shown, and that therefore the indicia of guilt which tended to incriminate one of the prisoners were not relevant on the trial of the other. When a crime has been committed which from its nature or the details of its commission necessarily or probably involved participation of more than one person, on the trial of a defendant accused thereof it is relevant and permissible to show, in connection with other incriminating circumstances, that he was found in company with another person to whose guilty connection with the transaction the circumstances point. If the particular defendant on trial had been found with a bag soon after the commission of the crime, it certainly would have been relevant to prove that an investigation into it revealed that it contained burglar's tools. Just so, when, soon after the burglary, he was seen in company with a man, and an investigation showed that this companion likely was one of the participants in the burglary, the very association became an appurtenant link in the chain of circumstances showing his own complicity in the crime. His connection with one of the animate agencies through which the crime was probably committed was as relevant a matter of investigation as would have been his connection with an inanimate agency. Every circumstance which tended to show that the two prisoners were part and counterpart in the personnel, so to speak, of the crime (in which from its nature and manner of commission more than one participant must have been involved), heightened the relevancy, as to each of them, of every guilty badge found upon the other.

2. The point is made that the evidence obtained through the search of the persons of the prisoners by the police upon their arrest at Augusta was inadmissible—that the arrests, having been made without warrant, were illegal, that the search and seizure were unlawful, and that the defendants were thereby compelled to furnish evidence tending to criminate them in violation of the constitutional guaranty as construed in the decisions of this court in *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66, and other similar cases. The arrests were not unlawful. By Pen. Code 1895, § 896, an officer may arrest without warrant if the offender is endeavoring to escape. The right to arrest without a warrant a suspected person apparently about to escape is broader in felony than in misdemeanor cases. *Robinson v. State*, 93 Ga. 87, 18 S. E. 1018, 44 Am. St. Rep. 127; *Johnson v. State*, 30 Ga. 426; *Harrell v. State*, 75 Ga. 842. There were strong reasons for suspecting these persons of the felony. They had left the neighborhood of the crime that night on a fast train, and

had already reached a border city in their apparent attempt to flee the state. The arrest was reasonable and justifiable. The arrest being legal, the search of their persons was lawful, and the evidence obtained thereby was admissible against them.

3. The contention that the prisoners were compelled to furnish evidence against themselves by the action of the sheriff in asking them for their shoes and in taking the shoes thus obtained and comparing them with the tracks found near the scene of the crime is answered by the decision of the Supreme Court in the case of *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748 (3).

4. The objection to the testimony of conductor Eaker that the pass, membership card, letters, etc., found in possession of the defendant Thompson were his, and that they had been taken surreptitiously from his possession, on the ground that this tended to embarrass the defendant before the jury by showing his complicity in another and independent crime, is not well taken. Thompson having used these papers in an attempt to establish an identity asserted by him, it was permissible for the state to show that he was thereby asserting a false identity to aid his escape, even though by its doing so another crime was indicated. *Ray v. State*, 4 Ga. App. 67, 60 S. E. 816 (3).

5. One of the grounds of the motion for a new trial in Thompson's case is that one of the jurors who tried him was related to one of the stockholders of the bank of Sharon, and that this fact was unknown to him or his counsel until after verdict. If these facts properly appeared, it would be a good ground for a new trial; but, after carefully scrutinizing it, we do not find the ground sufficiently supported. An affidavit from the juror himself showing the relationship is attached to the motion. It cannot be considered. "As a matter of public policy, a juror cannot be heard to impeach his verdict either by way of disclosing the incompetency or misconduct of his fellow jurors or by showing his own misconduct or disqualification from any cause." *Bowden v. State*, 126 Ga. 578, 55 S. E. 499. It is otherwise verified that, at the time of the hearing of the motion for a new trial, Cox, to whom the juror was related, was a stockholder of the bank, but not that he was a stockholder at the time of the trial. This is not sufficient. The affidavit of the defendant that he did not know of the disqualification of the juror at the time of the trial is imperfect, in that it is not entitled in the cause. For these reasons the trial judge did not err in refusing to grant a new trial on this ground.

6. There are other points in the record. We do not deem it necessary to elaborate them, but will be content to say that they are, none of them, well taken. The evidence fully authorized the verdict.

Judgment affirmed.

ROYAL UNION LIFE INS. CO. v. McLENDON. (No. 1,127.)

(Court of Appeals of Georgia. July 31, 1908.)

1. INSURANCE—CONSTRUCTION OF POLICY—FORFEITURES.

Policies of insurance will be liberally construed in favor of the object to be accomplished, and conditions and provisions therein will be viewed, if ambiguous, most strongly against the insurer. Forfeitures are not favored, and the courts will be prompt to seize hold of any circumstance appearing in the whole transaction that will prevent forfeiture of rights accruing to the insured or the beneficiary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 295.]

2. SAME—LIFE POLICY.

The policy of insurance in the present case appears from the record to have been in full force and effect at the time of the death of the insured.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Laura McLendon against the Royal Union Life Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Brown & Randolph and J. J. Bowden, for plaintiff in error. C. W. Smith, M. A. Hale, and S. B. Hatcher, for defendant in error.

RUSSELL, J. The defendant in error brought suit against the insurance company to recover upon a contract of insurance issued by the company upon the life of her husband. The defendant demurred to the petition both generally and specially. The plaintiff, with the permission of the court, amended her petition to meet the special demurrer, and thereupon the trial judge overruled the general demurrer, and exception is taken to these rulings.

The record really presents only one question: Had the policy lapsed at the time of the death of the plaintiff's husband? Or to put the question more exactly: Do the allegations of the petition show that at the time of McLendon's death the contract of insurance was a valid obligation, binding upon the insurer?

There can be no dispute as to the allegations of fact, because, for the purposes of the demurrer, the facts stand admitted. We come, then, to determine the question whether the policy had lapsed at the time of McLendon's death. The issue must be settled by a consideration of the insurance policy as a whole, including all of its terms, conditions, and stipulations, keeping always in mind the cardinal rules of construction that the whole contract must, if possible, be harmonized, and effect given to the manifest intention of the parties in its execution. As we have already held, in *Arnold v. Empire Life Insurance Company*, 3 Ga. App. 685, 60 S. E. 470 (1): "Policies of insurance will be liberally construed in favor of the object to be accomplished, and conditions and provisions of every contract of insurance will

be strictly construed against the insurer who prepares and proposes the contract. If a policy of insurance is capable of being construed in two ways, that interpretation should be placed upon it which is most favorable to the insured, and, forfeitures not being favored, the court should be 'prompt to seize hold of any circumstance that indicates an election to waive a forfeiture or an agreement to do so.' In the present case, however, as it appears to us, the policy of insurance now under consideration is so free from ambiguity as to admit of but one construction. The intention of the parties to a contract is to be ascertained in order that the whole contract and every part thereof, so far as consistent with the rules of law, may be carried into effect. *Hodges v. Hall*, 5 Ga. 165; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Brown v. Ransey*, 74 Ga. 215. While a contract of insurance prepared and proposed by the insurer should be most liberally construed in favor of the insured, who ordinarily has no hand in the preparation of the contract, still it is not to be overlooked that the construction which will uphold the contract as a whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part. *Jaskson v. Carswell*, 34 Ga. 281; *Fletcher v. Yound*, 69 Ga. 592; *Maxwell v. Hopple*, 70 Ga. 160. It is not only for the court to construe the contract, but it is also the duty of the court to determine, as a matter of law, whether a given state of admitted facts works a forfeiture or a lapse of a policy of insurance. The decision of the trial court upon the demurrer was practically the termination of the case, and we think that the demurrer was properly overruled.

Frank P. McLendon, the deceased, procured the policy of insurance in question on the 8th of April, 1899. The annual premium to be paid was \$66.20 per annum. Under the terms of the policy, this premium was to be paid wholly in cash, or the company agreed to advance the insured each year at his option, \$16.55 of the annual premium, and require only \$49.65 to be paid in cash. For the \$16.55, provided he desired that amount advanced or loaned to him in accordance with the terms of the contract, the insured was required to execute an acknowledgment of indebtedness, bearing interest at 5 per cent. per annum. In paying the first year's premium, McLendon availed himself of this option and executed the following acknowledgment of indebtedness: "I hereby acknowledge that the Royal Union Mutual Life Insurance Company of Des Moines, Iowa, has advanced me sixteen and <sup>55</sup>/<sub>100</sub> dollars, being part premium on policy No. 6,872, issued to me by said company on the 8th day of April, 1899, for \$1,000.00 at age 46 on the 20-year endowment plan (actuaries 4 per cent.), which amount, with any additional advance stated on the renewal receipt and in-

dorsed hereon, and with interest added annually at 5 per cent., shall be a lien on said policy until extinguished by the surplus apportioned thereto, or is otherwise paid to the company on or before the end of the accumulative period under said policy"—dated April 8, 1899. The premiums payable on April 8, 1900, 1901, and 1902, were paid by the deceased, thus carrying his insurance to April 8, 1903, by virtue of payments made by him. No subsequent payment was made by him or in his behalf. He died on March 16, 1905. In addition to the advancements to which we have heretofore called attention, the company had made small advances, though at a slightly higher rate, during 1900, 1901, 1902, and 1903, amounting, in all, to \$52.56, which appears to have been entered upon the original obligation quoted above, making an indebtedness of \$69.11, which, with the interest, computed to be \$8.26, aggregated \$73.37, which on June 30, 1903, was the amount of the indebtedness of the insured to the company for loans or advancements. One of the stipulations of the contract is that: "At the end of the third or any subsequent policy year all premiums having been paid, this company guarantees: \* \* \* (c) If any premium herein is not paid when due the same shall be charged as a loan against the cash surrender value if it be sufficient. The insurance will continue in force so long as this fund will pay for the same at the term premium rates of the company. At any time before the expiration of this extended insurance, the insured may furnish satisfactory health certificate and pay arrearages with interest thereon and continue the original policy of insurance as though no default in payment had ever occurred." The loan and cash surrender value are embodied in the policy. The insured had paid for four years. As specified in the policy, he was entitled at that time to a guaranteed cash surrender value of \$108, so that under the stipulations of the policy it was the duty of the company to have deducted the premium of \$66.45 from the cash surrender value of \$108 in payment of the premium payable April 8, 1903, and which would have extended the insurance to April 8, 1904. Had the company complied with this stipulation of the contract, the policy would have been in force on April 8, 1904, with a cash surrender value, specified in the policy, of \$146 less the \$66.45, which had been deducted to pay the premium payable April 8, 1903, and leaving \$79.55 of guaranteed cash surrender value available upon that date with which to pay the premium then again due, of \$66.45, which would have extended the contract of insurance to April 8, 1905, nearly a month subsequent to the death of the insured, and would have left \$13 still available upon the cash surrender value. So it is clear to us that, so far from the policy having lapsed, it was within the power of the defendant company, and its duty, under the provisions of this contract, to have kept the

policy in force for a longer period of time than the insured lived, and, as the rights of the beneficiary cannot be defeated by either willful violation by the defendant company of its contract, or even by its unintentional negligence, we hold that the policy was, at the time of the death of the deceased, by the very terms of the contract, a valid policy of insurance. It was the evident intention of both parties to the contract, after the payment of three premiums, to provide for the extension of the contract automatically so as to give the insured the benefit of his share of the surplus fund, and, in any event, to reward his faithfulness in paying three premiums by providing that the guaranteed cash surrender value should provide protection against forfeitures as far as the amount was consistent with that result. Each payment thus made, according to the company's own contract, would increase the amount of the cash surrender value, though, of course, the increase not being great enough to pay any premium in whole, it would only be a question of time before there would be no cash surrender value available for the purpose of paying further premiums. In the estimate we have given above we have taken the view of the case which, under the facts, is the most favorable to the company, because, if the company had continued the course of dealings which had been carried on by the deceased, and had advanced upon the certificate the sum of \$16.55, annually to be paid out of the surplus, when a settlement was had then there would have been deducted from the cash surrender value only \$49.45 each year, instead of \$66.55. Or if the term rate had been deducted, it appears that only \$36.40 per annum could have been taken from the cash surrender value and applied to the extension of the insurance, which would have made the \$108, considerably more than sufficient to pay the two premiums due April 8, 1903 and 1904, in which the insured defaulted.

It is insisted by counsel for the plaintiff in error that, when default was made in the payment of the premium which was payable April 8, 1903, the company had the right, first, to apply from the cash surrender value the sum of \$77.37, in payment of McLendon's obligation for advances, which would have left only \$30.63 to be applied upon the insurance premium at term rates, and that thereby the insurance could only be extended to January 29, 1904, more than a year before the insured died, by which time the policy expired. We are unable to sustain this contention, in view of the stipulations of the contract as a whole. The contract distinctly recognizes the fact that there is a surplus fund, as well as a mortuary fund, and the obligation of the insured for the loan of \$16.55, advanced him annually at 5 per cent. interest, is not payable upon any definite day nor upon any fixed contingency; but the amount advanced April 8, 1899, together with any additional advan-

ces stated in the renewal receipt and indorsed thereon, is to be a lien until extinguished by the surplus apportioned to the policy, or until it is otherwise paid to the company. The insistence of the plaintiff in error would deprive the insured of any participation whatever in the surplus fund, and yet, as appears from the policy, the guaranteed loan value, at the time that the cash surrender value would have been exhausted by the payment of the two premiums to which we have heretofore alluded, would have been \$228, while the insured would only have received the benefit in all of \$146 of cash surrender value, showing that there would have been a surplus at the time that the company was entitled to make a settlement of about \$82, or more than enough to pay the company's advances of \$77.37. The policy in question was an endowment policy and recognized a surplus, in which the insured was entitled to participate, arising from every premium except the first. It is probable that this surplus collected from policy holders, over and above the experience cost of meeting mortuary claims and providing the reserve fund required by law, was far greater than the amount indicated by the difference between the loan value and the cash surrender value at the end of each year, as stipulated in the policy; but it is unnecessary for us to consider this view of the question or the statutes of the state of Iowa in reference thereto, for the reason that it is plainly apparent to us, as it was to the judge of the court below, that there was, and would be, at any time during the application of the cash surrender value to the payment of premiums, so as to automatically extend the insurance, a sum sufficient to pay the advances made to the insured and for which the company held his obligation, in accordance with its terms. The court properly held that the condition of the contract as follows: "Policy Liability. Any indebtedness due the company by reason of this policy (including any balance of the year's premium) shall be a first lien against any equity, right or interest of the insured, his heirs or assigns under this policy, and such indebtedness shall first be deducted in settlement of any rights or privileges arising by virtue of this policy"—when construed in connection with the provision with reference to the payment of premiums out of the cash surrender value, simply gave the company a lien collectible from the amount due the beneficiary out of the proceeds of the policy, but conferred no right to deduct the \$77.37 claimed as a lien from the cash surrender value. The advances made under the contract between the parties were chargeable to the excess of premium collected and the dividends to be allowed during the life of the insured, and in case of death were to be deducted from the total value of the policy. If it was the intention of the parties that the cash surrender value could be applied to any pre-existing debt, or to any purpose other than the payment of premiums, as to which



the insured had made default, then it should have been so stipulated in the contract of insurance. The certificate of advancement, which we have quoted above, is equivalent to a promissory note, and "a note accepted in payment of a premium is a separate and independent transaction, \* \* \* and has no relation to the contract of insurance, except as stipulated in such policy of insurance." *Arnold v. Life Ins. Co.*, supra. In confirmation of this view, it is stipulated in the policy that "in case of death the balance of the year's premium, if any, and any other indebtedness to the company by reason of this policy, shall be deducted from the amount to be paid hereunder." Construing this with paragraph "c" of the nonforfeiture clause, which provides that: "If any premium herein is not paid when due the same shall be charged as a loan against the cash surrender value, \* \* \* and the insurance will continue in force so long as this fund will pay for the same"—and bearing in mind that it was optional with the insured throughout the entire life of the contract, even including the first year (for which year the premium was applied wholly to expenses), to pay only \$49.65 in cash, it becomes perfectly clear that the \$16.55 annually advanced at the option of the insured was merely a portion of the excess premium over and above the actual cost of insurance, which the company was anxious to lend the insured at 5 per cent. interest. It was virtually lending insured his own money and charging him 5 per cent. for the privilege of using it.

The trial judge committed no error in overruling the general demurrer. To meet the special demurrer, there should, perhaps, have been a more distinct averment as to the amount of premiums paid, in order to entitle the beneficiary to a recovery of 50 per cent. of the premiums guaranteed to her by the contract in the event the insured died within the 20-year period, though we hardly think this necessary in view of the fact that the petition alleges that four of the annual premiums were paid, and the policy specifies the amount of each annual premium, and the ascertainment of the 50 per cent. would be a mere matter of calculation. Even if the exact amount should have been specified, failure to sustain the special demurrer as to this point should not work a reversal of the judgment overruling the general demurrer. The amendment can still be made upon the trial. Judgment affirmed.

YEATES v. ROBERSON, Sheriff. (No. 1, 237.)

(Court of Appeals of Georgia. July 25, 1908.)

1. CRIMINAL LAW—FORMER JEOPARDY—NEW TRIAL ON PARTY'S OWN MOTION.

The fifth amendment of the Constitution of the United States—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"—has no application in this state in a case where a person invokes its

protection as against a second trial granted on his own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 372-375.]

2. HABEAS CORPUS—GROUNDS OF—FORMER JEOPARDY.

The defense of *autrefois acquit* or *convict* should be interposed on arraignment, and, where this is not done, the defendant cannot, subsequently to his conviction, set up this constitutional inhibition, by habeas corpus proceedings, as a ground for discharge. The law does not contemplate that a writ of habeas corpus can be converted into a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 27.]

3. SAME—REVIEW—QUESTIONS CERTIFIED—CONSTITUTIONAL QUESTIONS.

Whether the act of the General Assembly of 1896 (Acts 1896, p. 44, § 3), which provides that "in all cases decided by a full bench of six justices, the concurrence of a majority shall be essential to a judgment of reversal, and if the justices are evenly divided, the judgment of the court below shall stand affirmed," is in contravention of the fourteenth amendment of the Constitution of the United States, because it deprives the citizen of the equal protection of the laws, is not necessary to the determination of the present case, and this court declines to certify the question to the Supreme Court for decision.

4. APPEAL AND ERROR—SUPERSEDEAS—RIGHT TO GRANT.

This court has the right to grant a *superseas* of a judgment of a lower tribunal pending a review of such judgment on writ of error to this court, when necessary to the full exercise of its appellate jurisdiction.

The facts of this case, set out in the bill of exceptions, do not warrant the grant of an order staying the execution of the judgment.

Russell, J., dissenting in part.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Application by J. S. Yeates for a writ of habeas corpus directed to G. B. Roberson, sheriff. Application denied, and Yeates brings error. Affirmed.

James S. Yeates was indicted in the superior court of Decatur county, for the crime of murder, and on his trial was convicted of voluntary manslaughter. On appeal to the Supreme Court of the state, he was granted a new trial. 127 Ga. 813, 58 S. E. 1017. On his second trial under the indictment for murder, he was convicted of that offense, with a recommendation that he be sentenced to the penitentiary for life. He again filed a motion for a new trial, which being overruled, he sued out a writ of error to the Supreme Court of the state, and the judgment of the lower court was affirmed by operation of law; the justices of the Supreme Court being equally divided in opinion. 129 Ga. 636, 59 S. E. 771. Subsequently, he made an application to the judge of the United States court for the Southern district of Georgia for a writ of habeas corpus, for reasons therein set forth, which application was refused. To this judgment he sued out a writ of error to the Supreme Court of the United States. This last court on May 4, 1908, affirmed the final order in the case. When the remittitur

from the Supreme Court of the United States was made the judgment of the District Court on June 11, 1908, he filed an application to the judge of the city court of Macon for a writ of habeas corpus. His application for the writ was denied, and to this judgment he sued out a writ of error to this court.

His application for the writ of habeas corpus made to the judge of the United States District Court for the Southern District of Georgia and his application to the judge of the city court of Macon set out the same reasons for the grant of the writ. These reasons are as follows: (1) That his conviction of the offense of murder on his second trial in the superior court, on the same indictment in which he had been previously convicted for the offense of voluntary manslaughter, was illegal; 'the offense of voluntary manslaughter being a lesser grade of homicide and included in the charge of murder. That, notwithstanding he had asked for and obtained a new trial when convicted of the offense of voluntary manslaughter, he could not again be put on trial for the offense of murder, as to do so would contravene the fifth amendment of the Constitution of the United States; in other words, that his conviction of the offense of voluntary manslaughter, on his first trial on the indictment for murder, acquitted him of the greater offense of murder, and that the state, after he had been granted a new trial by the Supreme Court, could subsequently place him on trial only for the offense of voluntary manslaughter. That his trial on the indictment for murder and his conviction of voluntary manslaughter operated as an acquittal of the offense of murder. (2) As a further ground for the grant of the writ of habeas corpus, he alleges that, in the decision of his case in the Supreme Court of Georgia, the justices of that court were equally divided in number, three being in favor of reversing the judgment, and three for affirming it, and that thereupon the judgment of the trial court stood affirmed, under the provision of the act of the General Assembly of Georgia, passed December 17, 1896 (Acts 1896, p. 44, § 3), which provides that: "In all cases decided by a full bench of six justices, the concurrence of the majority shall be essential to a judgment of reversal, and if the justices are evenly divided, the judgment of the court below shall stand affirmed." He alleges that this act "is unconstitutional and deprives him of his liberty without due process of law and without the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States, because said act deprives the citizen of his right to have a judicial determination of his guilt by a reviewing court." He asked that these constitutional questions be certified by this court to the Supreme Court of the state for decision. When the case was called in this court for argument, the plaintiff in error made an application here for a supersedeas

of the sentence of the superior court of Decatur county until the questions herein made could be finally determined.

John R. Cooper, for plaintiff in error. W. E. Wooten and W. D. Sheffield, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. It is admitted by learned counsel for the plaintiff in error that this court is not required to certify to the Supreme Court the question raised by the first reason assigned by him for the writ of habeas corpus; it presenting no new question of the construction of any constitutional provision, but a question only as to the application of a constitutional provision to the facts of this case, as determining the rights of the plaintiff in error. The fifth amendment of the Constitution of the United States—"nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb"—has no application in a state where, by constitutional provision, it has been abrogated by the condition that a person may be again tried "on his or her own motion for a new trial after conviction, or in case of mistrial." "The Constitution of this state provides that: "No person shall be put in jeopardy of life, or liberty, more than once for the same offense save on his or her own motion for a new trial after conviction, or in case of mistrial." Const. 1877, art. 1, § 1, par. 8; Civ. Code, 1895, § 5705. This provision of the Constitution has been construed by the Supreme Court in a case directly in point: "The true intent and meaning of paragraph 8, § 1, art. 1, of the Constitution, which declares that 'no person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial,' is that one who, after conviction upon an indictment, voluntarily seeks and obtains a new trial thereon, becomes subject to another trial generally for the offense therein charged." *Waller v. State*, 104 Ga. 505, 30 S. E. 835. Waller had been indicted for the crime of murder, and on his trial had been convicted of voluntary manslaughter, and upon his own motion a new trial had been granted him. It was held by the Supreme Court that he could again be tried for the crime of murder, and the conviction of Waller on the second trial of the offense of murder was sustained not only upon the ground that he had been granted a new trial upon his own motion, and thereby waived the constitutional guaranty against a second trial for the same offense, following the decision of the Circuit Court of the United States in the case of *U. S. v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301, but his conviction was distinctly placed upon the provisions of the state Constitution itself that former jeopardy could not be pleaded in bar of a second trial, where the first judgment had been set aside and a new trial granted on the plaintiff's own motion.

This principle is recognized as sound by the Supreme Court of the United States in the following language: "In our opinion, the better doctrine is that which does not limit the court or jury upon a new trial to a consideration of the question of guilt of the lesser offense of which the accused was convicted on the first trial, but that a reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. \* \* \* If he chooses to appeal from it and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed." *Trono v. United States*, 199 U. S. 533, 26 Sup. Ct. 121, 50 L. Ed. 292. Therefore, so far as the state of Georgia is concerned, this question is not now an open one. A different rule prevails in some of the states which have no constitutional provision on the subject similar to the one in Georgia.

Again, the power conferred upon courts to grant writs of habeas corpus does not contemplate that this writ can be converted into a writ of error, and this seems to be the manifest purpose, in so far as the question of jeopardy is concerned, of the petition for the writ in the present case. This objection should have been made in the trial court on the second trial, by a plea of *autrefois acquit*, and if the plea had been overruled by the court, or if there had been a finding thereon against the defendant, the judgment could have been reviewed by the Supreme Court of Georgia. It is well settled that the defense of former jeopardy, or of former acquittal of conviction, does not entitle the prisoner to be discharged on habeas corpus. 21 Cyc. 305; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406.

2. The constitutionality of the act of December 17, 1906 (Acts 1896, p. 44, § 3), which provides that in all cases decided by a full bench of six justices a concurrence of the majority shall be essential to a reversal, and, if the judges are evenly divided, the judgment of the court shall stand affirmed, is asserted to be unconstitutional, as it deprives plaintiff in error of his liberty without due process of law and without the equal protection of the law, contrary to the fourteenth amendment of the Constitution of the United States, which guarantees to the citizen the right to have a judicial determination of his guilt by a reviewing court, and we are requested to certify the constitutional question thus made to the Supreme Court of the state for decision. The constitutional amendment creating this court provides that: "Where in a case pending in the Court of Appeals, a question

is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court," etc. The attack made by the plaintiff in error is on the constitutionality of the act of the General Assembly of the state, above noted, and if, in the opinion of this court, a decision of the question thus made is necessary for the determination of the case, it would be our duty to certify such question to the Supreme Court for decision. We do not think, however, that the constitutionality of the act in question is necessary to the determination of the present case by this court. If this act did not exist, the same result would necessarily follow an equal division of the justices of the Supreme Court as to the questions made by writ of error to that court. The burden is on the plaintiff in error to show error, and, where his effort in this direction results in an equal division of the justices of the court, he has not successfully carried this burden, and in no event can it be claimed that an equal division of the justices of the appellate court could effect a reversal of the judgment of the lower court. Such judgment must necessarily stand affirmed in that event. Besides, the right to review by appeal did not exist at common law and is not now a necessary element of due process of law. Even to this day in England there is no right of appeal in a criminal case, and in this country the state is not bound to provide, as a part of the administration of its criminal laws, a court of appeals for final review. It is within the discretion of the state to allow, or not to allow, such appeal, and, in the exercise of this discretion, it may provide the terms and conditions upon which the judgment of the lower court may be reviewed, affirmed, or reversed. "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case was not at common law, and is not now, a necessary element of due process of law." *McKane v. Durston*, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867.

3. This court, in our opinion, has the right to grant a supersedeas in a proper case, where the ends of justice require it, and where it is necessary to carry out its review of the judgment of an inferior tribunal. Civ. Code 1895, § 5498, par. 3. Even without statutory authority, it is probable that this court, as a Court of Appeals, and for the correction of errors of law, would have inherently the right in extraordinary cases to issue a supersedeas for the purpose of administering justice pending the review of the judgment of an inferior tribunal. Under the facts set out in the bill of exceptions in this case, we are

satisfied that neither the administration of justice nor the exigencies of the situation would justify us in granting a supersedeas. The facts as set out by the plaintiff in error lead to the conclusion that he is not entitled to have any stay of the execution of the sentence of the superior court imposed upon him on his conviction of the offense of murder. We are persuaded that the appeal in this case, although constitutionally pretentious, is, in fact, frivolous, and a mere sham for the purpose of delaying the administration of the criminal law of this state. Technically considered, every question made in the petition for a writ of habeas corpus is *res adjudicata*. The plaintiff in error, according to his own statement as set out in his bill of exceptions, has had accorded to him every right guaranteed to him by the Constitution and the laws of the United States and of this state, and he is now engaged in trifling with the due administration of the laws in an effort to delay the orderly execution of justice. Judgment affirmed.

RUSSELL, J. I concur in the judgment of the court and in the conclusions of law, but do not join in the criticisms of the motives of the plaintiff in error.

BUCK v. TIFTON MFG. CO. (No. 1,228.)  
(Court of Appeals of Georgia. Aug. 4, 1908.)  
MECHANICS' LIENS—ACTION AGAINST LAND-OWNER.

A materialman, who has furnished articles to a contractor for the improvement of the real estate of another, cannot maintain a separate action at law against the landowner, until he has first obtained a judgment against the contractor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 437.]

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Action by the Tifton Manufacturing Company against E. A. Buck. Judgment for plaintiff, and defendant brings error. Reversed.

J. B. Murrow, J. J. Murray, and T. H. Parker, for plaintiff in error. Fulwood & Murray, for defendant in error.

POWELL, J. The materialmen furnished articles to a contractor who was erecting a building for the landowner. The contractor lived in Colquitt county; the landowner, in Tift. The materialmen brought suits on the account against the contractor and on the lien against the landowner by separate simultaneous actions in the counties of their respective residences. The landowner demurred to the petition in the case against him on the ground that no prior judgment had been obtained against the contractor. The court overruled the demurrer, and the defendant excepts.

In the case of *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772, the following language

occurs: "According to the ruling of this court in *Lombard v. Trustees, etc.*, 73 Ga. 322, the lien of a materialman for lumber furnished upon the employment of a contractor could not be foreclosed by a direct suit against the owner of the premises, without previously or concurrently suing the contractor to whom the lumber was furnished." Looking to the decisions, both prior and subsequent to the one quoted, we are satisfied that the word "concurrently" is here used as the equivalent of the phrase "in the same suit," so far as actions strictly at law are concerned. Except in those cases where, by reason of the fact that both reside in the same county, the contractor and the landowner can be joined in the same suit, or where special reasons permit of recourse to a court of equity, the materialman should reduce his claim against the contractor to judgment before he sues upon it to establish a lien as against the landowner. The requirement of Civ. Code, 1895, § 2804, par. 3, that suit to recover the claim must be commenced within 12 months, relates to the action against the contractor, and not to the subsequent proceeding against the landowner. *Lombard v. Trustees, supra*. The suit against the contractor is in personam. The one against the landowner is in rem. On the general subject, see *Mauck v. Rosser*, 128 Ga. 268, 274, 55 S. E. 82; *Clayton v. Farrar Lumber Co.*, 119 Ga. 37, 45 S. E. 723; *Phillip Carey Mfg. Co. v. Viaduct Place*, 1 Ga. App. 707, 58 S. E. 274.

Judgment reversed.

McLAMB & CO. v. LAMBERTSON. (No. 1,199.)

(Court of Appeals of Georgia. July 25, 1908.)

1. EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS.

Parol evidence is admissible to identify the connection of a party or a circumstance with a written instrument sought to be introduced in evidence. Testimony that the witness applied for a homestead is not parol evidence as to the contents of the purported homestead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 471.]

2. HOMESTEAD — RECORD — PERSONAL PROPERTY.

Where only personal property is set apart as a homestead under section 2827 of the Civil Code of 1895, no record of the application is required in any county other than that of the applicant's residence.

3. WORDS AND PHRASES—"MARE"—"HORSE."

The word "horse" is generic, and includes mules and asses as species; but the term "mare" is not descriptive of a female of the species mule.

[Ed. Note.—For other definitions, see note at end of case.]

4. TRIAL—DIRECTION OF VERDICT.

It is error to direct a verdict, unless no verdict can be found other than that rendered.

5. HOMESTEAD — LIABILITIES ENFORCEABLE AGAINST—"MATERIAL FURNISHED FOR THE BENEFIT OF."

Neither an article of necessity furnished for the use of the family, nor even stock feed

furnished to feed horses, which has been set apart as part of a homestead, comes within the constitutional exceptions under which homestead property may be subjected to sale.

(Syllabus by the Court.)

Error from City Court of Nashville; C. T. Roan, Judge.

Chattel mortgage foreclosure by McLamb & Co. against J. A. Lambertson, wherein Lambertson interposed a claim that the property levied on was not his, but held in trust for his family, having been set apart as a homestead under Civ. Code 1895, § 2827. Judgment for Lambertson. and McLamb & Co. bring error. Reversed.

Hendricks & Christian, for plaintiffs in error. J. W. Powell, for defendant in error.

RUSSELL, J. McLamb & Co. foreclosed a mortgage of J. A. Lambertson upon one dark bay mare about eight years old and one dark bay mare mule about six years old, as the property of the mortgagor. J. A. Lambertson interposed a claim, as head of a family consisting of himself, his wife, and five children, alleging that the property levied upon was not his property but was held in trust for his said family, because it had been set apart as a homestead by the ordinary of Worth county, under the provisions of section 2827 of the Civil Code of 1895. The mortgagees also filed an affidavit in aid of their foreclosure, asserting that the plaintiffs' debt fell within one of the classes for which the homestead is bound under the Constitution, and amended their mortgage foreclosure by adding an itemized statement of the articles for which the mortgage was given, and by alleging that the articles furnished were for the benefit of the homestead exemption, and in the nature of purchase money. Upon the conclusion of the testimony the trial judge directed a verdict finding the property not subject to the mortgage. The plaintiffs in error excepted by direct bill of exceptions, to the admission of the testimony of the witness Lambertson, and of the certified copy of the homestead, and also to the refusal of the court to direct a verdict finding the property subject, as well as to the ruling of the court directing a verdict in favor of the plaintiff.

We shall first consider the objections to evidence which the court overruled. The plaintiff first objected to the testimony of Lambertson, to the effect that he then had a family of six children and a wife, all living, and that he applied for a homestead in Worth county. The objection urged was that the application for homestead was the best evidence. This objection seems to us without point. The witness was not speaking of the contents of the homestead, but merely stating a preliminary fact which identified him as the party referred to in the application, the contents of which must speak for itself. The plaintiffs, by their amendment, had admitted that the claimant had taken some kind of homestead, because

they alleged in their amendment that the articles they had furnished were furnished for the benefit of the homestead. This plainly appears in the affidavit of A. F. Shealy, a member of the plaintiff firm, which was filed April 23, 1908. The application directed to the ordinary and approved by him is, as insisted, the highest and best evidence as to what property, if any, was set apart as a homestead, and yet we do not think it would have been illegal for the court to permit the witness to be asked whether he ever took a homestead. When the certified copy of the original homestead was shown to the witness, he was permitted to testify that this paper was a copy of the original paper. The objection urged was that the copy would speak for itself. If there is any point in this objection, there is at least nothing hurtful in the ruling to which the plaintiffs in error except. The exception was that the certified copy was the best evidence. The court's ruling did not conflict with this proposition, and the certified copy was immediately thereafter introduced, showing that one dark bay mare, eight years old, of the value of \$150, and one dark bay mare, six years old, of the value of \$150, were included in the schedule of the property attached to the application for homestead, approved by the ordinary of Worth county December 3, 1906, and recorded by the clerk of the superior court of Worth county January 30, 1907. The plaintiffs objected to the certified copy upon several grounds, and the judge temporarily withheld his ruling. The claimant was then recalled, and was permitted to testify, over the plaintiffs' objection, that the bay mare and the mule included in the mortgage are the same mare and mule that were set aside in the homestead. The objection urged to this testimony was that the claimant was seeking, by parol testimony, to vary the terms of a written instrument; that is, to vary the terms of the homestead offered by the plaintiff. If the objection had been confined to the mare mule, the objection, for reasons hereafter stated, would have been valid; but, as the objection was only partly tenable, the court did not err in overruling it as a whole. The identity or lack of identity of an object can be shown by parol, regardless of the terms of description employed, provided the description in each case is legally identical. In such a case the written description is not affected or varied. The soundness of this rule will plainly appear when we consider that two pieces of property may be described exactly alike in two certain instruments, and may in fact be exactly alike, and yet may not be the same pieces of property. For instance, A. may mortgage a walnut roller-top desk to B., describing it minutely. B., upon foreclosing his mortgage, might levy the *fi. fa.* on a walnut roller-top desk belonging to C., made by the same manufacturer, and in ev-

ery respect like the one mortgaged by A., and yet A. might have bought his desk at one time from one salesman, and C. his at another time from another salesman, and A. and C. might not be acquainted with each other and might never have had a single dealing with each other, and their desks, though identical in physical appearance, might bear no legal relation whatever to each other. Certainly, in such a case, C. should be permitted to swear that his desk was not the desk mortgaged by A. to B., although the two desks might be exactly alike in every conceivable respect.

The objections to the certified copy of the homestead were: (a) That the homestead is not recorded upon the minutes of the homestead record in the clerk's office of the superior court of Berrien county. (b) That the property levied upon is not described in the homestead. (c) That the homestead has never been supplemented by order of the court, as required by law. (d) That there is no proof showing that the property levied upon is the property set apart in the homestead. (e) The description in the homestead and the description in the mortgage show that it is quite different property, and the levy shows the same fact. We think that these objections were properly overruled, for the following reasons:

Where a homestead is set apart in land, or where the homestead allowed under section 2827 of the Civil Code of 1895 consists partly of land and partly of personal property, the homestead must be recorded in each of the counties where any of the land is situated (Acts 1898, pp. 51, 52); but it is only when land outside of the applicant's residence is exempted that the homestead is to be recorded in any county other than that of the applicant's residence at the time that the homestead is allowed. As there was no property except personal property allowed under the homestead exemption in the present instance, the record in Worth county, which was made within 30 days after the approval of the ordinary, was sufficient.

The objections from "b" to "f," inclusive, are directed to a single point. In the application for homestead the animals levied upon are described as "one dark bay mare, eight years old, value \$150," and "one dark bay mare, six years old, value \$150." In the mortgage and entry of levy the animals referred to are described as one bay mare, eight years old, named Pet, and one bay mare mule, about six years old, named Emma. The point of the plaintiff's objection therefore, though presented in several different forms, is that the claim as to the bay mare mule, named Emma, cannot be supported by proof that a bay mare was set apart as exempt from levy and sale. Counsel for the plaintiff in error insist in their brief that the "homesteader" had evidently sold the dark bay mare six years old, and afterwards bought the bay mare mule, and that the lat-

ter was therefore subject to the mortgage of the plaintiffs. As far as Georgia is concerned, it was ruled, in *Teal v. State*, 119 Ga. 104, 45 S. E. 964, Judge Fish delivering the opinion, that: "It is a matter of common knowledge and observation that among our people the word 'mare,' when used without a word of qualification, is understood to mean a female of the horse species. We apprehend that one rarely, if ever, hears the expression 'a mare horse' employed to describe a female of the species horse, but that the term universally used in this state for this purpose is the single word 'mare.' On the other hand, when a female of the species mule is intended, the expression used is 'a mare mule,' and when a female of the species ass is intended, the word 'jenny' is used." For this reason the court erred in directing a verdict finding the mare mule not subject to the *fi. fa.*

Another point raised by the record is the contention of the plaintiff that the property levied upon is not exempt because the account comes within the exceptions provided by the Constitution, and within one of the classes of debts which may subject a homestead to sale. There is nothing in the evidence upon this point which would have prevented the trial judge from directing a verdict. The only execution which can bring homestead property to sale are those based upon taxes, purchase money of the property, debts for labor done thereon, or material furnished therefor, or for the removal of incumbrances. The contention of the plaintiffs in error was that the articles mentioned in their account were material furnished for the benefit of the homestead. We are sure that, while the shells mentioned in the account might have aided some member of the family in hunting and killing game, and the face powder might have contributed to their personal adornment, and the parasols might have been useful for protection, and the slippers useful for the purpose of domestic discipline as to the smaller children, and while the broom might have intimidated even the head of the family, the articles in the account were not sold or intended as material for improvement of the property set apart as the homestead. It is true there are several items of hay, oats, and other stock feed; but, taken as a whole, they constitute but a very small proportion of the account. The great bulk of the account is for articles of evident use and necessity to the members of the household, but the connection between their personal welfare and comfort and any improvement or maintenance of the articles of property set apart as a homestead is too dim and remote to be discoverable. In articles furnished for improvement of the homestead, improvements to realty alone are included.

Judgment reversed.

#### NOTE.

[a] A mare is included in the term "horse," and therefore an indictment for stealing a

horse is satisfied by proof of stealing a mare.  
 —(Ark. 1895) *State v. Gooch*, 60 Ark. 618, 29 S. W. 640, citing 1 Tayl. Ev. § 290, and 1 Bish. Cr. Proc. § 620;  
 (Cal. 1882) *People v. Pico*, 62 Cal. 50, 52;  
 (1887) *People v. Monteith*, 73 Cal. 7, 14 Pac. 373;  
 (Ill. 1836) *Baldwin v. People*, 2 Ill. (1 Scam.) 304;  
 (S. C. 1811) *State v. Dunnavant*, 3 Brev. 9, 10, 5 Am. Dec. 530;  
 (Tex. 1856) *Collins v. State*, 16 Tex. App. 274, 281; (1887) *Davis v. State*, 23 Tex. App. 210, 4 S. W. 590;  
 (Utah, 1880) *People v. Butler*, 2 Utah, 504.

[b] (Ala. 1887) The word "horse" is a generic term, and includes mare, and hence the substitution of the word "mare" for "horse," in an amended complaint in an action against a railroad company for killing a horse, is not the substitution of a new cause of action.—*South & N. A. R. Co. v. Bees*, 82 Ala. 340, 2 South. 752, 753.

[c] (Cal. 1899) "Horse" is a generic term, and includes ordinarily the different species of the animal, however diversified by age, sex, or artificial means; and hence a finding that two "horses" were released from a chattel mortgage is a sufficient finding that two "mares" were released.—*Troxler v. Buckner*, 126 Cal. 288, 58 Pac. 691, 692.

[d] (Ga. 1871) Code, § 4328, declares "horse" stealing shall include a mule and ass, and each animal of both sexes, and without regard to the alterations which may be made by artificial means. *Held*, that the word "horse" as used in the statute excludes mares, if used in an indictment, since Code, § 4249, requires an indictment to designate the nature, character, and sex of the animal, and give some description by which its identity shall be ascertained.—*Taylor v. State*, 44 Ga. 263, 264.

[e] (Ga. 1903) The word "mare," when used without a word of qualification, is understood to mean a female of the horse species.—*Teal v. State*, 119 Ga. 102, 45 S. E. 964, 965.

[f] (Ind. 1843) "Mare," as used in an Indiana statute providing that any person who shall knowingly suffer his horse, "mare," or gelding to be run in a horse race, etc., shall be fined, etc., should be construed in its ordinary meaning as a female horse; and hence an indictment under the statute, charging that the defendant suffered his "mare" to be run in a certain race, is not supported by evidence that the animal run was a horse, since the word "horse," as used in the statute, means a stallion.—*Thrasher v. State* (Ind.) 6 Blackf. 460.

[g] (N. C. 1881) The term "horse," in a bill of sale of one grey horse, one black horse, and one grey mare, does not include a black or bay mare.—*Miller v. Hahn*, 84 N. C. 226, 229.

[h] (Tex. 1873) Acts 1870, p. 121, exempts to every family from forced sale, among other things, two "horses," etc. *Held*, that the word "horses" should be construed to include geldings, mares, or mules, all being used for the same purpose. The object of the Legislature in passing the exemption law was manifestly to secure to each family a sure means of support, and the exemption of two horses was evidently intended to protect family animals used to cultivate the soil, and it would not be a liberal construction of the legislative intent to say that the use of the word "horses" in that connection excluded geldings, mares, or mules, since all are used for that purpose.—*Allison v. Brookshire*, 38 Tex. 199, 201.

[i] (Tex. 1885) A "mare" is the female of the horse or equine genus of quadrupeds (Webster's Dict.) so that an indictment charging the offense of sodomy as committed with a mare sufficiently charged the genus.—*Cross v. State*, 17 Tex. App. 476, 478.

## LUKE v. CANNON. (No. 1,160.)

(Court of Appeals of Georgia. July 25, 1908.)

### 1. WITNESSES — IMPEACHMENT OF PARTY'S OWN WITNESS.

Unless a witness has deceived and entrapped the party introducing him, such party will not be permitted to discredit or impeach him by proof of alleged former contradictory statements not made to the party, but to others. For one to impeach his own witness, voluntarily called by him, it must appear that the previous contradictory statements relied upon for purposes of impeachment were unknown to him, and that he was deceived and entrapped, and thus unwittingly damaged, by statements different from what he expected. It must also appear that the party claiming to have been entrapped, or his counsel, ascertained from the witness himself, and not from hearsay, the testimony which it was expected would be given when the witness was placed upon the stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1214-1219.]

### 2. EVIDENCE—DECLARATIONS—DEFENDANT IN FI. FA.—CLAIM CASE.

Declarations of a defendant in fi. fa. in a claim case, as to his title, made after levy, are inadmissible for any purpose.

### 3. WITNESSES — IMPEACHMENT — CONTRADICTORY STATEMENTS—FOUNDATION.

A witness cannot be impeached by proof of contradictory statements until his attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. The foundation for impeachment by means of previous contradictory statements is not properly laid by asking the witness as to making such previous contradictory statements to a person different from the one to whom the party attempts to show by the impeaching testimony the contradictory statements were made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1242.]

### 4. SAME.

The evidence of previous contradictory statements related to have been made by a witness sought to be impeached is not affirmative proof of the contents of such previous statements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1266.]

(Syllabus by the Court.)

Error from City Court of Calro; J. R. Singletary, Judge.

Claim by Roscoe Luke to property levied on as that of W. S. Sherrod, in pursuance of the foreclosure of a laborer's lien in favor of Joe Cannon. Judgment for Cannon, and Luke brings error. Reversed.

W. C. Snodgrass, for plaintiff in error. Ledford & Terrell and R. C. Bell, for defendant in error.

RUSSELL, J. The sheriff of Grady county levied an execution issued in pursuance of the foreclosure of a laborer's lien in favor of Joe Cannon upon certain personal property as the property of W. S. Sherrod, and a claim to a portion of this property was interposed by Roscoe Luke. Upon the trial of the claim in the city court of Calro (the judge acting both as judge and jury), the property claimed was found subject to the fi. fa., and the claimant excepts to this judgment. He excepts,

also, to certain rulings upon objections to testimony, and these exceptions are preserved by reason of the fact that the bill of exceptions containing these special assignments of error was certified within 30 days after the rulings complained of.

Upon the trial of the case the claimant testified: That certain lumber levied upon on the right of way of the Atlantic Coast Line Railroad Company near Pine Park, and about 8,000 feet of lumber of W. S. Sherrod near Pine Park, which had been levied upon, belonged to him; that he had paid for it, and it had actually been delivered to him some time prior to the levy of the laborer's lien. In accordance with the act of 1905 (Acts 1905, p. 84), the judge certified to certain additional evidence to that related in the original bill of exceptions, as follows: "The lumber covered by my claim belongs to me, because I paid for sawing it, and it had actually been delivered to me and was so delivered before I finished paying for it. In some instances I paid direct to the hands for the labor at Mr. Sherrod's mill, by paying drafts drawn on me payable to the hands. The lumber was delivered to me by Mr. Sherrod's statement prior to my paying him anything. At that time the lumber was on the right of way of the Atlantic Coast Line Railroad at Pine Park, with the exception of one car of about 8,000 feet, more or less, of 1x4, 9'-3" long. This, Mr. Sherrod represented to me was cut and either stacked or piled at his mill. The car I paid Mr. Sherrod for was this particular lumber. I had nothing to do with the operation of the said sawmill. I had nothing to do with the employment of the hands. In some instances, I paid them direct, because Mr. Sherrod drew on me in their favor. I do not think that this was for cutting this particular timber. I rather think it was not. It was not on cars at time of levy. Mr. Sherrod was to load the lumber on the cars at Pine Park, Ga. There was no count of the lumber before the levy, only by Mr. Sherrod. I don't know exactly what it measured up, but by checking furnished me by the parties who load it on cars for Mr. Sherrod it was about 40,000 feet. The count made by Mr. Sherrod was to be verified by my count in shipping. Mr. Sherrod guaranteed the count. The lumber was not to be delivered before it was paid for, but it was to be cut before it was paid for, and it was cut before I paid him the money."

At the conclusion of the claimant's testimony, the plaintiff in *fi. fa.* introduced as a witness Sherrod, the defendant in *fi. fa.* Though introduced in behalf of the plaintiff, Sherrod sustained the contention of the claimant by testifying that the lumber in controversy had been paid for by Luke prior to the time of the levy, and the lumber itself delivered to Luke in consideration thereof. Thereupon counsel for the plaintiff in *fi. fa.* stated to the court that he had been misled and entrapped by the witness Sherrod,

that the testimony of this witness was a surprise to him and contradictory to statements made to persons other than the plaintiff in *fi. fa.* or his counsel, that these contradictory statements had been communicated to counsel for the plaintiff in *fi. fa.*, and that he desired to introduce new testimony to impeach and contradict the testimony of Sherrod. It does not appear from the original bill of exceptions that any foundation for the impeachment of this witness was laid, but it is certified, in the supplement to the bill of exceptions, that counsel for the plaintiff in *fi. fa.* asked Sherrod the following question: "Did you not, in the same room where this trial is being held, tell me that the lumber was not to be Luke's lumber at all, but to be shipped to parties in Chicago, on orders given by them. And did you not show me said orders and state to me: 'I guess this will show where it was to go.' And did you not make similar statements to D. R. Collins and T. D. Gwaltney?" To which the witness answered: "I do not recollect." Whereupon the attorney for the plaintiff in *fi. fa.* stated in his place that he had been entrapped by the witness Sherrod by statements of the witness previously made to him and to others to the effect that the lumber was not to be Luke's, but only the proceeds of the sale were to be his. Three witnesses were then introduced, who testified that they had conversation with the witness Sherrod concerning the title of the lumber levied upon, and that the conversations were after institution of the proceedings and after the levy. To the testimony of each of these witnesses counsel for the claimant objected, upon the ground that the conversations with Sherrod were subsequent to the pendency of the proceedings or litigation involved, also because Sherrod was a witness for the plaintiff in *fi. fa.*, and also because the statement of counsel as to his being entrapped did not show a legal entrapment, and, further, that no sufficient ground was laid for the impeachment of Sherrod. These objections were all overruled by the court. Counsel for the claimant also moved to exclude the testimony of Collins and Gwaltney after it had been delivered, because the statements related, as having been made by Sherrod to the witnesses, were made subsequently to the levy. The court overruled the motion to exclude this testimony, holding that it was admissible for the purpose of affecting the credibility of the witness sought to be impeached, in reference to his statement in regard to delivering lumber to Luke, but that any statement made by the witness Sherrod, the defendant in *fi. fa.*, after the levy, would be inadmissible.

1. We think that the objections urged by counsel for the plaintiff in error to the introduction of testimony in relation to contradictory statements alleged to have been made by the witness Sherrod should have been sustained, and that the court erred in not with-



drawing this testimony, upon motion, after it was introduced. Section 5290 of the Civil Code of 1895 declares that: "A party may not impeach a witness voluntarily called by him, except where he can show the court that he has been entrapped by the witness by a previous contradictory statement." It must appear that the party or his counsel had been informed directly from the witness, either by hearing him speak or swear, or by reading a written report of his previous statement upon the same subject. It has never been ruled, so far as we are aware, that counsel can introduce a witness, and vouch for his veracity, and then claim to have been entrapped, upon the ground that he relied upon statements made by the witness to others, not parties to the cause, which were repeated by said third parties to himself or his client, and that, relying upon this second-hand information, he introduced the witness without being apprised of what he would really testify. One who claims to have been entrapped by a witness, voluntarily introduced by him, must not only show that he expected the testimony of the witness to be different, but that he is surprised that the testimony adduced is different from the substance of the statement made by the witness, prior to the trial, to himself or his client. Counsel, in this case, stated that he was surprised, and in his statement covered one point in the case, so far as the contradictory statement to himself was concerned, by calling the attention of the witness sought to be impeached to the place where the alleged contradictory statement was said to have been made; but the attention of the witness was not called to the time, and the provisions of the Code upon this subject is that the attention of the witness sought to be impeached must be called, as near as possible, to the time, place, and other surrounding circumstances. As to the other witnesses, with reference to whom the defendant in *fi. fa.* was interrogated, the attention of the witness was not called to either time, place, or any circumstance which would enable them to refresh their recollection. They were merely asked if they did not have a conversation with certain named witnesses upon a given point. The attention of the witnesses was not called to the alleged previous conversation with the witness Kent at all in any way. The law is so particular in its requirements of caution upon the part of one who introduces a witness to the court, and thereby vouches for his veracity, that a strict showing is required before one will be allowed to repudiate a witness voluntarily called by him, by attempting to impeach him. It is well settled, of course, that one may contradict his own witness by showing the truth to be different from what the particular witness testified. *Cronan v. Roberts*, 65 Ga. 678 (2); *Christian v. Railway Company*, 120 Ga. 317, 47 S. E. 923; *Moultreie Repair Co. v. Hill*, 120 Ga. 732, 48 S. E. 143; *McElmurray v. Turner*, 86 Ga. 217, 12 S. E. 359.

But "a party shall not be permitted to discredit his own witness unless he first shows to the court that he has been entrapped by previous contradictory statements made by the witness. It is not sufficient that he shall have made contradictory statements. Such statements must have deceived and led the party complaining to introduce him, and thus unwittingly to have been damaged by statements different from what he expected. Under such circumstances, the law permits a party to violate that statutory rule which assumes that one who brings a witness before a court has, at least, confidence in his truthfulness." *McDaniel v. State*, 53 Ga. 254. In that case the Supreme Court remarked upon the fact that the Solicitor General had not stated that he put up the witness by virtue of any false impression. This statement is always necessary where one claims to have been entrapped, because it is conceivable that counsel or a party might talk in advance with a witness and receive statements from him favorable to their contention, and yet be so well aware of his unreliability as to be thoroughly aware of the uncertainty of what he might testify when put upon the stand. "Unless a witness has deceived and entrapped the party introducing him, such party cannot impeach his credit by evidence of his previous declarations at variance with his sworn testimony." *Dixon v. State*, 86 Ga. 754, 13 S. E. 87. In *Marsh v. South Carolina R. Co.*, 56 Ga. 277, the court held that it was not a case of surprise. "The defendant's counsel did not profess to be surprised by his having testified differently from the expectations which he had raised by his previous statements." *Greenleaf's Evidence*, § 442.

2. Declarations of a defendant in *fi. fa.* in a claim case, as to his title, made after levy, are inadmissible for any purpose. The defendant in error insists, however, in his brief, that, though such statements are generally inadmissible, they may be used for the purpose of impeachment, and in his supplemental certificate the trial judge stated that he ruled that these declarations could not be used for any other purpose. Only contradictory statements as to material matters can be used for the purpose of impeachment, and by "material matters" are meant matters competent to prove one side or the other of the issue, and admissible for that purpose. If the testimony of the defendant in *fi. fa.* as to the title of the property levied upon, and which has been claimed by another, are inadmissible, they become immaterial, and, if immaterial and inadmissible, it would not matter that previous statements upon the same subject were contradictory to those made upon the stand. The court should therefore have sustained the objection of counsel for plaintiff in error upon this subject and excluded the testimony.

3. The principle announced in the third headnote is laid down in section 5292 of the

Civil Code of 1895, and needs no elaboration, except with reference to the latter portion of this headnote. It appears from the question asked the witness Sherrod, when the ground for impeachment was being laid, that he was not asked anything with reference to the conversations with the witness Kent, the witness Gwaltney, and the witness Collins. He was only asked if he did not make certain statements to counsel for the plaintiff in *fi. fa.* and similar statements to Gwaltney and Collins, but neither the time nor the place, nor the surrounding circumstances of the conversation inquired about, with Gwaltney and Collins, were suggested to the witness so as to give him an opportunity of refreshing his recollection. So far as laying the foundation is concerned, he was not informed by the previous question, with reference to the conversation with counsel for the plaintiff in *fi. fa.*, as to when this conversation occurred. So far as any previous statements to the counsel are concerned, the impeachment was not complete because no statement or testimony on the part of the attorney appears in the record detailing what statements, if any, the witness sought to be impeached had previously made to him.

4. Even if it be conceded that a proper showing was made that the plaintiff in *fi. fa.* and his counsel had been entrapped by a witness upon whose statements and veracity they relied, and that thereafter the witness by whom they were deceived was successfully impeached, still we are constrained to sustain the plaintiff in error's exception to the final judgment in the case. We are compelled to hold that, under the unimpeached evidence, the claim should have been upheld, and the property found not subject. If all the evidence be excluded by impeachment, except that of the claimant himself (and this must be done, if the impeaching testimony was believed), then the claimant established his title to the property. Delivery may be constructive, as well as actual, and the facts testified to by him, though some of the testimony might have been objected to, clearly established the fact that he paid for the lumber prior to the foreclosure of the laborer's lien and its levy.

It is insisted in the brief of the learned counsel for the defendant in error that the claimant admitted a *prima facie* case by admitting the property to be in the possession of the defendant at the time of the levy. This may be true as a matter of fact, but it does not appear in the record that the claimant made any admission. The original bill of exceptions simply purports to give such testimony as the plaintiff in error deemed material to a clear understanding of the errors complained of. Under the rule this is all that is required, and this court cannot presume that there was other evidence, or that there was not other evidence. There is no presumption either way,

further than that the plaintiff in error has embodied in his bill of exceptions all he desires considered by the reviewing court. Nor does the supplemental record, certified by the trial judge, contain any statement that the claimant admitted a *prima facie* case, or negative the idea that the plaintiff in *fi. fa.* was required to prove that the property was in the possession of the defendant at the time of the levy. The entries of levy which appear in the record, so far from stating that the property levied upon was in the possession of the defendant in *fi. fa.* state that it was on the right of way of the railway company. The giving of bond by the claimant admits nothing more than that the property has been levied upon.

On the trial now under review we think that the evidence, the testimony of Luke not being contradicted, demanded a finding in favor of the claimant, and, consequently, the judgment of the judge, finding the property subject, was erroneous.

Judgment reversed.

#### COPPAGE v. STATE. (No. 1234.)

(Court of Appeals of Georgia. Aug. 4, 1908.)

##### 1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF WITNESS.

The evidence upon the trial authorized the conviction of the plaintiff in error, and, the newly discovered evidence being impeaching only, this court would not be authorized to hold that the trial judge erred in refusing a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2331, 2332.]

##### 2. SAME—PUNISHMENT—RECOMMENDATION BY JURY—APPEAL—REVIEW—DISCRETION AS TO SENTENCE.

In criminal cases, where a defendant is found guilty of a felony, but the jury recommended that he be punished as for a misdemeanor, it is within the jurisdiction of the trial judge to act upon such recommendation or to disregard it, as he may deem proper. The exercise of this discretion will not be controlled, where the sentence imposed does not exceed the limits provided by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2108; vol. 15, Criminal Law, § 3073.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Fonzo Coppage was convicted of larceny from a house of money exceeding \$50 in value, and he brings error. Affirmed.

H. B. Moss, for plaintiff in error. B. F. Simpson, Sol. Gen., for the State.

RUSSELL, J. Fonzo Coppage was convicted of larceny from the house of money exceeding \$50 in value, and the jury in the verdict recommended that he be punished as for a misdemeanor. One witness swore directly that he saw Coppage take the money

in question from the desk in the pool room of Baswell, the prosecutor. Other circumstances appeared from the testimony which would lead to the conclusion that one Evans was in some way interested in the theft, either as accessory before or after the fact. But the attempt to impeach the witness who swore that he saw the plaintiff in error take the money was not successful before the jury, and, as this evidence covers every phase of the case and authorized the conviction of the defendant, other matters became immaterial. The trial judge disregarded the recommendation of the jury to punish as for a misdemeanor and sentenced him to five years in the penitentiary. A motion for new trial was made and overruled, and the plaintiff in error excepts to this judgment.

1. Outside of the contention that the verdict is contrary to the evidence and the law, the defendant relied for a new trial upon the ground of newly discovered evidence by which he sought to impeach the witness Brown, and attempts to show by the record of the subsequent conviction of one Tom Evans that he himself is innocent. The newly discovered testimony with reference to the witness Brown is impeaching only, if it amounts to anything at all, and the fact that Tom Evans may since have been convicted of theft of the same money on a separate indictment is of no moment in the consideration of the motion for new trial. Any point as to the quality and degree of participation of either of the defendants in the offense could have been raised upon the trial. If Coppage was the actual perpetrator of the crime, it is of no concern to him that Evans, though an accessory, was convicted also as principal in the first degree. It might have afforded ground of complaint for Evans, but none for Coppage. If the evidence in the present case had shown Coppage to be an accessory, we might hold a conviction unauthorized; but the evidence under review showed him, if he was guilty at all, to have been the principal thief.

2. It is insisted with great earnestness that the judge made a mistake in disregarding the recommendation of the jury, and in imposing upon the prisoner sentence as for a felony. It is entirely discretionary with a trial judge how much weight he will attach to the recommendation (which the jury is permitted to make as to certain felonies) that the defendant be punished as for a misdemeanor, and therefore in such cases, if he decides to sentence as for a felony, he is remitted to the usual rule, which allows him to impose any term of imprisonment which does not exceed that fixed by the statute. Nothing is better settled than that the discretion of the trial judge in fixing punishment cannot be interfered with upon review, if the sentence imposed is within the limits provided by law for the particular offense.

Judgment affirmed.

# McLAURIN v. FIELDS. (No. 1,153.)

(Court of Appeals of Georgia. Aug. 4, 1908.)

## 1. PLEADING—DEMURRER—PLEA IN ABATEMENT.

Where a defendant files both a general demurrer and a plea in abatement, the trial judge may consider either first, as he deems proper.

## 2. COSTS—DISMISSAL OF ACTION—SECOND ACTION—PAYMENT OF COSTS.

A plaintiff, who has dismissed a suit, must, before bringing a second suit for the same cause of action, either pay the costs of the former suit or file a pauper affidavit stating that he is unable on account of his poverty to pay the costs. Where there is a failure to do either, a plea in abatement upon that ground should be sustained.

## 3. SAME.

Defendants, as well as the officers of courts, have a substantial interest in the payment of the costs of the prior suit. That a clerk of a city court agreed to consider as paid the costs in the suit, which was dismissed, and to release the plaintiff from all liability for the costs, upon the obligation therefor being assumed by another person, is not a sufficient compliance with the provisions of the law, which require the payment of the costs as a prerequisite to the filing of a second suit for the same cause of action. Especially is this true where a portion of the costs was due to the sheriff, and it was not shown that the clerk had authority in behalf of the sheriff to accept payment otherwise than in money. The case is not altered by reason of the fact that the plaintiff's counsel offered to give a check in payment of the costs.

(Syllabus by the Court.)

Error from City Court of Blakely; W. A. Jordan, Judge.

Action by W. P. Fields against J. A. McLaurin. Judgment for plaintiff, and defendant brings error. Reversed.

Pottle & Glessner, for plaintiff in error. Park & Collins, for defendant in error.

RUSSELL, J. Fields brought suit against McLaurin, alleging the breach of a contract. The defendant, in addition to an answer to the plaintiff's petition, had filed a demurrer and a plea in abatement. When the case was called for trial the defendant invoked the ruling of the court first upon his demurrer; but the court declined to rule first upon the demurrer, and forced him to trial upon the plea in abatement. After hearing the evidence upon this plea, the court directed the jury to find against the plea in abatement. The court then overruled the defendant's demurrer, and proceeded with the trial, which resulted in a verdict in favor of the plaintiff. The defendant filed exceptions pendente lite to the ruling of the court in directing the verdict in favor of the plaintiff on the issue raised by the plea in abatement, as well as to the judgment overruling his demurrer, and assigns error thereon and upon the judgment overruling his motion for new trial.

1. We find no error in the action of the court in submitting to the jury, before ruling upon the demurrer, the issue raised by the plea in abatement. A trial judge may either consider a general demurrer first, or

give precedence to a plea in abatement, at his option. The determination of either may effectuate a complete disposition of the case without a trial upon the merits. In the present case, if the judge had sustained the general demurrer, or if the issue on the plea in abatement had been found in favor of the defendant, either would have prevented the necessity of a trial of the case by a jury upon its merits.

2. We think the judge erred in directing the jury to return a verdict in favor of the plaintiff on the issue raised by the plea in abatement. The issue was whether the plaintiff, who had filed a previous suit upon identically the same cause of action, had paid the costs before filing this second suit. The evidence did not authorize a finding that he had done so. While Civ. Code 1895, § 5043, provides that where a plaintiff has been nonsuited, or his suit dismissed or discontinued, he may recommence it on payment of costs, that section has been so construed by the Supreme Court as that he must actually pay the costs of the first suit before filing the second, as an indispensable prerequisite to the life of the second suit. It seems at one time to have been the opinion of the Supreme Court, as expressed in *Atlanta v. Wilson*, 70 Ga. 714, and in *Stirk v. Central R. & Banking Co.*, 79 Ga. 495, 5 S. E. 105, that the Code provision requiring the plaintiff to pay the costs was for the benefit of the officers of court, and that payment of the costs might be allowed even at the time of the trial of the second suit brought upon the original cause of action. This doctrine has, however, been expressly disapproved in later decisions, and upon the same line the General Assembly, in the act approved December 18, 1901, providing for the renewal of suits without the payment of costs, enacted that where "the plaintiff decides to recommence his suit, if he will make and file with his petition, summons or other proceedings, an affidavit in writing that he is advised and believes that he has good cause for recommencing his suit, and that owing to his poverty he is unable to pay the costs that have accrued in said case, \* \* \* the plaintiff shall have the right to renew said suit without the payment of costs," etc. Thus it is plain that not only the judicial but the legislative branch of our state government recognizes that, where an affidavit in forma pauperis is not afforded as a substitute therefor, the costs must be paid before a suit dismissed can be renewed. That the costs have not thus been paid is good ground for timely plea in abatement, and, indeed, in one of the earlier decisions, where the costs were allowed to be paid upon the trial of the second suit, it is noted that no plea in abatement had been filed.

3. There was no conflict in the evidence upon the trial of the issue raised by the plea in abatement. It was without dispute that one of the plaintiff's counsel, at the time that

he carried to the clerk of the court the petition in the suit now under consideration and ascertained the amount of the costs in the prior suit, which he then ordered to be dismissed, offered to give the clerk a check for the costs. It seems that the clerk was about to close his office for the day's business, and when the attorney asked him for a blank check the clerk told him to hand him the check in the morning; the clerk's reason being, as stated, that he did not want to go into the other room, which he had locked up, to find a blank check. The clerk said: "We can attend to that to-morrow." Whereupon the counsel said: "I want it understood between us that the costs in that case are paid, and that there is a difference between you and me of that amount; that it is a personal obligation that I owe you." The plaintiff's counsel then handed him the petition to file, and the clerk agreed to enter the case dismissed. It also appeared from the evidence that, of the \$4 costs due, \$2 was cost due the clerk, and \$2 was due to the sheriff. There was no evidence that the sheriff had authorized the clerk to permit the plaintiff's counsel to assume the payment of his costs in lieu of paying money. Defendants, as well as the officers of courts, have a substantial interest in the payment of the costs of a prior suit. That a clerk of a city court agreed to consider as paid the costs in a suit which was dismissed, and to release the plaintiff from all liability for the costs upon the obligation therefor being assumed by another person, is not a sufficient compliance with the provisions of the law, which require the payment of the costs as a prerequisite to the filing of a second suit for the same cause of action. Especially is this true where a portion of the costs was due to the sheriff, and it was not shown that the clerk had authority in behalf of the sheriff to accept payment otherwise than in money. The case is not altered by reason of the fact that the plaintiff's counsel offered to give a check in payment of the costs.

In the present case, no doubt, the clerk was perfectly willing to accept Mr. Collins' check; but in some instances the postponement of the acceptance of the check might be only a gentle way of declining it. As the costs were not paid, the verdict on the issue formed by the plea in abatement should have been in favor of the defendant. As this would have disposed of the present suit, all that occurred thereafter was nugatory, and it is for that reason unnecessary to pass upon the other questions raised by the record. That a plea in abatement should be sustained, where the costs have not been actually paid, see *Langston v. Marks*, 68 Ga. 435, *Sweeney v. Malloy*, 107 Ga. 83, 32 S. E. 858, *Johnson v. Central of Ga. Ry. Co.* 119 Ga. 185, 45 S. E. 988, *Wright v. Jett*, 120 Ga. 995, 48 S. E. 345, and *Board of Education of Tennesse v. Kelley*, 126 Ga. 479, 55 S. E. 238.

Judgment reversed.

**FOURAKER v. STATE (No. 1,209.)**

(Court of Appeals of Georgia. Aug. 4, 1908.)

**1. CRIMINAL LAW—APPEAL—REFUSAL OF NEW TRIAL.**

Where a ground of a motion for a new trial based on newly discovered evidence is filed, and a counter showing is made, so that a conflict arises as to the material facts upon which the ground is based, a reviewing court will not, except in a case of manifest abuse of discretion, reverse the finding of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3067-3071.]

**2. SAME—HARMLESS ERROR.**

The admission of testimony favorable to the defendant affords him no ground for a new trial.

**3. WITNESSES—CROSS-EXAMINATION.**

The trial judge has a discretion to control the right of cross-examination within reasonable bounds, and an exercise of this discretion will not be controlled by a reviewing court unless it is abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 923-929.]

**4. SAME—NEW TRIAL.**

Grounds of a motion for a new trial should be complete within themselves.

**5. HOMICIDE—ASSAULT WITH INTENT TO KILL.**

The evidence, though somewhat weak and circumstantial, is, legally speaking, sufficient to support the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 543-552.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Walter Fouraker was convicted of shooting, and brings error. Affirmed.

Townsend & Dame, for plaintiff in error.  
John W. Bennett, Sol. Gen., for the State.

**RUSSELL, J.** The plaintiff in error excepts to the overruling of his motion for a new trial. The motion was based in part upon the ground of newly discovered evidence. One M. C. Kite swore, by affidavit, that, at the time of the shooting with which the defendant was charged, he was present and was looking at the defendant, and that the defendant was standing near a railroad crossing and within a few steps of him, and did not fire any shot or have any gun. The prosecutor was shot with a gun, and, consequently, the evidence of this witness would have been very material, and perhaps would have caused a different result, upon another trial of the case, if believed. There were, however, affidavits introduced in behalf of the state tending to show that the witness Kite was in a different town on the night of the shooting, and that therefore his testimony was false.

1. Upon the hearing of a motion for a new trial and in the consideration of a ground of the motion, dependent upon newly discovered evidence, where affidavits are introduced supporting and disputing the ground of the motion, the trial judge is the trier of the facts, and it is his province to determine the credibility of the conflicting facts and contradictory witnesses. A reviewing

court will not in any such case control his discretion as to the comparative credibility of the witnesses who testified in support of the motion and those who swore to the contrary. We cannot therefore, in the present case, say that the trial judge erred in believing Sturges, Cribb, Johnson, and Tomlinson in preference to the witness Kite. As we cannot do this, we cannot hold that the court erred in overruling the ground of the motion based upon newly discovered evidence.

2. Even if the court should not have permitted the prosecutor's testimony with reference to what Swearingen said in apology to him, the error, if any, was harmless to the defendant. This testimony was: "I said: 'You just come in here and tell me that you are sorry for what you said, and just wait until you are sober, and there will be nothing of this. Go ahead and get sober.' He then turned around and said: 'You are right, I will go.' He then went off, both of them, and I did not see where they went." This evidence was objected to by counsel for the defendant, upon the ground that it was inadmissible and immaterial, and not connected with the assault for which the defendant was being prosecuted. We think that the evidence shows pretty clearly that the defendant and Swearingen were together from the beginning of the quarrel between the prosecutor (Allen) and Swearingen until after Swearingen was killed, and the entire difficulty may be considered as one transaction; but, even if this were not the case, in no event could the evidence above quoted, which tended to show that Swearingen was inclined to be pacified, injure the defendant.

3. The exception that the court erred in permitting the Solicitor General to cross-examine a witness introduced by him is not well taken, because it was purely within the discretion of the court as to whether the state's counsel should be permitted to lead the witness or to cross-examine his own witness.

4. The sixth ground of the amended motion for new trial presents nothing for the consideration of this court. In that ground it is alleged that the court erred in overruling the defendant's motion to declare a mistrial upon the grounds stated in the brief of evidence. The special reason why the court erred must be stated, and the specific error must be pointed out in the motion for new trial itself, and this court cannot look to the brief of evidence to ascertain the grounds of a motion for mistrial.

5. After a careful examination of the evidence, we find that the verdict of guilty is amply supported by the testimony. Swearingen (who was killed by Allen, the prosecutor) and the defendant, Fouraker, as it appears from the evidence, had been making threats and endeavoring to provoke a difficulty with Allen, but had gone away. Allen's house had been shot into, and he had felt obliged to arm himself and take refuge in

a darkened room. The conduct of the defendant and Swearingen, during the afternoon, had been such as tended to terrify Allen, who not only knew both men well, but was familiar with their voices. Allen had left his darkened room and returned to his store room, which was lighted, and was preparing to close up when two men, whom he took to be Fouraker and Swearingen, started up his steps. He saw Swearingen's pistol and warned him to go back and lay down the pistol. As Swearingen would not grant this request, Allen, who had his gun leveled upon Swearingen, asked one Kilburn, who was in the store, to go around and get the pistol, and just as he did so Allen was shot by a gun from the outside, and almost immediately he fired his gun, and Swearingen fell. From the circumstances testified to by all of the witnesses, no other inference could reasonably be drawn, than that Fouraker was the man who shot Allen with a shotgun. Fouraker and Swearingen were together all of the afternoon, Fouraker with a double-barrel shot-gun, and Swearingen with a pistol. They were inseparable, and both of them discharged their weapons repeatedly. No one else was connected with Swearingen in his disorderly conduct and in his attacks upon Allen, and it seems plain, as testified by one of the witnesses who heard the remarks of some one who was with Swearingen, that it was the intention of the defendant to have Swearingen "raise a row," whereupon he would do the killing. More than one witness swore to threats made by the defendant in connection with the prosecutor's refusal to sell certain goods to Swearingen on credit. The evidence being circumstantial, the jury might have been authorized to acquit the defendant if the evidence had pointed to any one other than this defendant as the man who fired the shot; but in our opinion the jury could not reasonably entertain any other supposition than that the defendant was the person who shot Allen, nor were they authorized, under the law, to find this shooting to be any lesser offense than that of assault with intent to murder.

So far as the absence of the defendant during the trial is concerned, the point is not properly presented for our consideration. It is not made one of the grounds of the motion for new trial, and the only reference to the subject is in the brief of evidence of which it forms no proper part.

Judgment affirmed.

#### ROSE v. STATE.

R. M. ROSE CO. v. SAME.  
(Nos. 990, 991.)

(Court of Appeals of Georgia. July 31, 1908.)

#### 1. INTOXICATING LIQUORS—OFFENSES—SOLICITING ORDERS IN PROHIBITED PLACES.

Section 428 of the Penal Code of 1895, which prohibits the soliciting or taking of orders for the sale of intoxicating liquors in counties where

such sales are, by law, prohibited, is a police regulation, necessary for the effective enforcement of the state's prohibitory regulations. The act forbidding soliciting orders for intoxicating liquors is not affected by the extension of the scope of its operations, caused by the passage of the general prohibition act.

#### 2. SAME—"SOLICIT PERSONALLY OR BY AGENT"—VENUE OF OFFENSE.

By the terms of section 428 of the Penal Code of 1895, the solicitation or taking of orders for the sale of intoxicating liquors is forbidden, whether the solicitation is by the seller personally, or whether the solicitor is only an agent of the seller. To solicit the sale of intoxicating liquors by letter or circular is a crime, if the letter is intended to be delivered, and is in fact delivered as intended, in any county in this state.

(a) The term "solicit personally" includes any act done by the seller himself, which may tend to effect a sale, as contrasted with any like act "by an agent" of the seller, tending to a similar result.

(b) Whether a solicitation is personal or by an agent is not dependent upon the personal presence of the solicitor, but upon whether the means of solicitation, whether oral or in writing, are used by an agent or by the principal himself. The solicitation of orders by mail for the sale of intoxicating liquors is personal solicitation, if the seller himself in person writes or mails the letter received by the prospective buyer.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 189.)

(c) The venue of a crime, committed by mail, is at the point where the matter transmitted by mail is delivered and takes effect. Where a sale of intoxicating liquors is solicited by a communication, written or printed, and mailed in one state, as no crime is committed until the delivery of the letter in the state where such solicitation is forbidden, the courts of the county where the letter is received by the addressee of such letter and its contents are ascertained have jurisdiction of such offense.

#### 3. CRIMINAL LAW—POWER TO PUNISH.

The state may punish for a crime committed through the mails as a medium, without in any sense impinging the undoubted right of the national government to control the mails. Freedom to use the mails does not extend to their use as a means of committing crime.

#### 4. INTOXICATING LIQUORS—POWER TO CONTROL TRAFFIC—STATES.

"The general power of the states to control and regulate, within their borders, the business of dealing in or soliciting orders for, the purchase of intoxicating liquors, is beyond question." *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 4.)

#### 5. COMMERCE — INTERFERENCE WITH INTERSTATE COMMERCE.

Under the provisions of the Wilson bill, a statute, which (in aid of a police regulation prohibiting the sale of intoxicating liquors within a state or any portion thereof) prohibits the solicitation of orders, is not, for the reason that such statute conflicts with the power of Congress to regulate and control interstate commerce, void as to orders solicited in said state, although the seller and the liquor to be sold may both be in another state, because such regulation in no wise encroaches upon the power of Congress to control interstate commerce. The exercise of such state regulation, so far from being in conflict with the power of Congress to regulate interstate commerce, is expressly allowed by law. Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177).

(Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 92.)

#### 6. INTOXICATING LIQUORS—OFFENSES.—PERSONS LIABLE—CORPORATIONS.

A corporation may be indicted and punished for any violation of law by its servants and agents in the conduct of its business, which it commands or ratifies. That the servant may also be punished does not relieve the corporation. (Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Randolph Rose and the R. M. Rose Company were separately convicted of soliciting orders for intoxicating liquor in a county wherein the sale of intoxicating liquor is prohibited by law, high license, or otherwise, in violation of Pen. Code 1895, § 428, and they bring error. Affirmed.

L. Z. Rosser and J. L. Anderson, for plaintiffs in error. Sam P. Maddox, Sol. Gen., for the State.

**RUSSELL, J.** The plaintiffs in error were accused in two presentations, which are practically identical. Demurrers were filed in both cases, and the plaintiffs in error except to the judgment of the superior court overruling their demurrers. As the same points are presented in both bills of exception, they will be considered together.

The defendants in the court below were accused of the violation of section 428 of the Penal Code of 1895, which forbids the solicitation or taking of orders for intoxicating liquors in any county in this state where the sale of such liquors is prohibited by law, high license, or otherwise. Each presentation contains two counts charging the offense of misdemeanor. We quote so much of each count as is material. In the first count it is alleged that the defendants in Bartow county unlawfully did "solicit personally and by agent the sale of spirituous, malt, and intoxicating liquors in said county of Bartow, where the sale of said liquors is prohibited by law, high license, and otherwise, \* \* \* said soliciting being made by and through the United States mail, by mailing letters to citizens of Bartow county from the city of Chattanooga, Tenn., containing self-addressed envelopes, order blanks, and other printed and written matter soliciting the sale of said liquors, said letters having been mailed and delivered to W. A. Cleveland and I. W. Alley in Bartow county and other citizens of Bartow county whose names to the grand jurors are unknown." In the second count of the presentation it is alleged that the defendants were guilty of the offense of misdemeanor, for the reason that they did "solicit personally and by agent the sale of spirituous, malt, and intoxicating liquors in said county of Bartow, where the sale of said liquors is prohibited by law, high license, and otherwise, \* \* \* said soliciting being made by and through the United States mail by mailing letters to citizens of Bartow county from the city of Chattanooga, Tenn., containing self-address-

ed envelopes, order blanks, and other printed and written matter soliciting the sale of said liquors, said letters having been mailed to W. A. Cleveland and A. W. Alley in Bartow county, \* \* \* said liquors then and there being in Chattanooga, in the state of Tennessee, and to be shipped to said Cleveland and Alley from Chattanooga, where the said Randolph Rose and R. M. Rose Company, at the time of said soliciting, had a place of business where they were engaged in selling said liquors."

The defendants demurred to the presentations upon the following grounds: First. That the indictment set forth no offense under the laws of Georgia. That it is not a crime under the laws of the state of Georgia to solicit the sale of intoxicating liquors not personally or by agent, but through the United States mail from a point without to a point within the state. Second. That the indictment shows on its face that the defendants were prosecuting a legal business, are not violating any penal law of the state of Georgia, have done no act in the county of Bartow, state of Georgia, either personally or by agent, but that they only mailed certain documents, therein mentioned, in the state of Tennessee, which is not a crime under the laws of the state of Georgia. Third. That the indictment shows upon its face that the defendants are engaged in an interstate business not prohibited by the Constitution or laws of the United States and not subject to be interfered with by the laws of Georgia. Fourth. That the indictment shows upon its face that the defendants are using the United States mails for legal ends and the conduct of a legal business, and it is incidental to interstate commerce. Fifth. That the indictment shows upon its face that the defendants are not guilty of any crime or penal offense, in that soliciting, through the United States mail, orders for the sale of liquors in Bartow county, Ga., to be shipped from Chattanooga, in the state of Tennessee, is a lawful use of the United States mails, and is incidental to interstate commerce, namely, the sale and shipment from the state of Tennessee into the state of Georgia. Sixth. That if the laws of Georgia undertake to make criminal the solicitation of the sales of liquors by mailing letters from without the state to persons within the state, such liquors to be sold and shipped from without the state to persons within the state ordering the same, such laws are void as contravening section 8, subd. 3, art. 1, of the Constitution of the United States.

The foregoing statement embraces the substance of the points presented in the demurrers of both defendants alike. The R. M. Rose Company also demurred upon the ground that, being an artificial person, it is not subject to indictment nor punishable for the criminal offense set out in this indictment. Other than the one last stated (and

which will be last considered) the demurrers raise three main points: First. That the solicitation of orders for whisky by mail is not forbidden by the terms of section 428 of the Penal Code of 1895, for the reason that to solicit by mail cannot be to solicit "personally" and is not included in that term. Second. That even if such solicitation be a violation of the law, when the point from which the letter is sent and the point where the letter is received are both within the same state, yet the statute is without effect where the letter is sent from another state, because to give the law effect would be to interfere with interstate commerce and an incident to interstate commerce, as well as to interfere with the power of Congress to control the postal service. Third. That, if it be held that the solicitation of sales of liquor by mail from without the state to a person within the state comes within the provision of section 428 of the Penal Code of 1895, when the liquor to be sold is to be shipped from without the state to persons within the state, then section 428 of the Penal Code of 1895 is void as contravening the power of Congress to regulate commerce among the several states.

The questions raised by this record present issues of the highest importance to the people of this state as well as of the gravest legal import. It is clear, upon the one hand, that the intention of the General Assembly, in the passage of the general prohibition act of 1907 (Acts 1907, p. 81), will be largely frustrated and brought to naught if it be held that liquor dealers have only to establish themselves beyond the borders of this state and carry on a mail order business in which their stock of goods is without the state, instead of within its borders. Upon the other hand, if the sale of intoxicating liquors comes within the same category as other objects of interstate commerce, or if it is so held by the federal courts, no state can prevent this. The sale of liquor is a legitimate business, where it has not been placed under statutory ban, and it is not within the purview of our duties, nor our purpose at this time, to discuss the moral aspect of either the sale or use of intoxicating liquors. We shall deal only with the legal aspect of the case; that is, with that legal restriction or prohibition which is in the nature of police regulation. We recognize, also, that, the sale of liquor being a legitimate object of interstate commerce, no state statute can stand which encroaches in any degree upon the prerogative of Congress to regulate commerce between the states. We recognize that the Constitution of the United States and laws of the United States in pursuance thereof are the supreme laws of this state, and, so far as the writer is concerned, he feels no little pride, as a Georgian, in the fact that the framers of our Constitution took the pains to embody in the organic law of this state a clear declaration of Georgia's para-

mount allegiance to the federal Constitution and laws.

The growth of the conviction that total prohibition was the best regulation of intoxicating liquors was gradual in this state. Prior to the passage of the local option act, numerous counties had, by local laws, some directly and others by high license, prohibitory in amount, abolished the sale of intoxicating liquors within their borders. By the passage of the act which prohibited the manufacture, sale, barter, giving away to induce trade, etc., of any alcoholic, malt, spirituous, or intoxicating liquors, approved August 6, 1907, the Legislature of Georgia intended, as a matter of police regulation, to prohibit the sale of all intoxicants in this state. Every device by which the unlawful use of liquors in this state could be supplied, which were suggested to legislative ingenuity, is guarded against in the act last above referred to. It cannot be conceived that the legislative contemplation extended only to the prevention of sales, for, if so, this would have worked merely to deprive the public treasury of a large income, devoted to the cause of public instruction. Whether wisely or not, the Legislature must have determined, either upon the ground of public health, public peace, or the public morality, or having all of them in view, that it was best as a matter of internal police regulation of the state that intoxicating liquors should be placed under the ban of the law. It is not to be denied that the law is sweeping and drastic. This, however, only goes to make more manifest the intention of the lawmakers and to accentuate our duty as a court to enforce this manifest intention. We have given to each question involved most serious consideration. No question can be more important than some of those involved in the present writ of error. The very right of the sovereign state to control its internal police regulations is called in question. If the contention of the plaintiffs in error is correct, then the state is powerless to prevent, by the enforcement of absolute prohibition, the evils it apprehends from the sale of intoxicants within its borders. It can prevent its own citizens from soliciting sales within its borders, but the arm of the state is powerless to prevent nonresidents from a similar violation of its policy. It can prevent its own citizens from lighting the fires of crime by inducing those to buy who otherwise might not do so, but cannot prevent citizens of Tennessee and Alabama from shooting arrows of fire, which may cause the same combustion. The state, according to this contention, may keep down fire set out by its own citizens, but cannot protect our homes in Georgia from being set on fire by showers of lighted arrows shot from Florida and Tennessee.

1. Keeping in mind the provisions of the Wilson act and various decisions of the Supreme Court of the United States construing it, it is our deliberate opinion that section



428 of the Penal Code of 1895 of this state, which prohibits the soliciting or taking of orders for the sale of intoxicating liquors in counties where such sales are prohibited, is a salutary police regulation, necessary for the effective enforcement of the general prohibitory statute of 1907. It was considered necessary when in only a portion of the counties in the state prohibition had become effective by local option. If prohibition was effective in only one county (and particularly if it were a border county), it seems to us that a non-resident solicitor would be as much liable as a solicitor who was a resident of this state. In no view of the case therefore can the effect of section 428 of the Penal Code of 1895 be affected by reason of the fact that the practical effect of the passage of the prohibition law of 1907 has been to extend the scope of the territory within which section 428 becomes operative.

2. The initial question to be considered in the determination of this case is whether section 428 of the Penal Code of 1895 forbids the solicitation of orders for whisky or other intoxicating liquors by mail in any case; that is to say, whether it would be a violation for A. B., living and doing business in Atlanta, Ga., to solicit by letter, mailed in Atlanta, Ga., an order for whisky from C. D., living in Elberton, Ga. We must necessarily consider this phase of the question first, because, if the solicitation for the sale of intoxicants by mail, through a letter which is delivered in a county where, by law, the sale of said intoxicants is prohibited, be no offense, where the solicitation by mail begins and ends within the jurisdiction of this state, then it would be unnecessary to consider the questions raised and argued at length as to whether the defendants could be convicted because their letters were written and mailed in the state of Tennessee. If it is not a violation of the law to solicit the purchase of intoxicating drinks by mail, when the solicitation is initiated and also included within the state, there can in no event be an unlawful solicitation within the terms of section 428, where the United States mail is used as the medium of communication between him who desires to sell, and him who might be induced to buy, intoxicating liquors within a county where the sale has been prohibited. Section 428 of the Penal Code of 1895, as amended by the act of 1897 (Acts 1897, p. 39), is as follows: "If any person shall sell, contract to sell, take orders for or solicit personally or by agent, the sale of spirituous, malt or intoxicating liquors in any county or town or municipal corporation or militia district or other place where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor." Section 428 was taken originally from the act of 1893 (Acts 1893, p. 115), which act, in its first section, also contained what is now section 429. We mention this fact because in the argument considerable stress is laid on the lan-

guage of section 429 as sustaining the argument that the original act applies only to solicitations made by one in person, and that for that reason the solicitation of sales, referred to, whether it be by the seller himself or by his agent, must be by personal visit to the locality where such sales are prohibited. The language of section 429 is: "The foregoing section does not prevent the furnishing of such liquors to persons in such prohibition counties upon purchases made of licensed dealers in such liquors outside of and not solicited or contracted for in said prohibition counties. Nor does it prevent the soliciting of orders from licensed druggists and practicing physicians." It will be found, upon examination of the original act of 1893, that section 429 is merely a proviso to the provisions of the only enacting section of the original act, the dominant purpose of which was to make the law effectual in those counties where the will of the people had decreed that intoxicating liquors should no longer be sold.

In our opinion the use of the words "personally or by agent," in the act of 1893, if not entirely superfluous, can, in no event, be construed as restricting the meaning and effect of the word "solicit" to personal solicitations only. It must be remembered as a notable historical fact that originally many of the strongest prohibitionists were not skilled lawyers, and vice versa. The words "personally or by agent" were, no doubt, inserted, not with the wish of restricting the meaning of the word "solicit," but in the attempt to broaden it. And when we consider that the intention of the act, to which we have already referred, was to make criminal the introduction of intoxicants from a county where the sale of such intoxicants was legal into a county where the sale was prohibited, it is readily to be seen that while the solicitation which was made penal could be a personal solicitation, it was none the less made a crime for any person, either himself or by an agent, in any way, to solicit the sale of intoxicating liquors where it was prohibited by law. The use of the word "personally" is more of a reference to the doctrine that in misdemeanors all who participate in any way in the commission of a criminal act are principals, than a reference to the means which might be employed to solicit sales. The Legislature declared in effect, in this section what has always been the policy of this state with reference to the violation of its liquor laws (as to sales under license and to minors), that the solicitor should be responsible for the act of his agent at his peril, as well as that the agent should be criminally responsible for his own act. The clear meaning of the act of 1893, so far as soliciting is concerned, is that the person who sells intoxicating liquors or solicits its sale in a prohibition county shall be responsible, whether the act is committed by himself individually or by any person who is his agent—it matters not what may be the

means employed by either to effect the illegal solicitation. Our view is sustained and strengthened by the provisions of section 429, which was originally a part of the same act, and elucidates the true intention of the Legislature, for the act proceeds to say that licensed dealers outside of prohibition counties, who have not solicited sales, may furnish intoxicating liquors to persons in prohibition counties, and yet in this provision there is no repetition of the words "personally or by agent." There is here no limitation placed on the word "solicit" as would have been if the word "solicit," in the earlier part of the act, had been intended to be restricted to solicitations made in person. The lawmakers had already said, in section 1 of the act, that any solicitation, whether made by the seller or by an agent of his, was unlawful, and, having thus defined what it meant by the word "solicit," the Legislature proceeded to say, by proviso in the same section, that one who had not solicited could furnish liquors, even in prohibition counties, upon unsolicited purchases made of them. This permission, of course, granted nothing and amounted to nothing (except that it may be used to illustrate the meaning placed by the General Assembly upon the word "solicit" as qualified by the words "personally or by agent"), because it has never been made penal to purchase intoxicating liquors, and the sellers referred to were licensed dealers in the counties of their places of business.

It is further to be noted that the language "personally or by agent" is not repeated after the word "solicit," in the provision of the act of 1893 relating to licensed druggists and practicing physicians. On the contrary, the language used clearly disclosed that, in using the words "personally or by agent," in the portion of the act which is now section 428, the Legislature was referring only to the fact that the solicitation might be done either by a principal or his agent, and not to the means which might be employed in order to solicit, for the language employed is: "The soliciting of orders from licensed druggists and practicing physicians." This is not interdicted by the act, no matter what means may be employed either by the principal or by the one employed as his agent to solicit sales in his behalf.

The learned counsel for plaintiffs in error insist that the word "personally" is the keynote in determining what the act forbids, and quote various liquor laws from which it is absent to support the statement that "it is a stranger to the state's liquor laws." They insist that, if section 428 had read "if any person shall sell or solicit the sale of spirituous liquors," etc., the family resemblance to the rest of the state's liquor laws would have been preserved. It is true, as stated by counsel, that the word "personally" is not to be found elsewhere in the liquor laws of the state, but there is not, for

that reason, any force in the argument that the Legislature intended only to forbid personal solicitations, unless it can be said that the word "personally" also qualifies the word "agent." Even a mere superficial reading will disclose that this is not true. The agent, then, could solicit in any manner he saw fit, and, even in this view, the most that could be said would be that the principal could not be found guilty unless he in propria personæ, and by personal presence and solicitation in the prohibition county, violated the law, and yet one who is his agent, as the word "agent" necessarily refers back to the word "solicit," if he in any manner solicits a sale, would be guilty, though his principal would not. It is not to be presumed that any Legislature intended to create such an anomaly as this.

We have already referred to the fact that acts are frequently presented and pressed to passage, whose authors are not skilled in the use of such language as will convey most aptly the thought desired to be expressed, and yet the language of the section now under consideration is very similar to that of the statute forbidding the sale of liquor to minors, and was, no doubt, intended to express exactly the same thought, as the latter statute forbids "any person by himself or another" to sell or furnish intoxicating liquors to minors. Pen. Code, 1895, § 444. The same thing is true of section 445 of the Penal Code, which forbids any person who keeps or carries on, "either by himself or by another," a barroom, to employ a minor in the barroom. Other statutes of the state, upon other subjects, use the same language—"any person who shall by himself or another." This is nothing more than a warning to the entire citizenry of the state that principals and accessories are alike punishable. We have no difficulty therefore in holding that it was the intention of the Legislature (in order to make the prohibition laws of those counties that might adopt them effective) to absolutely prohibit the encouragement of purchases of intoxicating liquors in counties which had prohibited the sale, by any kind or form of solicitation, except that licensed sellers might solicit orders from licensed druggists and practicing physicians. As the buying of liquor had not been made a crime (even if the sale were made in a prohibition county, and were unlawful), and as the Legislature, no doubt, considered that it could not punish the purchaser, and therefore could not prevent purchases from being made, liquor dealers who had not solicited the order were given permission to furnish purchasers who had come to them unsolicited, as a reward for their observance of the law; but the words "personally or by agent," so far from being restrictive, were, no doubt, inserted with the intention of being as absolutely inclusive of all kinds and methods of solicitation as the expression "from the north to the south," or "from the east to the west,"

would be esteemed inclusive of all intermediate points.

The next question, then, is whether the Legislature had the power to penalize a solicitation which originated in Fulton county and was completed in Washington county, so as to make the offense punishable in the latter county. To put the exact question raised by this record: If the solicitation was made by mailing the letter in Fulton county, and the letter was received by due course of mail by the person to whom it was addressed in Washington county, would the courts of Washington county have jurisdiction of the case? We think so. It has been held that if one standing in one jurisdiction fires a gun and kills another who is in a different and distinct jurisdiction, the courts of that government where the bullet took effect alone have jurisdiction of the crime, if any was committed. A thief may be prosecuted in any jurisdiction into which the stolen goods are carried. He who sends poison by mail, with the intent of accomplishing the death of another, if the poison be taken and death results, is triable for the murder where the poison is administered. If it be a crime at all, then, to solicit sales of whisky, regardless of the method of soliciting, the venue of the offense must be the point where the solicitation is communicated to the person sought to be solicited. If the agent (for, as we have said before, the word "personally" cannot limit or qualify the word "agent" in the statute) communicated by telephone, the solicitation would only be complete when the message was heard by the probable purchaser, and therefore the crime would be complete at the location occupied by the person solicited during the conversation. It has been held, as to telegrams, that damages accruing from the failure to deliver a message, though recoverable at its destination, are due only to the sender, who may have been hundreds of miles away. What is said in *Loeb v. State*, 115 Ga. 241, 41 S. E. 575, does not conflict with what we now rule. It is true that the court in that case held the offense under section 428 of the Penal Code of 1895 to be personal solicitation of orders for the sale of intoxicating liquors, and counsel for the plaintiffs in error rely strongly upon the language used. When, however, the real issues involved in that case are taken into consideration, it clearly appears that what the Supreme Court said upon this subject was obiter. The point now before us was not before the court. If it had been, we doubt not that the same considerations which control our judgment would have addressed themselves with equal force to the judgment of the Supreme Court.

3. Unquestionably the state may punish for a crime committed through the mails as a medium, without in any sense impinging the undoubted right of the national government to control the mails. Freedom to use the mails does not extend to their use as a means

of committing crime. In *Re Palliser*, 136 U. S. 266, 10 Sup. Ct. 1037, 34 L. Ed. 514, Justice Gray, delivering the opinion, after citing some cases in which it was held that the sender of a letter may be punishable at the place where he mailed it, says: "But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed, and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the post office consists in its being a threatening letter (citing *King v. Girdwood*, 1 Leach, 142; *Id.*, 2 East P. C. 1120; *Esser's Case*, 2 East P. C. 1125), or a libel (*King v. Johnson*, 7 East, 65; *Id.*, 3 J. P. Smith, 94; *King v. Burdett*, 4 B. & Ald. 95, 126, 150, 170, 184; *Commonwealth v. Blanding*, 3 Pick. [Mass.] 304, 15 Am. Dec. 214; *In re Buell*, 3 Dill. 116, 122, Fed. Cas. No. 2,102), or a false pretense or fraudulent representation (*Regina v. Leech*, Dearsly, 642; *Id.*, 7 Cox, Crim. Cas. 100; *Queen v. Rogers*, 3 Q. B. D. 28; *Id.*, 14 Cox, Crim. Cas. 22; *People v. Rathbun*, 21 Wend. [N. Y.] 509; *People v. Adams*, 3 Denio [N. Y.] 190, 45 Am. Dec. 468; *Adams v. People*, 1 N. Y. 173; *Foute v. State*, 15 Lea [Tenn.] 712)."

In the *Palliser Case*, the defendant mailed a letter in New York, addressed to a postmaster in Connecticut, soliciting him to violate his official duty. In concluding the opinion, the court held that: "It might admit of doubt whether any offense against the laws of the United States was committed until the offer of tender was known to the postmaster and might have influenced his mind; but there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut, and that, if no offense was committed in New York, an offense was committed in Connecticut, and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner."

In the recent case of *United States v. Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673, which was one of unlawful solicitation for campaign contributions, the Supreme Court of the United States, discussing the question of solicitation by letter, says: "The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried, or had been burned, the defendant would not have accomplished a solicitation. To sum up, the defendant solicited money for campaign purposes. He did not solicit until his letter actually was received in the building. He did solicit when it was received and read there, and the solicitation was in the place where the letter was received. We observe that this is the opinion expressed by the Civil Service Commission in a note

upon this section, and the principle of our decision is similar to that recognized in several cases in this court. In *re Palliser* (Palliser v. United States), 136 U. S. 257, 266, 10 Sup. Ct. 1034, 34 L. Ed. 514; *Horner v. U. S.*, 143 U. S. 207, 214, 12 Sup. Ct. 407, 36 L. Ed. 126; *Burton v. U. S.*, 202 U. S. 344, 387, 26 Sup. Ct. 688, 50 L. Ed. 1057." While the *Thayer Case* is not identical with the case at bar, the following language very clearly sustains our view, and holds, not only that it is possible to solicit by letter as well as in person, but also that the offense of solicitation, if it be made an offense, is only complete when the letter has reached the addressee in the manner intended by the writer. It also, we think, settles the question that the United States mail can be the agent of him who solicits, and thereby establishes the proposition that even a mailman, delivering the letter, may be the agent of the writer, within the terms of section 428, even if we were to hold, as contended for by counsel for plaintiff in error, that the solicitation must be made personally by an agent. In the *Thayer Case*, *supra*, Justice Holmes, speaking for the court, says: "Of course, it is possible to solicit by mail as well as in person. It is equally clear that the person who writes the letter and intentionally places it in the way of delivery solicits whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way."

We think it clear, then, that the court of the place where the solicitation is completed by the delivery of the letter in the way intended, and by the agency selected by the defendants, would have jurisdiction of any crime growing out of the solicitation. Consequently, we hold that the solicitation by mail of orders for whisky or other intoxicants, to be filled for persons who live in counties where, by law, the sale of intoxicating liquors is prohibited, is violative of section 428 of the Penal Code of 1895. See 9 Cyc. 297, and citations; *Palliser v. U. S.*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126; *Burton v. U. S.*, 202 U. S. 389, 26 Sup. Ct. 688, 50 L. Ed. 1057. To sum up the matter: Whether a solicitation is personal or by an agent is not dependent upon the personal presence of the solicitor, but upon whether the means of solicitation, whether oral or in writing, are used by an agent or by the principal himself. The solicitation of orders by mail for the sale of intoxicating liquors is personal solicitation, if the seller himself in person writes or mails the letter received by the prospective buyer. The venue of a crime, committed by mail, is at the point where the matter transmitted by mail is delivered and takes effect. Where a sale of intoxicating liquors is solicited by communication, written or printed, and mailed in one state, as no crime is committed until the delivery of

the letter in the state where such solicitation is forbidden, the county of the residence where the addressee receives such letter and gains knowledge of its contents has jurisdiction of such offense.

4. Counsel for plaintiffs in error argue that section 428 of the Penal Code of 1895, as construed and applied by the lower court, gives the law extraterritorial effect and is repugnant to the commerce clause of the Constitution of the United States. It is insisted that whisky and other intoxicating liquors are as much legitimate objects of commerce as any other articles which may be the subject-matter of barter and trade. Of course, when the subject of interstate commerce is to be considered, the rulings of the Supreme Court of the United States upon this subject very properly should control, and for that reason we cannot concur in the contention of counsel. In more than one case it has been held that the control of intoxicating liquors was a matter of police regulation. In regard to whose interchange a greater power had been delegated to the states than with reference to other articles of trade. In *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 40, 25 Sup. Ct. 552, 49 L. Ed. 925, Mr. Justice Brown states the well-known fact that the *Wilson act* was passed in consequence of the decision in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. In that case the state's statute prohibiting the sales of liquors was held to be unconstitutional as applied to the sale of the importer in original packages from another state. The decision in the *Hardin Case*, *supra*, was put upon the ground that liquors had always been recognized by the commercial world as subjects of exchange, barter, and traffic. The *Wilson act* (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), provided: "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein shall upon arrival in such state or territory; be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The purpose of the *Wilson act*, as construed by the Supreme Court of the United States in *Pabst Brewing Co. v. Crenshaw*, *supra*, was to enlarge the powers of the states in respect to intoxicating liquors so that upon their arrival in the state of their destination they should be subject to its police powers to the same extent and in the same manner as though such liquors had been produced within such state. As remarked by Justice Brown: "The primary, if not the sole, object of the *Wilson act* was to attach the prohibitory laws of the state as a police measure

to liquors the moment they were delivered to the consignee, although they might still be in their original packages." The scope of the Wilson act is thus stated in *Re Rahrer*, 140 U. S. 560, 11 Sup. Ct. 868, 35 L. Ed. 572: "Congress has now declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of similar nature."

The ruling in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, is not in conflict with the *Rahrer* Case; the effect of the holding being merely that the Wilson act did not authorize the laws of Iowa to be applied to liquors while in transit from another state and before their delivery in Iowa. On the contrary, the ruling in the *Rahrer* Case was reiterated, that liquors were divested of their character of articles of interstate commerce after their delivery in Iowa to the consignee. We think it clearly established that the Wilson bill puts intoxicating liquors, shipped into a state, within the police power of such state upon their arrival and delivery to the consignee, that such liquors do not stand upon the same footing as other articles of interstate commerce, and that any police measure that is a valid exercise of the police power of the state comes expressly within the purview of the Wilson bill. See, also, *Vance v. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; *Fopplano v. Speed*, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288; *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178; *Adams Express Co. v. Iowa*, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424. To use the language of Justice White in the *Pabst Brewing Co. Case*, supra: "Applying the Wilson act and the decisions thereunder to the statute here assailed, we think it clear that the contention that it is repugnant to the commerce clause of the Constitution is without merit." It is within the power of each state either to regulate the sale of liquor or to prohibit it altogether in the exercise of its police power.

At the time of the passage of the act of 1893, from which the Code section is taken, in numerous counties of Georgia prohibitory laws were effective, while in other counties the sale of intoxicating liquors was legalized. The act therefore at that time was only effective in those counties where prohibition was effective. Now it is effective throughout the state, by reason of the passage of the general prohibition bill, approved August 6, 1907. This difference, however, does not affect the validity of the police regulation provided by the act of 1893, but only goes to the scope of the territory affected. In either case it is a matter of police regulation, and if it does not encroach upon federal authority it is valid. As was held by the Supreme Court of Missouri in the decision quoted in the *Pabst Case*, so we hold that the act now in question, prohibiting the soliciting or taking orders for

the sale of intoxicating liquors, in any county where the same is prohibited, is a valid police regulation as to a traffic which, it is conceded, the state of Georgia has the power to prohibit entirely. The purpose of the act was to make prohibition effective in each and any county where the sale of intoxicants was prohibited, and it is immaterial to the validity of the regulation whether such counties are few in number or included all the counties of the state. To use the language of the Supreme Court of the United States: "It necessarily results from this that the assailed law comes directly within the express terms of the Wilson act." This must be the case since, as we have seen, the Wilson act, to use the words employed in *Re Rahrer*, "places liquor coming from another state after its arrival 'within the category of domestic articles of a similar nature.' To decide that an exertion by a state of its power to regulate the sale of malt liquors, manufactured within the state, was an exercise of its police authority, and yet to say that the same, when applied to liquor when shipped into the state from other states after delivery, was not an exertion of the police power, would be to destroy the Wilson act and frustrate the very object which it was intended to accomplish, and, besides, would overrule the previous decisions of this court upholding and enforcing that statute."

5. Counsel for the plaintiffs in error, however, argue that to hold that one may not, by letter, from without the state solicit orders for the sale of his liquors which are not in Georgia but are stored in Tennessee, would be to affect traffic in the article and operate to deter shipments to Georgia, and therefore that the statute must be treated as if it bore upon the liquor while still in transit as the subject of interstate commerce. A similar contention was made in the *Pabst Case*, and the Supreme Court said in reference thereto: "This proposition simply amounts to contending that the Wilson act should be disregarded, since to enforce it would give the states power to regulate interstate traffic in liquor. If, when a state has but exerted the power legally conferred upon it by the act of Congress, its action becomes void as an interference with interstate commerce, because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a state might exert its power to control or regulate liquor, yet, if it did so, its action would amount to a regulation of commerce and be void, and this would be but to say at one and the same time that the power could and could not be exercised; but the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious working of our constitutional system has been made possible."

In insisting that negotiations leading up to

an interstate sale of liquors are as much a part of interstate commerce as actual transit of goods, the learned counsel for plaintiffs in error lose sight of the fact that the Wilson bill has placed liquors upon a different plane from ordinary objects of interstate commerce. It is true, as a general rule, that "the negotiations in one state of sales of goods, which are in another state, for the purpose of their introduction into the former state, constitutes interstate commerce." 17 Am. & Eng. Enc. of Law (2d Ed.) 65. Upon this subject counsel for plaintiffs in error say: "If negotiations leading up to interstate traffic are subject to state regulations, there can be but little left upon which the federal Constitution can act with profit." And counsel proceed to argue that inasmuch as it is not a crime for a citizen of Georgia to negotiate for the purchase of liquor with a citizen of Tennessee, who has liquor to sell, it can by no means be held to be unlawful for a citizen of Tennessee to negotiate with a citizen of Georgia for the sale of such liquor. This would be true, no doubt, as to any article of commerce except intoxicating liquors. As to intoxicating liquors, the identical question has been decided by the Supreme Court of the United States adversely to the contention of plaintiffs in error. In *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, not only are all the other questions with reference to interstate commerce, which are involved in the present case, adjudicated, but, as to the particular point now under consideration, it is expressly held that: "Although a state may not forbid a resident therein from ordering, for his own use, intoxicating liquors from another state, it may forbid the carrying on within its borders the business of soliciting orders for such liquor, although such orders may only contemplate a contract, resulting from final acceptance in another state." In the opinion in that case, the court says:

"The proposition relied upon therefore, when considered in the light of the Wilson act, reduces itself to this: 'Albeit the state of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that state from other states, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the state, and the liquors to which they related were also outside the state. This, however, but comes to this: That the power existed to prevent sales of liquor, even when brought in from without the state, and yet there was no authority to prevent or regulate the carrying on the accessory business of soliciting orders within the state. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wil-

son act. That act, as we have seen, manifested the conviction of Congress that control by the states over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce upon the subject. When, then, for the carrying out of this purpose, the regulation expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein, it would be, we think, a disregard of the purpose of Congress to hold that the owner of intoxicating liquors in one state, can, by virtue of the commerce clause, go himself or send his agent into such other state, there in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors. Passing from these general considerations, let us briefly more particularly notice some of the arguments relied upon.

"As we have stated, decisions of this court interpreting the Wilson act have held that that law did not authorize state power to attach to liquor shipped from one state into another before its arrival and delivery within the state to which destined. From this it is insisted, as none of the liquor covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the state did not attach to the carrying on of the business of soliciting proposals, for until the liquor arrived in the state there was nothing on which the state authority could operate; but this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state. The proposition here relied on is widely different, since it is that, despite the Wilson act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquors situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had the right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same

in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce; but as, by the Wilson act, the power of South Dakota attached to intoxicating liquors, when shipped into that state after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson act did not exist."

It must be conceded, as insisted by counsel for plaintiffs in error, that under the Wilson act, even in a prohibition state, a resident of that state has the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use; but it does not follow from this that a dealer in the state of Tennessee may himself, individually, or by means of the mails, or by circulars, or perhaps by advertisement in the newspapers, or by a traveling salesman, come into Georgia and carry on the business of soliciting from residents of this state orders for liquor, to be consummated by acceptance in the state of the nonresident dealer. To use the language of Justice White in the *Delamater Case*: "The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of the state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on in its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court." The decisions upon statutes forbidding foreign insurance companies or their agents to make certain insurance contracts with citizens is then referred to by the Supreme Court, and the cases of *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, are cited, and the decision in *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, is cited and analyzed. A portion of the decision of the Supreme Court of Massachusetts in the *Nutting Case* is expressly adopted, as follows: "While the Legislature cannot impair the freedom of McKie to elect with whom he will contract, it can pre-

vent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons." *Massachusetts v. Nutting*, 175 Mass. 156, 55 N. E. 895, 78 Am. St. Rep. 483.

The ruling of the Supreme Court of the United States in *Delamater case*, *supra*, prevents the plaintiffs in error or any other nonresident dealers in liquors from sheltering themselves under the freedom of a citizen of Georgia to buy, in order to solicit contracts which, but for the attractive and glaring circulars which may be sent by mail, he would not have thought of making. The Massachusetts ruling, as Justice White in the *Delamater Case*, *supra*, says, "is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state to another after delivery and before the sale in the original packages. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not have thought of making,' must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

In passing, we may say that the suggestion was made in the argument that certain constitutional questions should be certified to the Supreme Court. Upon a careful examination of the demurrer we find that no such questions are made. Apart from the fact that no constitutional question is presented with that particularity and definiteness required by the decisions of the Supreme Court and of this court, it is clear that, at most, the demurrer raises only the question whether for this court to give to section 428 of the Penal Code of 1895 the extension and construction which we have just given would be to impinge upon the exclusive powers of Congress in the regulation of interstate commerce as conferred by the federal Constitution. We have repeatedly held that a point of this kind does not present any such direct attack upon the constitutionality of the statute as to require certification. There are many consti-

tutional questions which it is within the power of this court to decide. While our jurisdiction in that respect is limited, we are not forbidden all cognizance of constitutional law. The clause in the constitutional amendment creating this court, which requires certification of certain questions, is necessarily limited by the concurrent constitutional provisions that the decisions of the Supreme Court of the United States upon federal questions, and the precedents of the Supreme Court of Georgia upon state constitutional questions, are to be applied by this court. Consequently, we have held that, where the immediate constitutional question has been directly passed upon either by the Supreme Court of this state or of the United States, such question would not be certified. Upon these propositions see *Fews v. State*, 1 Ga. App. 122, 58 S. E. 64; *Hammock v. State*, 1 Ga. App. 127, 58 S. E. 66; *Anderson v. State*, 2 Ga. App. 18, 58 S. E. 401; *Walker v. Swift Fertilizer Works*, 3 Ga. App. 283, 59 S. E. 850.

6. For the reasons stated in *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67, a corporation, being responsible for the acts of its agent, is indictable and punishable just as a natural person would be for any unlawful act done by any of its servants as its agent and with its consent, if the act done by such servant in the conduct of the corporation's business is forbidden by law, and its commission is punishable as a crime. For this reason the trial judge did not err in overruling the demurrer interposed by the R. M. Rose Company, setting up the fact that it was a corporation.

The real question in the cases turns on whether the soliciting of sales of liquors can be a crime. Is the solicitation crime or legitimate commerce? If the state of Georgia has the power, as held by the Supreme Court of the United States, to make the soliciting of orders for intoxicating liquor a crime as a measure of police regulation, then he who uses any agency to violate that law with success may be guilty of that crime, and his guilt or innocence is not affected by the fact that the solicitation is by letter—that such an one used the mail as his medium of communication and action—any more than if the case was one of sending a threatening letter, a challenge to fight a duel, a circular in regard to a lottery or soliciting campaign contributions, or asking a postmaster to sell stamps upon a credit, or than if the case were even of murder, where the package which caused death was conveyed by mail.

Judgment affirmed.

MONAHAN v. NATIONAL REALTY CO.  
(No. 1,138.)

(Court of Appeals of Georgia. Aug. 4, 1908.)

1. LANDLORD AND TENANT—LIABILITIES OF LANDLORD—DEFECTS IN BUILDING.

A landlord is liable for defects in the original construction of a building, whether he

knows of them or not, and, where he retains a qualified possession and general supervision of his building, he may also be held liable for injuries arising from failure to maintain the building in proper repair, either if he knew of the defects, or if in the exercise of ordinary care he should have known of them.

2. SAME—ACTION FOR INJURIES—EVIDENCE.

In an action brought to recover for injuries due to the defective construction of a building, evidence as to the condition of the building at the time of the casualty may be admissible for the purpose of illustrating that the construction of the building was originally defective, and to show that the immunity, which a landlord may ordinarily claim upon the ground that he exercised due care in obtaining the advice of experts, has been withdrawn by reason of the facts that he had had ample notice (from actual physical conditions, brought to his attention or to that of his agents) that the construction was improper in the first instance.

3. NEGLIGENCE—RES IPSA LOQUITUR—QUESTION FOR JURY.

The maxim "res ipsa loquitur" is simply a rule of evidence, and whether, under a given state of facts, the maxim is to be applied, is an inference to be reached by the jury, and not by the court. In a case where one, himself in the exercise of due care, sustains an injury which is primarily traceable to the operation of some portion of a building, and the casualty is of a kind which does not ordinarily occur where a building has been properly constructed, a jury may be authorized to infer that the resultant injury was due to original defective construction. The duty of proper construction, devolving upon a landlord, is an absolute duty—he is especially charged with knowledge of the character of a building constructed by him—and where injury caused by an appliance of the building results to one properly invited by a tenant into the building, negligence is *prima facie* attributable to the landlord.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 271, 285.]

4. TRIAL—OBJECTIONS TO EVIDENCE—IRRELEVANCY.

Where the only objection made to the introduction of evidence is that it is irrelevant to illustrate a certain issue, it is not error to overrule this objection, if the evidence is relevant to any other issue in the case, and if no objection is made to the competency of such evidence. Although testimony may be incompetent, it need not be excluded upon that ground, unless that objection be specially raised. From knowledge of the existence of a present condition, knowledge of the existence of the same condition in the past may sometimes be implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 194-210, 226.]

5. LANDLORD AND TENANT—LATENT DEFECTS IN BUILDING—LIABILITIES.

One may be liable for the result of a hidden defect as well as for injurious consequences of a patent defect unless he did not know, or, in the exercise of due care ought not to have known, of such latent defect. A landlord is liable for a defect of construction, latent or otherwise, the existence of which he knew or ought to have known.

6. SAME—DEFECTIVE CONSTRUCTION.

Construction which is not strong enough to stand the strain of ordinary use is defective construction.

7. APPEAL AND ERROR—REVIEW—APPLICATION FOR NEW TRIAL—DISCRETION OF COURT.

Where the judge, who presided at the trial of the case, did not hear the motion for a new trial, but it was heard by his successor, the rule with reference to the weight of the opinion of the trial judge upon the facts has no



application; nor has a judge, who did not try the cause originally, that discretion in relation to the grant or refusal of a new trial upon the evidence, with which an appellate court is reluctant to interfere.

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Annie Monahan against the National Realty Company. Judgment for defendant, and plaintiff brings error. Reversed.

Osborne & Lawrence and Oliver & Oliver, for plaintiff in error. O'Connor, O'Byrne & Hartridge, for defendant in error.

**RUSSELL, J.** The plaintiff in error, Mrs. Monahan, brought an action against the National Realty Company, a corporation owning and operating an office building in the city of Savannah, to recover damages for an injury to her hand. The petition alleges: That Mrs. Monahan went to the office of a dentist in the defendant's building to be treated; that while there the annual policemen's parade passed by, and she raised one of the windows to look at the parade, and when she raised the window the chains which supported the sash broke and fell upon her hand, injuring it; that she did not know, and could not by ordinary care have known, of the size and weakness of the chains; that the defendant could, by the exercise of ordinary care, have known of the weakness of the chains and did, in fact, know of it, and further knew that the occupants and visitors to the office in the defendant's building went to the windows for the purpose of looking out, and especially when public parades were passing. The allegations of the petition which are especially material to be considered are those in paragraphs 7 and 12, which are as follows: "(7) That the window was caused to fall by reason of the fact that the chains which supported the sash in the lifts were too light to serve the purpose for which they were being used at the time and place aforesaid. Said chains, being too light and small to sustain the weight of the window, broke and caused the window to fall with full force upon petitioner's said wrist, causing the injury aforesaid." This paragraph was amended by adding the following: "The defendant knew that said chains were too light, weak, and small for the purpose intended when they were put in the windows in said building. The construction of the building was originally defective, in that the said chains were light, small, and weak. By the exercise of ordinary care at the time said chains were put in the building, defendant could have known that they were too light, small, and weak for the purpose to which they were put. The building was constructed by the National Realty Company and under its supervision." "(12) The defendant was negligent as follows: In keeping and maintaining a chain which was too light for the purposes for which it was intended to serve. Said chain was too light to sustain

the weight of the window when raised. Said defendant knew that the chains were too light to bear the strain upon them when the window was open. Said defendant ought to have known, in the exercise of ordinary care, that said chains were too light to bear the strain upon them when the windows were open. All of these acts of negligence concurred in producing the injury aforesaid."

From the evidence it appears that Dr. Osborne, a dentist, rented an office from the defendant. The defendant did not part with possession of its building. It kept a superintendent who looked after the building and had charge of making repairs to the same. It also furnished the tenants with ice water and porter service, including the care and cleaning of windows. On the date in question, the plaintiff went to Dr. Osborne's office to be treated. While in the office, the policemen's annual parade passed, and Mrs. Monahan went to one of the windows to look out. It appeared that it was customary for the windows to be so used when parades were passing. When raised, the chains, which supported the window, broke, and the sash fell and severely injured her hand. Dr. Osborne testified that Mr. Campos, the superintendent of the building, told him that the window chains had been breaking all over the building, and that he had been repairing them, and had used up a second roll of 500 feet of chain in making the repairs. He stated to Dr. Osborne that the reason the chains broke was that they were "too light." Campos, when put upon the stand, did not deny this statement. He said: "I told Dr. Osborne that morning that there was a great many of the windows broken by men cleaning them, revolving windows, jerking them up and down, they would break the chain, and whenever we took a sash out we replaced the chains on both sides of the sash, whether they were broken or not." The defendant put upon the stand the architect who designed the building. He testified that the chains used in the windows were of the kind in ordinary use and were a good grade of chain, and that a Mr. Moxson, who worked under him, had tested the windows after they were put in and after the building was constructed. He also testified that Mr. Campos had nothing to do with the construction of the building, but was employed by the defendant a short time before the building was completed so as to familiarize himself with the details about the building. Moxson testified that he was employed in the construction of the building, that the chains were of a kind in general use and were reasonably suited for the purposes intended, and that he inspected the windows after they were put in, and found them all right. His testimony showed, however, that the only inspection was for the purpose to see if the windows, when moved up and down, worked all right. He made no test as to the tensile strength of the particular chains. The jury returned a verdict

for the plaintiff for \$250. The case was tried before his honor, Thomas M. Norwood, and the rule nisi upon the motion for a new trial was issued by him. This original motion for a new trial was based upon the grounds that the verdict was contrary to evidence, against the weight of evidence, and contrary to law. Judge Norwood's term of office having expired, Hon. Davis Freeman, who succeeded him as judge, allowed the amendment to the original motion, and upon the hearing sustained the motion and ordered a new trial, and to this judgment the plaintiff in error brings her writ of error.

The questions which are presented for our consideration by the record are: Whether the evidence, under the pleadings in the case, authorized the verdict rendered; whether the court erred in admitting the testimony to which exception is taken in the amended motion for new trial; and whether the court erred in qualifying the request of the defendant's counsel by defining to the jury what was meant by "defective condition" of the window chains, by instructing them that such chains would be defective if they were not strong enough to sustain the strain to which they would be subjected by ordinary use. The court also refused the request preferred by the defendant's counsel to the effect that the defendant would not be liable if the chains broke from a hidden defect.

It is unnecessary for us to determine whether the allegations in the twelfth paragraph of the petition, which are quoted above, would constitute, with the allegations of the seventh paragraph, also set forth, a cause of action for failure to keep the building in repair, as insisted by counsel for plaintiff in error, or whether the right of action under the petition is restricted (as seems to have been the opinion of the trial judge) to a right to recover for original defective construction alone, for the reason that we think that, even if the allegations of the petition be construed in a more restricted sense, the plaintiff was entitled to recover.

In the motion for a new trial, it is assigned as error that the court admitted evidence of an admission of the defendant's superintendent that the reason that the chain broke was because it was too light, that windows had been breaking all over the building, and he had been repairing the same, and that he was then on the second roll of 500 feet of chain used in making repairs. It is undisputed in the evidence that the person who is said to have made this admission was the defendant's superintendent and in general charge of the building, and, when he was placed upon the stand as a witness, he practically admitted the entire statement which had been attributed to him, and testified to the truth of the facts therein related. If therefore there was any error in the admission of the statement, primarily, it was cured by the introduction later of the higher testimony. Viewing the contents of this evidence,

it may be remarked that, where it is shown that the owner of a building, constructed presumably with all proper care and under advice supposed to be competent, has brought to his attention facts and circumstances which must bring home the conclusion that the building, in spite of all his care, has been in some respects at least defectively constructed, not only is he thereafter charged with knowledge that the building is, in these respects, of defective construction, but, regardless of his original lack of knowledge, physical evidence of defects at the time of the accident may have real probative value in establishing that the building was, in fact, originally defectively constructed. For instance, if, a year or two after a building has been constructed (where there has been no settling of the walls and no portion of them has veered or cracked), a window sash could not be raised because the window frame was not plumb, or a door could not be shut owing to the fact that the door frame would not fit, it might be demonstrative of the fact that either the door or the window, or both, were originally defectively constructed. It would probably be convincing evidence. The substantive facts testified to by Mr. Campos were circumstances tending to show original defective construction. His admission was competent, in our opinion, to charge his principal with knowledge of these facts.

It made no difference, however, whether the defendant knew, when the building was being constructed, that the chains were too light and weak, or not. It was the defendant's absolute duty to know whether the construction was defective or not. Defective construction is misfeasance, and, where there is absolute misfeasance, the party guilty thereof is ipso facto chargeable with knowledge. See *Mayor of Brunswick v. Braxton*, 70 Ga. 193. Under section 3118 of the Civil Code of 1895, which is a mere codification of the principles laid down in *White v. Montgomery*, 58 Ga. 204, and *Freidenburg v. Jones*, 63 Ga. 614, a landlord is responsible to third persons both for damage arising from defective construction and for damage arising from failure to keep the premises in repair. As to positive misfeasance in construction, he is subject to the same rule which is announced in *Mayor of Brunswick v. Braxton*, supra. As far as keeping up repairs is concerned, the landlord should have notice of the necessity for repairs, where the possession of the premises is exclusively in tenants. In the present instance, however, the landlord retained a qualified possession of the entire building and exercised a general supervision over each room, and it is for this reason that we heretofore remarked that notice as to the necessity of repairs or alteration of the window chains was unnecessary. We have held that it was immaterial that the action was both for damages resulting from defective construction of the building and for damages resulting from failure to keep the premises in

repair, because we consider it well settled that a landlord is liable for defects in the original construction of a building, whether he knows of them or not.

As to the damages which may be recovered where there is a failure to keep the premises in repair and where the landlord has parted with the possession, notice of the defective condition of the premises must, of course, be brought home to the landlord, and hence it was held, in *Ocean Steamship Company v. Hamilton*, 112 Ga. 903, 38 S. E. 205, that the landlord was "not liable because of a failure to repair a defect of which he neither knew nor ought, in the exercise of reasonable diligence, to have known." The case of *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615, is also a case where liability was insisted upon upon the ground that there was a failure of the landlord to keep the premises in repair, and the point decided was that liability results not only where a landlord has actual notice, but where the circumstances are such as to require him to make an investigation which would result in discovery of the defects.

We are further of the opinion that the court did not err in the admission of the testimony of which complaint is made, for the reason that, if the chains were too light and weak to sustain the weight of the sashes at the time of the casualty, this would be a circumstance from which the jury might infer that they were originally too light and weak. Of course, we do not mean to say that it might not rather be inferred, if there was testimony to that effect, that the weakness or insufficiency of the chains at the time of the accident was not due to wear or usage; but the jury would have the right to say to which cause the insufficiency of the chains at the time of the accident was due, and in a case where the building had only been constructed, as in the present instance, for a short time, we think the jury would be authorized to say that the insufficiency of the window chains was not due to long usage and consequent loss of strength, but rather that they were originally too weak for the purpose intended. It may be asserted, as a general rule, that, in an action brought to recover for injuries due to the defective construction of a building, evidence as to the condition of a building at the time of the casualty is admissible for the purpose of illustrating that the construction of the building was originally defective, and to show that the immunity which a landlord may ordinarily claim, upon the ground that he exercised due care in obtaining the advice of experts, has been withdrawn by reason of the fact that he had ample notice (from actual physical conditions brought to his attention or to that of his agents) that the construction was improper in the first instance.

In our opinion, it could not be safely held by the trial judge, nor by this court, that

the jury were not authorized to apply the maxim "*res ipsa loquitur*." Of course, as remarked by Justice Cobb, in *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S. E. 329, this rule is to be applied with great caution, and it is, after all, merely a rule of evidence to be used by the jury for their guidance in arriving at the truth. In the present case, here was a heavy window in a new building, which fell, certainly without any fault of the plaintiff, and, according to some of the testimony, without any apparent cause. In determining whether it was an accident, for which no one would be liable, or whether it was due to negligence on the part of the landlord in the original construction of the building, it is to be borne in mind that where injury is shown, and it is also shown that the party injured was free from fault, and there is no proof of any external cause, a *prima facie* case of negligence may be raised, because the party managing or controlling the agency which created the injury is naturally the one responsible, and the burden is thereby placed upon the defendant to show proper original construction. *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443. Whether the explanation that the chains used in the windows in the defendant company's building were improved appliances similar to those used in two other modern buildings in the city of Savannah was sufficient to rebut the inference of negligence in construction, due to the unaccountable fall of the window in question, which was re-enforced by evidence of continual recurrence of similar accidents all over the building, and the fact that there was never any test of the tensile strength of the window chains, was a question for the jury. We cannot say that the jury erred, whether they applied the doctrine of "*res ipsa loquitur*" or not.

The remaining questions presented are so fully dealt with in the headnotes as to require no further elaboration.

Judgment reversed.

#### MERCHANTS' & MINERS' TRANSP. CO. v. CORCORAN. (No. 753.)

(Court of Appeals of Georgia. Aug. 4, 1908.)

##### 1. APPEAL AND ERROR—PRESUMPTIONS—BURDEN OF SHOWING ERROR—REASONS OF TRIAL JUDGE FOR DECISION.

It is *prima facie* to be presumed that a trial judge has exercised his discretion when he grants or refuses a motion for new trial, and he who asserts to the contrary must plainly show the failure of the judge to exercise the legal discretion with which he is clothed. The judgment of a court upon a motion for new trial cannot be impeached by statements of the presiding judge, not contained in the order overruling or granting the motion. If the trial judge has really exercised his discretion upon a motion for new trial, the reasons which influence him in giving direction to the case are unimportant to the court of review.

(a) In no event can a reviewing court look beyond the order disposing of the motion for new trial, or the recitals in a bill of exceptions af-

firmatively showing that his discretion was not exercised, to inquire whether the judge has failed to exercise his discretion.

(b) Even when the judge gives expression orally to disapproval of a verdict and does not incorporate it in his final judgment, it is not to be held that this indicated that there was not finality and exercise of discretion. It will be treated merely as indicating that the final decision was not reached without difficulty.

#### 2. NEW TRIAL—GROUNDS OF—SUFFICIENCY OF EVIDENCE—SECOND VERDICT.

A second verdict, found with no evidence to sustain it, should be set aside as readily as a first; but a second verdict cannot be set aside, as a first verdict might be, merely because upon the second trial the judge may think that the preponderance of the evidence is in favor of the losing party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 162-165.]

#### 3. MASTER AND SERVANT—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

The evidence authorized the verdict, and, though the evidence were weak, the judge would not be authorized to grant a second new trial because his personal opinion as to the weight of the evidence differs from that of the jury, unless for errors of law a new trial should be granted.

#### 4. SAME—EVIDENCE—ADMISSIBILITY.

Evidence of the incompetency of a servant as to a particular business requiring skill may be deduced from a circumstance disconnected with the cause of action, where the service to be performed is of the same nature or requires like skill as that from the absence of which it was claimed the plaintiff was injured.

#### 5. TRIAL—INSTRUCTIONS—SUFFICIENCY—PRESENTATION OF DEFENSE.

The court may present a defense of the defendant most strongly by excluding from the consideration of the jury all liability under the plaintiff's claim of right of recovery as to that matter.

#### 6. SAME.

(a) In the absence of a written request, it is not error for the court, after giving general instructions upon the subject of the measure of damages, to omit to instruct them that they should take into consideration the plaintiff's diminishing capacity for labor, due to old age. If general instructions are given on the subject of the ascertainment of damages, more specific instructions, if desired, should be duly requested.

(b) The jury are presumed to be as cognizant of the common phenomena of human experience as the judge, and, if their attention is especially desired to be directed thereto, a timely written request should be made. It is not essential, in order to form an estimate of the value of the life of a deceased or to ascertain the diminished capacity of a plaintiff to earn money which has been caused by an injury, that the jury trying the case should have before them the standard mortality tables. Such tables may be a useful circumstance, but are not conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, § 648.]

#### 7. APPEAL AND ERROR—DAMAGES.

A verdict of a jury cannot be held to be excessive unless it be manifestly the result of prejudice or bias, or other corrupt motive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Thomas R. Corcoran against the Merchants' & Miners' Transportation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

O'Connor, O'Byrne & Hartridge and Lawton & Cunningham, for plaintiff in error. Robt. L. Colding, for defendant in error.

RUSSELL, J. This case was heretofore brought to this court upon error assigned upon the award of a nonsuit, and it is reported in 1 Ga. App. 743, 57 S. E. 902. Upon the return of the case to the lower court it was again tried, and the trial resulted in a verdict for \$12,250 in favor of the plaintiff. Exception is now taken to the judgment refusing a new trial, and it is further insisted in the bill of exceptions that the trial judge did not, in fact, exercise his discretion in passing upon the motion for a new trial.

1. We shall first determine what merit, if any, is in the contention that the discretion of the trial judge with reference to the grant of a new trial was not exercised. In the grant or refusal of a motion for new trial it is, of course, to be presumed *prima facie* that such discretion was exercised, and it devolves upon him who asserts to the contrary to show that there was a failure on the part of the trial judge to exercise that broad and yet legal discretion with which he is clothed. We do not think that the circumstances which are relied upon by the plaintiff in error are sufficient to rebut the general presumption, or can be properly considered by this court in the face of the judgment overruling the motion for new trial. It appears from the record that in open court, on August 20th, the court passed the following order: "After hearing argument upon the within motion for new trial, it is considered and ordered that said motion be, and the same is hereby, overruled. In open court, August 20, 1907. T. M. Norwood, Judge City Court Savannah." This judgment was a finality, so far as the motion for new trial is concerned. The power of the judge of the city court of Savannah, so far as that motion is concerned, was then exhausted, and the case was at an end. Any further rights of the parties depended upon a writ of error by proper bill of exceptions, unless the judge, upon the ground that the order had been inadvertently or improvidently signed, had seen proper to set it aside or modify it. The plaintiff in error seeks to show that the judge had not exercised his discretion, because upon the succeeding day he filed an opinion explaining the reasons for his previous judgment.

The opinion was as follows (after stating the case): "Decision of court on motion for new trial. I have not had time to reduce my opinion to writing, and, in fact, in the view I take of it there would be nothing to say that I think would require a written opinion. This case came up here two or three years ago and was tried by a jury, and the jury rendered a verdict. I think it was for \$6,000. It came up again, and I was of the opinion that the plaintiff had no case—that is to say, not sufficient to submit to a jury—and I non-

sued the plaintiff. He took the case to the Court of Appeals, and the court said I was in error; that there was enough to go to a jury. It was then submitted to another jury, and that jury found a verdict for the plaintiff. It was found upon about the same testimony that was submitted when I nonsuited the case. A motion is made for a new trial, but the case stands on about the same footing that it did before, and, in the view I take of it, the duty of this court is this: The law in the case is about the same, that is to say, on this last trial, as it was before when it went to the Court of Appeals. The facts are about the same, and I think that I should allow the Court of Appeals to review the whole case again. They reviewed it once on motion for nonsuit. Now they can review it as a case completed, and decide whether the court here was in error, or the jury was in error, or both. My opinion is therefore that it is better to overrule the motion for a new trial without any reference to what I think about the case. I have nonsuited it once, and then let this court of revision, whichever counsel sees fit to go before, say whether I am right or wrong. This August 21, 1907. T. M. Norwood, Judge City Court of Savannah."

If the judgment overruling the motion for new trial was passed in open court and was not a finality, so far as the city court of Savannah is concerned, it does not appear from the record whether the opinion in which the judge explained the reasons why he exercised his discretion as he did was delivered in term time or in vacation—whether the city court was still in session or had adjourned. If the term of court had ended without an order continuing the hearing of the motion until vacation, the judge would be without jurisdiction or authority to pass any order, and, in the absence of any evidence upon that subject, this court cannot consider the subsequent order which we have quoted above. Beyond that, however, we are satisfied that it would never do to hold that the solemn judgment of a court can be impeached by the oral statements of the presiding judge in which he may give utterance to the views which influenced him, sometimes for the satisfaction and sometimes to the dissatisfaction of the counsel in the case, even though these remarks be stenographically reported, and the judge afterwards consents to verify them by his signature. The reviewing court is not concerned with the extrajudicial reasons which impelled the judge to decide. The only question is: Did the judge decide and thereby exercise his discretion, which is nothing more or less than the exercise of his right to legally determine between two or more courses of action? If he exercises his right of choice after full consideration, the judicial discretion has been exercised, whether it has been exercised wisely or not. This point was expressly ruled in *City of Atlanta v. Brown*, 73 Ga. 630. In delivering his judgment refusing a new trial in the *Brown*

Case, Judge Dorsey stated that "in his judgment the alleged injury was, or should not be an actionable defect, as to require the city to remedy such slight imperfections, would be to impose upon it an extraordinary degree of diligence, but, as he had fully and fairly charged the jury as to the defect being actionable, and they having found in favor of the plaintiff on that question, he felt that he should not disturb their verdict." It was insisted before the Supreme Court that this evidence that there was not an untrammelled and free exercise of the judge's discretion, and that to refuse the motion with such an impression resting upon his mind was an abuse of discretion. In passing upon the point, Justice Hall, in a well-considered opinion, says: "To this, however, we do not assent. It seems to us that it does not amount to an abuse, but is rather a reluctant forbearance to exercise his discretion \* \* \* in favor of the defendant. Upon the whole, he concluded to let the verdict stand, and we are to look to this conclusion as the exercise of his discretion, rather than to the reasons that led him to hesitate, before interfering with the finding of the jury." Throughout the opinion, the order refusing a new trial is treated as an absolute exercise of discretion, which is not to be affected by the fact that the judge was reluctant to reach the decision he finally rendered.

If the presiding judge were to give frank and full utterance to his thoughts in every case in which he rendered a judgment, it would be found that, perhaps, in a majority of the judgments rendered, both doubt and reluctance prevail. If the doubt of the judge, or even his personal opposition, appears in the order passing upon the motion for new trial, it may then be considered that the court has not exercised its discretion, but the judgment in the present case, though brief, makes no reference to any doubt, misgiving, or unwillingness to award the judgment which is rendered without equivocation. By the form of the order in which the court made a final disposition of the motion, this case is distinguished from those of *Central of Ga. Ry. Co. v. Harden*, 113 Ga. 453, 38 S. E. 949; *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912; *Rogers v. State*, 101 Ga. 561, 28 S. E. 978; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71. While it does not so appear in each case in the decision itself, an examination of the original record in all of these cases shows that the judge in each instance in his order gave evidence that his discretion had not been exercised.

We hold the true rule, then, to be:

(a) That in no event can a reviewing court look beyond the order disposing of the motion for new trial, or the bill of exceptions, affirmatively showing that his discretion was not exercised, to inquire whether the judge has failed to exercise his discretion.

(b) That even when the judge gives expression orally to a disapproval of a verdict, and does not incorporate it in his final judgment, it is not to be held that this indicates that there was not finality and exercise of discretion. It will be treated merely as indicating that the final decision was not reached without difficulty.

2. The trial judge, in the present instance, may not have been thoroughly satisfied with the verdict in favor of the plaintiff. He had set aside one verdict against the defendant, and upon its motion had awarded a nonsuit, which this court reversed. The discretion he had twice exercised upon the facts in the record had been narrowed and limited by these facts and by the salutary requirement that there must be an end of litigation, for, while the decision of this court in *Scribner's Sons v. Mutual Building Company*, 1 Ga. App. 528, 58 S. E. 240, and that of the Supreme Court in the case of *Dethrage v. Rome*, 125 Ga. 806, 54 S. E. 654, do not mean that the discretion of the trial court is exhausted upon a second motion for a new trial, they do mean that where there is only a conflict of witnesses, and the second verdict is the same as the first, and there is evidence sufficient to authorize the verdict, it would be an abuse of legal discretion, upon the part of the trial court, to grant a second new trial. Of course, a second verdict, found with no evidence to sustain it, should be set aside as readily as a first, but a second verdict cannot be set aside, as a first verdict might be, merely because upon the second trial the judge may think that the preponderance of the evidence is in favor of the losing party. As is well said in the *Dethrage Case* (125 Ga. 806, 54 S. E. 655) in which the second new trial asked was granted: "The liberality of indulgences by this court in favor of the discretion of the trial court in the first grant of a new trial will not be extended to a second. In the first instance, the discretion will be sustained, when questions of evidence are involved, almost as a matter of course, but not so with subsequent trials. There must be an end to litigation, and, after the first grant of a new trial, if the matter in controversy be one of fact for the jury, and for a second time in passing upon the same facts the verdict upon the question at issue be concurrent with the first, the mere discretion of the court can play but little part in the second motion for a new trial. It is true that it may sometimes be exercised, but only in cases where it is palpably apparent from the entire evidence that the verdict was strongly and decidedly against the weight of the evidence and manifestly wrong."

Other authorities are to the same effect. "In the case of *Cleveland v. Central R.*, 73 Ga. 793, where the action was for homicide of plaintiff's husband, the defense was contributory negligence. This court held that it was error for the trial judge to set aside a

second verdict of a jury on the ground that it was excessive, where there was enough evidence to support it, although the decision of the trial judge in setting aside the first verdict for the same amount, and based upon the same evidence, was upheld by the court. In *Cook v. Western & Atlantic R.*, 72 Ga. 48. In a similar action and defense, where the court on a former writ of error had decided that the evidence was sufficient to withstand a motion for nonsuit, it was held that the 'discretion of the presiding judge in granting the first new trial had been exhausted in the case, and the grant of another was error.' Also in the case of *Dempsey v. Rome*, 99 Ga. 192, 27 S. E. 668, the court having previously decided that it was error to grant a nonsuit on the same evidence as was then before it, held that a second grant of a new trial was error where the case turned upon the credibility of the witnesses, and it appeared that, if the jury chose to believe those introduced by the plaintiff, their evidence was amply sufficient to warrant a recovery." *Dethrage Case*, supra. The learned trial judge, no doubt, had these rulings of the Supreme Court in mind when he exercised his discretion according to law, by refusing a fourth trial of the case, and his opinion is merely an expression of regret that he was inhibited from a contrary judgment. This court, by a unanimous opinion, having held that evidence practically identical would withstand a nonsuit and authorize a recovery on the part of the plaintiff, the case (so far as the evidence was concerned) is practically identical with *Dempsey v. Rome*, supra.

3. We come then to consider, first, whether the court erred in overruling the motion for new trial upon the ground that the verdict was without evidence to support it. With this ground we shall consider also the fourth ground of the amended motion, that a new trial should have been granted "because it nowhere appears in and by the evidence adduced in said case that the injury received by the plaintiff was occasioned as a result of lumber falling upon his leg." The testimony of Corcoran himself, on the direct examination, was that the lumber fell across his knee. The end he had placed at half cant was across his leg. The evidence further was that, regardless of any injury which may have been received by his foot or in scraping his leg when the log was rolled off, the bone was so crushed by the fall of the timber that this fall across the leg rendered amputation necessary. It is true that upon cross-examination he testified with less definiteness, but he never did retract his first statement, so that the doctrine laid down in *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674, can be applied. On cross-examination he testified that it was the piece of lumber which crushed his leg, and he supposed did it all. "The rolling of the piece of lumber off my foot injured my foot, but the piece of timber in general hurt the leg all over." The jury

heard the plaintiff upon the stand, they saw his manner of testifying, and had the right to believe him. The turning point in the case, so far as the evidence is concerned, is whether Corcoran knew, or ought to have known, of the incompetency of the men with whom he was set to work. It might appear strange to us that the jury believed that Corcoran was wholly ignorant of the fact that the men put to work with him were green men, but he testified absolutely and positively that he did not know but that they were skilled men, and that their method of work up to the time of his accident was such as to lead any one to the conclusion that they were thoroughly competent and skillful in the loading of ships. The jury would have been authorized to believe, because of the prevalence of the strike and from the fact that Graham knew (as he says everybody else did) that the men were green men, that Corcoran also knew it, or that he had as good an opportunity of knowing it as Graham, the vice principal of the defendant company; but the jury were not compelled to take this view. The jury may have thought that Graham, having employed the men, necessarily knew more about them than Corcoran knew. It was not proved that Corcoran knew the extent of the strike, and both he and Graham testified that Graham did not tell him his fellow laborers were green and incompetent. The idea that Corcoran could with his own eyes have observed that they were unskillful and incompetent is rebutted by his statement that their work prior to the accident had not developed this fact.

The defendant introduced no testimony at all, and, after a careful review of the testimony in behalf of the plaintiff, we cannot say that the trial judge erred in refusing a new trial upon the ground that the verdict was without evidence to support it, or even because, to his mind, the evidence was unsatisfactory; this being a second verdict in favor of the plaintiff, and this court having adjudged, upon a prior consideration of practically the same evidence, that it was error to award a nonsuit. As we have already remarked, a verdict unsupported by any evidence should be set aside, no matter how often rendered; but nothing is better settled in the decisions of our Supreme Court than that a second verdict in behalf of the same party stands upon a different footing from the first verdict, where the evidence is merely weak and unsatisfactory, or even where it appears that the mere preponderance is in favor of the losing party. Especially will the appellate court not interfere where two verdicts have been returned for the plaintiff upon sufficient evidence, and the court below has refused a new trial. *Holliday et al. v. Anglin*, 76 Ga. 107. A second verdict, supported by some evidence, even though the trial judge believed he had no right to set the verdict aside, will not be vacated. *Fulton County v. Phillips*, 91, Ga.

65, 16 S. E. 260. The judgment granting a nonsuit having been reversed, the discretion of the trial court was exhausted by the first grant of a new trial, and the granting of a second new trial on discretionary grounds would have been error. *Cook v. W. & A. R.*, 72 Ga. 48. Doubt on any question of fact in the mind of an appellate court must be resolved in favor of the verdict, and not against it. *Brown v. Meader & Griffin*, 83 Ga. 406, 9 S. E. 681. In *Christian v. Westbrook*, 75 Ga. 852, it was announced that a second concurring verdict will not be disturbed, although the evidence was exceedingly weak. We may safely hold, in a case involving what has always been held to be a question of fact—the negligence of a master in employing incompetent servants without warning a fellow servant, who was to labor with them of their incompetency—that, where the evidence is sharply conflicting, the verdict must stand, unless an error of the court requires a new trial (*Freeman v. Bigham*, 65 Ga. 580); or, in other words, that it is error to grant a second new trial where two concurring verdicts have been returned on conflicting evidence, and there was no error in the court's ruling on the trial (*Veal v. Robinson*, 76 Ga. 838). These decisions seem to be more peculiarly applicable in the present case because the defendant introduced no testimony.

4. We shall therefore consider the errors of law assigned upon the admission of evidence, upon the charge of the court, and upon the omission to charge, insisted upon by the plaintiff in error. The first ground of the amended motion complains that the court permitted the plaintiff, Corcoran, to testify that, after he was hurt: "That piece of lumber was not lifted up. They rolled it off. In moving a piece of lumber, always lift it." The objection to the testimony was that the defendant was not liable for any incompetency of its servants in removing the piece of lumber from the plaintiff's leg. The certificate of the judge as to this ground of the motion shows that this testimony was not offered to show that the damage was caused by the rolling of the lumber, or that the defendant was liable for any injury caused by the rolling. The judge certifies that he permitted the testimony to be introduced, and so stated at the time, "solely for the purpose of illustrating the competency or incompetency of the fellow servants of Corcoran, and not for the resultant consequences of any act of negligence that occurred after the piece of lumber fell upon Corcoran's leg." We think this testimony was admissible for the purpose stated. The conduct of a servant in relation to a matter within the scope of his duty of course, may serve to illustrate his competency or incompetency; but even if the act in question be not within the scope of his duties, in the particular instance, and yet one requiring skill, it may be proved, by the method of discharging such act, whether the servant be



skillful or unskillful, competent or incompetent. In other words, if it be true that there is only one way in which a piece of timber can be skillfully handled, then, the fact that the person whose character is under investigation handles such lumber unskillfully may be a circumstance tending to show that he did not know how to handle it skillfully, and was therefore incompetent.

5. The second ground of the amended motion alleges that the court erred in not stating one of the main defenses of the defendant, to wit, that the plaintiff received the injury complained of through the negligence of a fellow servant, for which negligence the defendant would not be liable. It is strenuously contended that, as this contention of the defendant was one of the main issues involved in the trial of the case, the court should have instructed the jury specially upon this subject, even without request. The court approves this ground in the following note: "In reference to this assignment of error, reference is had to the entire charge of the court." Upon examination of the charge of the court and the record of the pleadings, we are unable to sustain this contention of the plaintiff in error. The court absolutely protected the defendant from even the slightest risk of liability arising from the negligence of the plaintiff's fellow servants by the very forcible instructions in the outset of his charge to the jury, in which he virtually told them that the plaintiff could only recover, if he could recover at all, upon the incompetency of the defendant company's servants. The jury were clearly informed that the plaintiff could derive no benefit from any injury which might have resulted to him from the negligence of his fellow servants, even if the jury believed that such negligence had been shown. The court began the charge to the jury as follows: "The first fact that I call your attention to is one of exclusion. It is about a matter that is not in this case. I do this because you might get confused on the issue that you are to decide. Except in cases of railroad companies, the master—that is, the defendant here—is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business. At common law a master was never liable for injuries done to a fellow servant by one of his servants; but our Legislature has changed that law as to railroads, so that, in the case of a railroad, the railroad is liable for the negligence of a servant that injures another servant in the employ of that railroad in the same business. So that you exclude from your consideration any idea that this is a case of liability for negligence by a fellow servant." Presuming that the jury were composed of men of ordinary intelligence, we do not see how the judge could have told them more forcibly and directly that "the defendant here" could not be held liable for any act of negligence, no matter what, on the part of Corcoran's fellow serv-

ants. This was not only the first thing to which the attention of the jury was directed, and the jury were not only told that they must not confuse a case like this, in which the master is a steamship company, with the rule in regard to railroad companies, but they were next told that the defendant was not liable for the negligence or misconduct of the servants toward a fellow servant, and therefore that it differed from railroads in that respect. Not content with this, the judge finally tells the jury that they must exclude from their minds any idea whatever that the defendant can be liable for negligence by a fellow servant. Having excluded from the jury the right to award the plaintiff anything for damages arising from negligence of his fellow servants, the court proceeds, in the next portion of the charge, to state that "the case rests upon the view that the master, the defendant here, is liable because he employed incompetent servants to work along with the plaintiff," and the recovery of the plaintiff is expressly limited, no less than three separate times, to the single question whether the defendant employed incompetent servants and whether Corcoran, by the exercise of ordinary care, could have known that they were incompetent.

As we view it, the assignment of error loses its force by reason of the fact that the defendant did plead, what it now insists upon, that Corcoran's injury may have been caused by the negligence of his fellow servants. If Corcoran's injury was caused either by his own negligence or that of his fellow servants, the fact would present a special defense of which the defendant might have availed itself. This, the defendant did not do. It is well settled that it is error for the trial judge, even without a request, to fail to charge upon any issue in the case. It is his duty to instruct the jury as to the law applicable to each issue and all issues properly raised by the pleadings, whether requested to do so or not, but the judge must look to the pleadings to ascertain the issues. The pleadings in the present case raise the issue that the plaintiff had been injured by reason of the fact that he was set to work without knowledge and without warning, with incompetent fellow servants, that the nature of the work at which he was engaged required skill, and that by reason of the ignorance and lack of skill of his fellow servants he was injured. The answer contented itself with a general denial of the plaintiff's allegation upon this subject, so that, though the judge, perhaps, was not required to charge a defense which the defendant had not urged, still, if he had been so required to instruct the jury upon the subject of the negligence of fellow servants as affecting the right of the plaintiff to recover, we think the instructions upon that subject were proper and sufficient.

6. In the third ground of the amended motion for new trial, the plaintiff in error insists that the court erred in the charge as to



the measure of damages. The portion of the charge to which exception is taken is as follows: "Gentlemen, should you find for plaintiff, you would be authorized to give damages for his impairment by reason of the injuries, the impairment of his physique, his body, to the extent that that impairment incapacitates him from doing the labor that he was capable of doing before the injury. I will illustrate it to you: Suppose he was getting \$60 per month before he was injured (I am only giving you figures now without reference to this case, so you can apply them to the facts of the case as they have been testified to), and that now he can only earn \$30 per month. His earning capacity is impaired one-half. You would not be justified in giving a verdict of \$60 per month under any circumstances, but you would have \$30 per month under the supposition you have submitted to you. Now, to arrive at your verdict to ascertain what that \$30 would be worth now (because you have got to base your verdict at this time, not what the amount would be in the future), you would take \$30 per month, multiply that by 12, and then multiply that by the number of years that have been testified before you, which is his expectancy for life that is called by insurance companies—it is his expectancy, how long a man of his age will live according to the average of human life—you would take the number of years therefore as his expectancy of life, and multiply that by the result of \$30 multiplied by 12, one year, and then you would reduce the amount, using 7 per cent. as your calculation, to a cash basis, and whatever that cash basis would be you would be justified in giving a verdict for. So those are the three elements for which you can give a verdict—mental suffering, physical pain, and his impairment of capacity to labor."

(a) A specific objection urged by plaintiff in error to this charge is that the jury were not instructed that in arriving at its verdict it should take into account the fact that the plaintiff's capacity for labor would be diminished as he grew older. Counsel for the plaintiff in error cite, in support of their contention, that a new trial should be granted for this alleged error, the case of *W. & A. R. Co. v. Moore*, 94 Ga. 458, 20 S. E. 640 (6), in which it was held, in view of the facts of that particular case and the amount of the verdict, that there ought to be a new trial, for the reason that the court erred in omitting to call the attention of the jury to the fact that in his declining years the capacity of the deceased to labor and his ability to earn money might have decreased, and that they should take this into consideration. We do not know that this case is controlling, in view of prior adjudications; but, in any event, the ruling must be confined, as the Supreme Court confined it, to its particular facts. The verdict in that case was \$8,000, and the plaintiff's husband was 39 years of age. The case of *East Tenn. Ry. Co. v. Mc-*

*Clure*, 94 Ga. 658, 20 S. E. 93, is also cited; but the new trial seems to have been granted in that case because the verdict was contrary to the evidence, and the fact that the court erred in charging the jury in reference to the Carlisle mortality tables, is only incidentally referred to as reason why a new trial should be granted. In *Mayor and Council of Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719, it was held that it was proper for the judge to instruct the jury that they should consider the plaintiff's declining years and the apparent decrease, year by year, of his capacity to labor; but the Supreme Court would not reverse the judgment of the court below on account of failure to give this principle in charge to the jury, because the jury could not have rightly arrived at a smaller amount than that of the verdict rendered, even if the charge as desired had been given. In none of these cases was the question raised whether the charge upon this point should have been requested, or whether the court was required to instruct the jury upon the point without request. However, in the later case of *City of Columbus v. Ogle-tree*, 102 Ga. 294, 29 S. E. 749 (4), it was held that a charge upon a mortality table, which, in substance, instructs the jury to ascertain the yearly amount of the plaintiff's diminished capacity, to earn money, if any, and to multiply it by the number of years he might be expected to live, and then to reduce the gross amount to present value, was not erroneous; the charge being in other respects appropriate, and if general instructions are given on the subject of the ascertainment of damages, more specific instructions on the subject, if desired, should be duly requested. So *Ry. Co. v. O'Bryan*, 119 Ga. 148, 45 S. E. 1000; *Macon Ry. & Light Co. v. Mason*, 123 Ga. 773, 51 S. E. 569. In the *Mason Case*, supra, Justice Evans, delivering the opinion, says: "The court in general terms instructed the jury that, in the event they found in favor of the plaintiff, it would be their duty to estimate 'the present value of the amount he claims he has lost by reason of his diminution in capacity to labor by reason of the injury,' and they might determine what would be a present cash equivalent from their own knowledge of arithmetic and mathematics, or from a paper which had been introduced in evidence, and which showed the expectancy of one 49 years of age, and other data, taken from the mortality and annuity tables published in 70 Ga. 'or from other evidence in the case.' The instruction given to the jury upon this subject is criticised as being confusing and as laying down an incorrect method to be pursued by the jury, and 'because it deprived the jury of the right to use their general knowledge upon the computation of damages of this character.' The general tenor of the charge was right, though the language employed by the court was more or less involved and not altogether accurate. The gross amount which the jury

might find the plaintiff would lose because of his diminished capacity to labor, as disclosed by the evidence, and not 'the amount which he claims he has lost,' was the sum to be reduced to present value. This and other minor inaccuracies of expression render the charge less clear than it should be. Otherwise it is not open to the criticisms made upon it. If more specific instructions were desired, an appropriate request to charge should have been presented." Thus we see in all of these cases that it is held to be incumbent on the counsel to request such a specific principle as the calculation of decreased earnings due to old age. In fact, however, we may say that the expectation of decreased earnings which would benefit a defendant is in many instances offset by an expectancy of increased earnings, which might benefit the plaintiff, and therefore, if either increased or decreased earning capacity is desired to be presented to the jury, it should be requested by the party desiring it.

(b) It is insisted, however, that the judge's charge is not warranted because there was no evidence of the plaintiff's expectancy. No mortality tables were introduced. We do not think, however, that it is indispensable that such evidence should be before the jury in order to enable them to ascertain the probable duration of life in a given case. In *Central Ry. Co. v. Ray*, 129 Ga. 353, 58 S. E. 844, in which it was held, as we now hold, that the judge's omission to call the attention of the jury to the decreased earning capacity, resulting from advancing age and other causes, should have been brought to his attention, and a timely written request upon the subject should have been made, if it was desired to take advantage of the point, the court held that: "In the process of reaching a correct result from the evidence, juries may take into consideration such universal experiences in human life as criteria in weighing the evidence in the particular case. The judge may refer in his charge to such matters as the plaintiff in error complains he omitted in this case." But "the jury are presumed to be as cognizant of these common phenomena of human experience as the judge, and, if their attention is specially desired to be directed thereto, a timely written request should be made." When there are sufficient facts in the evidence as to the age, health, physical condition, habits, etc., of a given person, the jury may form a reasonable estimate of the value of his life where death results, or of the diminished value of his services from the circumstances proven in his case, without resorting to the standard mortality tables usually introduced in cases of this kind. In *Boswell v. Barnhart*, 96 Ga. 524, 23 S. E. 414 (4), Chief Justice Simmons, delivering the unanimous opinion of the court, said: "It was not essential that the jury, in order to form an estimate as to the value of the life of the deceased, should have before them the standard mortality

tables usually introduced in evidence in cases of this kind." He then quotes with approval the language of Chief Justice Jackson in *Savannah, Fla., & Western Ry. v. Stewart*, 71 Ga. 446, in which he said: "I do not think that there is any Procrustean rule in the mode of estimating the value of a life. The age of a man, the health he enjoys, the money he is making by his labor, his habits, are data from which the jury may argue how long he will probably live and work, and what his life is worth to his wife in its pecuniary value. I know of no law which requires tables of the probable length of life and its probable worth to be introduced. They may be a useful circumstance, but are not conclusive or absolutely essential." As the factor of expectancy is derived from human experience, supposed to be well-nigh universal, and to be known to the jury, and as Corcoran's age at the time of his injury was proved to be 32 years, we apprehend that the jury could make the necessary calculation perhaps as well without the mortality table in evidence as if it had been introduced, and we do not think that the mere fact that the court incorrectly stated that the number of years of his expectancy of life had been testified before them should itself work a new trial.

(c) One reason of the exception to the charge is that the court did not instruct the jury how the reductions to a cash basis should be made. The excerpt from the charge, which we have quoted above, instructed the jury to reduce the amount found by 7 per cent. per annum; the language being 7 per cent. for one year. If the jury were capable of making this calculation, as they must be presumed to be, then the basis given them by the court was at least not unfair to the defendant, as 7 per cent. is the highest rate of interest allowed by law in this state in the absence of a contract.

7. In the argument considerable stress is laid upon the fact that the verdict is excessive. This court has no right to adjudge a verdict to be excessive, unless it was the result of bias or prejudice. From the record we are unable to say that this verdict was due to either of these causes. To say nothing of the torture due to enforced idleness, which is inflicted upon a man accustomed to work (spoken of in *Powell v. Augusta Ry. Co.*, 77 Ga. 200, 3 S. E. 757), the pain and suffering the plaintiff must have endured, and, according to his testimony, still endures, the personal disfigurement due to the loss of his leg, and the feeling of affliction he must carry with him through life, as well as the diminution of his earning capacity, we do not think it within the power of the court to say that the verdict of the jury was excessive. Perhaps a safe criterion by which we may judge the question is comparison with findings of other juries. While we have been unable to find a case in this state where as large an amount was returned for the loss

of a leg, similar amounts have been held not to be excessive in other jurisdictions where the question was presented. In *Akersloot v. Second Ave. R. Co.*, 59 N. Y. Super. Ct. 555, 15 N. Y. Supp. 864, \$12,000 was held to be not excessive for the loss of a leg. In *Kalfur v. Broadway Ferry Ry. Co.*, 34 App. Div. 267, 54 N. Y. Supp. 503, \$15,000 was held proper. In *Chicago Ry. Co. v. Taylor*, 68 Ill. App. 613, \$15,000 was held to be not excessive for a severe and permanent injury to the leg, and in *Chicago Ry. Co. v. Leach*, 80 Ill. App. 354, \$15,000 was held not excessive for the loss of a leg. In the case of *Williamson v. Brooklyn R. Co.*, 53 App. Div. 399, 65 N. Y. Supp. 1054, even the sum of \$22,500 was held to be not excessive for the loss of one of the plaintiff's legs. If, by any means, the judge in the court below can be construed to have held that he was not satisfied with a finding in favor of the plaintiff, he at least did not disapprove of the amount awarded to the plaintiff upon the jury's finding that the defendant was liable. As he was not authorized to say that the finding was excessive, neither can we.

After a very critical examination of the entire record in this case, we are confirmed in the opinion that the evidence of the plaintiff's injury, both as to nature and extent, being undisputed, and the jury having found in favor of the plaintiff on the crucial point that his injury was due to the negligence of the defendant in employing incompetent servants to work with the plaintiff, whose incompetency was unknown to him, the verdict was authorized by the evidence and was not caused by any error of law on the part of the court.

Judgment affirmed.

#### McLAREN v. STATE. (No. 1,224.)

(Court of Appeals of Georgia. July 31, 1908.)

##### 1. PERJURY—INDICTMENT.

In a prosecution for perjury, it is permissible to join in a single count of the indictment a number of separate and distinct material statements alleged to have been falsely sworn to by the defendant in the same legal investigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 70.]

##### 2. SAME—EVIDENCE—SUFFICIENCY.

On the trial under an indictment for perjury, it is not necessary to prove that the defendant made literally the statement alleged, for it is well settled that only the substance of the language used by the witness in the prior judicial investigation, in which he is alleged to have sworn falsely, need be proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 106.]

##### 3. SAME.

It is not necessary to the conviction of the defendant, on an indictment setting forth several distinct false statements, that the state should show the elements of perjury as to each and all of the statements so alleged; but, if perjury is established as to any one of the

statements which is material, a conviction may be upheld.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 99.]

##### 4. SAME.

The evidence was sufficient to authorize the conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 117–132.]

(Syllabus by the Court.)

##### 5. WORDS AND PHRASES—"MATERIALITY."

The test of "materiality" is whether the statement made could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acts, are material (quoting 22 Am. & Eng. Ency. of Law [2d Ed.] p. 687, citing Words & Phrases Judicially Defined, vol. 6, pp. 5309, 5310).

Error from Superior Court Campbell County; L. S. Roan, Judge.

Henry McLaren was convicted of perjury, and he brings error. Affirmed.

Claude C. Smith, for plaintiff in error.  
W. S. Howard, Sol. Gen., for the State.

RUSSELL, J. The plaintiff in error excepts to the overruling of his motion for new trial, which was based upon general grounds only. The offense of which he was convicted was that of perjury. In the indictment it was alleged that he had willfully, knowingly, absolutely, and falsely testified before the grand jury of Campbell county (the grand jury having under consideration at the time a special presentment charging one Mahaley Ross, alias Stinchcomb, with the illegal sale of whisky) as follows: "I did not furnish five pennies to John Henry Chandler to buy any whisky at any time in Mahaley Ross' house. I did not get any whisky from anybody in Mahaley Ross' house. I never saw any whisky in Mahaley Ross' house. I never tried to buy any whisky with anybody in Mahaley Ross' house. I did not see any money pass for whisky in Mahaley Ross' house. I did not buy any whisky from Mahaley Ross"—when in truth and in fact the said Henry McLaren did furnish five pennies to John Henry Chandler for the purpose of buying whisky in Mahaley Ross' house, and did buy whisky in the said Mahaley Ross' house, and he did then and there get whisky in the said Mahaley Ross' house, and he did then and there see whisky in Mahaley Ross' house, and he did then and there buy whisky with John Henry Chandler in said Mahaley Ross' house, and he did then and there see money passed for whisky in said Mahaley Ross' house, and he did buy whisky from Mahaley Ross; the said evidence being then and there material, etc. It is insisted that the verdict of guilty is unauthorized because the state could not in the same indictment charge six different statements as being false, each of them alleged to be material, without preferring the charge in separate counts. It is also insisted that the verdict was not authorized by

the evidence, because the testimony did not show that the defendant, when a witness before the grand jury, used the identical language in the indictment, and, further, that the conviction was unwarranted by the evidence because the state failed to prove each and all of the six false statements set forth in the indictment. It is further insisted that some of the statements set forth in the indictment as attributed to the defendant were only proved by one witness, and that other of the facts as to which it is alleged the defendant swore falsely were not material to the issue under investigation before the grand jury.

1. The objection that the indictment contained more than one offense in a single count cannot be raised by motion for new trial, if, indeed, it could be considered at all. No demurrer appears to have been filed to the accusation; but we really see no reason, where a party in one and the same judicial investigation swears falsely as to more than one material matter, why all of such false testimony with reference to the same matter may not be joined in a single count. In the present case, each of the six charges of perjury could be thus joined because the subject-matter was all material to the guilt or innocence of Mahaley Ross of the offense of selling intoxicating liquors unlawfully; presentment against whom was then being considered by the grand jury. The evidence sought from the witness, as may be deduced from each of the six charges of perjury, was material. Some of them would have shown the guilt or innocence of Mahaley Ross directly, while others, if the questions had been answered differently by the witness, might at least have tended to induce a presentment which is only an *ex parte* proceeding. "The question whether or not a particular statement is material will obviously depend upon the nature of the proceeding and the matters at issue, and can be determined in each case for that case only." 22 Am. & Eng. Ency. Law (2d Ed.) 686, citing: *Robertson v. State*, 54 Ark. 604, 16 S. W. 582; *State v. Schultz*, 57 Ind. 19; *State v. Clough*, 111 Iowa, 714, 83 N. W. 727; *State v. Wakefield*, 73 Mo. 549; *Lawrence v. State*, 2 Tex. App. 479. "The test of materiality is whether the statement made could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision and upon which the judge acts, are material." 22 Am. & Eng. Ency. Law (2d Ed.) 687. See, also, *Salmons v. State*, 31 Ga. 676; 6 Words & Phrases Judicially Defined, pp. 5309, 5310, pars. 3, 8; *Haines v. State*, 109 Ga. 526, 35 S. E. 141.

2. As to the insistence that the evidence failed to show that the defendant, when a witness before the grand jury, used the identical language attributed to him in the indictment, it is well settled that only the substance of the language used by the witness

in the prior judicial investigation, in which he is alleged to have sworn falsely, need be proved. The exact words of the prisoner need not be proved, provided the substance of his testimony is given. *Taylor v. State*, 48 Ala. 157; *State v. Frisby*, 90 Mo. 530, 2 S. W. 833; *People v. Burroughs*, 1 Parker, Cr. R. (N. Y.) 211; *Commonwealth v. Terry*, 114 Mass. 203.

3. It is further insisted by the plaintiff in error that the verdict of guilty is unsupported by the evidence and unauthorized, because the state failed to prove all of the particulars wherein perjury was alleged in the indictment. As the crime charged related to only one criminal transaction, which would be complete if committed in any one of the ways alleged, sufficient proof of the falsity of the oath as to only one of these particulars would authorize the conviction of the defendant in this case. "Where the indictment contains several distinct charges of perjury, proof of any one of them is sufficient." 22 Am. & Eng. Enc. Law (2d Ed.) 694; *Marvin v. State*, 53 Ark. 395, 14 S. W. 87; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Blaisdell*, 59 N. H. 328; *State v. Hascall*, 6 N. H. 352; *Harris v. People*, 64 N. Y. 148; *Moore v. State*, 32 Tex. Cr. R. 405, 24 S. W. 95. And while we have been unable to find the same holding in any criminal case in this state, the ruling in *Salmons v. Tait*, *supra*, clearly sustains the principle which we now assert.

4. We come then to consider, under the rules stated above, whether it is demonstrated by the record that the guilt of the accused, as to any one false statement in regard to a matter material, in the investigation pending before the grand jury, was proved beyond a reasonable doubt to have been willfully, knowingly, absolutely, and falsely made by the defendant. The ancient rule of the common law required the testimony of two witnesses, both directly contradicting the testimony previously delivered by the prisoner, in order to authorize a conviction of perjury; the reason assigned being that the testimony of one witness would merely be one oath against another. Our Code, however, in making perjury an exception to the general rule that the testimony of a single witness is generally sufficient to establish a fact, provides that corroborating circumstances may dispense with the second witness. Section 991 of the Penal Code of 1895 is as follows: "The testimony of a single witness is generally sufficient to establish a fact. Exceptions to this rule are made in specified cases; such as, to convict of treason or perjury, and in any case of felony where the only witness is an accomplice; in these cases (except in treason) corroborating circumstances may dispense with another witness." So that one witness and corroborating circumstances, if the corroboration be sufficient, may, in cases of perjury, serve to establish the falsity of the previous testimony delivered by the accused, as well as

to establish the substance of such previous testimony. Indeed, in several jurisdictions, it has been held that only one witness is required to prove the fact that the accused swore on a prior judicial investigation as charged. *U. S. v. Hall* (D. C.) 44 Fed. 864, 10 L. R. A. 324; *State v. Wood*, 17 Iowa, 18; *State v. Jean*, 42 La. Ann. 943, 8 South. 480; *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; *Commonwealth v. Pollard*, 12 Metc. (Mass.) 225. It is unnecessary for us to hold, in the present case, that this rule should prevail in this state, because two witnesses testified in accord as to several material allegations contained in the indictment, that the defendant swore substantially as charged, and the defendant, in his statement, so far from denying that defendant testified before the grand jury as charged in the indictment, practically admitted that he did testify as charged, and insisted that his former testimony was true.

Then, was the evidence sufficient to show that the defendant testified falsely as to matters material to the first investigation? We think that it was established by two witnesses: First, that the defendant furnished five pennies to John Henry Chandler, at a designated time within the statute of limitations, to buy whisky in Mahaley Ross' house; second, that he did get some whisky from another person in Mahaley Ross' house; and, third, that he saw whisky in Mahaley Ross' house. These facts, if true, even though they might not be sufficient to authorize the conviction of Mahaley Ross of the offense of selling whisky if she were on trial, were nevertheless material in the investigation of the evidence before the grand jury, because, in connection with other evidence, each of these facts might tend to induce the grand jury to find a presentment (which is merely the means of putting a defendant on trial), even if, indeed, the same evidence, if Mahaley Ross had been upon trial, would not have authorized her conviction. It must be borne in mind, too, that, as to the presentment pending against Mahaley Ross, her guilt could have been shown just as conclusively by evidence of a sale to John Henry Chandler as to the defendant himself, and for that reason the fact as to furnishing money to Chandler with which Chandler bought the whisky might be as important as if he had himself purchased the whisky. As to the testimony of the defendant, as alleged in the indictment, that he did not buy any whisky from Mahaley Ross, the only difference between this and the testimony of two witnesses introduced on the part of the state, as to what really transpired, was that he did not buy the whisky alone, but jointly with John Henry Chandler, he contributing five cents and Chandler twenty cents, and that for this twenty-five cents the whisky was brought into the room and delivered by Mahaley Ross and partaken of, both by the defendant and Chandler, the two

who had furnished the money to pay for it. This slight difference between purchasing alone and purchasing conjointly with another, when the sole material issue involved was whether Mahaley Ross sold whisky illegally, is insufficient to authorize a holding that the verdict of guilty is unsupported by the evidence. This feature of the case is practically identical with the facts in *People v. Burroughs*, 1 Parker, Cr. R. (N. Y.) 211. In that case it was held that, on a trial of a defendant for perjury in giving testimony that F. had taken usury in discounting a promissory note, it was sufficient in the indictment to allege that it became a material matter whether F. discounted said note, and whether he took usury in discounting it, and then to set forth particularly the testimony of the defendant on these points and the facts as they actually existed. It was further held that an averment in an indictment that the defendant was sworn as a witness between the bank and J. B. is sustained by proof that the defendant was sworn in a suit by the bank on a promissory note by J. B., the indorser, and F. McF. and the defendant as joint makers.

We think that the conviction was sustained by the law and the evidence, and for that reason the court did not err in overruling the motion, based solely upon the general grounds.

Judgment affirmed.

#### CARBO v. STATE. (No. 859.)

(Court of Appeals of Georgia. July 31, 1903.)

##### 1. HOMICIDE—INVOLUNTARY MANSLAUGHTER.

There can be no conviction of the offense of involuntary manslaughter, either in the commission of an unlawful act or in the commission of a lawful act without due caution and circumspection, where the homicide is directly due to an independent intervening cause in which the accused did not participate and which he could not foresee.

##### 2. CRIMINAL LAW—NATURE AND ELEMENTS OF "CRIME"—"CRIMINAL NEGLIGENCE."

To constitute a crime there must be either the joint operation of act and intention, or criminal negligence. Criminal negligence necessarily implies, not only knowledge of probable consequences which may result from the use of a given instrumentality, but also willful or wanton disregard of the probable effects of such instrumentality upon others likely to be affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 21.

For other definitions, see Words and Phrases, vol. 2, pp. 1736-1740; vol. 8, p. 7623; vol. 2, p. 1750.]

##### 3. NEGLIGENCE—CRIMINAL RESPONSIBILITY.

Consequently, criminal negligence is not shown as against a defendant who uses every means in his power for the safety of those whom it is alleged his negligence has affected.

##### 4. SAME.

One who has an object of danger or a dangerous instrument of any kind upon his premises owes no duty with reference to the safety of others, except as to those likely to be affected thereby. And upon his trial for crime it must appear that the injury to those affected by such

dangerous instrument was due to such negligence on his part.

#### 5. SAME.

One who, with full knowledge of a danger of which he has been warned, encounters such danger himself, assumes all risks, and a resulting injury cannot be made chargeable to another, where it appears that the injured party being a person of sound mind and of the age of discretion, by the exercise of ordinary diligence could have avoided the injury.

#### 6. SAME.

Before one can be held criminally liable for the result of negligence, it must be shown beyond reasonable doubt that the result, though caused by the accused unintentionally, injuriously affected one who but for his ignorance of the danger might have escaped harmless. There can be no conviction where it appears that the party injured was apprised of the danger and unnecessarily and over the protest of the defendant exposed himself thereto.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

J. A. Carbo was convicted of a crime, and he brings error. Reversed.

Twiggs, Oliver, Gazan & Oliver, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

RUSSELL, J. Judgment reversed.

SOUTHERN RY. CO. v. WEST. (No. 1,095.)  
(Court of Appeals of Georgia. Aug. 4, 1908.)

#### 1. MASTER AND SERVANT—RELATIONSHIP—EXISTENCE.

One who is employed by a railroad company in the work of building and repairing bridges, trestles, and depots, and is furnished with a car, in which he and his associates live, and in which they are transported to places along the line of the road where their services are required, the custom being to attach the car to engines and trains of the railroad company and move it from one place to another in the progress of the work, is an employé of the railroad company, not only while he is engaged in the work of building and repairing bridges, trestles, and depots, but also while being so moved in the car from place to place in the work of his regular employment.

#### 2. PLEADING—PLEADING AND PROOF—ISSUES.

A petition, brought to recover damages for personal injuries against a railroad company, wherein the facts set forth show liability arising from the relation of employer and employé, is sufficient to submit to the jury, and to let in proof of the allegations going to establish such liability, although the plaintiff claims in the petition that he was a passenger when injured, and as such entitled to recover. The legal status of the plaintiff is shown by the facts alleged, and not by his conclusion from such facts.

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by G. F. West against the Southern Railway Company Judgment for plaintiff. Defendant brings error. Affirmed.

McDaniel, Alston & Black and Maddox, McCamy & Shumate, for plaintiff in error. J. M. & H. J. McBride and John W. & G. E. Maddox, for defendant in error.

HILL, C. J. West sued the Southern Railway Company to recover damages for personal injuries. The material portions of his petition are as follows: "(3) That on said 10th day of July, 1905, petitioner was employed, and for some time prior thereto had been employed, by defendant as a member of what was known as the 'bridge gang,' and as such was engaged in the work of building and repairing bridges, trestles, and depots on its said system of railroads, both in Alabama and in Georgia. (4) That as such employé, petitioner, together with the other members of said bridge gang, was required by defendant to cook, eat, and live in some old passenger coaches furnished them for that purpose by said defendant, which said coaches were moved by the engines and trains of defendant on its said lines of railroad as it became necessary for said bridge gang to move from one place of work to another, and that, while going from one place of work to another, it was usual and customary for the members of said bridge gang to be transported by defendant in said cars; no other means being provided them. (5) That your petitioner, along with said bridge gang, had been, for some prior thereto, at work painting a bridge on defendant's line of railroad, about 2 miles east of Weems, in Jefferson county, Ala.; the work on said bridge being completed on said 10th day of July, 1905. (6) That on the evening of said 10th day of July, 1905, when the work on said bridge had been completed, petitioner, together with the others of said bridge gang, in accordance with the orders and directions of the foreman of said bridge gang, went aboard said cars, and the same were attached to a freight train, and defendant undertook to transport the same into Birmingham, Ala., a distance of about 20 miles. (7) That while traveling on said train, petitioner was not engaged in any work, had nothing whatever to do with the running or operation of said train, and had no control over any of those engaged in the running or operation of said train; but he was, in effect, a passenger on said train; and defendant owed him the duty of extraordinary diligence for his safety. (8) That the coach so furnished by defendant, as aforesaid, and in which petitioner was riding—the same being called the 'sleeping car'—was an old passenger coach, the wood and wooden draft timbers of which were decayed. The wood in the drawhead, used to couple said coach on to others, was old, decayed, and not sufficiently strong to make it safe to couple and use said coach in running on a railroad. The iron key, and the iron pin in said key, used in holding said drawhead in and to said draft timbers, was old, worn, and defective, and by reason thereof unsafe to use in coupling and carrying said coach, with petitioner therein, on said railroad. All of said defects were unknown to petitioner, but were known or could have been known to defendant, in the exercise of extraordinary

diligence, due to him as a passenger on said car. (9) That while said coaches were being carried on defendant's said line of railroad, and at a point about 7 miles from Birmingham, they were suddenly, violently, and unnecessarily jerked forward, then and there jerking and breaking and pulling said pin out of said key, tearing and breaking from their places the said pin and key and said draft timbers in the front end of the coach in which petitioner was riding, and jerking and breaking said drawhead and said pin and key, by which it was fastened to said draft timbers of said coach, thereby causing said coach to become uncoupled and detached from the car immediately in front of it. The said drawhead immediately dropped from its place to the ground and ties on said track, one end or part of said drawhead standing on the ties, and the other end up to and against the iron axle of the front trucks of said coach, thereby forcing the front end and truck of said coach up and off the track. (10) That at the time said coach was so derailed, said train was being run at a high and dangerous rate of speed, the same being about 30 miles per hour, and after said coach was so derailed it continued to run on the ground, and on the cross-ties along said track, for a distance of more than 100 feet. That after it was derailed, and before it stopped, it was running, jumping, and violently tossing, leaning, and careening from one side to the other, on and across the cross-ties and on the ground, and as petitioner believed, was in constant and immediate danger of being turned over. That while said coach was thus tossing and careening, your petitioner, with the others in said coach, including the foreman of said bridge gang, were caused thereby to become greatly excited, agitated, and alarmed for his safety, and while so, believing that his life was in danger, without time for reflection or deliberation, in company with said foreman and other persons in said coach, he jumped from said coach to the ground."

The injuries received by the petitioner are fully set forth and described in the petition. The defendant demurred to the petition, and moved the court to dismiss it, because "the plaintiff sues as a passenger on the defendant's train, and seeks to hold it to a degree of care required of a common carrier in its relation to a passenger, while the facts alleged by him show that he was not a passenger, but was an employé of the defendant, engaged in his duties as such, and was not entitled to the same degree of care as a passenger, and, being an employé, that he owed the defendant duties as an employé, which are not owed by a passenger." The court overruled the demurrer, and the defendant assigns error on this judgment.

Two questions are presented to this court for determination: First. Do the facts as set forth in the petition constitute the plaintiff a passenger? Second. Are the allegations of the petition sufficient to set forth a good

cause of action by the servant, against the master, for the master's own negligence? In determining the legal status of the plaintiff at the time he received the injuries complained of, the question must be decided according to the general law, and not under any statutory law of this state where the suit was brought, or of the state of Alabama where the injury occurred. No statute of the state of Alabama is pleaded as a basis of recovery, and of course no statute of this state would be applicable to the case. We think that the facts set forth in the declaration make a good cause of action under the common law to recover damages for personal injuries. If these facts show that the plaintiff was at the time a passenger, he was entitled, under the principles of the common law, to extraordinary care and diligence by the defendant. If the facts show that he was not a passenger, but was a servant, and that his injuries were inflicted by the negligence of the master, without any contributory negligence on his part, he would be entitled to ordinary diligence on the part of the master. In our opinion, under the facts as set forth by the plaintiff, he did not occupy the relation of a passenger to the defendant when he received his injuries.

The status of employés of railroad companies, not connected with the running of the trains, and while being transported upon the trains of the companies, has frequently been before the courts. There is some conflict as to whether an employé, carried to and from his work on a car, while being so carried, becomes a passenger or remains as an employé. Elliott, in his work on Railroads, states that "the weight of authority, however, as well as the better reason, is clearly to the effect that where he is so carried, he is not a passenger, but is ordinarily to be considered as an employé and a fellow servant of the employés upon the car transporting him. But, it may be otherwise if he is being carried in pursuance of his own business." He cites numerous authorities to sustain this dictum. 3 Elliott on Railroads, § 1303a, and decisions cited in the note. Judge Lurton of the United States Circuit Court, in the case of Louisville & Nashville R. Co. v. Stuber, 108 Fed. 936, 48 C. C. A. 151, 54 L. R. A. 696, says: "The rule is now well settled that railway employés while being carried, as part of their contract of service, to and from their place of work are fellow servants, and not passengers." In support of this general statement we cite several cases very much in point. In Gillshannon v. Railroad Corporation, 10 Cush. (Mass.) 228, it is held that laborers, being carried to and from their work upon a gravel train, are not passengers, but fellow servants of those operating the train. In Seaver v. Railroad Co., 14 Gray (Mass.) 466, a carpenter, whose business it was to repair bridges and fences along the line of the railroad, was injured while being carried from his place

of work, and he was held to be a fellow servant, and not a passenger. In *Ryan v. Railroad Co.*, 23 Pa. 384, a laborer on a gravel train was injured, through the negligence of the conductor or engineer, while being carried from his residence to his place of work. Held, that there could be no recovery. In *McQueen v. Railroad Co.*, 30 Kan. 689, 1 Pac. 139, a bridge painter, while being transported over the road to discharge his duties, was held not to be a passenger. In *Railroad Co. v. Smith*, 67 Fed. 524, 14 C. C. A. 509, 31 L. R. A. 321, it was held that a civil engineer, charged with the duty of looking after the maintenance of bridges, trestles, and water tanks, was not a passenger, but was traveling over the road in discharge of his duties. And in *Tomlinson v. Railroad Co.*, 97 Fed. 252, 38 C. C. A. 148, in an opinion by the Circuit Court of Appeals for the Eighth Circuit, it was held that a bridge builder and repairer, whose duties called him to various places on the line of the railroad company employing him, was not a passenger when being carried over the road to the place of work, but a fellow servant with those operating the train to which his car was attached. There are many cases to the same effect, all based upon the principles of the general law, applicable to the point in question. The conclusion, supported by the great weight of authorities, is comprehensively expressed by Beale and Wyman, as follows: "If the carriage is directly in connection with his work, he is really, while being carried, engaged in his employment, and his relation to the carrier is that of servant, and certainly not that of a passenger, as where a workman, on a construction or gravel train, is taken from place to place on the road as his services are needed. If he is not actually working at his employment, but is being carried to and from the place of employment, by agreement of the company, as an assistance to his work, it would seem equally to be engaged in his employment, and not to be a passenger. If, however, he receives, as a gratuity or in part compensation for his services, the right to travel free in the conveyance of the carrier upon his own business, then, in so traveling, he is to be regarded as in all respects a passenger." *Railroad Rate Regulations*, § 153.

Applying to the facts in the petition the test here laid down, the conclusion is irresistible that the plaintiff, at the time he was injured, was not a passenger. He was not traveling upon his own business, but was traveling in the car of the railway company, in direct connection with his ordinary duty as an employé. He had finished his work on the bridge of the company at one point of the railroad, and, following the orders and directions of the foreman of the bridge gang, went aboard the company's cars to be transported to Birmingham, Ala., a distance of 20 miles, presumably for the purpose of continuing his work and employment for the

company. He alleges that the bridge gang, of which he was a member, were required by the railroad company to live in some old passenger coaches, and to be moved, in the execution of their special employment, by the railroad from one place of work to another. It would be illogical to claim that while engaged at the places of work they would be employes of the company, but when transported between such places they would cease to be employes and become passengers. It was the plaintiff's duty to travel, in the cars provided for that purpose by the company, to those places along the line of the company's railroad where his services were required. While thus traveling, he continued in the service of the company, and was doubtless paid for his time; and we can perceive no substantial reason for holding that the relation between himself and the master and his fellow servants was broken while he was being transported from place to place of his work, and that it was re-established when he actually resumed work.

The case of *Carswell v. Macon, Dublin & Savannah R. Co.*, 118 Ga. 826, 45 S. E. 695, relied upon as establishing the contention that the plaintiff was, "in effect, a passenger, and entitled to extraordinary diligence," is not in conflict with the rule above announced. The *Carswell Case* is based upon the construction of a statute of this state (*Civ. Code* 1895, § 2297), which is as follows: "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence." This statute has no extraterritorial effect, and cannot apply to an injury occurring in the state of Alabama. This statute seems to make an exception to the general rule of law in favor of employes who are injured while being transported, and who have no control of the train upon which they are riding when injured. If, therefore, the facts alleged by the plaintiff limited his right to recover to his statement that he was a passenger at the time that he was injured, and was therefore entitled to extraordinary diligence on the part of the railroad company, we would be compelled to hold that the court erred in overruling the demurrer and in not dismissing the petition. But we think that the case made by the plaintiff in his petition should not be restricted to his conclusion that he was, in effect, a passenger, and as such entitled to extraordinary diligence; but the facts set out, which show that he was injured as an employé by the negligence of the master, and not by his own negligence contributing thereto, or the negligence of his fellow servants, should also be considered. It cannot make any ma-



terial difference that he is mistaken in designating himself as a passenger, if, notwithstanding such designation, the facts set out in his petition determine this issue, and show that he would be entitled to recover as an employé.

The petition alleges that the railroad company was negligent, in that it furnished a defective car in which to transport the plaintiff to his place of work. The defects in the car are specified. It was the duty of the railway company to furnish a safe car for the plaintiff to ride in, and the plaintiff was under no duty to inspect the car to see that it was in a safe condition. This was the duty of the company. *Dennis v. Schofield's Sons Co.*, 1 Ga. App. 489, 57 S. E. 925; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 263, 58 S. E. 249; *Southern States Cement Co. v. Helms*, 2 Ga. App. 314, 58 S. E. 524. And this would be true whether the plaintiff should be regarded as a passenger or as an employé. The duty of inspecting the condition of cars used in its trains is one of the absolute duties of the railroad company as a master, in relation to its employes. *Lucas v. Southern Ry. Co.*, 1 Ga. App. 810, 57 S. E. 1041; *Moore v. Dublin Cotton Mills*, 127 Ga. 610, 56 S. E. 839, 10 L. R. A. (N. S.) 772. It appears from the petition that the car in which the plaintiff was riding was furnished by the railroad company, not only as a place in which the plaintiff and other employes were to live, but in which they were to ride when being transported by the company from place to place. It was therefore the duty of the railroad company to see that this car was in a safe condition, not only for the employes to live in, but also for them to be transported in; and the allegation is that this duty was not discharged by the railroad company, and that the car was in an unsafe condition to be used as a means of transportation, and that this defective condition was un-

known to the petitioner, but was known, or could have been known, to the defendant. It being well settled that the railroad company owed to the plaintiff the absolute nonassignable duty of furnishing him a safe car in which to ride, if he is treated as an employé, and if the facts alleged which show that this duty was not fully discharged by the railroad company are proved, we think that he would be entitled to recover, notwithstanding the error of his conclusion that he was a passenger when he was injured. It is true that the allegations of the petition show that the plaintiff's injury was caused by the concurring negligence of the railroad company in furnishing an unsafe and defective car for transportation and in the negligence of the company's servants in handling the train or the engine which was pulling the car; but it is well settled that if the master's negligence concurred with that of a fellow servant in producing the injury, the master would be liable as if he only was at fault. In other words, the fellow servant doctrine would not apply in such a case. *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, and cases cited on page 732, 19 S. E. 33, 36, 44 Am. St. Rep. 113. "If the negligence of the master contributes to the injury of the servant, it must necessarily become an immediate cause of the injury, and it is no defense that another is likewise guilty of wrong." *McKinney on Fellow Servants*, § 16.

To conclude, we think that the facts set out in this petition make a case of liability, not the liability of a railroad company to a passenger, but the liability of a master to a servant; and the right of the plaintiff to recover, if he proves these facts, cannot be legally affected by his erroneous conclusion that he occupied the relation of a passenger. For this reason we think the judgment overruling the demurrer should be affirmed.

Judgment affirmed.

# HARPER FURNITURE CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina. May 29, 1908.)

## 1. DAMAGES—MEASURE OF DAMAGES—BREACH OF CONTRACT—PROFITS.

The current profits of a going manufacturing concern are, as a general rule, too uncertain to form the basis of an award of damages for breach of contract affecting the operation of the plant; the correct rule in such cases being that the damages shall be ascertained on the basis of interest on the invested capital which is unproductive for the time, with the addition, under certain circumstances, of the pay of employés rendered idle thereby, and hence, in an action by a manufacturing company for damages for the failure of a carrier to deliver machinery, whereby the plaintiff's factory was necessarily closed, the amount of profits which the mill could have realized during the delay was properly excluded.

## 2. CARRIERS—TRANSPORTATION OF FREIGHT—DELAY—SPECIAL DAMAGES—DAMAGES NOT CONTEMPLATED BY PARTIES.

Where goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, damages for delay in delivery are usually the difference between the market value at the time fixed for delivery and that when they were in fact delivered; but where the goods were ordered for a special purpose or present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay, and it is not necessary that the carrier be expressly informed of the special facts, if they are known to it, or are of such a character that the parties may be fairly supposed to have contemplated them in making the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, §§ 451-452½.]

## 3. DAMAGES—BREACH OF CONTRACT—NATURAL AND PROBABLE CONSEQUENCES.

The wrongdoer is *prima facie* liable only for the natural and ordinary consequences of his breach of contract; but where both parties knew and contemplated, when making the contract, that an injury would occur in addition to the natural consequences of the breach, as a result thereof, the person committing the breach will be liable for damage on the occurrence of the contemplated injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, § 58.]

## 4. CARRIERS—TRANSPORTATION OF FREIGHT—DELAY—DAMAGES—CONTEMPLATION OF PARTIES.

Plaintiff, a furniture company, ordered an engine shaft, weighing some 650 pounds, to be shipped to it by express from another state, through defendant and other express companies; but the shaft was not delivered on time, and plaintiff was compelled to close its mills because of delay in delivery and sued to recover damages from the closing of its mills by the delay. *Held*, that the fact that plaintiff was engaged in manufacturing furniture, which was shown by the bill of lading, taken in connection with the nature of the shaft ordered, and the unusual mode of shipment for such a heavy article, and the nature of defendant's business, by which they undertook for a higher wage to carry with additional safety and dispatch, was sufficient to give defendant notice that damages beyond the ordinary amount might reasonably be expected in case of delay in transportation, so as to render defendant liable for any special damages resulting from such delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Damages*, §§ 451-452½.]

## 5. SAME—QUESTIONS FOR JURY.

In an action against an express company to recover for wrongful delay in delivering goods,

the evidence *held* sufficient to take the question of the amount of compensatory damages for delay in delivery to the jury.

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Caldwell County; Ward, Judge.

Action by the Harper Furniture Company against the Southern Express Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial awarded.

See 144 N. C. 639, 57 S. E. 458.

There was evidence tending to show: That plaintiff was a firm engaged in the manufacture of furniture, having their mill at Lenoir, N. C.; that on or about the 21st of October, 1905, the Erie City Iron Works of Erie City, Pa., shipped to plaintiff, as consignee, at Lenoir, N. C., an engine shaft, of a given kind, weighing something like 650 pounds; that, pursuant to the order of plaintiff company, the shipment was made by express over a line of connecting carriers, between the two points, including the defendant, and the shaft was delivered at Lenoir, N. C., by defendant company on November 9, 1905, and indicating a wrongful delay in the shipment of something like two weeks. There was further evidence tending to show that the furniture factory of plaintiff company, for which the engine shaft had been ordered, was necessarily closed down during the time of wrongful delay, and that by reason of this loss of time in operating the factory the plaintiff company suffered damages to the amount of \$200 and more, arising from wages paid idle hands and other costs incident to the delay, and interest on the amount of capital invested in the mill and unproductive during said time. The character, capacity, and amount invested in the mill were shown as data for estimating the damage suffered, and it was proved that the full product of the mill had been already sold for the period and at a profit. It was further shown that, as soon as it was disclosed that the shipment was delayed, plaintiff company immediately duplicated the order, and both shafts were delivered at the same time, November 9th. Plaintiff offered to show the amount of profit which the mill could have realized during the time of delay, but the evidence was held to be incompetent. Plaintiff excepted. At the close of the testimony, the court intimated an opinion that on the evidence, if believed, only nominal damages could be recovered, and, in deference to this intimation, plaintiff submitted to a nonsuit and appealed.

Jones & Whisnant, for appellant. W. C. Newland, for appellee.

HOKE, J. (after stating the facts as above). The decisions of this state are to the effect that the current profits of a going manufacturing enterprise, which are dependent on the varying cost of labor and material and the fluctuations of the market value of the

product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested, which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. No doubt, there are cases where the average rental value of a business building or a given machine may afford data for a correct measure of damages; but, in plants of the kind indicated, this rental value is so connected with or dependent upon the fluctuation of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest of the capital invested and unproductive for the time with other incidental costs as the correct method of adjustment. The judge below therefore made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill. *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797; *Sharpe v. Railroad*, 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; *Foard v. Railroad*, 53 N. C. 235, 78 Am. Dec. 277; *Boyle v. Reeder*, 23 N. C. 607.

We are of opinion, however, that there was error in holding that, on the facts appearing from the evidence, the plaintiff could, in any event, recover only nominal damages. The plaintiff complains and offers evidence tending to show a breach of contract of carriage, and, as in other cases of breach of contract, it should ordinarily be allowed to recover the damages naturally incident to the breach, and which may be reasonably supposed to have been in the mind of the parties at the time the contract was made. Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held at the present term in the case of *Davidson Development Co. v. Railroad*, and *Lee v. Railroad*, 136 N. C. 533, 48 S. E. 809, is to the same effect. When, however, the goods are ordered for a special purpose, or for present use, in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated, and it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; but, when they are known to the carrier, under such circumstances, or they are of such a character that the

parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. *Moore on Carriers*, p. 425; *Hutchinson on Carriers*, § 1367.

In the citation from *Hutchinson*, after stating the general rule to be the difference in the market value of the goods, the author says: "But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which for special reasons the shipper may desire that the transportation of his goods may be hastened, and if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner."

The same principle is well stated by *Bramley, L. J.*, in the case of *Hydraulic Co. v. McHaffie et al.*, 4 Q. B. Div. [1878-79] 670, an action for damages for delay in constructing a machine, as follows: "The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury following from a breach of it. The wrongdoer is *prima facie* only liable for the natural and ordinary consequences of the breach; but where, at the time of entering into the contract, both parties knew and contemplated that if a breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation or damages on the occurrence of the injury." This limitation on the general rule as to the amount of damages recoverable for wrongful delay in the shipment of goods, and being itself an application of the third rule laid down in the case of *Hadley v. Baxendale*, *Woods, Mayne on Damages*, p. 21, is frequently presented in cases involving the making and shipments of machinery. In fact, these are the cases which usually call for the application of the principle stated. Many instances of such application are afforded in the decisions in our own state, as in *Boyle v. Reeder*, *supra*; *Foard v. Railroad*, *supra*; *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; *Sharpe v. Railroad*, 130 N. C. 613, 41 S. E. 799. See, also, *Mace v. Ramsey*, 74 N. C. 11; *Neal v. Hardware Co.*, 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697. And well-considered cases in other jurisdictions are to like effect. *Simpson v. Railway*, 1 Q. B. Div. [1875-76] 274; *Corey v. Iron Works*, 3 L. R. [1867-68] 181; *Gee v. Railroad*, 6 Ex. Ch. [1860] 210; *Diehlbinger v. Armstrong*, 92 Q. B. [1873-74] 473; *Railway v. Ragsdale*, 46 Miss. 460; *Griffin v. Clover*, 16 N. Y. 480,

69 Am. Dec. 718; *Priestly v. Railroad*, 26 Ill. 205, 79 Am. Dec. 369; *Railway v. Pritchard & Co.*, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

In *Simpson's Case*, supra, it appeared that plaintiff, a manufacturer of cattle spice and other substances, was in the habit of making an exhibit of samples of his goods in the grounds of certain cattle shows going on in different sections of the country. On the trial before Cockburn, C. J., at Spring Assizes, 1875, it was proved: "On the 13th of July, the Bedford show being about to end, and a similar show at Newcastle being about to be held on the 22d, 23d, and 24th of July, where the plaintiff desired to exhibit his goods, the plaintiff, by his son, who was in charge of the show tent and samples, made with the defendant's agent a contract for carriage of the samples. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son, consigning the goods as 'boxes of sundries,' to 'Simpson & Co., the show ground, Newcastle-on-Tyne,' and that he indorsed the note 'must be at Newcastle on Monday certain,' meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, or as to the goods being samples. The goods did not arrive till several days after time, and when the show was over." On the trial the undisputed damages were paid into court, with verdict for £20 additional to cover special damages, should the court be of opinion that such damages were recoverable. Rule No. 51 argued before Queen's Bench Division before Cockburn, C. J., and Mellor and Field, JJ. The reported case proceeds as follows:

"Field, J., referred to *Watson v. Ambergate Ry. Co.*, 15 Jur. 448.

"Gates, Q. C., and C. H. Anderson, in support of the rule: The argument for the plaintiff goes further than any decided case. The defendants ought to have been told that the goods were samples. *Woodger v. Great Western Ry. Co.*, 2 L. R. C. P. 318, 36 L. J. C. P. 177, 15 W. R. 383, 15 L. T. (N. S.) 579.

"Field, J. Must we not infer as a matter of fact that notice of their being samples was given?

"Counsel: *Great Western Ry. Co. v. Redmayne*, 1 L. R. C. P. 329, 12 Jur. (N. S.) 692, 35 L. J. C. P. 123, 14 W. R. 206, 1 H. & R. 97, shows that distinct notice must be given.

"Cockburn, C. J. Knowledge of circumstances from which the purpose would naturally be inferred is sufficient without express notice of the purpose itself.

"Counsel: As to the loss of profits, such profits as these have never been held recoverable.

"Cockburn, C. J. Can it be disputed that these profits would have been recoverable, if an express stipulation had been made that the goods should be delivered by a particular day, and the defendants had been told what the result of nondelivery would be?

"Counsel: That might be disputed.

"Cockburn, C. J. I am of opinion that this rule must be discharged. The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is especially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The plaintiff in the present case is in the habit of going about the country exhibiting his cattle spice at shows, to attract purchasers. The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line; and their agent must have known that the plaintiff had been exhibiting these goods, and that they were being sent to Newcastle for the same purpose. I therefore cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.

"Mellor, J. I am of the same opinion. As a jurymen I come to the conclusion that the clerk to the defendants had notice of the object for which the goods were being sent. As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves.

"Field, J. I am of the same opinion. I apprehend that for a breach of contract a plaintiff is entitled to recover for damages naturally following under circumstances known to both the parties. In this case, inasmuch as railway companies do not often bind themselves to deliver by a particular day, the defendants' attention would be attracted by the stipulation which was made to that effect. Then, where was the contract made? Upon a show ground. To what place was it the goods were to be sent? To a similar show ground. The inference from which would naturally be that the goods were being sent for the purpose of being shown there. Further, if the defendants' agent did not so understand the matter he might have been called to say so, but that was not done. Therefore I infer, as judge of fact, that both parties were aware of the circumstances with a view to which the plaintiff was contracting, and that they were made the basis of the contract."

In the case of *Gee v. Railway*, shipment of cotton for use in a mill, special damages disallowed, but court held that if it had appeared that defendant had knowledge of purpose for which cotton was required, and that stopping mill would follow from delay, the special damages could be recovered.

In *Priestly's Case*, *supra*, damages were allowed for the use of machinery during the time it was wrongfully delayed in shipment. On the trial below, only nominal damages had been allowed. On appeal, Breese, J., for the appellate court, said: "The principle announced by the court in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment that under a contract to deliver in a reasonable time valuable machinery such as described in the declaration, that the difference in the market value of such machinery at the time it was in fact delivered, and when it should have been delivered, is all the damage the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to carriers to perform, promptly, a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, as grain, live stock, and such like, this rule is doubtless the true one, and has been recognized by this court in the case of *Sangamon & Morgan County R. R. Co. v. Henry*, 14 Ill. 156. Where the property to be carried and delivered is not of a perishable nature, and is not a common or ordinary object of sale in market, and subject to its fluctuations, but is designed for a special purpose in a special business, the rule is very different; but in both cases adequate indemnity should be offered the plaintiff for the loss he has sustained."

In *Railway v. Pritchard*, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92, damages were allowed for injury caused by wrongful delay in shipping a still worm for a turpentine distillery. The elements of damages recovered in this case are thus stated in the opinion: "During all the time (of the delay) their machinery and the hands employed in running it were idle, and the tree boxes from which the crude gum was gathered had run over, and much of it was wasted for the want of barrels in which to deposit it, and such loss would not have occurred had the worm come to hand at the proper time, and the plaintiff been enabled to use the still. The principal loss was in the crude turpentine, estimated at 86 barrels, worth \$4 per barrel. There was verdict for the entire amount of damages, less \$16."

In *Ragsdale's Case*, *supra*, wrongful delay in shipping a boiler required for the operation of certain machinery, profits of the enterprise were disallowed as proper basis of damages, and it was held that the cost of hands necessarily kept unemployed by reason of delay, with interest on capital, unproductive for the time, was the correct rule for award of the damages.

And in the case of our own court (*Neal v. Hardware Co.*) damages were allowed for loss of a tobacco crop, on failure to furnish, as per contract, at the stipulated time, certain flues to use in curing tobacco. It was contended that no special damages could be re-

covered, inasmuch as plaintiff failed to show that defendant had knowledge that such damages would result from a failure to deliver the flues; but the court held that it was a matter of common knowledge, in localities where tobacco is cultivated, that if it is not cut and cured in apt time serious loss is the necessary consequence, and such knowledge would be assumed against defendant engaged in manufacturing the flues and his agent engaged in selling the same. A proper application of the doctrine declared and approved by these authorities will establish the position that, on the facts appearing in evidence, if the defendant's responsibility for this delay should be established, the plaintiff is entitled to recover compensatory damages, and the question of the amount should be referred to the jury, on the principles heretofore indicated.

The plaintiffs were a firm engaged in the manufacture and sale of furniture. Of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time, certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery. That it is essential and necessary for the purpose, and without it the engine itself and the machinery dependent upon it are for the time out of action. The kind and size, and weight of the shaft, would give notice of at least the maximum capacity of the engine. As we said on the former appeal of this cause: "We may safely assume that the express companies are agencies organized for the purpose, at a higher price, of providing greater security and dispatch in the delivery of freight." And it would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than 650 pounds, which under ordinary circumstances could and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price, unless the call was urgent, and some unusual result would follow by reason of delay. The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment, and require that the amount of plaintiffs' damages should be considered and determined by the jury in that aspect of the matter.

It is not practicable, within the compass of this opinion, already extended to an undesirable length, to refer to the numerous authorities relied upon to sustain the defendants' position. There is no substantial difference in the general principles established by any of these decisions, and the question of ever recurring perplexity for the courts is the correct application of these principles to the varying facts of the different cases.

To illustrate, in *Manufacturing Co. v. Railway*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725, where special damages were disallowed for delay in shipping a machine, for the reason that the machine was designed for present use and for a purpose that would afford data for allowance of such damage, there was not only no evidence indicating knowledge on the part of the carrier of the special purpose, alleged to have caused the loss, but there was testimony tending to show notice of an entirely different purpose. Cole, C. J., in delivering the opinion disallowing the claim, said: "The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume, as we have no right to do, that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use."

As we have endeavored to show in the case before us, the style and title of the plaintiff firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of defendant's business by which they undertook for a greater wage to give additional assurance both of safety and dispatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay in breach of defendant's contract. So, in case of *Saw Mill Co. v. Nettle-ship*, shipment of lot of machinery from Liverpool to Vancouver's Island. The machinery was in different boxes, and one of these, containing a portion of machinery, was lost, preventing operations until it could be replaced by sending to England for another piece, causing a delay in operations for something like 12 months. Damages for cost of procuring another piece was allowed, including cost of additional freight, but profits during the period of delay was disallowed. This was put, in part, on the fact that the machinery was boxed, and the carrier had no knowledge of the relative importance of that contained in the box lost, nor that stopping of the mill would likely follow from such loss. Some stress was laid, too, on the fact that, owing to the length and uncertainty of a voyage of that kind, it would be unreasonable to suppose that the parties, in that mode of shipment, contemplated that the additional damages could be recovered, and the case in both of these respects suggested is clearly distinguished from the one we are considering.

We are not inadvertent to the fact that in the case of *Hadley v. Baxendale*, itself, the implement was the crank shaft of an engine, for lack of which the plaintiff's mill was stopped for the time. Without adverting to the distinctions that could be suggested between the two cases, it may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly

ascertained, than as a decision on the facts of the particular case. In evidence of this, it may be noted that, as a matter of fact, the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear, possibly because the notice referred to was given the day before the shaft was delivered for shipment—not, it seems, a very satisfactory explanation. While this does not at all impair the value of the case as making notable declaration of the general rules applicable to such causes, it does, perhaps, weaken it to some extent as a decision on any given state of facts. In any event, we are of opinion that, on the facts presented here, the case comes within the third rule of *Hadley v. Baxendale*: "That where the special circumstances are known, or have been communicated, to the person who breaks the contract, and where the damages complained of flow naturally from the breach of contract, under those special circumstances, then such special damages must be supposed to have been contemplated by the parties to the contract and is recoverable."

It may be well to note that the cases of *Foard v. Railroad* and *Sharpe v. Railroad*, supra, go farther, perhaps, than the facts as they are made to appear in the cases on appeal would seem to justify in holding the carrier liable for unusual damages by reason of special circumstances. Certainly, they go much farther than is required to support the disposition we make of the present appeal. It is more than likely—as the question chiefly presented in these appeals was as to the correct rule for ascertaining compensatory damages as between current profits and interest on the amount of capital unemployed—that some of the evidence tending to fix the carrier with notice was omitted, as no point was made as to notice. This is certainly true in the case of *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. The writer presided at that trial, and there was evidence both direct and, from the character and quality of machinery shipped, tending to show notice, and it was omitted in statement of case on appeal for the reason suggested, that no point as to notice was made on the trial.

On the former appeal of this cause (144 N. C. 639, 57 S. E. 458), we held that there was evidence to be considered by the jury on the issue as to defendant's responsibility, and in this appeal we hold that, in case such responsibility is properly and correctly established, on the testimony there is evidence which requires that the question of the amount of compensatory damages shall be referred to the jury, and there was error in the ruling, that on the facts as they now appear only nominal damages can be recovered.

Judgment below reversed, and new trial awarded.

WALKER and BROWN, JJ., dissent.

# STANDARD SUPPLY CO. v. CARTER & HARRIS.

(Supreme Court of South Carolina. Aug. 13, 1908.)

## 1. SALES—CONTRACTS—BREACH—DAMAGES.

One who buys an engine to furnish power for a cotton ginnery and explains to the seller the necessity of prompt delivery is, on the failure of the seller to deliver within the time fixed resulting in the ginnery remaining idle for more than 40 days of the best part of the season, entitled to recover the value of the use of the plant for such period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1198.]

## 2. DAMAGES—WRONGFUL DEPRIVATION OF USE OF SPECIFIC PROPERTY—MEASURE OF DAMAGES.

Damages for the wrongful deprivation of the use of specific property are measured by the rental value of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 272.]

## 3. SAME—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The damages for the temporary deprivation of specific property due to a breach of contract cannot be restricted to the rental value of the property, where it has no rental value, and in such cases the damages must be ascertained by an inquiry into the value of the use of the property for the time of the deprivation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 272.]

## 4. SAME.

The measure of damages for the interruption of an established manufacturing plant is the value of the use of the plant to the owner, to be ascertained by inquiry into its past results and the profits earned, while the measure of damages for the prevention of the establishment of a new business does not include profits hoped for; they being too conjectural.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 272.]

## 5. SALES—DEFAULT OF SELLER—DAMAGES.

The profit which one who installed a ginnery hoped to make in a season is too speculative to constitute a measure of damages for the failure of a seller to deliver machinery within the time contracted for, resulting in the plant remaining idle, and the advantage the ginnery was expected to give the owner in the buying of cotton and cotton seed and collecting accounts is also contingent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1198.]

## 6. SAME—ACTIONS FOR PRICE—COUNTERCLAIM.

In an action for the price of an engine sold to defendant, the answer, alleging that defendant installed a cotton ginnery, that plaintiff contracted to deliver the engine on or before a designated date, to furnish power for the ginnery, that plaintiff, though fully informed of the facts, did not make the delivery until more than 40 days later, that defendant was unable to operate the ginnery for more than 40 days of the best part of the season, to his injury, etc., states a good counterclaim for damages to be measured by the rental value of the ginnery during the time it was idle by reason of plaintiff's breach of contract.

Appeal from Common Pleas Circuit Court, Lee County; Geo. E. Prince, Judge.

Action by the Standard Supply Company against Carter & Harris. From an order overruling a demurrer to the answer, plaintiff appeals. Affirmed.

Lee & Molse and McLeod & Dennis, for appellant. McLendon & Tatum, for respondent.

WOODS, J. The complaint alleges an indebtedness of the defendant to the plaintiff of \$317.20, the price of a lot of roofing and a 12 by 14 Clarke engine. The answer, as a counterclaim, sets up damages to the amount of \$1,995 for breach of contract of sale. The appeal is from an order of the circuit judge overruling a demurrer to the answer.

Shortly stated, the substantial allegations of the answer on which the counterclaim rests are: The defendants, merchants doing a large credit business at Ellotts, S. C., installed a cotton ginnery, so that they might not only make a direct profit from ginning cotton, but also facilitate their collections by having the first opportunity to purchase the cotton and cotton seed of their debtors. On April 12, 1906, the plaintiffs for value contracted to deliver to defendants one 12 by 14 Clarke engine on or before August 1, 1906, intended to furnish the power for defendant's ginnery for the season of 1906. The ginning season begins about the middle of August. Though fully informed of the injury that would result to defendant's business from a delay in the delivery of the engine, yet plaintiff did not deliver it until about September 26, 1906. The specifications of damage are thus set out in the answer: "The defendants were unable to operate their said ginnery for more than 40 days of the best part of the cotton ginning season of 1906, during which time a very large per cent. of the cotton crop was ginned; that the money invested in their said cotton ginning plant was idle and unproductive during said time; that by reason of their inability to operate their said cotton ginnery they were caused to lose all of the large patronage, and the profits of the same which was previously theirs, which was assured them, and which they would have gotten, during said time, part of which profits they have never recovered; that a considerable part of said patronage was persons who owed accounts to defendants, and they were deprived of the first opportunity, and in many cases of any opportunity, to buy the cotton of such debtors, which caused considerable injury to their collections; that by being thus thrown out of the first contract with a quantity of cotton and cotton seed which would have come to their ginnery, as the same was prepared for market, they lost the purchase of the same and profits thereof; and that the good will of defendants' cotton ginning business was greatly damaged and injured by reason of said delay—all to the hurt, damage, and injury of the defendants in the sum of \$1,995."

The circuit judge was undoubtedly right in holding the allegations of the counterclaim stated a cause of action for the rental value of the ginnery plant, for the period that the plaintiffs' delay in the delivery of the engine kept it idle. It is true, as plaintiff contends, defendants cannot recover remote, contingent, or speculative damages bas-

ed on profits they hoped to make. *Tappan & Noble v. Harwood*, 2 Speers, 536; *Sitton v. MacDonald*, 25 S. C. 68, 60 Am. Rep. 484; *Mood v. Tel. Co.*, 40 S. C. 524, 19 S. E. 67; *Colvin v. Oil Mill*, 66 S. C. 61, 44 S. E. 380; *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Howard v. Stillwell Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147. But if the defendant proves his allegations that the operation of the ginnery depended on plaintiffs' delivery of the engine at the time agreed on, that this was fully explained to plaintiff when the contract was made, and that the failure of the plaintiff to comply with its contract prevented the operation of the ginnery, then there cannot be a doubt of the liability of the plaintiff for the direct damages which resulted from the ginnery plant being idle. These damages would be the value of the use of the plant for the period of inactivity due to plaintiffs' delay in delivering the engine. The general rule, well supported by authority and the fairest that could be adopted, is that damages for the wrongful deprivation of the use of specific property are to be measured by its rental value. *Tappan v. Harwood*, 2 Speers, 536; *Martin v. Railway Co.*, 70 S. C. 8, 48 S. E. 616; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 963; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Brownwell et al. v. Chapman*, 84 Iowa, 504, 51 N. W. 249, 35 Am. St. Rep. 326; *Boyle v. Reeder*, 23 N. C. 607; *Williams v. Milling Co.*, 25 Or. 573, 37 Pac. 49; *Brown v. Foster*, 51 Pa. 165; *Central Trust Co. of N. Y. v. Arctic Ice Mach. Co.*, etc., 77 Md. 202, 28 Atl. 493; *Wing et al. v. U. S. Fidelity & G. Co. (C. C.)* 150 Fed. 672; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463; *Korf v. Lull*, 70 Ill. 420; *Livermore F. & M. Co. v. Union C. & S. Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482.

This rule rests on the same reason as the rule that the measure of the vendee's damage for complete breach of the contract for the delivery of goods is the difference between the contract price and the market price. That reason is that things are worth what they will bring in the market, not what the party concerned may think they ought to bring. But when, in breach of contract for the sale of goods by a final refusal to deliver, there is no market value by which the damages may be definitely ascertained, it would be unjust and absurd to say the recovery must be limited to nominal damages. The damages then, from the necessity of the case, must be ascertained by inquiry into the value of the article to the injured party. A familiar application of this rule is the allowance to a passenger of the value to him of baggage lost by a carrier. *Turner v. Railway Co.*, 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188. Many other conditions to which the rule is applicable appear in the cases cited in note to *So. Exp. Co. v. Owens*, 9 A. & E. Ann. Cas. 1148, and

*Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 227. In *Hydraulic, etc., Co. v. McHaffie*, 4 Q. B. D. 670, 18 Eng. Ru. Cas. 558, the plaintiffs were under contract to deliver a certain machine by a certain time, and the defendants contracted with them to make a certain part of the machine called a gun. Owing to the delay of the defendants in making the gun, the plaintiffs were unable to comply with their contract, and the machine was left on their hands. It was held the plaintiffs were entitled to recover from defendants the loss of their profit on the machine and their expenditures uselessly incurred in making other parts of the machine. So, also, damages for the temporary deprivation of specific property of another, due to a breach of contract, cannot be restricted to its rental value, where from any cause it has no rental value. In such cases the damages must necessarily be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Many cases might be cited illustrating this exception to the rule of rental value. A traveling salesman's sample trunks have no rental value, and hence, in *Strange v. Railroad Co.*, 77 S. C. 182, 57 S. E. 724, from necessity, the court laid down the rule that the measure of damages for breach of contract by delay in delivering such trunks, known to be essential to the salesman's business, was his fair average daily earnings. A like measure was adopted in *Weston v. Boston & M. R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, to the delay in delivery of theatrical properties. Yet it is to be borne in mind the end courts always seek to attain is to give substantial and fair reparation to the injured party, and, at the same time, keep out of the administration of justice speculation and uncertainty. These ends are best attained by adhering to the market sale and rental value as closely as possible, and adopting other measures of damages only when necessity compels because there is no substantial market value.

There is a manifest difference between the interruption of an established manufacturing plant or other business, such as a cotton mill or flour mill, in successful operation, and the prevention of the establishment of a new business. It would, in most cases of the former kind, be exceedingly unjust to limit the award of damages to what the business would rent for, because there would ordinarily be no demand for the temporary use of the business which would express, even approximately, its value to the owner. The measure, then, must be the value of its use to the owner to be ascertained by inquiry into its past results, and the most important factors in ascertaining such past results would be the usual profits earned. 3 Elliott on Evidence, § 1994, and authorities there cited. In *Saluda Mfg. Co. v. Penning-*



ton, 2 Speers, 735, one of the questions was the measure of damages for the interruption of a manufacturing business, due to defendant's failure to build a dam according to his contract. Plaintiff claimed large consequential damages. The proof was that the business, instead of being in successful operation, was a losing enterprise. For the interruption of the business the jury in making up their verdict allowed the company interest on the money invested in the plant and the wages of the operatives for the time the mill was idle by reason of defendant's default. The plaintiff appealed, and the court held it had no reason to complain that the verdict was not larger. The defendant did not claim that the measure of damages should have been less than that allowed by the jury, but, on the contrary, acquiesced in the verdict. The case, therefore, is not authority for the proposition that, when a losing business is interrupted, the party responsible for the interruption must pay the interest on the investment and the wages of employes. It leaves undetermined the true measure of damages in such circumstances. When a business is in contemplation, but not established, or not in actual operation, profit merely hoped for is too uncertain and conjectural to be considered. 1 Sedg. on Damages, 174, 189; note to *Slitton v. MacDonald*, 60 Am. Rep. 488; *Williams v. Island City, etc., Co.*, 25 Or. 573, 37 Pac. 49; *Central Trust Co. v. Arctic, etc., Co.*, 77 Md. 202, 26 Atl. 493; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; *Fraser v. Echo Min. & Smelt. Co.*, 9 Tex. Civ. App. 210, 28 S. W. 714; *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cleveland, C. C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Rigney v. Monette*, 47 La. Ann. 211, 17 South. 211.

A cotton ginnery is in operation during the harvest season only, and conditions are so liable to change from one season to another that the profit or loss of one season is only one of several factors in estimating the probable results of the next; and therefore profit which the defendants hoped to make in the season of 1906 is too uncertain and speculative as the measure of damages. The advantage the ginnery was expected to give them in the buying of cotton and cotton seed and collecting accounts was still more contingent and speculative. It is quite possible to arrive at the fair rental value of a cotton ginnery for a cotton season. The business is simple, requiring little, if any, skilled labor. In making proof of the rental value of a ginnery which had been operated in past seasons, evidence may be offered not only of the cost and physical condition of the property but of all the conditions which surround it, including its patronage, and success and hazards in the past, and any change for better or worse in such conditions. All of these, and perhaps other matters, would be inquired into by those contemplating the renting of the

property, and they are therefore factors entering into the determination of the market rental value; but neither the past success indicated by the profits, nor any other single factor, is to be taken as controlling. Evidence of all these factors, along with other competent evidence, is admitted in order to arrive at the fair rental value. *Lipscomb v. Railroad Co.*, 65 S. C. 148, 43 S. E. 388; *Novelty Iron Wks. v. Oat-meal Co.*, 88 Iowa, 524, 55 N. W. 518; *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. 855; *Logemann v. Pauly*, 100 Wis. 671, 76 N. W. 604; *Nelson v. Minn. & St. L. Ry. Co.*, 41 Minn. 181, 42 N. W. 788; *Mace v. Ramsey*, 74 N. C. 11; *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Williams v. Island City Milling Co.*, 25 Or. 573, 37 Pac. 49.

The answer states a good counterclaim for damages to be measured by the rental value of the ginnery from August 15 to September 26, 1906, the period alleged to have been lost by the plaintiff's breach of contract.

The judgment of this court is that the judgment of the circuit court overruling the demurrer be affirmed.

#### JOHNSON v. PERKINS. (No. 1,168.)

(Court of Appeals of Georgia July 31, 1903.)

#### 1. BAILMENT — ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 125.]

#### 2. SAME.

An unreasonable, improbable, or impossible explanation of an injury, which has been sustained by property of the bailor while in the hands of the bailee, may be equivalent to an admission of liability. In any event, such an explanation, as well as no explanation, may be held by a jury to be a failure on the part of the bailee to show proper diligence towards the property intrusted to his care. Where a horse is delivered in good condition to a blacksmith to shoe, and shortly afterwards the horse is found still in his possession badly cut, the presumption of negligence on the part of the bailee arises, which will authorize liability for the injury to be affixed on him, unless that presumption be rebutted to the satisfaction of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, § 124.]

#### 3. SAME—EVIDENCE—SUFFICIENCY.

The evidence, though meager, supports the verdict, and there is no room for interference by this court with the discretion of the trial judge, who approved it.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action in the county court by S. A. Perkins against Berry Johnson. From a judgment for plaintiff, on appeal to the superior court, defendant brings error. Affirmed.

F. C. Foster, Sr., for plaintiff in error. Q. L. Williford, for defendant in error.

RUSSELL, J. Perkins, a liveryman, brought a suit in the county court against

Johnson, a blacksmith, to recover damages for an alleged negligent injury to a horse which the defendant had engaged to shoe; it being alleged that the horse, while being shod, received an injury from which he afterward died. The case was appealed to the superior court and resulted in a verdict in favor of the plaintiff, for \$150. Exception is taken to the judgment of the superior court overruling a motion for new trial, based upon the general grounds.

The material allegations of the plaintiff's petition are: That on July 21, 1905, Perkins carried his horse to the defendant's shop to be shod; that, while it was being shod, Riley Cash, a regular employé of the defendant, who was accustomed to aiding the defendant in shoeing horses, "did negligently, carelessly, and without cause cut, with a knife or other sharp instrument, the side of said horse, making a very serious and terrible wound; and that said horse died from said wound on August 3, 1905." The evidence for the plaintiff tended to show that Perkins carried his horse to the defendant's shop to be shod, and that after a time he returned and found a deep gash or cut in the left side of the horse, about three inches long, just in front of and even with the small bone which projects at the top of the hip. The horse was cut to the hollow. Riley Cash, the helper (it appearing that the proprietor, Berry Johnson, was absent) was asked about the cause of the wound and stated to Perkins that he did not know the cause. The doctor was summoned and stitched up the wound. Two or three days later, Riley Cash stated that the horse must have gotten cut when he fell back on him while he was paring its foot. The physician who was called in gave the horse good medical treatment, and the wound began to close up; but the action of the horse showed that it was in pain. It threw its head to its left side, and could not carry its left hind foot forward with ease, gave way on the left side, and, when the stitches were cut after several days, quite a quantity of pus ran out, and the wound had to be washed for a number of days. On the 29th, after the horse received the cut, it was ridden (very slowly, according to the testimony for the plaintiff, and, according to evidence for the defendant, in a gallop) 8½ miles into the country, and on the way back died. The value of the horse, care, attention, loss of service, and physician's bill were shown. This constituted the evidence in behalf of the plaintiff.

1. The evidence was uncontradicted that the party who took the horse in charge to shoe him was the servant of the bailee, or blacksmith, who was employed by the bailee for that purpose. The evidence therefore put the horse in the possession of the bailee in good condition. When it was shown that he was injured while in possession of the bailee, the burden of proof was shifted, and it devolved upon the defendant to show that the damages that resulted was not due to

negligence on his part. The learned counsel for the plaintiff in error attacks the judgment refusing a new trial upon the general grounds only and insists that the plaintiff failed to make out a case because the evidence does not clearly show that Cash, the servant of the defendant, intentionally injured the horse. Under section 2896 of the Civil Code of 1895, it did not devolve upon the plaintiff to show that the blacksmith, or his servant, cut the horse, and thereby damaged the plaintiff. On the contrary, when the injury was shown, it devolved upon the blacksmith, as bailee, to show that injury could not have been prevented by proper diligence, that it was due to no neglect on his part, and, if the defendant failed to make this showing to the satisfaction of the jury, the plaintiff was entitled to recover upon mere proof that the cutting was done while his horse was in the care of the blacksmith, or of his servant employed by him for the purpose of shoeing horses. "In all cases of bailment, after proof of loss, the burden of proof is on the bailee to show proper diligence." *Johnson v. State*, 58 Ga. 397; *Central of Ga. Ry. Co. v. James*, 117 Ga. 833, 45 S. E. 223; *Tuggle v. State*, 119 Ga. 909, 47 S. E. 577; *Heidt v. Southern Tel. & Tel. Co.*, 122 Ga. 476, 50 S. E. 361; *Morris Storage Co. v. Wilkes*, 1 Ga. App. 751, 58 S. E. 232.

2. It must be conceded, then, that if the plaintiff showed that his horse was cut while in the possession of the blacksmith, and that he died from the wound, without more, he would be entitled to a recovery. The defendant attempted to explain the presence of the wound in the horse's side. Riley Cash testified that he was on the right-hand side of the horse with his face towards the horse's hip, and paring his right forefoot, when the horse gave way, fell on him, and in an unaccountable way was cut. The jury had uncontradicted testimony that the cut was right at the point of the left hip bone. It would seem by all physical laws that it was impossible, under these circumstances, for the cutting to have taken place in the manner described by the horseshoer, and the jury had the right to say that this explanation was ill founded and unsatisfactory. It may have been a significant fact to the jury, also, that the witness, when first questioned in regard to the matter, stated that he did not know how it occurred, when he must have known as well at that time as he did when he subsequently testified. An unreasonable, improbable, or impossible explanation of an injury sustained by property of the bailor while in the hands of the bailee, may be equivalent to an admission of liability. In any event, such an explanation, as well as no explanation, may be held by a jury to be a failure on the part of the bailee to show proper diligence towards the property intrusted to his care. Where a horse is delivered in good condition to a blacksmith to shoe, and shortly afterwards the horse is found to be in his possession badly cut, the presumption of negligence on the part of

the bailee arises which will authorize liability for the injury to be fixed on him, unless the presumption be rebutted to the satisfaction of the jury.

3. We think the evidence supported the verdict. We have already dealt with the fact that the jury could with propriety come to the conclusion that the injury was due to the negligence of the bailee, or his servant, if the explanation of the cutting was not satisfactory to them; but it is insisted that there is no proof that the death of the horse was the result of the injury, and also that the verdict of the jury was for less than the amount of damage shown by the proof. We think the jury were authorized to conclude from the evidence that the cut caused the death of the horse. He was cut to the hollow, and gave evidence of pain, according to some of the testimony, up to the time of his death. Mr. Utsey testified that, while the horse had before been a free driving horse, he became too sluggish for his use after the wound. He testified, it is true, that in his opinion sluggishness might be produced by overfeeding and other causes; but that there was no evidence that the causes which were suggested had supervened. There was a conflict in the evidence as to the speed at which the horse was ridden the day he died. If the jury had believed the witness who testified that the horse was being ridden in a gallop on a very hot day, the jury might have been in doubt as to the cause of death, or might have disbelieved that the death of the horse was caused from the wound; but the jury had just as much right to believe the testimony in rebuttal of this, and that the horse was ridden very slowly the day he died, requiring several hours to make a few miles, and therefore, in view of other circumstances in the case, that death resulted from the wound, and not from the ride. The jury were not compelled to find the full amount proved by the plaintiff. They were the exclusive judges of negligence and its degrees; but, if they erred in the amount of their finding, the defendant cannot complain that they found less against him than they should have found. *Ellis v. U. S. Fert. Co.*, 64 Ga. 571; *Mullins v. Murphy*, 69 Ga. 754; *Roberts v. Rigden*, 81 Ga. 440, 7 S. E. 742; *Taylor v. Gilmore*, 3 Ga. App. 93, 59 S. E. 325.

Judgment affirmed.

#### BOARD OF EDUCATION OF MILLER COUNTY v. FUDGE et al.

WILLIAMS, County School Com'r, v. BOARD OF EDUCATION OF MILLER COUNTY.

(Nos. 1,171, 1,183.)

(Court of Appeals of Georgia. July 31, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS—OFFICERS—LIABILITY ON OFFICIAL BONDS—PRINCIPAL AND SURETY—CONSTRUCTION OF CONTRACT.

Funds derived by county boards of education from borrowing money are not included in

county school funds, and the proper receipt and disbursement of such borrowed money is not one of the duties of a county school commissioner by virtue of his office.

(a) A contract of suretyship is to be strictly construed in the interest of the surety. The risk of a surety on a county school commissioner's bond may be increased by his being intrusted by the county board of education with large sums of money to be disbursed under the orders of a county board of education, which moneys were not received as part of the common school fund, nor at the times provided by law for the payment of such fund.

(b) Sureties upon the bond of a county school commissioner are not liable upon a bond providing for the faithful discharge of his duties for any moneys borrowed by such county board of education. In the case of loans to county boards of education, the entire transaction is individual and not official.

#### 2. SAME.

In a case where an action cannot be maintained against the sureties on an official bond because the malfeasance or dereliction of duty of their principal is personal and not official, neither can the action be maintained upon the contract as against the principal, though he may, in an action of a different nature, be individually liable.

#### 3. SAME—POWER TO BORROW MONEY.

The power to make arrangements for the efficient operation of schools, conveyed by section 1363 of the Political Code of 1895, does not include the power to borrow money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 212.]

(Syllabus by the Court.)

Error from City Court of Miller; C. C. Bush, Judge.

Action by the board of education of Miller county against J. R. Williams, county school commissioner, and F. E. Fudge and others, sureties on his official bond. Judgment sustaining a demurrer of the sureties to the petition and overruling the motion of Williams to dismiss the same, and the board and Williams both bring error. Judgment sustaining the demurrer affirmed, and overruling the motion to dismiss reversed.

Bush & Stapleton and Russell & Hawes, for plaintiff below. R. W. Grow, P. D. Rich, and Pottle & Glessner, for defendants below.

RUSSELL, J. The writs of error in these two cases will be considered together, for the reason that the questions in each arise upon the consideration of the same petition. The county board of education of Miller county brought suit against the county school commissioner and the sureties on his official bond for an alleged misappropriation of school funds. The material portions of the petition allege that Williams, being elected as county school commissioner, executed a bond for the faithful discharge of all and singular the duties required of him by virtue of his office as county school commissioner, with Phillips, Fudge, and Ball as securities. The bond upon which the suit was based was for the sum of \$4,000, payable to the county board of education and their successors in office. The condition of the bond is in the following language: "Whereas, the above-bound J. B. Williams was on the 6th

day of February, 1904, elected county school commissioner of Miller county for the years 1904, 1905, 1906, and 1907, and during the term pointed out by law the condition of the above obligation is such that if the said J. R. Williams shall faithfully discharge all and singular the duties required of him by virtue of his said office as aforesaid, during the term he continues therein, or discharge any of the duties thereof, then the above obligation to be void, otherwise to remain in full force and virtue." The petition further alleges that during the year 1905, \$3,835.50 was paid to the county school commissioner, of which \$1,935.50 was paid in checks from the State school commissioner, and \$1,900 cash, borrowed by the county board of education from the First National Bank of Colquitt; it being alleged that all of this money was for school purposes, was part of the school fund of the county, and was accepted by Williams as part of the school fund of the county. In the seventh paragraph of the petition it is further alleged: "That at the time the said board of education of Miller county borrowed the \$1,900 from the First National Bank of Colquitt, same being the money borrowed and referred to in paragraph 5 of this petition, there was then due Miller county from the state of Georgia from the school fund the sum of \$3,137.74, and said money borrowed from the First National Bank of Colquitt by your petitioner was borrowed to take the place of money that had been appropriated to Miller county for school purposes, but which had not been delivered to said county by the state of Georgia; that said amount was to be delivered, and was a definite and a certain and a settled sum, and the money borrowed was secured by your petitioner as an advance on the amount due and unpaid by the state of Georgia." The petition then proceeds to say that the principal, Williams, has accounted for only \$2,913.35 of the above-stated amount, leaving a balance of \$929.15, for which demand is alleged to have been made, and which the county school commissioner has failed and refused to deliver and account for. Upon the foregoing statement of facts a breach of the bond is alleged, and the liability of the principal and the sureties for the sum of \$929.15 is asserted. To this petition the sureties demurred, and Williams orally moved to dismiss the same, upon the ground that it set forth no cause of action.

We think the lower court properly sustained the demurrer interposed by the sureties, and erred in not dismissing the action as to the principal. In our opinion the petition set forth no cause of action on the bond sued upon, either against the principal or the sureties. It may be that the county school commissioner is liable to the board of education, if he received any money as their agent and misappropriated it; but, under the allegations of the petition, he is not liable upon this contract any more than his sureties up-

on the bond. The only obligation in the bond is that J. R. Williams "shall faithfully discharge all and singular the duties required of him by virtue of his said office," and the period for which he is bound to perform these duties, as we construe the meaning of the bond, is during the term he continues therein or during which he discharges any of the duties thereof. We cannot agree with the contention of the counsel that the bond was void if Williams discharged "any of the duties thereof." These words naturally refer back to the words "during the term." The obligation of obligors on a bond is to be strictly construed, and we have no hesitation in holding that the bond bound Williams and his sureties to discharge only "all the duties required of him by virtue of his office."

We come then to the inquiry, in the first place: What are the duties required of a county school commissioner by his office, so far as the matters alleged in this petition are concerned? The duties of a county school commissioner are varied in their nature. Some involve the care and expenditure of money, and others do not concern matters of finance. The county school commissioner is the custodian and the disbursing agent of the common school fund in his county. He has a duty in reference to these funds which is included in the duties mentioned in this bond; but the common school fund is expressly defined in our Code. Pol. Code 1896, § 1384. Money borrowed by the county board of education is not included within the terms of section 1384, and therefore the county school commissioner, as such, has no duty devolving upon him, either as to the safe-keeping or proper disbursement of money borrowed by the county board of education. The county board of education has no right to borrow money. Paragraph 1 of section 7, art. 8, of the Constitution of the state, which is cited by counsel, has no possible application to a county board of education. Its meaning cannot be extended beyond its terms. The county board of education cannot incur a new debt which is temporary, or settle a casual deficiency under the provisions of this clause of the Constitution, because the board of education is neither a county nor a municipality, nor a political division of the state.

In *Mason v. Commissioners*, 104 Ga. 85, 30 S. E. 513, the sureties on the bond were held free from liability for borrowed money which had been turned over to the county treasurer. Certainly, if, under the facts of that case, as well as those in *Hall v. Greene County*, 119 Ga. 254, 48 S. E. 69, it could be held that the sureties and the county treasurer were not liable for money borrowed by a county, there should be no difficulty in holding that the sureties and the county school commissioner are not liable for money placed in the county school commissioner's hands,

which has been borrowed, not by the county or county commissioners, but by a board of education. The borrowing by these members of the county board of education was simply an individual undertaking, and the money obtained was money for the payment of which they were individually liable, and which they individually turned over to the county school commissioner as an individual and as their agent. Not only did the placing of these private funds in the hands of Williams tend to increase the risk of the sureties on his bond, for the reason that the sureties naturally based their liability on the amounts only which it was presumed would be received quarterly from the state and not upon other amounts which might be borrowed and thereby increase the amount of money handled by the county school commissioner, but they did not assume, and perhaps would have declined to assume, liability for Williams' disbursements, except those stipulated in the bond. The obligation in the bond to discharge all the duties of the office of county school commissioner was the only obligation the sureties assumed. Williams' duties, as county school commissioner, were all that were in contemplation of the parties. The liability of sureties is always one of strict law. Sureties cannot be held bound unless the law is strictly complied with. So far as the liability of the sureties for public money in the hands of the county school commissioner was concerned, the sureties had the right to expect that Williams would not have in his possession anything but the common school fund of the county, made up from the sources provided by law. Legally stated, they knew that this money was turned over to Williams, under the statute, quarterly and in comparatively small amounts. It would not be paid until the county board already owed it, and the commissioner would have to disburse it almost immediately. Under the operation of the law, the money to be sent by the state school commissioner hardly has time to reach the county school commissioner before it must be disbursed, and under the allegations of this very petition it appears that all the money that was sent by the state school commissioner was properly disbursed by the county commissioner. We have no hesitation therefore in holding that the demurrer, on the part of the sureties, was properly sustained, for to hold otherwise would be to create a liability not contemplated by the contract, judged by its express terms, as well as to cause these sureties to incur a risk greater than they assumed.

The reasons which have controlled our judgment as to the sureties impel us to hold that the court should have also dismissed the action as to the principal on the bond. We do not mean to say that, if the allegations of the petition are true, Williams, as an individual, may not be liable in a proper action for money had and received; but we do hold that, under the allegations of the

petition, the money, which he is alleged not to have accounted for, he did not and could not receive as county school commissioner, that his bond is merely for the faithful discharge of the duties of his office, and that, as the petition alleges that he has accounted for more than the amount received as county school commissioner, failure to account for a balance of money borrowed by the members of the county board may be private malfeasance, but cannot be a breach of official duty.

Counsel for the county board of education insist that, having received money by reason of a loan made to a county board the treasurer, upon the principle announced in *Mason v. Commissioners*, supra, was estopped to question the validity of the authority under which the money was so collected and received. The decision in the *Mason Case* rests upon its own particular facts. Importance was attached, in that case, to the fact that *Mason* assisted in borrowing a large portion of the money himself, signing the notes officially as county treasurer. Whether the principle laid down in *Mason's Case* is sound or not, there are two great differences between the facts in that case and in this. In the first place, county commissioners of a county have broader powers for borrowing money than a county board of education, and it does not appear, in the next place, that Williams signed any of the notes for the money borrowed in this case. The motion to dismiss was well taken, however, regardless of the principle announced in the *Mason Case*, because, even though Williams should be estopped to challenge the validity of the loan, he is not estopped to say that he is not liable on the contract sued on, for the reason that, in the particular obligation which is the basis of the suit, he did not undertake to receive or disburse any money other than that which came within the province of his duty as county school commissioner.

Counsel for the county board of education insist that the borrowing of money to pay teachers is authorized by section 1363 of the Political Code of 1895. The language relied upon is that portion of the section which gives county boards of education power to make all arrangements necessary to the efficient operation of the schools. The spirit and language of our Constitution is such that unlimited power to borrow money cannot be inferred from this language. If the Legislature had power to authorize county boards of education in their discretion to create indebtedness, they would doubtless have exercised this power in express terms, and not placed it simply in connection with other arrangements, which do not call for the raising of funds, but pertain solely to the expenditure of money for such things as are necessary in the conduct of schools—"maps, globes, and school furniture."

Judgment in 1,171 affirmed, and in 1,183 reversed.

POWELL, J., disqualified.

**HOBBS v. CRAWFORD & MAXWELL.  
CRAWFORD & MAXWELL v. HOBBS.  
(Nos. 929, 959.)**

(Court of Appeals of Georgia. July 31, 1908.)

**1. PAYMENT—APPROPRIATION BY CREDITOR.**

In the absence of direction by the debtor as to the application of payments made by him, a creditor may apply payments, made upon a running account covering the transactions of several years, to the oldest items so as to avoid the bar of the statute of limitations. This right of the creditor is not defeated or necessarily affected merely by reason of the fact that the balance due at the end of each year is brought forward as such as the first item of the succeeding year's account, provided the aggregate amount of the items of account actually purchased within the statutory period of four years is greater than the remainder or unpaid balance claimed to be due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 109.]

**2. PLEADING—SPECIAL DEMURRER—GROUNDS OF—WAIVER.**

A debtor may by special demurrer demand a complete statement of each item of an indebtedness upon which suit has been brought. Failure to demur is a waiver of the right.

(Syllabus by the Court.)

Error from City Court of Lexington; Philip W. Davis, Judge.

Action by Crawford & Maxwell against N. A. Hobbs. From the judgment both parties bring error. Affirmed on the main bill, and cross-bill dismissed.

Jos. G. Faust and Jas. Davison, for plaintiff. Howard & Shull and Tye, Peeples, Bryan & Jordan, for defendant.

**RUSSELL, J.** The controlling question in this case is whether a creditor, in the absence of any direction by the debtor, has the right to apply payments made by him to the various items of an account running through several years, so as to avoid the bar of the statute of limitations. This question is answered by Civ. Code 1895, § 3722. The record discloses that Hobbs had, for several years, been a customer of Crawford & Maxwell, purchasing supplies from them during the years 1902, 1903, 1904, 1905, and 1906. The first item of the account sued upon and attached to the petition was "balance brought from 1904, book, \$177.34." This balance apparently was the amount due at the end of 1904 and was entered upon the books of 1905 on February 23, 1905, together with a charge of interest on the same, \$14.18. An examination of the plaintiffs' ledger for 1904 showed that the first item for that year was balance brought forward, January 6, 1904, from the year 1903, of \$129.14, and it appears from the testimony that the first item of the 1903 account, dated January 6, 1903, was "to balance from old book 1902, \$165.73." The evidence in behalf of the plaintiffs sustained their contention as to the correctness of the various items of indebtedness, but the defendant insisted, and now insists, as plaintiff in error, that the account for 1902 and

the debt for items bought in that year are barred by the statute of limitations. The defendant perhaps might have developed this fact by a timely special demurrer, but it does not appear from the pleadings or from the evidence in behalf of the plaintiff.

The contention of the defendant was that he overpaid the account for 1905, and that the first item of the account was really merely a statement of the unpaid balance of the account of 1902, and that as suit was not filed until April 16, 1907, the bar of the statute attached to the account for 1902, which would have been due January 1, 1903. If the counsel for the defendant had moved by special demurrer to strike the first item of the plaintiffs' account, upon the ground that he was entitled to know of what "the balance" consisted, the court might have been justified in sustaining his contention as to that item, because the defendant had the right to know the exact article or charges of which the alleged balance consisted. The defendant, however, did not demur, but, on the contrary, moved to rule out all the testimony of the plaintiff Crawford as to the amount due the plaintiffs. Some of this testimony was legal and competent, and as the court could not rule out all of it without ruling out that which was legal, as well as that which might be illegal, the court properly refused the motion, and the defendant lost the benefit of the point. Considered in its last analysis, and tested by the testimony adduced in behalf of the plaintiffs, their method of keeping books was simply evidence of the fact that, in the absence of any direction on the part of the defendant, they applied payments made by him each year to the oldest items of their account against him. In the absence of direction by the debtor, the creditor has the right to apply payments made to him, where there are several items or several accounts, to such one or more of them as he may elect. The debtor first has the right of election as to the application of the payments made by him. If he does not choose to exercise this right, it falls to the creditor, and it appears that in this case the evidence authorized the finding that the creditors did so apply all payments made by their debtor, the defendant.

We agree with counsel for the plaintiffs in error that it is not a question of mutual accounts. There can be no mutual accounts, as we have heretofore held in *Smith v. Hembree*, 3 Ga. App. 510, 60 S. E. 126 (2), unless each party has extended credit to the other, and each has been indebted to the other for some service or article of value. In this case Crawford & Maxwell had never at any time gotten anything from Hobbs on the faith of their credit or financial standing. They only received payment from Hobbs for what he was due to them.

Judgment affirmed on the main bill of exceptions; cross-bill dismissed.

GEORGIA RY. & ELECTRIC CO. v.  
DOUGHERTY. (No. 1,071.)

(Court of Appeals of Georgia. July 31, 1908.)

1. TRIAL—APPLICATION OF PERSONAL KNOWLEDGE OF JURORS.

D. sued a street railway company for damages on account of personal injuries received by him. There was, on the trial, a direct conflict in the testimony on the controlling question in the case. D. was the only witness in his own behalf on this point. His testimony was contradicted by three witnesses introduced by the defendant. Counsel for D., in the concluding argument, said he hoped that some of the jury knew D. personally, and said, further, that a man's life, if properly lived, was his best asset. Defendant's counsel objected to this statement, on the ground that a juror could not consider his personal knowledge of the plaintiff, and moved the court to caution the jury to that effect. This the court declined to do. Counsel for the plaintiff then made a similar statement to the jury, and the defendant's counsel again moved the court as above stated, but the court again declined to interfere. *Held*, that the court erred in refusing to instruct the jury that a juror must not consider any personal knowledge that he might have in reference to the plaintiff's character. What passed between the court and counsel might have left the jury under the impression that a juror could consider his personal knowledge of the plaintiff's character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

2. WITNESSES—IMPEACHMENT—EXPLANATION OF CONTRADICTORY STATEMENT.

Where an attempt is made to impeach a witness by proof of contradictory statements previously made, the witness may explain the statement previously made by showing that it was not made with reference to the transaction then being investigated, but was made with reference to another transaction that happened at a different date, and may also give the details of the former transaction for the purpose of showing that they corresponded with the alleged contradictory statements previously made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1261.]

3. APPEAL AND ERROR—REVIEW.

The other assignments of error are without merit.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by D. H. Dougherty against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Rosser & Brandon, Walter T. Colquitt, and Ben. J. Conyers, for plaintiff in error. Arnold & Arnold, Harvey Hill, and C. D. Hill, for defendant in error.

PENDLETON, Circuit Judge. 1. The plaintiff in the court below sued for damages which he alleged he received in alighting from a car of the defendant company. He claimed that the car stopped, and that, while he was in the act of stepping from the car, it suddenly started forward and threw him to the ground. The defendant claimed that the plaintiff stepped from the car while it was in motion and before it came to a stop. The plaintiff supported his theory of the case by his own testi-

mony alone. The defendant supported its theory of the case by the testimony of three witnesses. The judge charged the jury that, under the admissions made by counsel for defendant, it was not necessary for them to consider the question of negligence. It was admitted by defendant's counsel that the plaintiff would be entitled to recover if he received the injuries in the way he claimed to have received them, but it was contended that he would not be entitled to recover if he received them in the way the defendant claimed he received them. It will thus be seen that there was a plain and sharp contest before the jury between the plaintiff's theory and the defendant's theory. The plaintiff's theory was supported by one witness, the plaintiff himself. The defendant's theory was supported by three witnesses. It was therefore necessary to the plaintiff's recovery that the jury should give more credit to his testimony than to that of these three witnesses. His counsel, in the concluding argument, stated to the jury: "Gentlemen, I don't know whether any of you are personally acquainted with the plaintiff, but I trust you are." Counsel for the defendant appealed to the court to stop this line of argument, on the ground, among others, "that the jury could not legally consider their personal knowledge of the plaintiff's character and reputation." The court declined to interfere, and counsel for the plaintiff continued: "Gentlemen, I hope that some of you do know Mr. Dougherty. A man's life, if properly lived, is his most valuable asset. No noble life was ever lived in vain. If there should arise a question of veracity between Gen. R. E. Lee, on the one side, and two or three like myself, and Ben Conyers and Walter Colquitt, on the other, you would, and ought to, believe Gen. Lee rather than a whole cow pen full of us." Defendant's counsel then again moved the court to stop this line of argument, and to grant a mistrial, or caution the jury against giving consideration to their personal knowledge of the plaintiff's character; but the court overruled this motion, and allowed counsel to proceed with the same line of argument.

What was the meaning of counsel's statement to the jury? It was, in effect, this: "In this sharp conflict between Mr. Dougherty and three witnesses, I trust there are some of the jury who knew Mr. Dougherty personally. I hope some of you know him. A man's life, if properly lived, is his most valuable asset, and I feel sure that, if you know that life, you will believe him in preference to all three of these witnesses who testify against him." Plaintiff's counsel say there was no intimation as to whether Mr. Dougherty's character was good or bad. Certainly the jury would not suppose that he was "hoping" that they would know something about the plaintiff that was bad. They also contend that Mr. Dougherty's character was in issue. Suppose it was. That issue

ought to be tried, like all other issues, by the testimony. Again, it is claimed that the presumption was that Mr. Dougherty's character was good. It is quite evident that counsel was not calling the attention of the jury to presumptions. There were three other witnesses who had presumptions in their favor. Something that the other witnesses did not have in their favor was what was needed, and what was evidently being sought after. We are not, however, considering this statement of counsel from any of these standpoints, but from the standpoint that what passed between the defendant's counsel and the court, in view of the statements made, would authorize the jury to infer that a juror might consider his personal knowledge of the plaintiff's character. At the common law, a juror was permitted to consider his personal knowledge of the plaintiff, the witness, and the facts. This resulted from the fact that the jury came from the vicinage, for the reason that they were supposed to know the parties, the witnesses, and the facts. In *Rogers v. King*, 12 Ga. 229, there is an obiter to this effect, which seems to be followed in *Anderson v. Tribble*, 66 Ga. 584, *Head v. Bridges*, 67 Ga. 227, and *Howard v. State*, 73 Ga. 84. These cases were reviewed and overruled in *Chattanooga, Rome & Columbus Ry. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853; the court holding, that jurors must not consider their personal knowledge of the witnesses. This decision was made in 1892, and was codified by the compilers of the Code of 1895, and appears as section 5337, as follows: "A juror shall not act on his private knowledge respecting the facts, witnesses or parties, unless sworn and examined as a witness in the case." In *Savannah, Florida & Western Ry. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85, this section is cited to support the proposition that a juror could be introduced as a witness; as is also the case of *Chattanooga, Rome & Columbus R. Co. v. Owen*, supra. Section 5146 of the Civil Code of 1895 deals with the question of the credibility of the witnesses, and provides that the juror may consider, along with many other things, in passing upon the credibility of the witnesses, "their personal credibility, so far as the same may legitimately appear from the trial." The personal knowledge of the juror does not legitimately appear if the juror is not sworn and examined in the case, and if a verdict is based on that knowledge, in a case in which he is not sworn as a witness, it is based on that which is dehors the record. When counsel for the plaintiff, in the concluding argument, expresses the hope that some of the jury may have a personal knowledge of the plaintiff, who has been sworn as a witness in his own behalf, and opposing counsel object, on the ground that a juror should not consider his personal knowledge of the plaintiff, the court ought to caution the jury against considering any personal

knowledge that any of their number might have as to the plaintiff's character.

2. The defendant introduced the conductor as a witness. He testified that the car was moving at the time the plaintiff stepped off, and that the plaintiff stated to him as soon as he got up, after having fallen, that the company was not at fault; that he had made a mistake in supposing that the car had stopped when it had not. The plaintiff was reintroduced as a witness, and admitted that he had a conversation with a conductor in substance as stated, but testified that it was at another time. He stated that on a former occasion he stepped off the car while it was in motion, and he went into details of the former transaction to show that it was not the injury for which he was then suing. The defendant objected to all of this testimony, on the ground that it was hearsay, irrelevant, and a self-serving declaration. The court allowed the testimony, and we think correctly. It was a difference of recollection between the witnesses as to the dates of the occurrences. If A. testified that B. made a statement to him on a given date, B. would certainly be allowed to admit the statement, but deny the date, and to go further and show that he was a thousand miles away on the date in question, in a distant city, and go into particulars to show that he could not be mistaken about the date. It has been held that a witness may explain a contradictory statement by showing that he was drunk when it was made, or that he did not understand the full effect of the English language, or that the scrivener did not correctly take down the statement. *Jessee v. State*, 20 Ga. 156, supports the last proposition. It would seem to be clear that the witness could deny the date of a contradictory statement, and that it referred to the transaction in question, and state the transaction that it did refer to. Judgment reversed.

Judge PENDLETON, of the Atlanta circuit, presiding by designation of the Governor in lieu of HILL, C. J., disqualified.

POWELL, J. (specially concurring). If the Legislature, or one of those courts by whose decisions I am judicially bound, should declare that twice two are five, I would not know, in the law of the next case coming before me and involving mathematics, whether three times three should be declared to be six or some other number. Such inconsistencies frequently harass my judgment and always leave me in doubt. Our Supreme Court, and the Legislature, through the Code, have declared that the jurors shall not act upon personal knowledge of the character of the parties and the witnesses. Ideally speaking, this is possible; practically and psychologically considered, it is impossible. The jurors as human beings, in passing upon the credibility of the witnesses, necessarily must be, and in all cases are, to a greater or less de-



gree, affected by whatever knowledge they personally possess as to the character of the persons testifying. Shall we say, then, that an intelligent lawyer (knowing, as he does, that, despite the mandate of the law to the contrary, the jurors will necessarily, to some extent, use their private knowledge if they have any) must absolutely ignore this practical feature of his case? May he not candidly assume this truth in his discussion of the case to the jury? Suppose Mr. Hill had said to the jury: "The law forbids that you should act upon your personal knowledge of the character of the witnesses; but I know that in a large degree this is psychologically impossible, and I congratulate myself, as counsel for the plaintiff, who has testified in his own behalf, that I am to suffer no disadvantage from this fact, in that I feel sure that whatever personal knowledge you possess and may use will merely corroborate, and not tend to detract from, that good character which the law allows you to presume he possesses." Would this have been improper? It is conceded that, in the absence of evidence showing to the contrary, the law presumes that every party and witness is of good character, and that this presumption is sufficient of itself to justify counsel in urging to the jury, or in assuming before the jury, that the party or witness is of good character. See *Bennett v. State*, 86 Ga. 404, 12 S. E. 808, 12 L. R. A. 449, 22 Am. St. Rep. 465.

It is conceded that in this case it was legitimate to point to the fact that the plaintiff had lived in the community throughout a long number of years and had been engaged in an honorable occupation, for these things appeared from the evidence. From this circumstance the presumption of his good character was strengthened, for, if his life had not been honorable, his bad character would thereby have been so much the more easily capable of proof by the defendant. There was no evidence of his bad character. Nothing on the trial indicated it. His good character was therefore a fact established in the case—a fact of which the jury were required to take cognizance, even under the most ideal view of the jury's prerogative in such matters. If the remarks of the plaintiff's counsel in the present case are to be construed as urging the jury to act upon their private knowledge and find that the plaintiff was of good character, he was merely asking them to reach, through that practical process which he as a reasonable man knew they would use, the same result as they should necessarily reach by the theoretical process which the law prescribes. If the actual and the theoretical truth in a given case are demonstrated to be the same thing, I cannot see how either the opposite party or the ultimate ends of justice can be very much hurt by the application of the one where the other is required. Now, if Mr. Hill had said to the jury, of the witnesses for the opposite side, literally, or in substance: "Gentlemen, they are presumed to be of good character, but

in this case they are not telling the truth. We have not attacked their characters by proof, but I hope you know them personally, for your personal knowledge will not corroborate the presumption which the law raises in their favor"—then there would have been an attempt to array the actual against the theoretical truth, and the court could logically say: "This is juridic error." I think that counsel should be allowed considerable latitude in argument, provided they do not attempt to bring into the case illegitimate extraneous facts. Matters which the law authorizes to be presumed are not extraneous, nor are those things which are within the range of the ordinary and common observation of all thinking men. At one time there was a tendency, in the decisions of our Supreme Court, to hold counsel to what, to my mind, seems to be undue strictness; but there is a tendency in the later decisions of that court to allow greater latitude. My personal judgment as to what is best leads me to desire to do nothing to counteract this tendency in what seems to be the right direction, and out of this consideration I am strongly led to dissent in this case. However, this verdict is not strongly supported by the evidence, and, since what the French would call the tout ensemble of this incident of the trial may have unfairly prejudiced the defendant's case, I will specially concur. See, in this connection, the concluding remarks in the *Bennett Case*, 86 Ga. 408, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465. If counsel for the defendant had desired the jury to be instructed that they had no right to act on personal knowledge of the witness or party, a timely written request would have availed them.

#### ALABAMA CONST. CO. v. CONTINENTAL CAR & EQUIPMENT CO.

(Supreme Court of Georgia. July 24, 1908.)

##### 1. PLEADING—AMENDMENT OF DECLARATION.

Where a declaration in attachment alleged that the defendant was indebted to the plaintiff in a stated amount for the purchase money of certain cars, as shown by a statement of account attached, and the account was for the price of certain dump cars, it was not competent to amend such a declaration by merely alleging that on a certain date the defendant wrote to the plaintiff a letter, of which a copy was set out, and in which it was stated that "we will remit to you for our first payment by New York exchange." Standing alone, this did not set out any contract, either as being that on which the account was based, or as an effort to plead a new and independent cause of action. Nor was it proper to set out such letter in the pleadings, merely because it might become admissible in evidence in the progress of the case.

##### 2. SALES—ACTIONS FOR PRICE—EVIDENCE—ADMISSIBILITY.

Under a declaration in attachment, based on an account for the price of certain cars, evidence was admissible to show that the cars were in the possession and use of the defendant shortly after the date of the sale.

##### 3. WITNESSES—CROSS-EXAMINATION—SCOPE.

An opportunity for a thorough and sifting cross-examination should be allowed, but the

presiding judge may restrain useless and unnecessary repetition of questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 931-948, 990.]

**4. EVIDENCE — PAROL EVIDENCE AFFECTING WRITINGS—TIME ESSENCE OF CONTRACT.**

Where a written contract for the sale of personal property fixed a time within which shipment should be made by the vendor to the purchaser, parol evidence was admissible to show that time was of the essence of the contract.

**5. SALES—ACTIONS FOR PRICE—NATURE AND FORM.**

Where suit was brought for the price of personal property, on an open account, although it appeared that there was a written contract for the sale of the property, yet if the evidence for the plaintiff showed that there had been complete performance by the vendor, and nothing remained to be done but for the defendant to pay the purchase money, a nonsuit was properly refused.

**6. SAME—EVIDENCE—SUFFICIENCY.**

The evidence was sufficient to make out a prima facie case, and the overruling of a motion for a nonsuit was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1056-1059.]

**7. CONTRACTS—PROOF OF EXECUTION—METHOD.**

The execution of a written contract cannot be proved by the attesting witness by a mere general assertion that it is the contract covering the transaction in question. After proving the execution, if it is necessary to identify the personal property described in it, this may be done by parol.

**8. SALES—WAIVER OF DELAY IN DELIVERY.**

If a vendor agreed to ship certain personal property within a stated time, and did not do so, but shipped it some days later, and thereafter wrote to the purchaser that he had made the shipment, to which the purchaser replied that he would remit to the vendor for the "first payment" upon the arrival of the cars, and there was no evidence of any consideration for this statement in the letter, or that the vendor had acted upon it or had done anything in reliance upon it, this did not constitute, as matter of law, such a waiver of any right on the part of the purchaser to claim damages resulting from a delay in the shipment as to authorize the presiding judge, in a suit by the vendor against the vendee for the purchase price, to refuse to admit evidence on the subject of damages, and to direct the jury to find a verdict in favor of the vendor for the full amount of the purchase price.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Attachment by the Continental Car & Equipment Company against the Alabama Construction Company. Judgment for plaintiff, and defendant brings error. Reversed.

John T. Norris, for plaintiff in error. John W. & Paul F. Akkin and Clayton B. Blakey, for defendant in error.

**LUMPKIN, J.** The Continental Car & Equipment Company sued out an attachment against the Alabama Construction Company for the sum of \$2,161.70, principal, alleged to have fallen due in three installments, together with interest thereon. The declaration in attachment alleged that this amount was due as purchase money of certain goods, as shown by a statement of account attached,

and that the debt was just, due, and unpaid. Attached to the declaration was an account dated November 18, 1904, for "Twenty 4-yard 'Continental' Diamond Frame Two Way Dump Cars, at \$112.00, \$2,240.00," with a credit of \$78.30 allowed on account of excess freight, leaving a balance of \$2,161.70. The defendant filed an answer, denying the substantial allegations of the plaintiff's declaration. On the trial the plaintiff was allowed, over objection, to amend his declaration by adding an allegation that on November 22, 1904, the defendant wrote to the plaintiff the following letter: "Your letter of the 18th received and noted. Will say in reply that as soon as the cars arrive we will remit to you for our first payment by New York exchange. I trust the cars will arrive either to-day or to-morrow." The amendment contained no other allegation except as to the writing of this letter. Evidence was introduced by both sides. At its close the presiding judge directed a verdict for the plaintiff, and the defendant excepted.

1. It is not clear on what theory the trial judge allowed the amendment to be made to the declaration. The suit was on an open account. It might have been amended by setting out the contract of purchase, not for the purpose of counting on it as a new and independent cause of action, but to disclose and allege pertinent facts and circumstances under which the sale and delivery were made. *Tumlin v. Bass Furnace Co.*, 93 Ga. 595, 20 S. E. 44; *May Mantel Co. v. United States Blow-Pipe Co.*, 93 Ga. 778, 21 S. E. 142. But the amendment here allowed was not of that character. It was not alleged that the letter contained the contract for the purchase of the cars. On the contrary, it showed on its face that this was not so. It did not state the terms of the contract, but referred in general terms to "our first payment." It is apparent that it neither was nor was alleged to be the contract itself, and it did not set out or elucidate the terms thereof. Standing alone, it merely promised to make a first payment on arrival of the cars. If it was pleaded for the purpose of meeting an anticipated defense and of setting up a waiver, the amendment did not state the terms of the contract, nor what effect this letter was claimed to have, nor any reason why it was a proper matter to be pleaded. Whether the letter may have had evidential value in rebutting a defense, or not, is not the question. Standing as it does, the amendment seems to be nothing more than the pleading of a piece of evidence, and, on objection, it should not have been allowed.

2. Evidence was admitted to show that the cars were in the possession and use of the defendant very shortly after the date of the sale to it. In this there was no error. It was admissible as tending to establish the indebtedness. Objection was also taken to the admission of evidence showing that the defendant was using a part of the cars, that

they were worth \$112 each, and that the witness who testified to such facts could not say positively how long the defendant had been using them. At least a portion of this evidence was admissible as just above held, and the objection was to it as a whole.

3. Counsel for the defendant had very thoroughly cross-examined a witness for the plaintiff on the subject of whether the plaintiff had fully performed its contract, and there was no error in refusing to allow him to repeat substantially the same questions. Thorough and sifting cross-examinations should be allowed, but this does not mean that counsel have an unrestricted right to repeat questions to a witness. The judge may restrain useless and unnecessary repetition.

4. The written contract for the purchase of the cars, introduced by the defendant, provided that the plaintiff should ship them within six days from the date of the contract, or sooner if possible. One material question in the case was whether time was of the essence of this contract. It is declared by our Code (Civ. Code 1895, § 3675, par. 8) that: "Time is not generally of the essence of a contract; but by express stipulation or reasonable construction, it may become so." This accords with the general rule in equity. If there is an express stipulation to that effect, there is no room for construction. If a time is fixed, but there is no express statement that it is of the essence of the contract, it is open to construction to determine whether such is the case or not. Parol evidence is admissible to show that the proper construction is that time is of the essence of the contract. At first blush, it might seem that this was an infraction of the rule prohibiting the introduction of evidence to supplement or contradict a written contract, but in fact it is not so. If it were an absolute rule that, in the absence of an express stipulation to that effect, time should never be of the essence of the contract, parol evidence would not be admissible; but, as will be seen from what is said above, the rule is not an arbitrary and unvarying rule of law. Time is not "generally" of the essence of the contract. Presumptively it is not so, unless there is something in the contract to show the contrary; but, if the contract names a date, this presumption is rebuttable by showing that time is of the essence of the contract. It will be observed that this does not conflict with the contract, which declares that a thing shall be done at a named time. To show that it must be done at that time is not to contradict, but rather to support, the contract and show that it means just what it says. It neither adds to the contract nor takes from it, but aids in construing it, by showing that the parties regarded the statement of time made in the contract itself as vital or essential. *Van Winkle & Co. v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299 (4); *Thurston v. Arnold*, 43 Iowa,

43; 3 Gr. Ev. (16th Ed.) § 366; *Hammond on Contracts*, § 445.

5.6. A motion for a nonsuit was made, on the ground that it appeared that there was a written contract between the parties touching the subject-matter of the account, and that the evidence did not show that the plaintiff fully performed or completed such contract, in that it did not ship the cars within six days from the date thereof, as agreed, and that whatever rights the plaintiff had against the defendant must have been predicated and based on a suit on the contract, and not on an open account. It is too well settled in this state to be discussed as an open question that, though there may have been a written contract for the sale of personalty, yet, where suit was brought on an open account for the amount claimed to be due, and the evidence for the plaintiff was to the effect that it had fully complied with its contract, and nothing remained to be done but the making of a money payment by the defendant, a nonsuit was properly refused. *Southern Printer's Supply Co. v. Felker*, 125 Ga. 148, 54 S. E. 193, and citations. Here there was sufficient evidence to make out a prima facie case. If the plaintiff should have introduced the contract, in order to show what were the terms which he claimed to have performed, and what was the price of the cars, the contract was afterwards introduced by the defendant; and if a nonsuit should have been granted when the motion was made, but the necessary and omitted evidence was afterwards supplied by either party, the refusal of a nonsuit will not require a reversal. Defendant's counsel insisted that the evidence showed a failure of complete performance, but the evidence for the plaintiff did not show such a failure as would necessarily destroy a right of recovery and require a nonsuit. It showed the shipment of the cars by the plaintiff and their receipt and use by the defendant; that the account was just, due, and unpaid; that, after receiving the cars, the president of the defendant was asked why he did not remit the first payment, and answered that he was going to Alabama, and would remit from there; and, also, that just before the trial he admitted that he had not paid the debt. The letter set out in the amended declaration is not included in the brief of evidence, but the presiding judge certified that it was considered by him, "as conceded by both parties, as in evidence." We understand this to mean that both parties agreed to treat this letter as in evidence. After the plaintiff closed its case in chief, the defendant introduced some testimony, and then renewed the motion for a nonsuit; but the function of evidence for the defendant is to overcome the case made by the plaintiff, not to furnish ground for a nonsuit.

7. The witness who attested the written contract between the parties was placed on the stand, and testified "that is the contract covering the cars in question." The court

held that this was not the proper mode of proving the execution of the contract, but that the signatures should be proved. This was right. The execution of the contract cannot be shown by the mere statement of an attesting witness that "this is the contract" covering the matter in dispute. After proving the execution, if there is a question as to whether the contract applies to the cars involved in the suit, this can be shown; but the effort appears to have been to prove the contract in the general way referred to.

8. The presiding judge directed a verdict, holding that the legal effect of the letter set out in the amendment to the declaration was necessarily to waive any right of the defendant against the plaintiff to damages on account of delay. The defendant had filed a plea claiming such damages. The judge declined to allow evidence on the subject of damages, because he entertained the view stated, though saying that he had grave doubts on the subject. We appreciate the doubts which our worthy brother of the circuit bench entertained, but we have been unable to arrive at the same solution of them as he did. It must be remembered that a verdict is not to be directed except when there is no conflict, or material points in the evidence, and that introduced, with all the reasonable deductions or inferences therefrom, demand a particular verdict. Civ. Code 1895, § 5331. Waiver is a similar doctrine to that of election. If a party to a contract not in default has the right, by reason of the conduct of the other party who is in default, to elect between treating the breach as a discharge of the contract, or treating the contract as in full force and effect, he may, if he so chooses, take the latter alternative. If he elects so to do, his right to treat the contract as discharged is thereby waived. A waiver may have reference either to the question of discharge of the contract, or to the question of claiming damages by reason of a breach. The general principles applicable to both are similar, but the facts upon which they operate are so different that different results are often reached. If there is a consideration for waiving damages, an express or implied agreement to that effect is valid and will be binding. If the party who is not in default, by his acts or conduct, induces the one who is in default, before performance has been had, to perform in a certain manner, generally he will be estopped from claiming damages, or if the party not at fault leads the other to believe that he will not insist upon strict performance, or requests the breach, or renders performance impossible in the time or manner specified in the contract, he cannot thereafter recover damages on account of a departure from strict compliance thus caused. Acquiescence may sometimes amount to waiver. Mere acceptance of property purchased, after the time for delivery provided in the contract, without more, will not amount to a waiver of any claim of damages on account of

delay. The party waiving must generally have knowledge of the facts which constitute the breach. The knowledge may be actual or constructive. One cannot be willfully ignorant and relieve himself from a waiver because he did not know. Waiver includes the idea of intent, express or implied; but legal intent will often be presumed from one's conduct, and sometimes a party will not be allowed to overcome this by setting up what was his private purpose or intent. See 3 Page on Contracts, § 1494 et seq., and section 1506 et seq.; *Van Winkle v. Wilkins*, 81 Ga. 94, 7 S. E. 644, 12 Am. St. Rep. 299 (7); 29 Am. & Eng. Enc. Law (2d Ed.) 1091 et seq.; *Poland Paper Co. v. Foote & Davies Co.*, 118 Ga. 458, 45 S. E. 374 (1). The letter relied on as a waiver was dated November 22, 1904, and was in reply to one dated November 18th, written to the defendant by the plaintiff, setting out the shipment of the cars, and asking that remittance be made of the first installment, in a draft on New York. On November 16th the plaintiff had written to the defendant, stating that the cars were shipped that day. Thus the letter relied on as a waiver was apparently written after the cars had been shipped, and there was nothing to show that there was any consideration for it, or that the plaintiff acted on it in any way, or changed its situation, or relied on it. See *Pearson v. Brown*, 105 Ga. 802, 31 S. E. 746. It cannot be said, as matter of law, that this was a waiver of any right to claim damages, under the evidence as it appears in the record, so as to authorize the presiding judge to direct a verdict.

The defendant further sought to show that its president, who made the contract, could not read or write, and depended on his bookkeeper or clerk for information, and that at the time he signed the letter he did not know the exact amount of the damages. It appears, however, from evidence for the defendant, that he made the contract, informed the plaintiff's agent of the necessity for prompt delivery and of the danger of loss or injury from delay, and insisted on having a time fixed when the cars should be shipped, and that time should be of the essence of the contract. So far as the question of knowledge is concerned, if its president knew all the essential facts, and that there was a breach, a mere negligent failure on his part to inquire of his own agent or bookkeeper as to the exact extent of the damage would not avail the defendant.

There are some other exceptions to refusals on the part of the court to allow certain questions to be asked by counsel for the defendant of a witness introduced by him, but it is not shown what was expected to be elicited from the witness, and the exceptions are not sufficiently taken.

We have carefully considered the brief and argument presented by counsel for the defendant in error, but we think that what

is said above is controlling and necessitates a reversal.

In addition to discussing the correctness of the rulings of the presiding judge, it was insisted on behalf of the defendant in error that, if it should be held that the judge erred in holding that the letter set out in the amendment to the plaintiff's petition was a conclusive waiver of any right to claim damages by the defendant, nevertheless, much, if not all, of the evidence rejected was objectionable, some of it for one reason, some for another, and that, under the evidence introduced by both parties, a direction of a verdict was proper. It was stated in the brief of counsel for the defendant in error that: "Whether the defendant's letter was or was not a waiver of damages, yet, inasmuch as the defendant failed to introduce any competent testimony whatever showing any recoverable damages, it is wholly immaterial whether the defendant did or did not waive damages." It is true that some of the assignments of error contained in the bill of exceptions were not sufficiently made, and also that some of the evidence offered on behalf of the defendant may have been objectionable for various reasons; but it is evident, from a careful inspection of the bill of exceptions, that the portions of the evidence rejected were not ruled out because of the reasons now suggested. Had they been so, counsel offering such evidence might have had an opportunity to have reshaped the questions and, in some instances at least, to have met the objections now suggested. The judge held broadly that no evidence was admissible for the purpose of proving damages on behalf of the defendant, because, in his opinion, the letter from the defendant's president to the plaintiff was a binding waiver of any claim of damages, and precluded any effort to recover them. That this was the basis on which the judge acted is apparent from statements made by him during the trial. In ruling on the motion for a nonsuit he said: "It makes no difference if they [the plaintiff] shipped them [the cars] 6 days or 600 days thereafter; if you accepted them, you are bound by it." Again, he said: "If the defendants accepted these cars and promised to pay and waived their rights, they would be bound. The question is: Have they waived them? There would have been no trouble at all if you had not written that letter. I have grave doubts about it, but I believe the legal effect of this paper is to waive the right. I think, in legal contemplation of law, that paper is a waiver, and Mr. Lacy saying 'I will send first payment in accordance with contract' seems to be a waiver." It is true that this does not appear from the bill of exceptions to have been a ruling on the admissibility of specific evidence when offered, but it tends to show the basis on which the judge rejected the evidence as offered. Later, when the president of the defendant company was on the stand, its

counsel stated to the court that he offered to prove by this witness that the defendant company, by reason of the delay of the plaintiff company, suffered at least \$1,500 or \$2,000 actual damages. It was recited that "the court refused to allow defendant's counsel to prove said damages, and overruled said offer." Still later, in announcing that he would direct a verdict, the presiding judge said: "I rule out all the testimony of Mr. Delorm as to damages, because this (referring to the letter) was a waiver of all right to damages"—and thereupon directed a verdict for the plaintiff. These quotations show that the rejection of the evidence and the direction of the verdict were not based on the form in which the questions were put, or because some of the evidence offered may have contained an expression of opinion, or for other like reasons, but solely because of the view he took of the effect of the letter from the defendant to the plaintiff. It would be too restricted and technical a view, under these circumstances, to affirm his judgment for reasons relating to such possible objections.

If the defendant is entitled to recover damages on account of the delay, it must be damages of the character pleaded, and such damages must be proved by competent evidence. On the next trial, any inadmissible evidence can be excluded on proper objection. When the evidence shall have all been introduced, the court may then proceed in such manner as may be authorized, in the light of the case made. As it now stands, however, there must be a reversal, and a new trial, not limited or restricted by the idea that the letter, a copy of which was attached to the erroneously allowed amendment, necessarily controlled the case.

Upon the whole, we think the court erred as indicated above, and that a reversal must result.

Judgment reversed. All the Justices concur.

#### CENTRAL OF GEORGIA RY. CO. v. MOTE. (Supreme Court of Georgia. July 24, 1908.)

##### 1. APPEAL AND ERROR—REVIEW—DISCRETION OF LOWER COURT—DIRECTION OF VERDICT.

While a trial judge may, within the restrictions prescribed by Civ. Code 1895, § 5331, direct a verdict, this court will in no case reverse a trial court for refusing to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3846.]

##### 2. TRIAL—VERDICT—SUFFICIENCY.

Where, in a suit for personal injuries against a railroad company, the damages were laid at \$20,000, and the evidence was sufficient to authorize a verdict of \$10,000, and the jury returned a verdict: "We, jury, find for the plaintiff the sum of ten thousand (10,000.00) and cost of suit"—such verdict, where nothing otherwise appears, will be construed to be a verdict for \$10,000, and the judgment thereon for \$10,

000 should not be set aside on the ground that it was not authorized by the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 786.]

### 3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a suit for personal injuries against a railroad company, where the negligence was alleged to be due to the use of an unsafe bolt, without proper inspection, which was visible only from under the running board of the engine, and it appeared from the testimony of the plaintiff, who was under no duty of inspection, that, before the commencement of the trip on which he was injured, he saw the bolt in question, and it appeared to be in proper place and condition, it was not sufficient cause for the grant of a new trial that the plaintiff was permitted to testify in his own behalf, in effect, that the duties of the fireman with respect to cleaning the engine related to that part of the engine which was above the running board, over the objection that such testimony tended to restrict the rule of the company which provided that his duties with respect to cleaning the engine extended to the entire machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171-4177.]

### 4. SAME—EXCLUSION OF EVIDENCE—FACTS OTHERWISE APPEARING.

Whether or not certain testimony of witnesses which was rejected by the court should have been admitted, such ruling did not injure the defendant, where the same witnesses gave the same testimony in another part of their evidence, and it was before the jury in substance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200-4203.]

### 5. TRIAL—INSTRUCTIONS—CONSTRUCTION.

It will not require the grant of a new trial that the judge, while charging the jury upon the degree of care required of railroad companies in the matter of furnishing safe machinery to their employees and making proper inspection thereof, charged that such companies were bound to "reasonable care," where in other parts of his charge the term "ordinary care" was properly defined and was employed in connection with the term "reasonable care"; both terms being used in the same sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

### 6. SAME—REMARKS OF COURT.

Where, during the progress of counsel's argument in conclusion, persons in the courtroom applauded the speech, and the judge did not of his own motion suspend the case and rebuke the persons so applauding and warn the jury to disregard the incident, and there was no motion by opposing counsel for a mistrial, but a request was made by him that the court call the attention of the jury to the impropriety of the applauding and warn them to disregard the incident, it was not sufficient cause for the grant of a new trial that the judge prefaced his remarks by stating to the jury, "I am requested to call your attention to the applause," etc., after which he proceeded in an appropriate manner to warn the jury against being influenced by the incident, and to impress upon them that their verdict should be based solely upon the evidence and should not be influenced by any other cause.

### 7. SAME—INSTRUCTIONS.

The court did not commit error, while giving certain charges as requested, to add thereto the converse of the propositions contained in the requests and proper modifications and elaborations thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 668.]

### 8. SAME—SUBJECT-MATTER—CREDIBILITY OF WITNESSES.

In this case it was not erroneous for the judge to refuse to instruct the jury: "I charge

you, gentlemen of the jury, that the evidence introduced before you of the railway employees cannot be absolutely discarded or disregarded by you, and should not be, unless you find the evidence introduced before you discredits or contradicts them. In that event you should give such weight to their evidence as you think it deserves. You should not disregard the evidence of any witness, which is not discredited either by evidence or circumstances."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 414-417.]

### 9. SAME—REQUESTS TO CHARGE COVERED BY GENERAL CHARGE.

There was no exception to the charge of the court sufficient to require a reversal of the judgment for any reasons assigned, and certain requests to charge which were refused by the court, in so far as they contained sound legal propositions applicable to the case, were covered by the general charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

### 10. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.

Under the facts of this case, a verdict for \$10,000 was not excessive.

### 11. MASTER AND SERVANT—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

### 12. WORDS AND PHRASES—"ARBITRARILY."

The word "arbitrarily" means in an arbitrary manner, and "arbitrary," as defined by the Standard Dictionary, means: "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 487.]

### 13. SAME—"ABSOLUTELY."

The word "absolutely," as defined by the Standard Dictionary, means: "In an absolute degree or manner; without limitation; completely."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 43-45.]

Error from Superior Court, Muscogee County; J. H. Martin, Judge pro tem.

Action by C. M. Mote against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff was employed by the defendant as a fireman to serve in the operation of its locomotive engines. On the 19th day of May, engine No. 1,418, upon which the plaintiff was employed, left Columbus, Ga., on a trip to Montgomery and return. About 2 o'clock a. m. on the 22d of May, when the plaintiff's service connected with the round trip was about to be concluded, but just before the engine was delivered to the yard crew in Columbus, while running at about four miles per hour, the plaintiff fell from the engine and sustained serious injuries. Attached to the engine was a tender, and between the two was a space of about eight inches. The duties of the plaintiff required him to be constantly over this space, and as an instrument of safety for the protection of the plaintiff and the engineer a metal apron

had been provided which covered the space between the engine and the tender. The apron was fastened to the tender by means of certain bolts arranged hinge fashion, so that the apron could be moved up and down. One tongue of the bolt was bolted to the floor castings of the engine, while the other end was inserted through the apron and made fast to the apron by means of certain taps which were screwed onto the end of the bolt which went through the apron. It was so arranged that the taps would be under the bottom of the apron and would not be visible from the plaintiff's place of work while the apron was in position. It was contended that the threads to the bolt which passed through the apron were badly worn, and that on account of such condition the tap came off, and the hinge became loosened, and the apron worked out of position so as to leave the space between the engine and the tender partly exposed, and that while the plaintiff was engaged in work his foot slipped in the hole, and in his effort to recover he fell and suffered the injury. It was contended that the defendant had not exercised ordinary care in its inspection of the engine and the apron in question, and that it was negligent in furnishing an appliance defective in the manner indicated, and in failing to discover the defect. On a former trial of the case the plaintiff recovered a verdict for \$3,000, and the judgment refusing to grant a new trial was reversed by this court. 120 Ga. 593, 48 S. E. 136. In that case it was held that the plaintiff had shown himself to be free from fault, and that upon proof of the injury the burden of proof was upon the defendant to show that its agents and servants had exercised all ordinary and reasonable care and diligence with respect to the matters which were charged to be grounds of negligence in the declaration, and that, the defendant having shown by uncontradicted evidence that the agents and servants of the defendant were in the exercise of all ordinary care and diligence in respect to the matters of negligence alleged, the burden of proof imposed by law upon the defendant was supported, and the plaintiff could not recover. On the next trial in the court below the plaintiff and defendant introduced substantially the same evidence as had been introduced on the former trial; but at the conclusion of the defendant's evidence the plaintiff, in rebuttal, introduced a witness who had not before been sworn as a witness in the case. Among other things, this witness testified, in effect: That he was a helper to a night foreman in the shops of the defendant at Columbus at the time the plaintiff received his injury; that his hours of work were from 7 o'clock in the evening to 7 o'clock in the morning; that soon after the plaintiff had been hurt, to wit, between 4 and 5 o'clock in the morning, he had worked on the apron and fixed the bolt. With reference to these matters, the

witness, among other things, said: "I worked on engine 1,418 at that time. I worked on her apron and fixed a bolt on the left-hand side. Me and Mr. Cooper first taken the bolt and put a washer and two nuts, which is called a jam nut, on it. After we done that we found there was not enough on the bolt to hold the nuts, and I spoke to him about it, and he looked at it. He had me to take that bolt out. \* \* \* The apron on that engine was attached in this way: It was fastened with a hinge and two bolts, you know, at each end, that went through the casting of the engine something like this [referring to model], put it on here, and the washer goes on here at the end [indicating on the model]. The left side of the apron was loose. It was plumb loose when I found it. The bolt was plumb loose, out of the casting, and no nuts on it at all. \* \* \* The reason I didn't leave the two nuts I first put on the bolt, the bolt was not sufficient to hold the nuts on it. The bolt had worked up and down so the threads were stripped, worked up and down and backwards and forwards, stripped. Then, after looking at that bolt, this here bolt was worn so bad [referring to bolt that attached the bolt that went through the casting to the hinge] it was not sufficient to hold the nut, and we took a chisel and cut that out and put a five-eighths bolt in there and a nut on it, and then tapped the nut to keep it from coming off. \* \* \* The hinge at that time had a rivet on it like the one which is in the hinge you now show me, only the rivet was worn out. It was an old apron. The rivet was about worn out, and I took a chisel and knocked the end of it off and put a bolt in there with a nut on it and tapped the end of it to keep the nut from coming off." On this trial the jury found a verdict for the plaintiff as follows: "We, the jury, find for the plaintiff the sum of ten thousand (10,000.00) and cost of suit." The defendant moved for a new trial on numerous grounds, which, as far as necessary, are stated in the opinion. The motion was overruled, and the defendant excepted. The defendant also made a motion to set aside the judgment, which was entered upon the verdict, which being overruled, the defendant excepted.

Charlton E. Battle, for plaintiff in error.  
Hoke Smith, G. T. Tigner, and Smith & Hastings, for defendant in error.

ATKINSON, J. 1. One of the assignments of error complains of the ruling of the trial judge in refusing to direct a verdict in favor of the defendant upon proper motion at the conclusion of the evidence. While a trial judge may, within the restrictions prescribed by Civ. Code 1895, § 5331, direct a verdict in a proper case, this court will in no case overrule as erroneous a refusal to do so. *W. & A. R. Co. v. Callaway*, 111 Ga. 889, 36

S. E. 967; *Owen v. Palmour*, 115 Ga. 683, 42 S. E. 53.

2. In this suit for personal injuries the damages were laid at \$20,000. The evidence, as will be seen from another division of this opinion, was sufficient to authorize the verdict for \$10,000. The jury returned a verdict in the following language: "We, jury, find for the plaintiff the sum of ten thousand (10,000.00) and cost of suit." There was nothing in the pleadings or evidence to indicate that the plaintiff was seeking a recovery of anything other than dollars. Upon the verdict rendered a judgment was entered for \$10,000. In its motion to arrest the judgment, the defendant insisted that the judgment should be arrested because the verdict did not expressly state the amount in dollars or money that the jury found to be due the plaintiff, and that the judgment rendered for an express amount in dollars was not authorized by the verdict. Considered in connection with the pleadings and in the light of the evidence, no other reasonable construction could be placed upon the verdict than that it was a verdict for \$10,000. By giving the verdict this construction, there was no variance between the verdict and judgment, and the objection urged against the judgment was insufficient to require the court to set it aside. See, in this connection, *Heinkin v. Barbrey*, 40 Ga. 249; *West v. Bank of Americus*, 63 Ga. 230; *Hopkins v. Orr*, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523; *Provo Mfg. Co. v. Severance*, 51 Mo. App. 260; *Gregory v. Gregory*, 10 Mo. App. 589; *Gulf Ry. Co. v. Fink*, 4 Tex. Civ. App. 269, 23 S. W. 330; *O'Docharty v. State* (Tex. Cr. App.) 57 S. W. 657.

3. Certain rules of the company were introduced, and one of them specified the duty of the firemen, as follows: "They must assist in cleaning and polishing their engines every trip and making repairs when required." The following question was propounded to the plaintiff: "What part of the engine did the fireman clean? Answer: "We cleaned above the running board." An objection was made to the admission of the testimony, on the ground that it restricted the rule of the company defining the duties of firemen. It was not contended that the fireman was under any duty of inspection, but the defendant insisted that it was the plaintiff's duty to assist in cleaning the entire engine, which would have imposed duties of cleaning below as well as above the running board, and had he performed his duty as required by the rule the condition of the alleged defective bolt might have been ascertained by him in the performance of his duties. The refusal of the court to exclude the testimony was not sufficient cause for the grant of a new trial. It elsewhere appears in the plaintiff's testimony that on the morning before the commencement of the trip he saw the bolt in question, and that the nut then appeared to be tightly

screwed and in its proper place. Being under no duty to inspect, if there was nothing to put him upon notice of a defect in the bolt, the plaintiff would not be precluded from a recovery because of the latter defect of which he did not know, and where he was not under any duty to inspect. The cleaning of the engine would probably have revealed nothing more than what the plaintiff casually saw.

4. The court, upon appropriate objection, excluded certain testimony of two of the defendant's witnesses, which tended to show that the dropping of the nut from the bolt was the result of the motion of the train, and was one of the ordinary risks which the plaintiff assumed, and that it was not lost on account of any defect in the bolt. It appears that the same witnesses were allowed, without objection, at other times during their examination, to testify substantially to the same effect as the testimony which was excluded. Under these conditions, the ruling of the court was not sufficient cause for the granting of a new trial. *Bertody v. Ison*, 60 Ga. 317; *Southern Ry. Co. v. Ward* (Ga.) 61 S. E. 913.

5. The court charged the jury: "If you believe from the evidence that the plaintiff was injured in the manner set forth in his declaration—that is, that there was a defect in this apron—and he fell in or stumbled over it, as he alleges in his declaration, and was injured, and you further believe from the evidence that he was without fault, then the presumption of negligence arises against the defendant company, and then it is incumbent upon the defendant to relieve itself of that burden by showing either that it was not negligent, or, in other words, that it exercised all reasonable care and diligence in furnishing its machinery and in maintaining it." Error was assigned upon this charge, on the ground that the jury were instructed "that it is incumbent upon the defendant to show that it exercised all reasonable care and diligence in furnishing and maintaining machinery; its duty under the law being to exercise only ordinary care and diligence." The court also charged: "If, on the other hand, you do not believe that he was injured in the manner set forth, or that he was not free from fault, or if you believe that the defendant had exercised all reasonable care and diligence on its part in furnishing the machinery and in maintaining it and having it properly inspected, I charge you that the plaintiff would not be entitled to recover." Error was assigned upon this charge upon the ground that it imposed upon the defendant the burden of "reasonable" care and diligence in furnishing and maintaining machinery; whereas, its duty under the law is only to exercise "ordinary" care and diligence. It will be observed that the same objection was urged to each excerpt from the charge, and that the ground thereof was that the court employed the term "reasonable care," rather than "or-



ordinary care." In other portions of the charge the court properly defined the meaning of "ordinary care," and clearly instructed the jury that the defendant was bound to "ordinary care." That term was used interchangeably with the term "reasonable care," and both were used in the same sense, so that the jury could not have been misled by the instruction complained of. Both words are used in the statute; the language being "ordinary and reasonable care." Civ. Code 1895, § 2321. Under these circumstances, the charge complained of was not sufficient cause for the grant of a new trial, though it would have been better to have followed the language of the statute.

6. It appears from the recital of facts that, during the argument of counsel for the plaintiff, spectators in the courtroom applauded. The defendant's counsel requested the court "to call the attention of the jury, when the charge was delivered, that they were not to be influenced by the applause of the audience and the remarks of counsel, and that such conduct is improper, and should be overlooked by the jury." The court complied with this request of counsel, prefacing his remarks, however, with the statement that: "I am asked to call your attention to the fact that during the progress of the trial there was applause in the courtroom." Error is assigned upon the prefatory remark of the court "that counsel had requested such charge," and it is insisted that the instruction should have been given by the court of its own motion, and the jury should not have been advised of the defendant's request. The judge did not say that he adverted to the fact of the applause at the instance of the defendant's counsel. He merely said: "I am asked to call your attention," without saying by whom; but during the course of the instructions on that point the court warned the jury that they were not to be influenced by anything other than an honest endeavor upon their part to ascertain the truth, that they were to lose sight of the parties, and treat the case as if the issues were between strangers, with only the ultimate object in view of ascertaining the truth of the issue. Under these conditions, we do not think that the prefatory remarks complained of prejudiced the plaintiff in error. Under the ruling in *Patton v. State*, 117 Ga. 230, 43 S. E. 533, it would have been proper for the judge, on his own motion, without any request, to have suspended the case and rebuked the spectators for the disturbance and warned the jury to disregard the incident; but where he did not do so, and there was no motion for a mistrial, and the judge, after request was made, did so warn the jury, it was not sufficient cause for the grant of a new trial that he prefaced his warning by the statement that he did so upon request. It would have been better, however, to have given the admonition without referring to the request.

7. The judge, upon request of counsel for the defendant, charged the jury: "If the

plaintiff in this case was injured by reason of a defect alleged to exist in the machinery or appliances, if this defect in the machinery or appliances, or in the manner in which it was adjusted, could have been ascertained by the plaintiff as well as by the defendant, and if both the plaintiff and the defendant had equal opportunities of discovering such defect in the machinery or appliances, or in the manner of its attachments, on the date that the accident occurred, then the defendant would not be liable for any injury resulting to the plaintiff, and, before the plaintiff would be entitled to recover, it must be made to appear that the master—that is, the defendant company—knew, or ought to have known, of the defects or danger in the machinery or appliances, and the manner in which it was attached; and it must further be made to appear that Mote, the plaintiff, did not know of such alleged defect in the appliance, or the manner of its attachment, and that he did not have equal means with the defendant railway company of knowing such alleged fact; and it must further be made to appear that he could not have ascertained the alleged defect in the appliance, or its manner of attachment, by the exercise of ordinary care, if it should appear from the testimony that the alleged defect in the appliance, or the manner of its attachment to the engine, was open and obvious, or if the plaintiff had equal opportunity with the defendant of discovering its condition, or if he could have, by the exercise of ordinary care, known its condition—then he would not be entitled to recover." After giving this charge, the court added: "In that connection I charge you this: In ascertaining whether or not the plaintiff had equal opportunity with the defendant, you must look to the testimony in the case. You see who the plaintiff was and what his duties were on that occasion, and see whether or not the duty of the defendant was the same as that of the plaintiff in making examinations for the purpose of finding out defects. If it was not the same, or if the defendant company had better means and opportunities of ascertaining these things than the plaintiff, why, then, he would not be charged with the same degree of inspection that the defendant would be." Error was assigned upon the added charge, on the ground that it was a restriction upon the principle of law requested, and had the effect of destroying the force of the request, and, further, because said added part does not undertake to explain or set forth the duties of the plaintiff under the circumstances.

The court also, upon request, charged the jury: "If the jury believe under the evidence in this case that the plaintiff was injured, and in the manner claimed in his petition, and should further believe that such injury was occasioned by a latent or hidden defect in one or more of the appliances furnished by the company to be used by the plaintiff, and if you should further believe that such latent

or hidden defect could not have been discovered by the exercise of ordinary care and diligence, such as proper inspection made at proper times and places, then the company would not be liable to the plaintiff, notwithstanding the jury may believe that the plaintiff was injured in consequence of such latent or hidden defect." After so charging, the court added the following charge: "On the other hand, gentlemen of the jury, if this plaintiff was injured on account of a defect in this appliance, although it may have been a latent defect, if, by the use of ordinary care and diligence on the part of the company or its inspectors, it could have discovered this latent defect, and they failed to do so, and failed to exercise ordinary care and diligence, in consequence of which failure the plaintiff was injured, then I charge you that the plaintiff could recover, provided he was not at fault and contributed nothing to the injury." Error was assigned upon the charge, on the ground that it was a repetition of the duty of the defendant without reference to the duty of the plaintiff under the same circumstances; and, further, that the effect of the charge was to relieve the plaintiff from the exercise of ordinary care and diligence to ascertain the hidden defect, if it existed.

The court also, upon request, charged: "An employé of a railroad company, who is charged with the duty of assisting in the running and operation of its train of cars, or in the use of the machinery and appliances furnished in the furtherance of the company's business, assumes the risks of all perils incident to his employment, necessary, ordinary, and extraordinary, except the negligence of the company, its servants and agents, and if the jury should believe from the evidence in this case that the occurrence out of which the injury to the plaintiff arose, if he was injured, was either a pure casualty or one of the ordinary risks of the particular employment in which the plaintiff was then engaged, no liability arose against the defendant because of the injuries he sustained." After so charging, the judge added: "In other words, gentlemen of the jury, if the injury that the plaintiff sustained was occasioned by the ordinary risks which he assumed as an employé of the company, and not occasioned by any negligence of the defendant, why then, of course, the defendant would not be liable. In other words, if the defendant was not negligent in this case, the plaintiff cannot recover." Error was assigned upon the added charge on the ground that its effect was to destroy the entire force of the charge requested, and to destroy the effect of a previous charge as to the hazards assumed by the plaintiff; and, further, because the added charge was based solely upon the theory of the defendant's lack of negligence, without reference to the negligence of the plaintiff.

The court also, upon request, charged: "I charge you further, gentlemen, that a railway company is not an insurer of its em-

ployé's safety. The law imposes upon the railway company the duty of exercising ordinary care and diligence to furnish reasonably safe machinery, and to subject the same to reasonable inspection—such an inspection as a reasonably prudent man would give. If the railway company performs this duty, and one of its employés is injured, it will not be liable." After so charging, the court charged: "That is to say, gentlemen of the jury, if the plaintiff was injured by the machinery and appliances furnished the employé, [in] the furnishing of which and the maintenance of which the defendant has exercised all reasonable care and diligence, in a case like that, that is, as to inspecting it and keeping it in repair, and, notwithstanding the exercise of ordinary care and diligence, the plaintiff was hurt, why, of course, the plaintiff would not be entitled to recover, for in such case the defendant would not be liable." Error was assigned upon this added charge, upon the ground that it was a repetition of the duties of the defendant without reference to the duties of the plaintiff, and had the effect to destroy the charge as requested, and to withdraw it from the consideration of the jury; "and especially is this true with respect to the language of the court: 'Why, of course, the plaintiff would not be entitled to recover for in such case the defendant would not be liable.'"

The additions to the several requests to charge were not erroneous for the reasons assigned. They did not in any instance amount to an improper restriction, but were simply statements of the converse of the propositions referred to, or proper qualifications on elaborations thereof.

8. One of the exceptions was to the refusal of the judge to charge the jury as follows: "I charge you, gentlemen of the jury, that the evidence introduced before of the railway employés cannot be absolutely discarded or disregarded by you, and should not be, unless you find the evidence introduced before you discredits or contradicts them. In that event you should give just such weight to their evidence as you think it deserves. You should not disregard the evidence of any witness which is not discredited either by evidence or circumstances." In the cases of *W. & A. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863; *South Carolina R. Co. v. Powell*, 108 Ga. 437, 33 S. E. 994; *Ga. Sou. Ry. Co. v. Sanders*, 111 Ga. 128, 36 S. E. 458; *So. Ry. Co. v. Thompson*, 111 Ga. 731, 36 S. E. 945; *Ga. R. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639; *Macon R. Co. v. Revis*, 119 Ga. 332, 46 S. E. 418; *Seaboard A. L. Ry. v. Walthour*, 117 Ga. 427, 43 S. E. 720; *Ga. & Ala. R. Co. v. Cook*, 114 Ga. 760, 40 S. E. 718; *White v. Sou. Ry. Co.*, 123 Ga. 360, 51 S. E. 411; *Cen. Ry. Co. v. Mote*, 120 Ga. 593, 48 S. E. 136; *Cen. Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956; and *Ala. R. Co. v. Scruggs*, 119 Ga. 70, 45 S. E. 689—the question under discussion was whether the respective verdicts

were contrary to law and the evidence. In the opinion or the headnotes it was several times stated that a verdict was contrary to evidence, because there was nothing, on one side, save the statutory presumption raised by the proof of an injury or death caused by a railway train, while, on the other, there was the uncontradicted evidence of the employees in charge of the operation of the train, showing positively how the injury occurred, and that there was no negligence on the part of the railway or its agents. What is said in an opinion as to the sufficiency of evidence to support a verdict, or to show that the evidence in a particular case demanded a certain finding, is not always appropriate as a charge to be given by the court to the jury. In *Brunswick & Western R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513, a request was made to the court to charge the jury which appears from the original record on file to have been in these words: "The testimony of the employees of the railroad company, in the absence of anything to discredit it or contradict it, cannot be arbitrarily disregarded." It was held that this request embodied a sound proposition of law, and it was further said: "The jury cannot arbitrarily disregard the evidence of any witness, which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witnesses the weight to which, in their opinion as conscientious men seeking after the truth, they believe it is entitled; but the employment or business of a witness affords no reason why this evidence should arbitrarily or without reason be disregarded." It will be seen from this that the court did not say that the witnesses must be believed, but that their evidence could not be arbitrarily disregarded, in the absence of anything to discredit or contradict such evidence; that is, that the jury should consider the evidence of a witness and give to it the weight to which, in their opinion as conscientious men seeking after the truth, they believed it to be entitled. There were two controlling words in the request dealt with in the *Wiggins* Case which were not the same as those in the request preferred in the present case. There, the expression was that the evidence of persons in the employment of the railroad company cannot be "arbitrarily" disregarded. Here, the request was to instruct the jury that such evidence could not be "absolutely" disregarded. The word "arbitrarily" means in an arbitrary manner, and "arbitrary," as defined by the *Standard Dictionary*, means: "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." The word "absolutely" is defined

to mean: "In an absolute degree or manner; without limitation; completely." A comparison of these two definitions will show that the words "arbitrarily" and "absolutely" are susceptible of quite different meanings, and a charge that the jury cannot absolutely reject a thing may well be understood by them to mean that they cannot reject it entirely or completely; while a charge that they cannot arbitrarily do a thing means that they cannot do it capriciously and without judgment or reason. Again, in the *Wiggins* Case, the request to charge was that, "in the absence of anything to discredit it or to contradict it," the testimony of the witnesses could not be arbitrarily disregarded. Here the request was that the evidence of the railroad employees introduced before the jury could not be "absolutely discarded or disregarded by you, unless you find the evidence introduced before you discredits or contradicts them." This limited the medium of discrediting or contradiction to the evidence introduced before the jury. Civ. Code 1895, § 5146, declares that: "In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case. The witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number." It will be seen at a glance that the request restricted the jury in their determination of the weight to be given to the evidence much more closely than does the section cited. While it may be a sound rule that the evidence of no witness should be arbitrarily or capriciously disregarded, it may not always be proper to select certain witnesses of one side or the other by designation or name and charge in regard to them and the credence to be given to them in a way which may lead the jury to differentiate them from other witnesses as to the matter of arbitrarily disregarding, without informing the jury, also, that a similar rule applies to other witnesses similarly situated; but this is merely suggestive, and, without regard to it, the distinction between the charge dealt with in the *Wiggins* Case and that invoked in the present case clearly appears from what has been stated above. As the decision in the *Wiggins* Case is not controlling, it is not necessary to deal with the request which was made to review and overrule it.

9. In the ninth ground of the motion for new trial, counsel for defendant assigned error upon certain excerpts from the court's charge, and in other grounds complained of the refusal of the judge to charge certain

requests which have not heretofore been dealt with in this opinion. Upon careful consideration thereof we do not think that any of these grounds are sufficient cause for the grant of a new trial, and do not deem it necessary to make further reference thereto than the announcement made in the ninth headnote.

10. It is complained that the verdict of the jury is so excessive as to show extreme bias upon the part of the jury, and for that reason that a new trial should be granted. There was evidence from which the jury could have found: That the plaintiff was 41 years old, and was a fireman on the railroad, and receiving \$2 per day as such fireman, and that he had a reasonable prospect of promotion and increase in his earning capacity; that the plaintiff, in attempting to avoid injury by falling in the space between the engine and tender, which was exposed by reason of the shifting of the position of the apron, fell from the car, striking his back against a rail on one of the side tracks of the defendant; that he suffered great pain, and was immediately attended by his own physician and the physician of the defendant; and that he was confined to his bed for about three months, and suffered much pain. Testifying in his own behalf, the plaintiff said: "In about two weeks I began to pass blood and mucus from my bladder in my urine. I passed that, I suppose, about six weeks, and Dr. Des Portes had to take my water several days before I could make it. My digestion was all right, I suppose. My back was the biggest trouble, and head, and my kidneys were all out of order. After I got up I had relapses. I would be up and down. I dragged around home there, I suppose, a month or two, knocked around, up and down, and every once and a while I would have one of those nervous spells, draw and jerk, and I would be out of my head. When I would get in that condition my wife would send for the doctor. I have had those spells ever since the accident happened, but not regular. Sometimes I will have more than others. Now, if I do any straining work, it brings on one of those spells. I cannot lift anything to amount to anything. If I walk a great deal it breaks me down, and finally I am in bed. I have right here recently had a spell which I could attribute to lifting. I believe it was in June or July I had a pretty bad spell by lifting something around home. I think I went to the well and drew a bucket of water. I have not been able to do any regular manual work since I was hurt. I am unable to do the work of a fireman to-day. Before the accident my health was good, and I had not had any spells of the kind I have described." The time at which the plaintiff was testifying was about seven years after the injury. Dr. Sims, the family physician, testified: "When I reached him I found him in a state of partial convulsions, muscles very much drawn,

unconscious; seemed to be considerable muscular contraction. Dr. Des Portes, the railway surgeon, came in about the same time. I made a physical examination of the body at that time. I don't remember how long he was confined to his bed, but a good long while, months. I mean by that, confined to his bed; that is, where he could be taken up or down. As a result of examinations made immediately after the injury and my presence with him at that time, in my opinion, the morning I saw him, he had had an injury to the spine in the region of the lower end of the lumbar spine, traumatic injury to the spine, the effect of the injury being to paralyze the lower extremities and produce a state of nervous irritation, which threw him into that unconscious state, aggravated form of convulsions. \* \* \* The plaintiff also had inflammation of the bladder from paralysis. The plaintiff suffered very much from his bladder being unable to pass his urine. The retention of the urine was very painful. I only visited the plaintiff for the first few days, and then after that I turned him over to the railroad surgeon, and he attended him a month or so himself, possibly two or three months. \* \* \* I don't think he will ever be physically any account." Where pain and suffering were involved on account of injuries such as were described by the witnesses, we cannot say as a matter of law that, when considered in connection with the age and earning capacity of the plaintiff and his prospect for an increase of earning capacity, the verdict was so excessive as to authorize an interference with the discretion of the trial court, who approved and refused to set aside the verdict.

11. When the case was before this court on a former occasion (120 Ga. 593, 48 S. E. 136) a new trial was granted. The evidence then before the court was of such character as to show the injury, and that the plaintiff was free from fault, which raised the statutory presumption provided for in Civ. Code 1895, § 2321, against the defendant. To meet the presumption, the defendant introduced its employees, whose testimony was in no wise contradicted, and it was held by this court that the testimony so introduced was sufficient to overcome the statutory presumption against the defendant, and thereupon a new trial was granted. Upon the next trial a witness was introduced by the plaintiff, whose testimony is set out at greater length in the statement of facts, for the purpose of contradicting and rebutting the testimony by witnesses for the defendant. This witness was not introduced on the former trial. The effect of the testimony of this witness was such as to contradict the testimony of the witnesses for the defendant upon the point as to whether or not the alleged defective bolt was in fact defective, and as to whether or not the defendant had exercised ordinary care in its inspection of the engine. In view of the contentions of the parties, the case is

made to turn upon these points. It was contended by the defendant that the physical facts and testimony of other witnesses for the defense completely discredited the testimony of this witness, and destroyed its effect, thereby leaving the case before the jury substantially upon the same evidence as was offered upon the former trial, and that, on account of the adjudication by this court in the former case, a verdict for the defendant was demanded. The physical facts alone were not sufficient to destroy the testimony of the witness, and it is well settled that, wherever there is a conflict between witnesses, it must be left to the jury of the vicinage to reconcile the conflict. In such cases this court never interferes with the discretion of the trial court in refusing to set aside the verdict of the jury.

Judgment affirmed. All the Justices concurred.

### DEADWYLER & CO. v. KAROW & FORRER.

(Supreme Court of Georgia. Aug. 11, 1908.)

#### 1. SALE—CONSIDERATION—COMPLETION.

A valuable consideration is essential to a sale, and, if its ascertainment becomes impossible, there is no sale. Where a contract is made for the sale, at a specified price per pound, of certain bales of cotton, even though there be a constructive delivery to the buyer, if the weights of the cotton be thus unknown, and such weights, by which the amount of the purchase price is to be determined, are by such contract to be ascertained by subsequent weighing by the buyer when actual delivery to him is made, and the cotton is destroyed by fire before being so delivered and weighed, and it becomes impossible to ascertain such weights, there is no sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 525, 526.]

#### 2. CUSTOM AND USAGE—VALIDITY.

A custom which contravenes a positive statute is invalid and does not become a part of a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 9.]

#### 3. SAME.

If a part of a custom would be valid if it stood alone as a separate and independent custom, such part would be invalid when another part of the entire custom of which it forms a part was invalid, unless it is reasonably certain that to enforce the former as a separate and independent custom would correspond with the intent and purpose with which the custom, as a whole, was established and used.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Deadwyler & Co. against Karow & Forrer. Judgment for defendant, and plaintiff brings error. Affirmed.

A. C. King and Saml. H. Sibley, for plaintiff in error. Adams & Adams, for defendant in error.

HOLDEN, J. The plaintiffs brought suit against the defendants for the contract price of 100 bales of cotton alleged to have been sold by them to the defendants. Fifty-

eight bales of the cotton were consumed by fire before there was any actual delivery. After some correspondence between the parties, the remaining 42 bales were taken by the defendants, and a payment for the purpose of settling the amount due for them was made, but which did not fully cover the principal and interest due, and the court, to whom the matter was submitted without the intervention of a jury, found in favor of the plaintiffs against the defendants for this balance, and found in favor of the defendants on the main issues in the case, the effect of which was to find that the plaintiffs were not entitled to recover the price of the cotton destroyed by fire. To this judgment the plaintiffs excepted.

The following facts appear from the testimony: The plaintiffs were cotton factors and warehousemen in Athens, and the defendants were cotton dealers in Savannah, with a buyer located in Athens. There was evidence by the plaintiffs to show that there was in the Athens market, among cotton factors and warehousemen, and buyers from them, the following custom: The factor would extract from each bale of cotton in their possession for sale a sample, in which was wrapped a tag on which was written the number and marks of the bale from which it was drawn, and to the bale was attached a duplicate tag having on it the same number and marks. This sample, with its inclosed tag, was taken to the sample room and there kept for exhibition to and examination by prospective buyers. The bale in the warehouse represented by the sample could be positively identified by the duplicate tag attached thereto. When a buyer wished to purchase cotton, he would examine these samples and agree with the cotton factors on the price to be paid for each bale represented by the respective samples. It was also the custom of the market that when this agreement was made, and the samples, with the tags therein, delivered to the buyer, or left with the cotton factor to be sent for by the buyer, and the sale listed on the books of the cotton factor, such bales then became the property of the buyer and were held by the warehouseman thenceforth at his risk. It was a part of the custom that each bale was to be reweighed by a weigher representing the buyer, in the presence of the warehouse weigher, and the cotton settled for by the buyer at these reweights on the basis of the price per pound agreed upon when the samples were examined and the contract made. The buyer could waive the reweighing and take the cotton at the weights when first put into the warehouse, but the custom was to reweigh each bale bought. If any bale bought was "falsely packed," or damaged, or was "mixed packed," or failed to come up to the sample, the buyer had the right to reject it. When the defects were not excessive, the seller would make good the defects by compro-

mise or settlement of some kind. When the cotton was reweighed, a bill therefor was made out according to such reweights and the payment for the cotton made. Sometimes the buyer, at the request of the seller, would make a payment before the reweighing. The difference would then be paid when the cotton was reweighed. In this particular case, the buyer of the defendants located in Athens contracted to buy from the plaintiffs, at a price of  $11\frac{3}{10}$  cents per pound on a basis of Athens Middling grade, 100 bales of cotton from samples, on a Saturday afternoon. The samples, with the inclosed tags, were kept by the plaintiffs and placed in a basket in their office. On the books of the plaintiff these 100 bales were listed as having been sold to the defendants, and a duplicate list of the marks, numbers, and grades of the bales were made out, one for the scalesman, and one for the warehouseman. The buyer, Mr. Butt, took the list and the number of each grade and went back to his office. This transaction occurred in the afternoon, after banking and business hours. Early the following morning all of the cotton was consumed by fire, except the 42 bales above referred to. The samples were left in the office of the plaintiffs, subject to the order of the buyer. Prior to the fire the defendants' agent did not reweigh the cotton. Nothing was paid before the fire on the cotton bought. There was no express agreement about reweighing, or when the cotton was to be reweighed or delivered to the buyer, nor was there any express agreement about the time of payment. There was no testimony as to how long the 100 bales had been in the warehouse after being first weighed, nor was there any testimony as to whether or not the bales would come up to the sample.

1. The plaintiffs in this case contend that they are entitled to recover the price of the 58 bales of cotton sold and consumed by fire. The 42 bales not destroyed were delivered to the defendants and paid for by them, except a small balance due as interest. Under the letters that passed between the parties, and the other facts in the case, the acceptance of these 42 bales and the payment therefor would not have the effect of making the defendants liable for the cotton burned. One of the contentions of the plaintiffs is that they are entitled to recover the price of the 58 bales burned, under Civ. Code 1895, § 3546, which is as follows: "Cotton, corn, rice, crude turpentine, spirits turpentine, rosin, pitch, tar, and other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer: Provided, that in cases where the whole or any part of the property has been delivered to the buyer, the right of the seller to collect the purchase-money shall not be affected by its subsequent loss or destruction." The

plaintiffs contend that, outside of any custom, the proved facts immediately connected with this sale show a constructive delivery of the cotton, and that under the provisions contained in the latter part of the section just quoted they are entitled to recover the purchase price of the cotton which was burned. They further contend that, even if the facts do not show there was a delivery, there was by custom a constructive delivery of the property to the buyer. It appears that, at the time of the transaction between the parties, the only thing expressly agreed upon was the price per pound, on a basis of middling grade, to be paid by the buyer for the bales of cotton represented by the samples and identified by the tags. Nothing whatever was said between the parties as to the weight of any bales. Under the custom testified to, the amount to be paid by the buyer for each bale was the price per pound agreed on, according to the weights when reweighed by the buyer, and that it was customary for the buyer to have the cotton reweighed by his scalesman. Moreover, it was a part of the custom that, when the cotton was reweighed and actually delivered, the buyer had the right to reject any bales "falsely packed," or "mixed packed," or damaged, or that did not come up to sample, and have the matter adjusted. If this was a proved and valid custom entering into the contract as a part thereof, the amount to be paid for each bale of cotton could not, according to the contract, be determined until there was a reweighing and acceptance by the buyer. If this custom was not proved, or, if proved, was not valid, and if all question as to the existence of such custom be ignored, it would still be true, under the facts of this case, that the amount to be paid by the buyer for the cotton contracted for could not be ascertained until the cotton was reweighed, as there was no agreement whatever in reference to the weight of any particular bale, though there was an agreement as to the price per pound to be paid for each bale. Nothing was said by the seller or buyer as to weights, and no agreement was made by them as to what were the weights of the respective bales. The seller testified to the following: "After he received the cotton as to grade, it was listed to L. F. Butt, completing the sale as to marks, numbers, and grades. \* \* \* My recollection is that I put the samples in a basket after they were listed. The basket was left in the office, subject to his order. The tags still remained in the samples. \* \* \* I made an entry on the sales book, on November 6th, of 100 bales sold to L. F. Butt at a certain price, certain basis. On the occasion of entering the samples, I made a list of the marks, numbers, and grades. My recollection is that there were duplicate lists, one for the scalesman and one for the warehouseman. I delivered and listed the samples. These entries were made a few minutes after the transaction; that is, after delivery as to

grade. \* \* \* He came in and received the cotton, and took the list and number of each grade and got back to his office. \* \* \* I know it from agreements that existed by buyers voluntarily, when this cotton was passed on as to grade. \* \* \* I understood it was his cotton and to be weighed out to him as soon as he could reweigh it." A letter from L. F. Butt to the defendants was introduced in evidence, containing the following statement: "I accepted the cotton, and the only thing left to be done was to reweigh cotton, in order to make out correct bill." The entry on the delivery book of the plaintiffs was as follows:

Nov. 10, 1905. Sold to L. F. Butt, Agt.			
Marks	No.	Wt.	Wt.
1 Ash.....	468	350'	
2 ".....	470	424	

—and so on, covering the 100 bales, showing the original warehouse weight of the 100 bales in the first column marked "Wt." and in the second column marked "Wt." the reweight of the 42 bales not burned; but it was blank in the second column as to the weight of those burned. Before the 42 bales not burned were taken and paid for, they were reweighed and settled for by the reweights. Where the price per pound is agreed upon by the buyer and seller, and there is no agreement between them as to the number of pounds in such bale, under the facts appearing in this case it is proper to hold that the understanding was that the cotton would have to be reweighed in order to ascertain the amount to be paid therefor. Such facts show an understanding between the parties as a part of the agreement that the buyer was to pay for the cotton a certain price per pound according to the number of pounds in the bales at the time of the consummation of the trade, and this number of pounds was to be ascertained by weighing each bale. Whether viewed from the standpoint of a custom, or from the law governing what occurred between the parties independent of custom, the amount to be paid by the buyer for the cotton bought was not determined before it was consumed by fire, and nothing appears in the record to show that after the fire it was possible to determine this amount as to the cotton burned. The amount to be paid would necessarily depend upon the number of pounds of cotton in each bale, and there is no way by which it can be determined from the record before us the number of pounds in any particular bale destroyed by the fire. If there was testimony from which it could be implied that the cotton was weighed when first brought to the warehouse, it does not appear when it was thus weighed, and what would be the probable loss in weight, if any.

Under the record before us, it would be impossible for the courts to determine what was the amount of consideration to be paid by the buyer for the cotton which was burn-

ed, and, where the consideration becomes impossible of ascertainment, there is no sale, under the provisions of Civ. Code 1895, § 3548, which is as follows: "A valuable consideration is essential to a sale; it must either be definite, or an agreement made whereby it can be made certain; if its ascertainment becomes impossible, there is no sale." Where the consideration for the sale of property is to be determined by ascertaining its quantity, and meanwhile this is rendered impossible by reason of its destruction, there is a closely analogous instance to cases where the parties agree upon a sale of property, the value of which is to be fixed by a named third person, who refuses to act, or dies before fixing such value. In such cases the sale fails, because the consideration becomes impossible of ascertainment. See, in this connection, *Elberton Hdw. Co. v. Hawes*, 122 Ga. 858, 50 S. E. 964. We do not mean to intimate that, in cases of the nature referred to, were the property before its destruction converted by the prospective purchaser, or its loss were to ensue from such negligence as would render him liable in his character of bailee independent of any connection of the proposed sale, or if the delay in reweighing before the property was destroyed was the result of his negligence and in violation of his obligation to reweigh in a given or reasonable time, or under some other circumstances, an action could not be maintained by the seller of the property for the value of the property; but he could not recover on the contract as vendor of the property, there being in law no sale of such property where the consideration becomes impossible of ascertainment. Even if there was a valid contract to sell, and constructive or actual delivery of the cotton which was the subject thereof, there could be no recovery in this case, under section 3546 of the Civil Code of 1895, because of the fact that there was no sale, as this section, together with sections 3545 and 3543, contemplates a sale. The provision in section 3546 that, when the property has been delivered to the buyer, the right of the seller to collect the purchase price shall not be affected by its subsequent loss or destruction, follows provisions in that section in regard to a sale of the property referred to, and is based on the fact of their being a sale, and, if there is no sale on which this provision is predicated, it would have no application. The provisions of this section have no application to this case, because under its facts there was no sale, either conditional or unconditional. The plaintiffs could not recover under section 3546, which provides that when property is sold, and title is not to pass until the purchase money is paid, the loss of the property, without the vendee's fault, before such payment, falls on the owner. It is only under the latter part of section 3546 that the plaintiffs could recover the purchase money where cotton is sold with title retained by law in the vendor until the purchase

money is paid, and it is destroyed after delivery to the vendee. The latter part of this section provides that, when the cotton is delivered to the buyer and is destroyed, the right of the seller to collect the purchase price is just the same as it would have been had the cotton not been destroyed. Under the facts of this case, the seller could not have collected the purchase price if the cotton had not been destroyed until after it was reweighed, as it was sold at an agreed price per pound, and it was to be weighed to ascertain the number of pounds. The purchase price was not due, and could not be known till the cotton was weighed. While the latter part of this section provides for the recovery of the purchase price, in such cases, how can the purchase price be recovered when it is impossible to ascertain what is the amount of it? There is no purchase price when an effort is made to fix a purchase price and this effort fails and it becomes impossible to ascertain it. There can be no recovery of a purchase price of property when there is no purchase price fixed and, without the buyer's fault, it becomes impossible to ascertain it. There can no more be a recovery of the purchase price when there is no purchase price fixed, and it is impossible to ascertain it, than there could be a recovery of a bale of cotton when there was no such bale in existence as the one sought to be recovered, or, if in existence, it was impossible to identify it. Property cannot be recovered which is not so described as to be capable of identification, nor can a purchase price be recovered when it cannot be ascertained what it is. This cotton was never actually delivered. The transaction occurred after banking and business hours on Saturday afternoon. In a letter from the plaintiffs to the buyer of the defendants, they say: "Had the cotton been classed earlier in the day, it would have been actually turned out to you on Saturday afternoon; but on account of the lateness of the hour at which it was classed, it was not to have been turned out to you until Monday morning. In the meantime the fire occurred." Hence it will be seen that it was not the buyer's fault that the cotton was not actually delivered and weighed before the fire occurred.

2. If the evidence in this case authorizes the conclusion that when there was an agreement between the buyer and the cotton factor in the Athens market that the former should pay a certain price per pound for a bale of cotton represented by a sample, and the sample was actually or constructively delivered to the buyer, but there was no agreement as to the number of pounds in the bale, and the number of pounds was not definitely known at the time, but was to be determined by subsequent weighing when the cotton was actually delivered, a custom existed in such market that the property became the property of the buyer and was held by the warehouseman at the risk of the buyer, such

custom would be invalid if the cotton was destroyed before the weights were known, and it was impossible to ascertain such weights, thereby making it impossible to determine the consideration to be paid by the buyer for the cotton. In such a case, as shown in the previous division of this opinion, there would be no sale, and a custom to the effect that there was a sale, and that the property became the property of the buyer, would contravene this positive statute section 3548, and would be invalid. Such custom that the cotton became the property of the buyer would also contravene the provisions of section 3548, which says that in sales of this kind the title to the property sold remains in the seller until the purchase money is paid. A custom contravening a positive statute is invalid. It does not become a part of a contract. *Fleming v. King*, 100 Ga. 449, 28 S. E. 239. If there be a custom that in cases like the one above named any loss of the property by fire before reweighing and actual delivery would fall on the buyer, such custom would be invalid, for it is predicated on the other custom that the title to the property passes to the buyer under such circumstances, which is invalid for the reasons above stated.

The custom that the ownership and risk passed to the buyer seems to be one entire custom, and that the risk followed ownership. This would seem to be a proper construction of the testimony, a part of which is as follows: "Under the customs of the Athens market in November, 1905, it was understood that anything designating a specific number of bales of cotton as being the cotton sold passed the title to the buyer. \* \* \* As between warehouseman and buyer, it was considered the buyer's cotton so that he should insure it, according to my understanding at that time. \* \* \* I was not in the cotton business in November, 1905, but prior to that time, under the customs existing, the title and ownership of the cotton passed when samples of the cotton were received from the seller by classification and grade. \* \* \* When cotton was delivered to them, it was at their risk so soon as ownership could be proven. \* \* \* Under the customs of said market, after the cotton had been agreed on and entered up on the books as sold as above, the cotton was regarded as at the buyer's risk. \* \* \* It was regarded in said market at the time in question as transferring the ownership and risk of the cotton from the seller to the buyer. \* \* \* Under the customs of the Athens market, after my transaction with Mr. Butt, the cotton and the risk were Mr. Butt's." It appears that the destruction of cotton by fire, under the circumstances of this case, had never at any previous time occurred in Athens. However, if such custom that any loss of the cotton by fire would fall upon the buyer were not invalid for any other reason, would it not be invalid for the reason that it was un-



certain and indefinite in its terms? The loss feature of the alleged custom is its chief feature, and can it be told, under the facts, whether the loss is to be the value of the cotton, or its contract price, and, if either, whether it is to be computed from first weights, or on a basis of probable loss in first weights? The testimony shows that there may be a loss from first weights; but there is no testimony showing usual or probable loss, or when the cotton was first weighed.

The custom that the cotton was held at the risk of the buyer was interwoven with and predicated on the understanding that by the working of the entire custom prevailing a sale was accomplished, carrying with it both title and risk of loss to the purchaser. When a valid custom exists, and the parties contract with reference thereto, the custom affects the contract in the same manner as would a statute which contained a written law applying to such contract the same incidents which the custom attaches thereto; and, in determining whether a part only of a custom shall be enforced, we are to be guided by the rule which obtains with respect to a statute a part of which is found to be invalid. The rule in such instances is announced by Chief Justice Simmons, in *Elliott v. State*, 91 Ga. 694, 696, 17 S. E. 1004, as follows: "When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the Legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose; but if the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it. The courts cannot construct from a defective statute a law which the

lawmaking body did not intend to enact and which it cannot be presumed it would have been willing to enact. See *Cooley*, Const. Lim. (6th Ed.) 209 et seq.; *Sutherland*, Stat. Constr. §§ 169-180; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 32 L. Ed. 766, and cases cited." The central idea of the custom invoked in the present case is that risk follows ownership, and this, accords with the general policy of the law.

These observations in reference to custom as affecting the rights of the parties are made without reference to the provisions of section 3546, which provides that the seller may recover the purchase price when property is delivered to him, though under such section he gets no title thereto. We have shown, under the preceding division of this opinion, that there can be no recovery under that section. We cannot say that the parties establishing and using a custom that the risk was with the buyer would have done so but for the custom existing with it that the ownership passed to the buyer, carrying with it the incidents and burdens imposed by law, including that of sustaining whatever loss its destruction involved. As we have stated, the chief feature of the custom was that risk followed ownership, and its evident scheme and intent would be destroyed if it were held that, while ownership did not pass because the custom was invalid for that purpose, yet the buyer did, under what was left of the custom, assume the risk of loss. Under the facts of this case, the loss could not for any reason be the buyer's loss if there was no sale, either conditional or unconditional. The custom that the risk passed to the buyer was merely an incident of the proposed sale, and, when anything occurred making it no sale, the incident thereto passed away with it. The plaintiffs in this case were not entitled to recover.

Judgment affirmed. All the Justices concur.

## SOUTHERN RY. CO. et al. v. GRIZZLE.

(Supreme Court of Georgia. Aug. 15, 1908.)

## 1. COMMERCE — REGULATION OF CONDUCT OF BUSINESS—RAILROADS—CHECKING SPEED AT CROSSINGS.

The provisions of Civ. Code 1895, § 2222, requiring the engineer of a locomotive to check the speed thereof on approaching a public crossing, so as to stop in time, should any person or thing be crossing the railroad track on such crossing, is not, with respect to a railroad company doing an interstate business, violative of section 8, art. 1, of the Constitution of the United States, as being a regulation of interstate commerce, but is a police regulation, designed to secure the public safety, and is valid as such. *Hennington v. State*, 90 Ga. 396, 17 S. E. 1009; *Seale v. State*, 126 Ga. 644, 55 S. E. 472; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 79.]

## 2. SAME.

The court committed no error in refusing to allow an amendment, offered by the defendant railroad company in this case, alleging that the Code section above cited was void because of being violative of the provisions of the Constitution of the United States above referred to, and that the failure to comply with the requirements of such Code section by the defendant company in the operation of one of its trains then engaged in doing an interstate business could not lawfully be attributed to it as negligence.

## 3. TRIAL — INSTRUCTIONS — SUBMISSION OF MATTERS NOT SUSTAINED BY EVIDENCE.

The following charge of the court was error, requiring a new trial: "Although the plaintiff's husband may have been negligent, if you believe that the railroad company, defendant, was willfully negligent, then the plaintiff would be entitled to recover." There was no evidence to show willful infliction of the injury, and the language of the court was subject to the construction that, if the engineer willfully or intentionally omitted to comply with the requirements of the crossing law, the plaintiff was entitled to recover, regardless of any amount of negligence, or failure to use ordinary care, by her husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

## 4. SAME—INVASION OF PROVINCE OF JURY.

It was not error to refuse a timely written request, made by the defendant, to charge the jury as follows: "If you believe that the plaintiff's husband deliberately went upon the railroad track at the crossing in Norcross in front of an approaching train, thinking that he could cross before the train reached him, and miscalculating its speed for any reason, the plaintiff cannot recover for the death of her husband resulting from being run down by the train, although the company's servants may have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road or street crossing where it occurred." Such a charge would have been in effect an instruction to the jury that certain facts would have constituted negligence on the part of the deceased. Civ. Code 1895, § 4334: *Atlanta & West Point R. Co. v. Hudson*, 123 Ga. 106, 51 S. E. 29. (Beck and Holden, JJ., dissenting: The above charge was legal and applicable in this case, and under the facts thereof the refusal to give it was error. *Thomas v. Cen. of Georgia Ry. Co.*, 121 Ga. 38, 48 S. E. 633; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49 [5]; *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261; *Roberts v. State*, 114 Ga. 450, 40 S. E. 297; *Central Ry. Co. v. Goodman*, 119 Ga. 234, 45 S. E. 969.)

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 436-438.]

## 5. SAME — REQUESTED CHARGES COVERED BY CHARGES GIVEN.

The other charges requested, so far as legal and pertinent, were covered by the charge of the court given to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

## 6. SAME—CONSTRUCTION AS A WHOLE.

In view of the entire charge, the other portions of the charge complained of were not subject to the objections made thereto.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; J. J. Klmsey, Judge.

Action by A. H. Grizzle, by reason of the death of her husband, against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Jno. J. Strickland, for plaintiffs in error. Atkinson & Born, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

## SOUTHERN RY. CO. v. BROWN et al.

(Supreme Court of Georgia. Aug. 12, 1908.)

## JUDICIAL SALES—NATURE AND ESSENTIALS—ATTACHMENT—SALE.

Where an attachment sued out by a creditor of a nonresident railroad company is levied upon one of its freight cars standing idle and empty in this state, upon the spur track of another railroad company, which under a contract with such owner is in possession of such car, with a right to use, load, and send it beyond the limits of this state, and an order has been obtained to sell such car after 10 days' notice, *held*, upon the hearing of an application for injunction by the company having such possession to prevent the sale of such car, it is not error to grant such injunction conditioned upon the plaintiff giving bond in a named sum to return the car to the proper officers of court after its right to use the car under such contract has expired.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Southern Railway Company against Brown and others. From the judgment, plaintiff brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error. Smith, Berner, Smith & Hastings, for defendants in error.

HOLDEN, J. Charles Brown, one of the defendants, had an attachment issued against the Mobile & Ohio Railroad Company, upon the ground that it was a nonresident of this state, and had it levied upon a freight car belonging to said company in the possession of the plaintiff. An order was obtained by Brown to sell the car, because of its being expensive to keep. The attachment proceedings were returned to the city court of Atlanta. The plaintiff sought to enjoin the levy and sale and interference with its possession and use of the car. Upon the hearing the court granted the injunction, provided the

plaintiff would give bond in the sum of \$1,000, conditioned to return the car to the officers of court after its right to use the same had expired under the contract attached to the petition, and under which contract the plaintiff claimed to have held the car. In this judgment the plaintiff was given three days within which to give the bond, during which time the restraining order previously granted was continued in force. To this judgment the plaintiff excepted. Upon the hearing the plaintiff introduced the following evidence: A written agreement between it and the Mobile & Ohio Railroad Company and other railroads, by virtue of which one road had the right to use the cars of another, for a named charge for hire per day, and, when a car belonging to one railroad company came into possession of another, such road had the right to hold and use the same in accordance with certain specifications set forth in the contract, and in such use had a right to send it out of the state. The plaintiff operates under the interstate commerce law, and at the time of the levy there was a large movement of freight over the lines of the company, and especially over the lines going out of the city of Atlanta. It was heavily taxed to provide cars for shipment, and on many occasions was unable to provide cars for such movements, and freight was frequently delayed because of the plaintiff's failure to have sufficient cars to meet the demand of shippers. Various roads interchange cars, and in this way cars become scattered all over the United States. The plaintiff now needs all of its cars and the cars of other roads in its possession. The levy will result in delay to its business, and compel it to hold over freight because of its inability to use the car levied upon. The defendant offered evidence to show that the car, when levied upon, was empty and on a spur track of the plaintiff in Atlanta, Ga. The spur track connected with other tracks only at one end, and this car was the last car on the spur track nearest to the end not connected with another track. The car was standing empty and idle, and no goods were being loaded on it.

The plaintiff contends: That it operates under the interstate commerce law, doing an interstate business as a common carrier; that the seizure of the car and sale of the same would interfere with interstate commerce, and with the duties of the plaintiff and of the Mobile & Ohio Railroad Company to the public; that they could not use the car without losing control and jurisdiction over it; that the property of a common carrier cannot be sold in piecemeal; that the proper way to collect a debt from it is a sequestration of the proceeds of its earnings; and that it was the duty of the plaintiff to protect the property of the Mobile & Ohio Railroad Company, another carrier, from illegal seizure. There have been many decisions upon the question as to whether or not the cars, engines, and other rolling stock of a railroad

company may be levied upon and sold. Some authorities hold that it can be done, and others that it cannot. Many hold that it can only be done when the rolling stock is not in actual use at the time of the levy. The car levied on in this case was not in actual use at the time of the levy. Its seizure therefore at this time did not immediately interfere with the duties of either of the railroads to the public, or with interstate commerce. If the seizure and sale of this one car might create such interference at some time in the future, it did not do this at the time of the seizure, as the car was then empty and idle. The fact that a creditor, in the prosecution of his rights to collect a debt by attachment of the property of his debtor, a nonresident railroad corporation which is a common carrier, may, by the levy and sale of an empty and idle freight car of the debtor, incidentally affect future interstate commerce, will not render such proceeding illegal. If such empty and idle freight car was not subject to levy in Georgia because it was an instrument of interstate commerce, it would not be subject to levy in the state of the residence of the Mobile & Ohio Railroad Company, because, if it is an instrument of interstate commerce, it would be such instrument in one place as well as another. A local corporation whose line did not extend beyond the state would likewise hold its rolling stock immune from levy and sale if it permitted it to be used in interstate commerce, and it was liable in the future to be so used if the law were different from the rule above announced.

One of the questions involved in this case was passed on by this court in the case of *Southern Flour & Grain Company v. Northern Pacific Railway Company*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356. We have been requested to review and overrule this decision. However, we think the ruling there made is correct, and will not disturb it. We do not think the levy of an attachment against a nonresident railroad company on one of its freight cars standing empty and idle on the spur track of a railroad in this state is invalid, and a sale thereof cannot be enjoined on the ground that such levy and sale are an interference with interstate commerce or the duties of a common carrier to the public, or on the ground that a part of the property of a nonresident railroad corporation serving the public as a common carrier cannot be sold under attachment to pay its debts, but the collection of the debt should be made by the sequestration of the earnings of such nonresident corporation, or on any other ground referred to in the briefs of the counsel for the plaintiff. See the authorities referred to in the case cited *supra*. See, also, *City of Atlanta v. Grant*, 57 Ga. 340; *Drake on Attachments* (7th Ed.) § 252a, p. 253a; *Kneeland on Attachments*, § 321, p. 237.

The fact that the plaintiff held the car under the contract referred to would not make

the levy of the attachment on it illegal. If the plaintiff was a hirer of the property in question, the judgment of the court granting the injunction, provided the plaintiff gave bond to return the car as provided for in the order, was one of which the plaintiff cannot complain in this case. Civ. Code 1895, § 2913. An attachment can be levied on property of a debtor, though hired to another before the attachment is issued. There is nothing in Civ. Code 1895, § 2913, preventing an attachment from being levied on such property, and we know of no other statute having such effect.

Judgment affirmed. All the Justices concur.

**UNITY COTTON MILLS et al. v. DUNSON et al.**

(Supreme Court of Georgia. Aug. 12, 1908.)

**1. INJUNCTION—AD INTERIM INJUNCTION.**

Under the pleadings and evidence in this case, there was no abuse of discretion in granting an ad interim injunction until the final hearing of the case.

**2. APPEAL AND ERROR — AMENDMENT OF DECREE—INJUNCTION.**

The petition having prayed both for an ad interim injunction and for a decree perpetually enjoining the defendants, and the decree rendered on the interlocutory hearing ordered and adjudged "that the injunction prayed for be granted," and that the defendants be enjoined, and exception being taken on the ground that this amounted to a final injunction, which the presiding judge could not grant on a preliminary hearing, direction is given that the decree be so amended as to show that it is not a perpetual injunction, but one to continue in force until the final hearing of the case.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by J. E. Dunson and others against the Unity Cotton Mills and others. Judgment for plaintiffs, and defendants bring error. Affirmed, with directions.

Hatton Lovejoy, for plaintiffs in error. A. H. Thompson and F. M. Longley, for defendants in error.

**FISH, C. J.** Judgment affirmed, with direction. All the Justices concur.

**BANK OF COMMERCE v. NEW YORK LIFE INS. CO.**

(Supreme Court of Georgia. Aug. 15, 1908.)

**1. APPEAL AND ERROR — SECOND APPEAL — LAW OF CASE.**

This case was before the Supreme Court on a former writ of error. 125 Ga. 552, 54 S. E. 643. The rulings then made are binding, and are conclusive, unless on the second trial the facts were substantially different from those on the first trial. The decision then made is not subject to review or reversal in the same case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661-4665.]

**2. SAME.**

On the second trial there was nothing to change the application of the decision formerly made by this court. Nor do the rulings made by the court, either on the pleadings or the evidence, or in directing a verdict, require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by the Bank of Commerce against the New York Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion on former appeal, see 125 Ga. 552, 54 S. E. 643.

W. P. Wallis, for plaintiff in error. E. A. Hawkins, for defendant in error.

**ATKINSON, J.** Judgment affirmed. All the Justices concur, except EVANS, P. J., disqualified.

**MALLORY v. MORGAN COUNTY.**

(Supreme Court of Georgia. Aug. 13, 1908.)

**EMINENT DOMAIN—ASSESSMENT OF DAMAGES—ELEMENTS.**

Where proceedings were taken by the authorities of a county for the purpose of condemning a right of way for a public road through a tract of land, and it appeared that this was in pursuance of an alteration in the road, and that the old road passed near the residence located on the land, while the new road, or new portion of the road, would also pass through the same tract, but at some distance from such house, and where the evidence indicated that the old road was to be abandoned, in assessing the consequential damages, such abandonment and the attendant results upon ingress to and egress from the residence and upon the value of the property were proper for consideration in determining whether the market value of the land would be diminished.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Proceedings by the commissioners of roads and revenues of Morgan county against A. H. Mallory to condemn a right of way for a bridge. From a judgment awarding defendant a certain sum as damages, he brings error. Reversed.

The commissioners of roads and revenues of Morgan county gave notice to Mallory and the Bank of Madison, which was alleged to hold a security deed to the property involved, for the purpose of condemning a strip of land about 35 feet wide by 600 feet long, extending through the land of Mallory, for a roadway "around the hill upon which the former home of said Mallory is built." The proceeding was commenced under Civ. Code 1895, § 4657 et seq. Assessors were duly named, and awarded in favor of the applicant the sum of \$20 for the land to be taken, \$5 for the cotton which would be destroyed in taking it, and for consequential damages \$50, making a total of \$75. From this award Mallory entered an appeal to the superior

court. The commissioners of roads and revenues paid into the hands of the clerk of the superior court the amount awarded by the assessors. On the trial of the case thus appealed, the jury found in favor of the appellant the sum of \$15.31. He moved for a new trial, which was denied, and he excepted.

E. W. Butler and Saml. H. Sibley, for plaintiff in error. O. L. Williford and George & Anderson, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The controlling question in this case is whether the judge erred in laying down the rule to guide the jury in measuring the damages of the landowner. The road involved in the controversy formerly ran near the house and improvements upon the land. It would seem, from what appears in the record, that the commissioners of roads and revenues determined to alter the road, so that it would pass around the hill, leaving the residence located on the plaintiff's land some distance away. In doing this they required a right of way extending through the same general tract of land. The proceedings to alter the road were not introduced in evidence, and we can only surmise what they were, or whether they were due and lawful, from references to the matter in the parol testimony. Generally, a petition to alter an old road for a portion of its length, so as to place it in a new location, involves the discontinuance of the original portion thus altered, and, under a citation to alter a road, it has been held competent to discontinue the part of the old road which is rendered unnecessary by the alteration. *Ponder v. Shannon*, 54 Ga. 187. The county commissioners are not compelled in all cases to abandon a part of an old road because they may condemn a new way between certain points on its route. Sometimes they have expressly declared that both the old and the new roadway should be kept open and in proper repair; but, generally, the alteration contemplates the abandonment of a portion of the old road.

The evidence here was sufficient to authorize the jury to infer that the alteration, including both the opening of the new way and the simultaneous abandonment of the old one through the land, was contemplated. This being so, the question arises as to whether the abandonment of a part of the old road, and the establishment of the new roadway at some distance from the residence on the land, was a matter which the jury could consider in determining whether such a change caused damage or benefit to the land. The trial judge was correct in the opinion which he entertained that the only consequential damages which could be recovered by landowner, in addition to the value of the strip to be taken for the new road, and on account of the direct damage to property, were pecuniary damages lessening the mar-

ket value of his land. Mere matters of choice, or inconvenience, or the mere fact that the house would be left some distance from the road in its new location, and that it could not be as readily seen by those traveling the road, or that travelers could not be as readily seen from the house, would not per se authorize a recovery of damages; but the location of the residence, the mode of ingress and egress to and from it, convenience of access to different parts of the property, and all the circumstances disclosed by the evidence as to the location and construction of the road, and its effect on the property, furnish legitimate matter for the consideration of the jury as bearing upon whether the value of the land was diminished by the alteration and relocation of the road passing through it. Land on a public road may be worth more than if it were some distance therefrom. Accessibility or inaccessibility may fairly be taken into account in passing upon value. The opinions of witnesses differed very widely as to whether and in what way the land would be affected in value by the alteration in the road. Physical facts of the character referred to might have been considered by the jury, in connection with the testimony of the witnesses, and might have added weight to the opinion of one or another.

In *Huff v. Donehoo*, 109 Ga. 638, 34 S. E. 1035, it was held that owners of realty abutting upon an existing public road are not entitled to damages alleged to have been occasioned by the establishment of a new road which does not touch their premises, and that this is true though the order for laying out the new road may have been granted upon an application for an alteration of an old road, if, as matter of fact, the portion of the latter running by or through the property of such owners is by the express terms of such order left open, and provision is therein made for keeping the same in repair. In the opinion it was said: "If every landowner could claim damages for a diminution in the market value of his property, incidentally occasioned by the laying out of a new public road which merely attracted travel from the road running by or through his land and which was itself kept open as before, endless and grievous burdens would be imposed upon our taxpayers. To allow such damages would be stretching the constitutional clause prohibiting the damaging of private property for public purposes without compensation to an extent never dreamed of by the wise men who framed our organic law." There is a wide difference between claiming damages merely because a new road is opened, which may attract the public to travel along it rather than along the old road, and removing a road from one part of a tract of land to another, by opening a new roadway through it by condemnation, and abandoning the old one. Moreover, in the decision in *Huff v. Donehoo*, supra, the headnote

and opinion both mention the fact of the keeping open of the old road, as well as the new one, in that case.

Pol. Code 1895, § 520, declares that, on application for any new road or alteration in an old road, the ordinary shall appoint three commissioners to report upon its utility and mark it out. Section 522 provides that written notice shall be given to all persons, their overseers or agents, residing on land through which such road passes, except the applicants for the road or alteration, "that they may put in their claim for damages or be forever after estopped." The proceeding before us is based on the act of 1894, which has been codified in section 4657 et seq. of the Civil Code of 1895. The caption of that act was "to provide a uniform method of exercising the right of condemning, taking, or damaging private property." No question was distinctly raised or argued before us by counsel as to the form of procedure, nor as to what effect the passage of the act of 1894 and that of 1900 (Acts 1900, p. 68) had upon the prior law, which still remains in the Political Code of 1895 (sections 522, 557). Nor was any question raised as to whether, in the proceeding to alter the road, a claim of damages should be filed in a case like this. Civ. Code 1895, § 4675, declares that the assessors appointed under it shall assess the value of the property taken or used, or damage done, and shall also assess the consequential damages and consequential benefits. If the laying out of and taking land for the new part of the road and the concurrent abandonment of the old part is substantially a single act affecting the same tract of land, all the results of that act working benefit or injury to the market value of the land should be considered. It would be unjust, as against the claim of consequential damages, to take into view the greater accessibility and general benefit to the land, which the new road may give, but to decline to consider that the reverse might be true because of the effect on an important part of the land where the houses or improvements were situated. This would practically apply one rule in favor of the county authorities and another against them.

Whether the vacation of a public road alone furnishes ground for damages in favor of an owner of property abutting on that part of it which is to be vacated has produced conflicting views on the part of text-writers and courts. Some of the decisions may be reconciled by a reference to the difference in the language of the statutory or constitutional provisions in force in the jurisdictions where they were rendered. Some are irreconcilable. Some seek to draw a distinction between a street in a town or city, and a highway in the country, while others declare that, as to constitutional or statutory provisions establishing a right to damages, there is no such legitimate distinction. On the general subject, compare Elliott, on

Roads and Streets (2d Ed.) §§ 871-877; 15 Am. & Eng. Enc. Law (2d Ed.) 402, and citations. In this state, see Civ. Code 1895, § 5729; Pol. Code 1895, § 841; Smith v. Floyd County, 85 Ga. 420, 11 S. E. 850; County of Monroe v. Flynt, 80 Ga. 489, 6 S. E. 173; White Star Line Steamboat Co. v. County of Gordon, 81 Ga. 47, 7 S. E. 231; Millwood v. Dekalb County, 106 Ga. 743, 747, 32 S. E. 577; Barfield v. Macon County, 109 Ga. 387, 34 S. E. 596; Harris County v. Brady, 115 Ga. 767, 42 S. E. 71; Langley v. City Council of Augusta, 113 Ga. 599, 45 S. E. 486, 98 Am. St. Rep. 133; Howard v. County of Bibb, 127 Ga. 292, 56 S. E. 418; Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312, 104 Am. St. Rep. 156. The case before us does not require a decision of this question. It was not a case of the vacation of a highway or part of a highway, disconnected from any taking or condemning, but a change of location of a roadway from one part of a tract of land to another. Land was to be condemned. The question of damages, both direct and consequential, was involved. The depreciation or nondepreciation of the market value was to be determined. The jury should have been allowed to consider all the elements necessary for that purpose.

We see no force, however, in the suggestion that the consequential benefit to the entire property, which may arise from such a change, should not be considered in connection with consequential damages which may accrue to a part of the property. It is the effect on the value of the property, not merely a part of it, which is to be considered. We think the court restricted the jury too closely on this subject. He informed them that "To constitute such damages [referring to consequential damages] it must appear that the injury or damage resulting therefrom was directly and proximately caused by the opening of the road and nothing else." The last expression, "by the opening of the road and nothing else," might have led the jury to believe that the property owner had no right to damages which might arise from abandonment of the old road in connection with the opening of the new one, whether or not it affected the mode of ingress to and egress from the residence, or depreciated the value of the property. Again, he stated to the jury that "the county had a right to abandon the old road and to open the new road, and any inconvenience or trouble that might result to the owner of the land, growing solely out of the abandonment of the old road, would not be an element of damages recoverable in this case."

We see no other error in the various rulings complained of in the grounds of the motion for a new trial which would necessitate a reversal.

Judgment reversed. All the Justices concur.

## JOYNER v. JOYNER.

(Supreme Court of Georgia. July 27, 1908.)

## 1. DIVORCE—FOREIGN JUDGMENT—SERVICE BY PUBLICATION—ENFORCEMENT.

The husband and wife being domiciled in Georgia, the husband left the wife, acquired in good faith, after a lapse of five years, a domicile in Kansas, and obtained in that state, and in accordance with its laws, a judgment of divorce a vinculo, based on constructive, and not actual, service of process on the wife, who meanwhile remained domiciled in Georgia and never appeared in the action. *Held*, that the Kansas judgment was not entitled to obligatory enforcement in Georgia by virtue of Civ. Code 1895, § 5237, which provides that records and judicial proceedings, properly authenticated, "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 827½.]

## 2. SAME—COUNTY.

It appearing that the grounds of the divorce, as found by the Kansas court, were in accordance with recognized principles underlying the marriage state, and that notice of the pendency of the suit was given by publication, a copy of the same being sent by mail to the wife, who had reasonable time to appear and defend, but failed to do so, and allowed the husband to obtain a decree, upon the faith of which he contracted a subsequent marriage, it is proper for our courts, on the ground of comity, to recognize the validity of such divorce; it not appearing that any imposition, fraud, or concealment was practiced by the husband in procuring the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 827–829.]

## 3. SAME—ALIMONY.

Subsequently to the rendition of the Kansas decree of total divorce, the wife instituted suit for alimony in Georgia, and obtained personal service in this state on the husband, who pleaded and set up the Kansas judgment. *Held*, that the wife's suit for alimony cannot be maintained, and a verdict in her favor must be set aside.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Roselle Joyner against R. G. Joyner. Judgment for plaintiff, and defendant brings error. Reversed.

Roselle Joyner, hereinafter called the wife, brought an action for alimony against R. G. Joyner, hereinafter called the husband, in the superior court of Fulton county. The husband appeared and pleaded. The court rendered judgment in favor of the plaintiff, and the husband excepted; one of the grounds of his exceptions being that the judgment was without evidence to support it, "because the evidence showed that defendant had been granted a divorce from plaintiff by a court of competent jurisdiction, to wit, the district court of Sedgwick county, Kan., and that by said judgment plaintiff's right to alimony was barred." The record discloses the following facts: The parties were married in Georgia in 1898, where they both resided at the time, and where the wife continued to reside. In 1900 or 1901 the husband left the wife at their home in Atlanta, Ga., ostensibly to go to Hot Springs, Ark., for his health. He re-

turned about a month later and spent two days, leaving a second time and taking up his domicile at Wichita, Kan. His wife was not permitted to accompany him. In 1905 the husband procured a total divorce in the district court of Sedgwick county, Kan., the place of his domicile. The notice of the pendency of the divorce proceedings was by publication, a copy of the same being sent to the defendant by mail; but the wife did not appear in the action. Subsequently the husband married again, and returned to Atlanta, Ga., where he now resides. On the trial of the action for alimony, the husband pleaded the Kansas divorce. The court admitted an authenticated copy of the proceedings in evidence, but refused to recognize the same as a bar to the wife's right to alimony.

Moore, Gordon & Branch, for plaintiff in error. Francis L. Eyles, for defendant in error.

BECK, J. (after stating the facts as above). 1. In the case of Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, Mr. Justice White, after an exhaustive review of the authorities, both state and federal, announced the opinion of the majority of the court in the following language: "The husband and wife being domiciled in New York, the husband left the wife, acquired in good faith, after a lapse of years, a domicile in Connecticut, and obtained in that state, and in accordance with its laws, a judgment of divorce based on constructive, and not actual, service of process on the wife, who remained domiciled in New York, and never appeared in the action. The wife subsequently sued for divorce in New York and obtained personal service in that state on the husband, who pleaded the Connecticut judgment. *Held*, without questioning the power of the state of Connecticut to enforce the decree within its own borders, and without intimating any doubt that the state of New York might give it such degree of efficacy that it might be entitled to in view of the public policy of the state, that the Connecticut decree, rendered as it was without being based on personal service of process on, and therefore without jurisdiction over, the wife, was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause of the federal Constitution." The facts in the Haddock Case are very similar to those in the case at bar, and the opinion in that case disposes of the question as to whether the Kansas court, in virtue alone of the domicile of the husband in that state, had jurisdiction to render a decree against the wife which was entitled to be enforced against the wife in this state in and by virtue of the Constitution and laws of the United States.

But it is contended by the plaintiff in error that section 5237 of the Civil Code of Georgia of 1895, which provides that records and judicial proceedings properly authenticated

"shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken," makes it obligatory upon the courts of this state, independently of any federal law, to give the Kansas decree the same efficacy in Georgia that it has in Kansas. To this contention it is sufficient to reply that the Code section is a literal copy of a federal statute (Rev. St. U. S. § 905 [U. S. Comp. St. 1901, p. 877]), and its inapplicability to a question like the one now under consideration was adjudicated in *Haddock's Case*, supra. As was said by Mr. Justice McCay in *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. St. Rep. 680: "This is not intended to exclude such defenses to the judgment as inquire into the jurisdiction of the court in which the judgment was given, or such as inquire into the right of the state itself to exercise authority over the person or subject-matter." In the present case, the Kansas decree was rendered without being based on personal service of process on the defendant, who did not appear in the action, and the court rendering the decree was therefore without jurisdiction over the person of the defendant. The only instance in which a judgment, entitled to obligatory enforcement in other states, can be obtained against a nonresident defendant, based upon constructive service of process, is where the proceeding is one in rem, and the res is within the jurisdiction of the court rendering the judgment. *Woodruff v. Taylor*, 20 Vt. 85. And, as was pointed out in *Haddock's Case*: "A suit for divorce, brought in a state other than the domicile of matrimony, against a wife who is still domiciled therein, is not a proceeding in rem justifying the court to enter a decree as to the res, or marriage relation, entitled to be enforced outside of the territorial jurisdiction of the court." See, also, *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225.

2. We come next to consider the question as to whether the Kansas decree should be given effect in Georgia, not because of the statute above referred to, but because of the comity between the states. The general rule governing the comity of nations is that in a proper case the laws and judicial proceedings of one state will be enforced in another state, provided they do not involve anything immoral, contrary to general policy, or violative of the conscience of the state called upon to give them effect. *Eubanks v. Banks*, 34 Ga. 407. In the case of *Cox v. Adams*, 2 Ga. 158, Nisbet, J., delivering the opinion, said: "The comity of nations cannot be recognized as capricious—as depending upon arbitrary whims or tyrannic impulses. It has grown into a system whose sanctions are reason, religion, and the common interests of all, for the violation of which states are amenable to the public sentiment of the world. The rules admitted by civilized states upon this subject are founded not only in convenience,

but in necessity. Without them commerce could not exist between the states. \* \* \*

The whole system of agencies, purchases and sales, mutual credits, and transfers of negotiable instruments depends upon the *jus gentium*. In fact, nothing so much distinguishes civilized from savage states as this comity of the nations." What is here said, as to the necessity of a wise and uniform system of comity between the states as regards trade and commerce, is equally applicable to the subject of marriage and divorce. Especially in the United States, where from our position as a confederation of independent sovereignties, contiguous, but each with its distinctive municipal law of divorce, the necessity for such a rule of comity becomes manifest. As was pointed out by the New Jersey Court of Chancery in *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 106, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612, and by Mr. Justice Holmes in his dissenting opinion in *Haddock's Case*, supra, the result of a contrary rule would be to bastardize children supposed to be the offspring of lawful marriage, and to make the relation of man and woman either legitimate or adulterous as they happen to be within the limits of one state or another. Such a condition of the law is not to be tolerated any further than is plainly required by public policy. In the case of *Jackson v. Johnson*, 34 Ga. 511, 89 Am. Dec. 263, it was said that "comity is reciprocity." The laws of Georgia expressly permit a citizen of this state, whether this be the domicile of matrimony or not, to obtain a divorce, based upon constructive service of process, against a nonresident defendant. Manifestly it was intended and desired that such decrees should have extraterritorial effect. Otherwise it would be necessary for a citizen of Georgia, when this state is not the domicile of matrimony, in order to obtain a universally valid divorce against a nonresident defendant, to seek out the defendant and sue in the state selected by the latter, and since the laws of most states require the plaintiff to be domiciled in the state where he seeks a divorce, the plaintiff would be compelled to abandon his residence in Georgia and take up a permanent residence in the domicile of the defendant. It would therefore be impolitic, as well as unjust, to lay down the general rule that the courts of this state will never recognize a divorce granted in another state, other than the domicile of matrimony, based on constructive service of process upon the defendant. For in order that a Georgia decree, rendered under such circumstances, may receive recognition in other states, this state must be ready to reciprocate, as far as public policy will permit, by according to such decrees rendered in other states a like degree of efficacy in this state.

On the other hand, it would be equally as unwise and unjust to lay down the general rule that this state should recognize every



divorce granted in another state against defendants domiciled in Georgia, regardless of the cause for which the divorce was sought or the manner in which it was obtained. It is easily conceivable that some states might grant divorces upon grounds not recognized by the laws of Georgia, and in violation of the public policy of this state. As was said by the Supreme Court of the United States in *Haddock's Case*, supra: "Under the rule contended for, it would follow that the states whose laws were the most lax as to length of residence required for domicile, as to cause for divorce and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state [as for example, in Georgia] and who wished to violate the marital obligations, would be able, by following the lines of least resistance, to go into the state whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other states." Another effect of this rule would be, in many cases, to violate the general principle of law that no person should be deprived of property without due process of law; that is, without notice and a reasonable opportunity to be heard in his own behalf. In a proceeding in personam, no judgment against a defendant is valid unless he has been actually served with process within the territorial limits of the court's jurisdiction, or has voluntarily appeared. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. In proceedings in rem, if the res be within the court's jurisdiction, "due process of law" merely requires constructive notice to be given to the defendant by publication; actual notice being dispensed with on the theory that the owner is bound to know where his property is, and that he will be informed if any peril threatens it. *Doughty v. Doughty*, 27 N. J. Eq. 315. A proceeding for divorce partakes of "the nature of proceedings in rem rather than of proceedings in personam; the res being the status. \* \* \* At the same time, these causes cannot be said to be altogether proceedings in rem. There is a personal element that enters into them, not found in suits instituted merely to subject or affect property. \* \* \* It results therefore that these causes constitute in some measure a dividing line between proceedings strictly in rem and proceedings strictly in personam, partaking in part of the nature of each; the former, however, predominating. Hence they are very often very properly denominated proceedings quasi in rem." Minor on Conflict of Laws, 191. "Accurately speaking, a proceeding in rem is a proceeding against tangible property, and actual notice is dispensed with on the theory that the owner is bound to know where his property is and what is being done with it. It is mani-

fest that this theory cannot be applied to the relation of husband and wife." *Doughty v. Doughty*, 27 N. J. Eq. 315. Thus it often happens, where the only notice given a non-resident defendant is by publication in a local newspaper, that the defendant has no knowledge that divorce proceedings are pending, the plaintiff is granted a divorce upon an ex parte showing, and the marital rights of the defendant are destroyed without his having had any opportunity whatever to defend those rights. And "a sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

The laws of Georgia recognize the necessity of actual notice to the defendant of the pendency of the divorce proceeding, and require such notice to be given, where that is practicable, by mail or actual service of notice, not by publication merely. Civ. Code 1895, §§ 2432, 4978, 4979. It follows from what has been said that in any attempt to lay down a general rule of comity governing the reception and enforcement of a divorce granted in another state, not the domicile of matrimony, based upon constructive service of process upon the defendant in this state, a delicate regard must be had, as far as public policy will permit, for the rights of the plaintiff who has acted in good faith in procuring the divorce, and of innocent parties who have dealt with the plaintiff upon the faith of that decree, and a just regard had, also, for the rights and interests of the defendant.

Examining the facts of the present case, we find that the husband left Georgia, the domicile of matrimony, and acquired in good faith a domicile in the state of Kansas, where, after a lapse of five years, he obtained, in accordance with the laws of that state, a judgment of divorce. The wife might have inquired into the jurisdiction of the court granting the divorce, and, if it had appeared that the plaintiff had not acquired a bona fide domicile in Kansas at the time of instituting the proceedings, the decree would have been open to attack. *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804. But no such attack was made, and therefore we are bound by the recitals of that decree. As to the grounds for divorce prescribed by the laws of Georgia and Kansas, there are certain points of difference, it is true. The Georgia law requires desertion for the term of three years, while the Kansas statute requires only one, and the Kansas law recognizes one ground for divorce not recognized by the laws of Georgia, viz., "gross neglect of duty." The grounds for divorce alleged by the husband in the Kansas court were "gross neglect of duty" and "extreme cruelty." It requires no argument to show that there was nothing

in the grounds upon which the divorce was granted which violates the policy or conscience of this state. The proceedings in the Kansas court, which were properly authenticated, show that the husband, in conformity with the laws of Kansas, placed a copy of his petition, together with a copy of the publication notice, in an envelope, which he addressed and mailed, postage paid, to the wife in Atlanta, Ga. The language of Mr. Vice Chancellor Pitney, in the case of *Felt v. Felt*, 57 N. J. Eq. 101, 40 Atl. 436, is especially applicable to the facts of the present case: "We have not here to deal with a case where the ground of the divorce, as found by the foreign tribunal, was frivolous or not in accordance with recognized principles underlying the marriage state, or with a case where any imposition, fraud, or concealment was practiced upon either court or party. \* \* \* We are bound to presume that the finding of the court of [Kansas] was based upon sufficient and unassailable evidence. Hence it appears that no injustice was done the wife." And under these circumstances we are of opinion that the principles of comity require that such decree be given the same faith and credit in the courts of this state that it has in the state in which it was rendered. In applying the principle of comity we had in view, of course, the fact that the courts of the state in which the decree was rendered recognize the validity of and give effect to decrees in similar cases of the courts of other states. *Roe v. Roe*, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367.

3. The rule announced in the third headnote, that alimony will not be allowed to the wife on a separate proceeding, after a total divorce has been granted at the instance of the husband, is sustained by the weight of authority, and the verdict in favor of the wife must therefore be set aside. 14 Cyc. 769; *Downey v. Downey*, 98 Ala. 373, 13 South. 412, 21 L. R. A. 677, and cases cited.

The question is not made in this case, and we do not make any ruling, as to what might be the wife's rights or remedies had there been in this state property of the husband, real or personal, owned by him at the time of the granting of the decree of divorce, which might have been seized and administered by a court of competent jurisdiction, in proceedings by the wife to subject such property to her claim for a support or allowance in the nature of alimony out of such property.

Judgment reversed. All the Justices concur.

#### JAMES v. DOUGLAS COUNTY.

(Supreme Court of Georgia. Aug. 13, 1908.)  
COUNTIES—CONTRACTS—ACTIONS ON—PLEADING.

Under the law now embraced in Pol. Code 1895, § 343, and in view of the construction

placed upon the provisions of section 527 of the Code of 1868, relating to the same subject-matter, by this court in *Pritchett v. Inferior Court*, 46 Ga. 462, and in more recent cases where the ruling in that case has been followed, a petition in an action against a county, founded upon an alleged contract, is not good unless it affirmatively avers that such contract was entered upon the minutes of the proper authorities in charge of the financial affairs of the county. *Milburn v. Glynn County*, 109 Ga. 473, 34 S. E. 848; *Holliday v. Jackson County*, 121 Ga. 310, 48 S. E. 947; *Jones v. Bank of Cumming* (Ga.) 62 S. E. 68, and citations.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; J. J. Kimsey, Judge.

Action by W. A. James against Douglas county. Judgment for defendant. Plaintiff brings error. Affirmed.

James brought his equitable petition against the county of Douglas, seeking an injunction against the enforcement of a certain tax *fi. fa.*, and praying judgment for the sum of \$300, alleged to be due him as fees for certain services performed by him as an attorney at law under a contract of employment by the county. It was alleged that petitioner performed the services contemplated under the contract of employment, and that the county received the benefit of the services so rendered. It does not appear that the contract was entered upon the minutes of the authorities having charge of the financial affairs of the county, nor even that it was in writing. The petition was dismissed upon demurrer. The injunction had been previously denied, and the question as to whether it was properly denied is not before the Supreme Court, as no exception to the ruling of the superior court upon that question was filed.

W. A. James, for plaintiff in error. B. G. Griggs, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

#### KEHOE v. ROURKE.

(Supreme Court of Georgia. Aug. 13, 1908.)

1. MUNICIPAL CORPORATIONS—CONVEYANCES—VALIDITY.

Where the municipality had title in fee to its streets, as indicated by the ruling in *Savannah R. Co. v. Shiels*, 33 Ga. 614, and statutes therein cited, and the mayor and aldermen of the city of Savannah, by an appropriate deed executed January 12, 1898, conveyed a certain portion of one of its streets covered by a public dock in exchange for other land to be used as a street, even if the municipality did not then have charter power to execute such deed, the want of original authority was saved by the confirmatory act of August 23, 1905 (Acts 1905, p. 595), and the grantee by virtue of the conveyance acquired title to the demised premises. *Marietta Chair Co. v. Henderson*, 121 Ga. 406, 49 S. E. 312, 104 Am. St. Rep. 156.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 640.]

2. SAME—ASSESSMENT OF DAMAGES.

The fact that the act of 1905 (Acts 1905, p. 595) did not provide for the assessing of damages did not render it unconstitutional;

there being a general lawmaking provision as to the mode of assessing damages to adjacent property, if the owner be entitled thereto.

### 3. SAME—OBSTRUCTION OF STREET—INJUNCTION.

Where, after the execution of such a deed as described in the first headnote, the grantees therein named inclosed the part of the street so conveyed to him and constructed a permanent marine railway thereon, without objection from the owner of an abutting lot, or any attempt to prevent it, a subsequent purchaser of the land, after the permanent obstruction and abandonment was complete, would not have a right, after the passage of the act of 1905 (Acts 1905, p. 595), to an injunction against such obstruction. Nor would the fact that the structure projected over the line of the lot and occupied a portion thereof furnish ground for the injunction against the maintenance of such obstruction. Under the facts stated, if the purchaser has any remedy, it is not by injunction; and a proceeding which sought only such remedy was demurrable. *Marietta Chair Co. v. Henderson*, 121 Ga. 406, 49 S. E. 312, 104 Am. St. Rep. 156.

### 4. CANCELLATION OF INSTRUMENTS—PARTIES.

The city of Savannah is a necessary party to an application to cancel such a deed as is referred to in the first headnote. *Savannah Ry. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010; *Mayor of Macon v. Harris*, 73 Ga. 428; *Hope v. Gainesville*, 72 Ga. 246; *Palmer v. Inman*, 122 Ga. 229, 50 S. E. 86.

### 5. INJUNCTION—PARTIES ENTITLED.

For an unauthorized interference with the employes of a lessee of real property, while engaged in the service of their employer, the landlord has no right to enjoin such interference. *Coney & Parker v. Brunswick Steamboat Co.*, 116 Ga. 222, 42 S. E. 498.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by William Kehoe against John Rourke. Judgment for defendant, and plaintiff brings error. Affirmed.

O'Connor, O'Byrne & Hartridge, for plaintiff in error. Osborne & Lawrence, Adams & Adams, and John P. Rourke, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

BROWN v. ATLANTA, B. & A. R. CO.  
(Supreme Court of Georgia. Aug. 12, 1908.)

### 1. PLEADING—PETITION—AMENDMENT—ANSWER.

While a defendant may file an answer to an amendment to the petition in a case, admitting or denying material allegations in the same, or stating why he can neither admit nor deny them, he is not required to file an answer to the amendment, and his failure to do so does not authorize the court or jury to treat the allegations in the amendment as being admitted. *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874.

### 2. RAILROADS—SALE.

Upon the controlling question raised in the record, this case is ruled by the decision in the case of *Hawkins v. Central of Georgia Railway Company*, 119 Ga. 159, 46 S. E. 82.

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by J. P. Brown against the Atlanta,

Birmingham & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. Wall and E. W. Ryman, for plaintiff in error. Rosser & Brandon, J. L. Sweat, and Haygood & Cutts, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

### CORBIN v. SHIVER et al.

(Supreme Court of Georgia. Aug. 15, 1908.)

### 1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—CONVEYANCE BY WIDOW—RIGHTS OF HEIRS.

A petition in a suit brought to recover an undivided interest in certain lands, alleging that the land had belonged to the estate of a named decedent and had been set apart as a year's support for the widow and the minor children of the decedent, that the widow, after the setting aside of a year's support, sold and conveyed the lands to a named party, and that the latter had, in turn, conveyed the property to his vendee, states no cause of action entitling the petitioner to recover against those who derive title from the vendee of the widow, where the plaintiff in the suit relies for a recovery upon the fact that he was one of the minor children of the decedent and the widow at the time of the setting apart of the year's support, but has since married; there being no allegation in the petition that the sale of the land by the widow was for purposes other than those contemplated by the statute creating the right of a year's support for the family of the decedent. *Miller v. Miller*, 106 Ga. 312, 31 S. E. 186; *Howard v. Pope*, 109 Ga. 259, 34 S. E. 301; *Bridges v. Barbree*, 127 Ga. 679, 56 S. E. 1025.

2. SAME.  
As the petition in this case stated no cause of action against the defendants, the court erred in overruling a general demurrer thereto.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by Minnie Shiver and others against Etta Corbin. Judgment for plaintiffs, and defendant brings error. Reversed.

Bennet & Cox, for plaintiff in error. I. A. Bush, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

### TOWN OF PELHAM et al. v. PELHAM TELEPHONE CO. et al.

(Supreme Court of Georgia. Aug. 17, 1908.)

### 1. TELEGRAPHS AND TELEPHONES—USE OF STREETS—MUNICIPAL ASSENT—EVIDENCE.

Express municipal assent to the occupation of a city's streets by a telephone company can only be shown by formal municipal action, and not by mere general declarations of witnesses that such municipal assent was given. Parol statements of witnesses that certain improvements were made or work was done "with the full knowledge and consent of the municipal authorities of said town, including the mayor and council of said town," and that a telephone company had established and maintained in the town a telephone system, with poles, wires, and

other fixtures in, on, and over the streets, "all by the consent of the municipal authorities of said town," and that a witness, who has been a member of the town council and of a committee, thereof, has designated and pointed out in the streets of said town where to locate the poles and wires, "receiving his authority to do so from the town council of said town in regular meetings," and other like statements, were not admissible in evidence.

**2. TRIAL—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE FOR SPECIAL PURPOSE.**

Even if some of the testimony admitted over objection was competent as tending to raise an estoppel, it does not appear whether the court considered the testimony for that purpose, or to show an express municipal grant; and, as the record does not show it was so restricted, on another hearing its admissibility to establish an estoppel may be passed on by the court.

**3. APPEAL AND ERROR—REVIEW—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.**

Material evidence having been erroneously admitted, which may have played an important part in affecting the decision of the presiding judge, the judgment is reversed, and direction given that a new trial be had upon proper evidence.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action between the town of Pelham and others and the Pelham Telephone Company and others. From the judgment, the town of Pelham and others bring error. Reversed.

Davis & Merry, for plaintiffs in error. J. J. Hill and Pope & Bennet, for defendants in error.

**PER CURIAM.** Judgment reversed. All the Justices concur.

**BOSWELL et al. v. GILLEN.**

(Supreme Court of Georgia. Aug. 15, 1908.)

**1. COMPROMISE AND SETTLEMENT—BINDING EFFECT.**

Where an agreement for the compromise of a pending cause is made by a party and his counsel on the one hand, and by the counsel of the opposite party and ratified by his client, whereby one of the parties is to do certain acts, such agreement, upon performance or offer to perform according to its terms within a reasonable time, becomes binding on the parties, and puts an end to the original subject-matter of the controversy. *Parker v. Riley*, 21 Ga. 427.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, § 66.]

**2. SAME—AGREEMENT IN PAROL.**

Such an agreement need not be in writing. 8 Cyc. 513.

**3. SAME.**

The rule of court that no consent between attorneys or parties, if denied, will be enforced, if not in writing, has no application to an oral agreement and compromise of a pending suit.

**4. SAME—CONSIDERATION.**

The settlement of doubtful issues involved in a pending cause is a sufficient consideration to support an agreement of settlement and compromise. *Watkins v. Watkins*, 24 Ga. 402; *Belt v. Lazenby*, 126 Ga. 772; 56 S. E. 81.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 36-38.]

**5. SAME—PLEADING IN BAR.**

Where, in a claim case, the plaintiff in fact and the claimant orally agree to settle the

issues in the pending case, by the terms of which settlement the claimant is to pay one-half of the costs and a certain amount of money to the plaintiff, and transfer to the plaintiff a certain bond for title, upon the performance by the claimant of the conditions imposed upon him, or an offer to perform by him within a reasonable time, such agreement and settlement may be pleaded in bar of the further prosecution of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, § 54.]

**6. TRIAL—REMARKS OF COURT.**

It is not error, after the evidence has been closed, and counsel for plaintiff moves for the direction of a verdict, stating as a ground therefor that the settlement relied on by claimant was without consideration and would not be binding, for the court, in ruling on the motion, to say: "Yes; it would be binding. If a man makes a settlement, he ought to be made to stick to it."

**7. CONTINUANCE—GROUNDS.**

The court is not bound to suspend the trial of a case to enable a litigant to procure additional evidence. *Zipperer v. Savannah*, 123 Ga. 135, 57 S. E. 311.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 58.]

**8. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.**

An assignment of error on an excerpt from a charge, where the quoted excerpt is only a fragment of a sentence to the effect that if the jury should find certain facts, without stating their legal effect or significance, and concluding with the word, "etc.," is too indefinite to present any question for adjudication. *Holland v. Williams*, 126 Ga. 617 (2), 55 S. E. 1023.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3013-3016.]

**9. TRIAL—EXCEPTIONS TO CHARGE.**

A general exception to the charge of the court in its entirety is sustainable only where the whole charge is erroneous. *Reedy v. Brunner*, 60 Ga. 108.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 689.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by A. J. and E. R. Boswell against T. D. Gillen. Judgment for defendant, and plaintiffs bring error. Affirmed.

Jas. Davison, for plaintiffs in error. Samuel H. Sibley, for defendant in error.

**FISH, C. J.** Judgment affirmed. All the Justices concur.

**HEARN et al. v. CLARE et al.**

(Supreme Court of Georgia. Aug. 15, 1908.)

**1. CORPORATION—ACTIONS—PARTIES—WHO ARE STOCKHOLDERS.**

Persons are not parties to litigation solely by reason of the fact that one of the parties thereto is a corporation of which such persons are stockholders. *Blackman v. Central R. Co.*, 58 Ga. 189.

**2. SAME—RECEIVERS—REMOVAL.**

Where, upon a petition duly filed, the assets of a corporation have been placed in the hands of receivers, no one can have a hearing of his petition in such litigation, in aid of the original petition, asking for injunctions, a removal of the receivers, and the appointment

of others in their stead, and for other relief, before becoming a party to such litigation. *Branan v. Baxter*, 122 Ga. 222, 50 S. E. 45; *Bradford v. Cooleage*, 103 Ga. 753, 30 S. E. 579; *Citizens' Bank v. Hubbard*, 70 Ga. 411; *McDougald v. Hall*, 3 Ga. 174; Civ. Code 1895, § 4903.

### 3. SAME.

In an equity cause, in which receivers had been appointed, some who were parties to the cause and some who were not jointly filed a petition, which they prayed should be filed as an equitable proceeding therein in aid of certain exceptions, motions, and other proceedings already pending, and also for other relief in the cause. The court granted a rule nisi, in which, among other things, it was ordered that "said petition be filed in accordance with the prayer thereof, and that respondents show cause, as hereinafter provided, why the same should not be allowed as an amendatory or ancillary proceeding as prayed for." Upon a demurrer setting up, among other grounds, a misjoinder of parties in such petition, the presiding judge dismissed it. *Held*, that there was no error in such ruling.

### 4. APPEAL AND ERROR—REVIEW.

A misjoinder of parties being sufficient to uphold the judgment dismissing the petition, it is unnecessary to pass upon the other grounds of demurrer.

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by Samuel Hearn and others against Sydney Clare and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

R. L. Berner, Crovatt & Whitfield, and Haygood & Cutts, for plaintiffs in error. E. Wall, Hal Lawson, L. Kennedy, E. W. Ryman, Eason & Bull, and O. H. Elkins, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

## FULLBRIGHT v. NEELY.

(Supreme Court of Georgia. Aug. 18, 1908.)

### 1. NEW TRIAL—PROCEEDINGS TO PROCURE SPECIFICATION OF ERROR—SUFFICIENCY.

An assignment of error in a motion for a new trial, complaining of the admission or rejection of evidence, is not valid when such evidence is not literally or in substance set forth in the motion or attached thereto as an exhibit.

### 2. EVIDENCE—SELF-SERVING DECLARATIONS.

Upon the trial of a complaint for land, evidence of a declaration made by the defendant, while in possession thereof, that the purchase by him of the dower interest therein made his title to such land complete, as he had previously acquired and then owned the reversionary interest, was inadmissible in his behalf, where no question as to prescriptive title or adverse possession was involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1078.]

### 3. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Under the facts of this case, the defendant was not a competent witness to testify that the deceased grantor of the plaintiff executed, in her capacity as executrix of an estate, a deed to the defendant to the land for which suit was brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 693.]

### 4. TRIAL—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.

The court charged the jury as follows: "I charge you that in this case there is no evidence contradicting the testimony of Mrs. Carter, and that the deed to her and Annie Carter was signed by Oscar Carter, Mr. and Mrs. Burdell, and Mr. and Mrs. Butler, and no evidence contradicting her testimony that the power of attorney to Heman H. Perry was signed by Edward A. Carter. I charge you, therefore, that in this view of the case you must find that the plaintiff is entitled to recover an undivided four-fifths interest." The court also charged the jury: "The only conflict in the evidence, as to the deed of Mrs. Carter and Annie Carter, relates to the question as to whether Edward A. Carter signed the power of attorney to H. H. Perry, authorizing him, as attorney, to convey the remainder in this land to Mrs. Carter and Annie." The evidence in this case was such that the question as to whether or not a deed and a power of attorney of the kind referred to were executed and delivered by the parties named was one for determination by the jury, and the giving of the charges above quoted constituted error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420-435.]

### 5. ESTOPPEL—EQUITABLE ESTOPPEL—INCONSISTENCY OF CONDUCT AND CLAIMS.

The application in the name of the defendant that he be appointed guardian of the property in question, as the property of the grantor of the plaintiff, and the order of the ordinary appointing him as such guardian, and an order of the ordinary authorizing him as such guardian to rent such property, were admissible in evidence, under the facts of this case; and the court committed no error in giving the charge complained of relative to estoppel as arising by reason of such application and orders.

### 6. EJECTMENT—VERDICT.

Under the facts of this case it was error to charge the jury that, if they should find for the defendant, the form of their verdict would be: "We, the jury, find the land sued for to be the land of the defendant."

### 7. SAME—RIGHT OF ACTION—TITLE TO SUPPORT ACTION.

Where a testator, who held property belonging to some of his children under a trust deed, directed in his will that all of this property and his property be equally divided between his widow and all of his children, and that, if any child owning an interest in the property under the trust deed should take such interest thereunder, the property belonging to the testator's estate be so divided that such child should receive nothing from his estate until each child not owning any property under the trust deed should receive from his estate an amount equal to that received by such child under the trust deed, and directed that as each of his children became of age one share be assigned to such child, and that in doing so an allowance be made for the education of those under age, in addition to an equal share, and where there was evidence that all except the youngest of the legatees received from the estate all that they would be entitled to if a proper distribution had been made according to the provisions of the will, and that the only property left was the reversionary interest in land in which the widow had taken dower, which interest was no more than such youngest legatee would be entitled to if such distribution had been made, *held*, that if such reversionary interest was not assigned to her by the executors, or by the court, or conveyed to her by the other legatees, and she had never been in possession of such land, the grantee of the youngest legatee, by reason of such proof alone, even though the executors were dead and many years had elapsed since the death of the testator, could not maintain, after the death of the widow, a statutory complaint for such land against one of the legatees.

**3. SAME.**

A plaintiff in ejectment, or in a statutory complaint for land, must recover on the strength of his own title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16-20.]

**9. SAME—FORM OF ACTION.**

The form of action in this case was a statutory complaint for land.

**10. SAME—INSTRUCTIONS.**

Under the facts of this case, the charge of the court relative to presumption of assent on the part of the executors was inapplicable.

(Syllabus by the Court.)

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Statutory complaint for land between H. J. Fullbright, executor, and R. C. Neely. From the judgment, Fullbright brings error. Reversed.

Brinson & Davis, Phil P. Johnston, and H. J. Fullbright, for plaintiff in error. Lamar & Callaway, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur.

**LAY v. NASHVILLE, C. & ST. L. RY. CO.**  
(Supreme Court of Georgia. Aug. 18, 1908.)

**1. NEGLIGENCE—WHAT LAW GOVERNS—COMMON LAW—PRESUMPTIONS—FOLLOWING DECISIONS OF OTHER STATES.**

Where suit is brought in this state to recover damages for personal injuries sustained in the state of Alabama, the rights of the parties as to the merits of the case are to be determined by the law of Alabama; and, where no statute of that state is pleaded or shown, it will be presumed that the common law is in force there. While the courts of this state will follow the decisions of a sister state in construing the statutes thereof, they are not bound by the interpretation placed upon the common law by the courts of other states.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 2; vol. 20, Evidence, § 101; vol. 10, Common Law, § 14; vol. 13, Courts, § 322.]

**2. MASTER AND SERVANT—INJURIES TO SERVANT—LIABILITY OF MASTER.**

In the present case, no statute of the state of Alabama having been pleaded, the rights of the parties as to the merits of the controversy were dependent upon the common law of master and servant, the general principles of which, as applicable to the case, are embodied in Civ. Code 1895, §§ 2611, 2612.

**3. SAME—INSTRUCTIONS—QUESTIONS FOR JURY—PROCEDURE.**

Upon the trial of a case in this state, founded upon a cause of action originating in another state, the procedure of this state governs. A statute of this state prohibits the trial judge from expressing or intimating to the jury his opinion of what has or has not been proved, and makes a violation thereof absolute cause for a new trial. Civ. Code 1895, § 4334. It has been repeatedly held by this court that an instruction to the jury that certain facts do or do not constitute negligence is a violation of such statute. Accordingly, on the trial of an action brought in this state by a brakeman of a railway company to recover damages for personal injuries sustained in Alabama on account of the alleged negligence of the defendant company in the construction and maintenance of

an overhead bridge across its track, it was error, requiring the grant of a new trial, for the judge to give the jury the following instructions: "If they [the company] should erect it [the bridge] so low that the parties passing under it on the cars, the brakemen, cannot avoid the danger by bending or stooping, then it would be negligence; \* \* \* otherwise it would not be so," and "If many railroads abstain from their use [the use of whipping cords, or telltales] the failure to use them is not negligence; and their use by a majority of railroads does not require all railroads to use them, nor impute negligence on account of the failure to use them." The fact that substantially the same language may have been used by the Supreme Court of Alabama in delivering an opinion did not authorize the trial judge to embody it in his charge. *Southern Cotton Oil Co. v. Skipper*, 125 Ga. 368 (8), 54 S. E. 110, and citations.

**4. SAME.**

None of the other instructions excepted to was erroneous for any of the reasons assigned.

**5. APPEAL AND ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.**

An assignment of error was not well made which was to the effect that the court erred in admitting in evidence, over plaintiff's objection (which was stated), "three law books purporting to be Reports of the Supreme Court of Alabama, and to introduce in evidence three cases reported therein, to wit, the case of *Louisville & Nashville Railroad Company v. Hall*, 87 Ala. 708-725, 6 South. 277, 4 L. R. A. 710, 18 Am. St. Rep. 84. *Same Railroad v. Hall*, 91 Ala. 112-124, 8 South. 371, 24 Am. St. Rep. 863, and *Same Railroad v. Banks*, 104 Ala. 508-519, 16 South. 547." A ground of a motion for a new trial should either be complete in itself, or rendered so by an exhibit to the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3010-3012.]

**6. MASTER AND SERVANT—INJURY TO EMPLOYÉ.**

In view of the decision rendered in *Stirk v. Central R. Co.*, 79 Ga. 495, 5 S. E. 105, and especially as no point was made as to variance between the allegations of the petition and the proof submitted by the plaintiff, we cannot say that the evidence in the present case demanded the verdict found in favor of the defendant.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by Ladd Lay against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Arnold & Arnold, J. Z. Foster, and Harvey Hill, for plaintiff in error. Brown & Spurlock and Payne & Payne, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

**HUTCHESON v. MANSON, Ordinary.**

(Supreme Court of Georgia. Aug. 13, 1908.)

**MANDAMUS—TO ORDINARY—WHEN GRANTED.**

The fact that an ordinary, whose official duty it was to hire out certain misdemeanor convicts and to collect and disburse the hire for the same, has, after hiring them out and collecting the hire, wrongfully disbursed the fund thus received by him, will not prevent a mandamus ab-

solute from being granted for the purpose of compelling him to pay over to the applicant for the writ an amount of money which it was the legal duty of the ordinary to pay him from such fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 224.]

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Application by John B. Hutcheson for writ of mandamus against Z. T. Manson, ordinary. From an order denying the writ, petitioner brings error. Reversed.

J. W. Wise and J. W. & J. D. Humphries, for plaintiff in error. W. L. Watterson, for defendant in error.

FISH, C. J. John B. Hutcheson brought a petition for mandamus against Z. T. Manson, as ordinary of Clayton county. The petition alleged that during the year 1905 the petitioner held the office of solicitor of the city court of Jonesboro, and during that year in the discharge of his official duties, prosecuted to conviction, for misdemeanors, four named persons, and they were all sentenced by the court to work in prison or on the chain gang, the terms for which they were respectively, sentenced being stated: That each of these convicts was hired out by the defendant ordinary for the full term for which such convict was sentenced, and the full amount of the hire, in each case, was collected by the ordinary; he thus receiving, in the aggregate the sum of \$668. That the petitioner had a balance due him of \$335.10 on his insolvent orders, for insolvent fees which had accrued to him in the discharge of his official duties in the city court of Jonesboro. That he was "entitled to have his pro rata part of the hire of such convicts appropriated to the payment of said insolvent fees." That, on a named date, he had presented his claim for such fees to the ordinary, "and demanded that his pro rata part of the money arising from the hire of said convicts be paid upon his claims, but his demand was refused." Alleging that he was without other remedy to enforce his rights, he prayed that the ordinary be compelled by mandamus to pay him the sum that was due him. In his answer to the rule nisi, the ordinary admitted that the persons named in the petition as having been convicted had been convicted and sentenced for the terms alleged, but alleged that they were sentenced to work in the chain gang of the county, or such other place as the ordinary might direct. He admitted the allegation as to his having collected the amount of hire of these convicts as alleged in the petition, but denied that the same, or any part thereof, was in his possession or control at the time of filing his answer, or the time when demand was made on him, or at the time when the petition for mandamus was filed, and alleged that the

funds arising from the hire of these convicts had been paid out for work done on the public roads and bridges of the county, after paying to the petitioner and the other officers entitled thereto the costs which had accrued in each of these particular cases. He further alleged that he had been ordinary of the county for a number of years, and that all funds and money coming into his hands, arising from the hire of misdemeanor convicts, had, with notice to all the officers interested therein, been paid out in the same way, and none of them had ever claimed said money, and that all of them, including the plaintiff, at the time that the money arising from the hire of the convicts named in the petition had been paid out on the roads and bridges of the county, had full notice as to the use that was being made of it, and made no objection to the same. He also alleged that his course in the matter was in accordance with the custom which prevailed in the county. The petitioner demurred to the answer; one ground of the demurrer being that the answer set up no defense that was good in law. The court overruled the demurrer, and exceptions pendente lite were filed. When the case came on to be heard, in term, the court submitted certain questions of fact to the jury, and the jury returned a verdict in which they answered such questions. The petitioner made a motion for a new trial, upon the ground that the answer of the jury to one of these questions was contrary to the law and the evidence. This motion was overruled, and the court then denied the mandamus absolute and discharged the rule nisi. The petitioner sued out a bill of exceptions, wherein he complained of the overruling of the motion for a new trial and of the refusal of a mandamus absolute, and also assigned error upon the exceptions pendente lite.

The trial judge erred in not sustaining the demurrer to the defendant's answer. It was the duty of the ordinary, after hiring out the convicts and collecting the hire for the same, to disburse the funds so received by him. *Sapp v. De Lacy*, 127 Ga. 659, 56 S. E. 754, and cases cited. The ordinary recognized this to be his duty, and did disburse the funds so collected and received; but, unfortunately for him, he did not do so in accordance with the law. "Under Pen. Code 1895, § 1097, the fund arising from the hire of misdemeanor convicts shall be first applied to the payment of the fees of the officers of court. This application is to be made by first taking from the hire the costs in the particular cases, including the fees of witnesses, and then discharging the orders of the officers of court for insolvent costs in other cases, and paying into the county treasury whatever balance may remain." *Barron v. Terrell*, 124 Ga. 1077, 53 S. E. 181. It being the official duty of the ordinary to so apply such funds, upon his refusal to do so performance of such duty could be compelled

by mandamus. *Pulaski County v. De Lacy*, 114 Ga. 583, 40 S. E. 741. See, also, *Barron v. Terrell*, supra, in which the question decided as above indicated arose under a proceeding for mandamus instituted against the ordinary of a county.

But the ordinary set up the defense that the funds which came into his hands from the hire of these misdemeanor convicts had all been disbursed by him, that he had paid therefrom the costs of the officers of court in the particular cases in which these convicts had been, respectively, convicted, and the balance of such funds had been paid out for work done upon the roads and bridges of the county, and that therefore no portion of such funds was in his possession or control. He further alleged that the funds were so disbursed by him with the knowledge of the petitioner, and without objection upon his part; but he did not allege that the petitioner did or said anything which induced him to so pay out these funds. So the simple question made by the answer of the ordinary was whether mandamus would lie to compel him to pay the orders of the petitioner for insolvent costs, when the funds from which these orders should have been paid had been all disbursed by the defendant in violation of the law, and hence were not in his possession or within his control. In some jurisdictions, inability upon the part of a public officer to pay or turn over funds which have come into his hands, to the person to whom it is his official duty to pay or deliver them, has been held sufficient to prevent his being required by mandamus to do so, even though his inability has been caused by his having paid out or disbursed such funds in violation of his duty under the law. In other jurisdictions, a contrary rule has been enforced. The question in this state, however, cannot now be considered an open one. In *Aaron v. German*, 114 Ga. 587, 40 S. E. 713, a county treasurer brought a petition for mandamus against the ordinary of the county to compel him to turn over to the plaintiff the proceeds of the sale of certain bonds issued by the county, for the purpose of raising money with which to build a courthouse. A portion of the fund raised by the sale of the bonds had been disbursed, before the defendant ordinary came into office, by his immediate predecessor therein. After the defendant came into office, he collected the balance of such fund, and proceeded to pay therefrom various county orders which had been drawn by the former ordinary, in payment for work done in the erection of the courthouse. Subsequently, the plaintiff, as treasurer of the county, made a demand upon the defendant, as ordinary, for the gross amount of the proceeds of the sale of the bonds, which demand was refused, and shortly thereafter the treasurer brought his proceedings for mandamus, to require the defendant to pay over to him such gross sum, or at least that portion of it which actually went into the hands of the defend-

ant. The trial judge granted a mandamus absolute as to the funds still remaining in the hands of the ordinary, but denied it as to the rest of the original fund. This court held that as, upon the theory presented by the plaintiff's petition, to which there was no demurrer, the ordinary was under a legal duty to turn over to the plaintiff, as treasurer of the county, the portion of the fund which the defendant had collected as ordinary, he could be compelled by mandamus to do so, and that "the mandamus absolute, if granted at all, should have covered the whole amount for which [the defendant] was accountable, and not merely the balance which he retained in his hands after making an unauthorized disposition of the greater portion of the fund which he had collected." The headnote in the case is as follows: "One who has failed to comply with a duty imposed upon him by law of paying over to another a particular fund to the custody of which the latter is entitled is liable to account to him, not merely for such part of the fund as the former has retained in his hands, but also for any portion thereof of which he may have made an illegal disposition." Under that decision, it is clear that the fact that the ordinary did not have in his possession or control the funds which he had collected from the hire of the misdemeanor convicts, from which to pay petitioner's orders for insolvent costs, as solicitor of the city court, was no reason for denying a mandamus absolute, when it appeared that the ordinary had himself disbursed such fund in violation of the law. Consequently, the case falls squarely under the ruling made in *Aaron v. German*, and the judgment overruling the demurrer to the defendant's answer must be reversed.

The statute requires the ordinary, after discharging the orders for insolvent costs, to pay over the balance to the county treasurer. Pen. Code 1895, § 1097. The answer of the ordinary to the mandamus nisi set up that he expended the money himself. He had no authority to do so, and, if thus the money was illegally expended, the ruling in the case of *Aaron v. German*, supra, applies. If, at the time of paying to the applicant his costs in the particular cases, the response set up and the evidence showed any case of legal or equitable estoppel (Civ. Code 1895, §§ 5150, 5152), as, for instance, if the law was susceptible of two constructions, and had not then been construed by the Supreme Court, but was the subject of different views, and if the applicant knew the construction placed upon it by the ordinary, and that under it the latter would proceed to pay into the county treasury the balance after deducting the particular costs, and acquiesced in his doing so, without objection, a different question might be presented, which we are not now required to consider or decide.

Of course, a new trial of the case necessarily results from our ruling, as the proceedings in the court below, after the erroneous



overruling of the demurrer to the respondent's answer were nugatory and void.

Judgment reversed. All the Justices concur.

### SIMS et al. v. SIMS et al.

(Supreme Court of Georgia. Aug. 13, 1908.)

#### 1. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—SUFFICIENCY.

Where a number of witnesses testified upon each side of a case, an assignment of error complaining of the admission or rejection of specified testimony of a witness is not valid, when it nowhere appears in such assignment of whose testimony the complaint is made. *McTier v. Crosby*, 120 Ga. 878, 48 S. E. 355 (2); *Central Ry. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 590 (7); *Sims v. State*, 68 Ga. 486.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3010-3012.]

(a) One ground of the motion for a new trial was as follows: "Because the following occurred upon the trial of the case: 'Q. Where did the proceeds of your labor go? A. To lay the foundation for his fortune. Q. Whose fortune? A. The one these boys are trying to get. Mr. Arnold: We object to that evidence. The Court: Yes, that is an improper statement. Mr. Arnold: We object to going into the entire history of this gentleman and letting him put the construction on what he has done. The Court: He can state what he did, but not that he laid the foundation for the fortune. That statement is withdrawn from you, gentlemen.' The error assigned is sustaining the objection of the propounders and excluding the statement of the witness that he laid the foundation of this fortune." Another ground was as follows: "Because the following occurred upon the trial of the case: 'A. He seemed to. He never said a cross word to me in his life in an angry voice. Q. Did he seem to appreciate your conduct then? A. Yes, sir. Mr. Quillian: I object to that question as leading, and calling for a conclusion. The Court: It strikes me that the question is leading. I think the inference as to whether he showed a great affection for him is a conclusion.' The error assigned is exclusion of the statement by the witness that his father had always shown a great affection for him."

There were a number of other grounds of the motion for a new trial, similar in general form and character to those above set out, though some of them varied from those quoted in some respects. It is evident from the quotations above that such grounds of the motion were of such a character as to render their consideration improper. They neither state expressly who offered the evidence, nor identify the witness either by name, designation, or otherwise, so as to show whether he was a witness sworn by the propounders or the caveators, or gave other indicia by which the court could read the evidence to which objection was made in the light of its context or surroundings, or determine whether the witness had given the same evidence in substance without objection, or whether the error alleged existed at all, or, if so, whether it was material. Grounds of a motion for a new trial of the character of those indicated by the quotations above made, or of similar kind, are not such as to authorize or require this court to pass upon them. In order to pass upon such grounds, the court would be compelled to search through the entire brief of evidence to ascertain to the evidence of what witness objection was made and the pertinency and force of such objection, and, inasmuch as the brief of evidence cannot properly be made up of questions and answers, the difficulty would be enhanced with a proper

brief of evidence, the more especially in a case where the evidence was excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1744.]

#### 2. SAME—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE—NECESSITY OF SETTING OUT.

An assignment of error in a motion for a new trial, complaining of the admission or rejection of evidence, is not valid, when such evidence is not literally or in substance set forth in such motion, or attached thereto as an exhibit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3010-3012.]

#### 3. TRIAL — STRIKING OUT EVIDENCE — EVIDENCE ELICITED BY MOVANT.

Where, in the trial of a case in the superior court, counsel asked a witness if he did not testify to certain matters upon the trial of the same case before the ordinary, it was not error to refuse to rule out, at the instance of such counsel, the answer of the witness: "Yes, that is what I am testifying to to-day."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 241.]

#### 4. NEW TRIAL — GROUNDS — RECEIVING EVIDENCE IN WRONG ORDER.

Where the mental condition of a party is under investigation, it is not error requiring a new trial to permit a witness to give his opinion on the subject and thereafter give the facts upon which it is based, instead of requiring the witness to first state the facts upon which he bases his opinion.

#### 5. WILLS—PROBATE—PLEADINGS—GROUND OF CAVEAT—SUFFICIENCY.

There was no error in sustaining a demurrer thereto and striking the following ground of the caveat to the probate of the paper propounded as a will: "Said instrument is not the will of W. E. Sims, because the same was executed by him under a mistake of fact as to the conduct of the caveators, who are heirs at law and sons of said W. E. Sims." A conclusion only is averred, and no facts upon which the alleged mistake was based are stated.

#### 6. SAME.

There was no error in sustaining a demurrer thereto and striking the following grounds of the caveat to the probate of the paper propounded as a will: "Said instrument is not the will of W. E. Sims, because the same was executed by him under the mistaken belief that by its terms he was making his children equal objects of his bounty; whereas, said instrument does not have that effect." And: "Said instrument is not the will of W. E. Sims, because the same was executed by him under and because of the belief that he had given or advanced to the caveators money or property, prior to the execution of said will, which, taken together with what he had bequeathed to them in said alleged will, gave to them as much as he gave to his other children by the terms of the said alleged will; whereas, in fact he had not so given or advanced to them the amount of said gifts or advances being far less in value than the value of the property bequeathed to his other children in the said alleged will."

#### 7. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE—ADMISSIBLE IN PART.

Where objection is made to the entire testimony of a witness on the ground that he is incompetent as a witness to testify to transactions and communications between him and a deceased person, because knowledge thereof was acquired while he was acting as attorney for such deceased, and that such testimony related to such transactions and communications, whether or not such witness was competent to testify to such transactions and communications under the facts of the case, such objection is not well taken, where it appears that a part of such testimony did not relate to such transactions or com-

munications and was relevant to a material issue in the case. *Murphey v. Bush*, 122 Ga. 715, 718, 50 S. E. 1004; *Maynard v. Interstate Ass'n*, 112 Ga. 443, 37 S. E. 741.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 223-225.]

#### 8. SAME—INSTRUCTIONS—REQUESTED CHARGES COVERED BY CHARGE GIVEN.

There was no error in any of the failures or refusals to charge, specified by movant in the motion for a new trial, or in giving the charges of which complaint is made. The requests submitted, so far as legal and pertinent, were covered by the general charge, which fully and fairly presented to the jury the issues involved in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

#### 9. APPEAL AND ERROR—REVIEW.

None of the errors of which complaint is made require the grant of a new trial. The evidence was amply sufficient to warrant the verdict rendered, and the judgment of the court below refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceedings between W. I. Sims and others and George H. Sims and others for the probate of a will. From the judgment, W. I. Sims and others bring error. Affirmed.

Burton Smith and Anderson, Felder, Rountree & Willson, for plaintiffs in error. F. A. Quillian, Arnold & Arnold, and V. S. Moore, for defendants in error.

HOLDEN, J. Affirmed. All the Justices concur.

### GEORGIA COAL & IRON CO. v. BRADFORD.

(Supreme Court of Georgia. Aug. 15, 1908.)

#### 1. MASTER AND SERVANT—INJURIES TO SERVANT—"FELLOW SERVANTS"—STATUTES.

Employees of a common master, engaged in labor for the furtherance of the general purpose of the business in which they contract to serve, are "fellow servants," within the purview of Civ. Code 1895, § 2610, providing that, "except in case of railroad companies, the master is not liable to the servant for injuries arising from the negligence or misconduct of other servants about the same business."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 475-479.

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

#### 2. SAME—TEAMSTER AND ENGINEER AND FIREMAN—"FELLOW SERVANT."

Under this rule a teamster employed by a coal and iron company to assist in hauling a boiler from the furnace plant of the company to its coal mines, to be there used in getting out coal for consumption in the furnace and locomotives of the company, is a "fellow servant" with the engineer and fireman of a locomotive operated in the yards of and in connection with such furnace plant, and therefore not entitled to recover damages from the master for injuries attributable to their negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 486.]

(Syllabus by the Court.)

#### 3. WORDS AND PHRASES—"SAME BUSINESS."

A crew operating an engine and one who engages as a day laborer in removing a boiler from the furnace plant of the company to its coal mines, for use at the latter in getting out coal to be consumed in the furnace and locomotive, are engaged in the "same business," within the meaning of Civ. Code, § 2610.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by L. E. Bradford against the Georgia Coal & Iron Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye & Bryan, for plaintiff in error. Payne & Payne, for defendant in error.

HOLDEN, J. L. E. Bradford brought an action against the Georgia Coal & Iron Company, a corporation, for damages alleged to have been sustained by him by reason of the negligence of the defendant's servants and agents, and obtained a verdict. The defendant's motion for a new trial was denied, and that ruling was brought to this court by writ of error. The facts disclosed by the record, necessary to an understanding of the decision here made, are as follows: The defendant company was engaged in the operation of a furnace plant at Rising Fawn, Ga., and desired to move a boiler from its plant there to be used at its coal mines, from 10 to 14 miles distant, in getting out coal for use in its locomotives and furnaces. The plaintiff was hired by the defendant, at a stated price per day, to furnish a team of mules and himself to assist other teamsters in hauling this boiler from the plant to the coal mines. He reported at the furnace plant on the morning he was to begin work, hitched his mules, threw his "stretcher" across his shoulders, and started with them to the place where the wagon on which the boiler was to be hauled was standing. A railroad track ran through the yards of the furnace plant of the defendant company, passing between the point at which the plaintiff hitched his mules and the place where the wagon was, which track was used by the defendant company in connection with its furnace plant. As the plaintiff was walking over a crossing leading across this track to the defendant's furnace, carrying the "stretchers" to the wagon, he was struck and thrown from the track by the rear end of an engine used in hauling products from the furnace, which was then backing along the track on its way to a water tank, sustaining the injuries for which he brought suit. He alleged that he was not guilty of any negligence, but that his injuries were occasioned solely by the negligence of the servants of the defendant who were operating the engine which struck him.

It appears from the evidence contained in the record that the master mechanic of the defendant (who the plaintiff testified was the "company's boss foreman there about the place, giving any orders") made the contract of employment with the plaintiff; and the

undisputed evidence, including that of the plaintiff himself, is that he was to furnish his own labor and that of his team of mules at an agreed price per day, and was to be subject to the control and direction of the said Johnson in and about the work to do which he was employed. When the plaintiff, pursuant to his contract, reported on the premises of the defendant, and was engaged in carrying a part of the outfit furnished by him to the wagon to be used in hauling the boiler, he had already entered on his employment, and the relationship of servant and master existed between him and the defendant. It remains to be determined whether, with this relation existing, under the peculiar facts of this case he occupied the further relation of fellow servant with the crew of the engine to whose negligence he attributes the injuries which he received. It is conceded by counsel for the plaintiff, and such is the law, that if the latter relation also existed, notwithstanding his injuries be chargeable to the negligence of such fellow servants, the master would not be liable to respond to him in damages therefor.

The courts have experienced great difficulty in laying down any fixed rule by which to determine when the relationship of fellow servant exists. Indeed, it is well-nigh impossible to do this, since of what are termed personal relations, that of master and servant most frequently receives the attention of the courts, and gives rise to such a flood of cases that no criterion can be established sufficiently accurate to cover the ever-shifting facts involved in the various decisions. The difficulty has been greatly enhanced, and a diversity of opinion created among the various courts, by the application of different theories as to what constitutes the rationale underlying the liability of the master. Some authorities have entertained the view that considerations of public policy give rise to the exemption of the master from responsibility for the negligent acts of a fellow servant, on the idea that to hold the servants alone responsible to each other tends to promote regard and caution for the welfare of each other, thereby enhancing the general character of the service and the consequent good of all concerned. Others have reasoned that the master should not be held to liability, because the servants, coming in contact with each other, were in better situation to become acquainted with the habits and methods of their fellow workmen, to note their exercise of care or want of it, and were thus better able to guard themselves, than the master was to protect them, against the perils arising from the negligence of each other. These views have originated what is known as the "conassociation or department rule," whereby those engaged in separate departments of the work of a common master are not regarded as fellow servants.

Were either of these views applied in this state, we would have no hesitancy in holding

that Bradford was not a fellow servant with those engaged in running the engine which struck him. Manifestly he was in no position to control the movements of the engineer or fireman. His employment by the defendant company only began the morning of his injury, and he had but just appeared on the premises of the company as its servant. It does not appear from the record that he and the engine crew were even acquainted with each other, or that either knew that the other was employed by the common master. Nor does it appear that the removal of the boiler and the running of the engine were so connected that those engaged in the one work knew, or were chargeable with knowledge, of the movements of those engaged in the other, or that there was any association or concert of action between them at the time of the injury. As we have stated, in those jurisdictions where the "department or conassociation rule" has been adopted, the rule seems to be founded on the idea that the master is freed from liability to the servant for injuries occasioned by the negligent acts of another servant in cases where the servants are engaged in identically the same labor, or in the same department of work, at the time of the injury, or their duties are such that they are thrown together and have the opportunity of observing the habits and methods of work of other servants, and thereby occupy a better position than the master with respect to guarding against the consequences of negligence. But this is not the view adopted by many of the leading text-writers and supported by the best considered decisions; nor does such view obtain in this state. True, in the early case of *Cooper v. Mullins*, 30 Ga. 148, 76 Am. Dec. 638, this theory was adverted to as being the foundation of the rule; but, as was pointed out by the present Chief Justice in the case of *Brush Electric Light Co. v. Wells*, 110 Ga. 192, 196, 35 S. E. 305, such expression of the judge delivering the opinion in the *Cooper* Case was obiter, and the "departmental rule," which naturally follows from this line of reasoning, has been expressly repudiated by this court. See *Brush Electric Light Co. v. Wells*, *supra*, and authorities there cited.

In the present case there is no dispute as to the plaintiff and those by whose negligence he avers his injuries were occasioned serving the same common master. The difficulty lies in the determination of the question whether they were, at the time of the injury, engaged in the "same business," within the meaning of Civ. Code 1895, § 2610, which declares that, "except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business"; and it is with a view of reaching a decision of this question that we are considering the logical foundation of the principle of law, codified in that section of the

Code. The true reason why the master is exempt from liability for damages occasioned by acts of negligence on the part of fellow servants is very lucidly stated in the oft-quoted language of Judge Shaw in *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49, as follows: "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.

\* \* \* The master, in the case supposed, is not exempt from liability because the servant has better means for providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself, and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

The master, therefore, escapes liability, not on the theory that to compel the servants to look to each other for protection against the consequences of negligence will be promotive of public policy, nor on the ground that they should not be allowed any recourse on the master because they were in a better position than the master to guard against the results of each other's negligence, but for the reason that the whole matter falls within the domain of implied contract. After the master has performed the duty of selecting with due care a sufficient number of servants properly to carry on the common work, except with respect to acts the proper performance of which rest as a personal obligation on the master, which he cannot delegate, the master is not liable for an injury which befalls one fellow servant by reason of the negligence of another, not retained after knowledge by the master of the incompetency or unfitness, for the reason that when the relationship of master and servant is entered into there is no implied contract on the part of the master that he shall be re-

sponsible for such negligence, and there is an implied contract on the part of the servant that he assumes the ordinary risks incident to his employment, among which assumed risks is the danger of being injured by the negligence of a fellow servant properly selected by the master to engage in the same common employment. Such common employment is co-extensive with the scope of the business in which such servant contracts to engage; for the logic of the rule above outlined leads to the conclusion that the servant impliedly contracted to assume the risk of being the sufferer from the negligence of any other servant connected with that same business, whenever and wherever resulting, whether after association together, or upon first contact with each other, or perhaps never being within the sphere of each other's influence, as was the case with the lineman and the engineer in the *Wells Case*, supra, as far as the record discloses. And we think such is the intendment of the words "the same business," as employed in Civ. Code 1895, § 2610, above referred to.

Applying this view to the case under consideration, we are of the opinion that when Bradford became a servant of the defendant, operating a coal and iron business, to engage as a day laborer in removing a boiler from the furnace plant of the company to its coal mines, for use at the latter in getting out coal to be consumed in the furnace and locomotives of the defendant, in law he became engaged in the same business under a common master with all other servants connected with such coal and iron business, and was, with the respect to the crew operating the engine which struck him, a fellow servant, to whom the master is not legally liable for any injuries resulting from negligence on their part. Just as a servant, prosecuting the work to do which he was employed, when he moves from one location to another, assumes all ordinary risks which may be incident to the new location, in like manner he assumes the risk of negligence of employes engaged in the same business, with whom he may be thrown casually, though each be serving the common master in different capacities. The gist of the whole matter is that he impliedly assumed all risks of negligence flowing from any employe of the common master engaged in the same business in which he contracts to serve. In our opinion, Bradford, as an incident of his employment, assumed the risk of being injured by any negligence of which the engineer and fireman of the engine which struck him may have been guilty, as they, together with Bradford, were serving the defendant as a common master in the same business at the time of the injury, and he is therefore not entitled to recover.

Having reached the conclusion in the case above announced, it is unnecessary to con-

sider any of the other assignments of error contained in the bill of exceptions.

Judgment reversed. All the Justices concur.

### AUSTIN v. COLLIER et al.

(Supreme Court of Georgia. Aug. 15, 1908.)

#### 1. PLEADING—ISSUES AND PROOFS—EVIDENCE ADMISSIBLE UNDER PLEADINGS — WRITTEN INSTRUMENTS.

It is not a valid ground of objection to an instrument in the form of a receipt, tendered in evidence by a defendant, that it is irrelevant, in that it does not refer to the matter in controversy, when the answer of the defendant alleges that there was a mistake in the wording of such instrument, and clearly shows a purpose to prove that it was intended by the parties to the transaction in which it was given to refer to such matter.

#### 2. APPEAL AND ERROR—FORMER DECISION—LAW OF THE CASE.

Assignments of error upon given charges of the court, as not being authorized by the pleadings and the evidence, are clearly without merit, when this court has, upon a former occasion, in the same case, and upon the same pleadings held substantially similar instructions to be applicable to the issues made therein, and when such instructions were again authorized by the evidence before the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661-4665.]

#### 3. SAME.

It is not error for the trial judge to construe the answer of the defendants as it was construed by this court when the case was formerly here.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661-4665.]

#### 4. QUIETING TITLE—EVIDENCE.

The evidence was sufficient to authorize the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Upson County; E. J. Reagan, Judge.

Action by S. E. Austin against R. M. Collier and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Cotten and Lester & Lester, for plaintiff in error. M. H. Sandwich and Allen & Tinsger, for defendants in error.

FISH, C. J. This is the second appearance of this case here. On the former occasion a full statement of the case, as shown by the pleadings, was made in the opinion of the court, delivered by Justice Lewis, which will be found in 112 Ga. 247, 37 S. E. 434, et seq. To that statement it is only necessary to add here the substance of an amendment which the plaintiff, Mrs. Austin, made to her petition after the case was returned to the lower court, the allegations of which the defendants answered by denying them. When the case was here before there were two plaintiffs, Mrs. Sallie E. Austin and her brother, James O. Whatley, each seeking to recover an undivided one-fourth interest in a described tract of land; it being alleged that they each owned a one-fourth interest

therein, that the defendant Robert M. Collier owned one-fourth, and the defendants Mrs. Gussie L. Collier and her two minor children, Lillian and William Collier, owned the remaining one-fourth, and that the Colliers were in the adverse possession of the entire tract. Plaintiffs sought to recover their alleged interests in the land and mesne profits from the defendants, and to have it partitioned between the alleged several owners. The case came up before on a writ of error sued out by the plaintiffs, complaining of the overruling of a motion for a new trial, made by them after the jury had returned a verdict in favor of the defendants. This court then decided that the judgment overruling such motion should be affirmed as to the plaintiff Whatley, and reversed as to the plaintiff Mrs. Austin, as the trial judge had erred in ruling out certain testimony offered by her, which ruling did not affect the case as to the other plaintiffs; the court being of opinion that, "so far as the evidence [was] concerned, \* \* \* it was sufficient to support a verdict against both defendants, certainly against James O. Whatley." 112 Ga. 251, 37 S. E. 436. So now there is only one plaintiff, Mrs. Austin. At the November term, 1903, of the trial court, nearly three years after the case had been returned to that court, Mrs. Austin amended her petition by alleging "that the receipt set up and claimed by defendants to be a conveyance of petitioner's interest in the lands in question to Robert M. Collier, Sr., deceased, was signed by petitioner without any valid consideration"; the \$400 mentioned therein as the consideration being "for a debt made and due by petitioner's husband, H. H. Collier, to said Robert M. Collier." While denying, in this amendment, that the receipt was given as a conveyance of the land in dispute, she alleged that, even if it were, the same was not binding on her, "for the reason that the wife's property cannot lawfully be taken to pay the debts of her husband." It may be well to state here that the defendants claimed under the will of Robert M. Collier, Sr. When the case came on for trial under the amended pleadings, a verdict was again rendered in favor of the defendants. The plaintiff made a motion for a new trial, which was overruled, and she excepted.

1. One ground of the motion for a new trial complained of the admission in evidence, over objection of the plaintiff, of a receipt given by plaintiff to R. M. Collier, Sr., under whom defendants claimed. This receipt read as follows: "Received of R. M. Collier four hundred dollars in full payment for my interest, present or future, in the estate of my mother, Mrs. Susan J. Collier, formerly Susan J. Whatley; and in consideration of the above sum I hereby transfer my interest to the said R. M. Collier, it being for money and supplies furnished." It was signed "Sallie Austin," attested by a notary public, and dated January 16, 1878. The ob-

jections urged to this paper were that it was irrelevant, did not show what property or kind of property it referred to, and because it referred to the estate of Mrs. Susan J. Collier, plaintiff's mother, while plaintiff was not seeking to recover an interest in such estate, but in the estate of Dr. James G. Whatley, her father. These objections were not well taken. Plaintiff's petition showed that she claimed as a remainderman under the will of her father, James G. Whatley, after the expiration of a life estate in the land, created by such will in her mother, Susan J. Collier, formerly Whatley. Defendants pleaded that plaintiff, "on the 16th day of January, 1878, sold all her interest in said land to R. M. Collier, Sr., for the sum of \$400 which was paid by said R. M. Collier to plaintiff, and the said plaintiff then and there transferred all her interest," etc. "Said transfer is in writing, and while the interest therein transferred is mentioned as the interest of plaintiff in the estate of Mrs. Susan J. Collier, formerly Susan J. Whatley," it was the intention of the parties to the transaction that the interest should be that of the plaintiff in the land now in controversy, "as that was the only estate then owned by said Mrs. Susan J. Collier; \* \* \* but in wording said transfer the interest \* \* \* was, by mistake of the draftsman, mentioned as aforesaid to be the interest of plaintiff in the estate of Mrs. Susan J. Collier, instead of the remainder interest in said land as the estate of Jas. G. Whatley." And the defendants asked that "plaintiff be required to make them a deed in pursuance of said purchase by said R. M. Collier, Sr." It will be seen, therefore, that defendants claimed that there was a mistake in the wording of this paper, which they called a "transfer," and clearly indicated a purpose to show that it really referred to the land in dispute; and they subsequently introduced testimony from which the jury could have found that this purpose had been accomplished. While defendants termed this receipt a "transfer," they evidently did not rely upon it as a deed, for they did not ask to have it reformed, but prayed that "plaintiff be required to make them a deed in pursuance of said purchase by said R. M. Collier, Sr." When the case was here before, this court held that the answer of the defendants did not "indicate that they claimed a deed in regular form had been made," and that "the whole question raised by the pleadings and the evidence was whether, in point of fact, Collier had paid the full purchase money for the land under the agreement." It follows, as we have already intimated, that the court properly admitted the receipt in evidence.

2. In another ground of the motion error was assigned upon the following charge: "If you believe from the evidence that Mrs. Austin made a parol contract of sale of her interest in the lands to Robert M. Collier, and that Robert M. Collier paid her the purchase

price for the same, the purchase price agreed upon, the full purchase, and went into possession of the same, then I charge you that she conveyed a complete title, notwithstanding there may have been no deed taken, the purchase price having been paid, and possession given would convey to Robert M. Collier, Sr., all the right, title, and interest that the plaintiff had in the land under the will of her father, Jas. G. Whatley, unless the sale was made in payment of the debt of her husband." The assignment of error was, that this charge "was not authorized by the evidence and the pleadings in the case," and was "directly contradictory to the contention of the defendants as shown by their answer filed in the case." The charge here complained of is substantially the same as one dealt with by this court when this case was formerly before it. See the third division of the opinion in *Austin v. Collier*, 112 Ga. 251, 252, 37 S. E. 434. It was then held that such a charge was not erroneous, though plaintiffs in error contended then, as the plaintiff in error does now, that the charge was not applicable to the issues in the case. The answer of the defendants was then the same that it is now, except as to their reply to plaintiff's subsequent allegation that the alleged sale was in payment of the husband's debt. It is therefore obvious that upon the question as to whether the charge was authorized by the pleadings the plaintiff is concluded by the former decision of this court, and as there was evidence sufficient to authorize the charge the assignment of error is without merit.

This ruling disposes of another ground of the motion, wherein it was alleged that the court erred in charging: "If she made such a contract of sale, and the purchase money was paid, possession taken of the land, the full purchase price agreed upon paid in any other way except in payment of a debt of her husband, then she conveyed all right; title, and interest she had in the land under the will of her father, and she would have no right in this case to recover anything, or have a verdict at your hands for any part of the land." The assignment of error upon this instruction was substantially the same as the one which we have dealt with above.

3. In the next ground of the motion error is assigned upon the following excerpt from the charge: "The defendants in this case plead that the plaintiff in the case sold and transferred all her right, title, and interest in this land to Robert M. Collier, Sr., and that they are the legatees under the will of said Robert M. Collier, Sr., or that the same descended to them as the heirs at law of Robert M. Collier, Sr. Now, gentlemen, the defendants also plead that as evidence of that sale that a receipt was given for the purchase money." It is contended that this instruction "submitted to the jury a theory of the case not authorized by the facts and evidence, in that the jury were thereby instructed that the instrument relied on by the defendants as

a conveyance of the plaintiff's interest in the lands in question was merely an ordinary receipt for the purchase money, whereas defendants set up and contend that the same was a conveyance of the plaintiff's interest in said property. It is insisted that this charge was misleading to the jury, and was capable of and did confuse and mislead the jury as touching the issues of fact in the case." The court did not instruct the jury "that the instrument relied on by the defendants as a conveyance of the plaintiff's interest in the lands in question was merely an ordinary receipt for the purchase money," but simply that defendants pleaded that plaintiff sold her interest in the land to Robert M. Collier, Sr., and "that as evidence of that sale \* \* \* a receipt was given for the purchase money." When the case was here before, this court, as we have seen, construed the answer of the defendants, and held that they did not claim title to the land under a written transfer—that the answer did "not indicate that they claimed a deed in regular form had been made." That construction of the answer was, of course, binding upon the lower court and the parties to the case, when this same answer was to be construed upon a subsequent trial of the case. Hence this assignment of error is without merit. Besides, it would seem that the plaintiff was hardly in a position to complain that the court construed the answer of defendants as setting up a receipt, when she herself, in the amendment to her petition, so construed this answer. In that amendment she alleged "that the receipt set up and claimed by defendants to be a conveyance of petitioner's interest \* \* \* was signed and given by petitioner without any valid consideration. The \$400 stipulated as the consideration of said receipt was for a debt made and due by petitioner's husband," and, "further, that, even if said receipt was given as a conveyance of her interest in the lands in question, \* \* \* the same is not binding on her."

4. There was evidence sufficient to support the verdict in favor of defendants, and no error was committed in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

#### DOLVIN v. AMERICAN HARROW CO.

(Supreme Court of Georgia. Aug. 15, 1908.)

##### 1. APPEAL AND ERROR—FORMER DECISION—LAW OF THE CASE.

The rulings in striking portions of the plea, which were complained of in the exceptions pendente lite, were in accordance with a prior decision rendered by this court in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3661-3665.]

##### 2. BILLS AND NOTES—PLEADING—ISSUES AND PROOF.

In view of the fact that so much of the plea as sought to allege that the original note and contract executed by the defendant were not

what they plainly purported to be had been stricken, the court properly excluded all evidence offered by defendant to show that such instruments had a meaning different from that therein expressed.

##### 3. WITNESSES—COMPETENCY—DEFENDANT—TRANSACTION WITH PLAINTIFF'S AGENT, SINCE DECEASED.

In a suit instituted by a corporation, the defendant is not competent to testify in his own behalf to transactions or communications had by him solely with a deceased agent of the corporation, and the fact that such transactions or communications were had in the presence of third persons in no way connected with the corporation does not alter the rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 582.]

##### 4. CORPORATIONS—AGENTS—AUTHORITY—EVIDENCE.

Where the defendant to such a suit alleged in his plea that the agent of the corporation had authority to do a certain thing, it was not error to allow the officers of the corporation to testify that the agent had no such authority.

##### 5. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—LETTERS ADMISSIBLE IN PART.

Where a batch of letters was objected to as a whole on the ground of irrelevancy, and it appeared that some of the letters were relevant, the objection was not well taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Witnesses, §§ 223-225.]

##### 6, 7. BILLS AND NOTES—ACTION—INSTRUCTIONS.

The instructions of the court as to mutual mistake of law, as to the character of evidence necessary to set up an oral agreement at variance with a written contract, and as to the presumption that a writing embodies the whole contract, were not open to the criticisms made thereon, when considered in connection with the other portions of the charge.

##### 8, 9. SAME—AUTHORITY OF AGENT.

The question as to whether the plaintiff ratified the alleged unauthorized acts of its agent was in the case, and the exceptions made to the charge on that subject were not meritorious.

##### 10. NEW TRIAL—GROUNDS—INSTRUCTION ON IRRELEVANT ISSUE—PREJUDICE.

A charge, though not applicable to the issue involved in the case, is not cause for a new trial, when it does not appear that the complaining party was probably hurt thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 71.]

##### 11. SAME—VERDICT—AMOUNT.

A defendant, against whom a verdict has been returned, cannot complain that the verdict is for a less amount than that which the plaintiff was entitled to recover, if entitled to recover at all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 151, 152.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by the American Harrow Company against J. G. Dolvin. Judgment for plaintiff, and defendant brings error. Affirmed.

G. A. Merritt and Samuel H. Sibley, for plaintiff in error. Park & Park, for defendant in error.

FISH, C. J. This case has been before this court twice heretofore. 119 Ga. 186, 45 S. E. 983; 125 Ga. 699, 54 S. E. 706. The action is founded upon a promissory note, dated

April 11, 1901, and due on or before January 1, 1902, absolute and unconditional on its face, given by J. G. Dolvin to the American Harrow Company, for \$934.18 principal, interest at 8 per cent. per annum after maturity, and 10 per cent. attorney's fees if collected by suit. It contains the recital that "this is given in settlement of old note, No. 3,975." At the time of the execution of this note one Webster, an agent of the American Harrow Company, wrote, signed, and delivered to Dolvin an instrument as follows:

"I agree to receipt J. G. Dolvin for note given me to-day, April 11, 1901, for \$934.18, note due January 1, 1902.

"American Harrow Company,

"By F. P. Webster."

At the same time Dolvin gave to Webster, on a printed form furnished by the latter, the following statement:

"John G. Dolvin. Debits.

Face of note.....	\$1,513 00
Interest accrued.....	21 56

Total debits.....\$1,534 56

"Credits.

By indorsements.....	\$587 38
".....	13 00
" new note due January 1, 1902.....	934 18

"P. O., Siloam, Ga. 4/11, 1901.

"Mess. American Harrow Co., Detroit, Michigan—Gentlemen: The above is a correct statement of the full and final statement of my note as made with your Mr. F. P. Webster to-day. I have received my note, and have no further claims of any kind against you.

"Yours truly,

J. G. Dolvin."

The plea of mutual mistake, which was held in 125 Ga. 699, 54 S. E. 706, to be sufficient to withstand the objection, in the nature of a general demurrer, urged against it in its entirety, is there fully set forth (page 701 et seq. of 125 Ga., page 706 of 54 S. E.), and, as it is quite lengthy, we will give only the following summary of it here: At the time of the execution of the note sued on and the signing of the other written instruments given on the same occasion (copies of which have just been set out), the defendant contended that his original note given to the plaintiff, and for which the note sued on purports to have been given in settlement, was never intended by the parties thereto to be an obligation on his part to pay the plaintiff an indebtedness, as he never purchased the machines for the purchase price of which the note appeared to have been given, but had merely received them from the plaintiff to be sold by him on commission as plaintiff's agent, and that, if the original note and contract by reason of their terms should be held to indicate a purchase by him of the machines, then he had a complete defense of failure of consideration of the note, as

the machines had proved to be entirely unfit for the use for which they were intended. In view of these contentions of the defendant, Webster, plaintiff's agent, "agreed upon a settlement of the transactions represented by said first note," and desiring, as in the first transaction when the original note was given, to have defendant execute a note as security for a final accounting by defendant for the machines received by him and the proceeds of the sales of machines made by him, Webster proposed to take the note sued on as representing the value of the machines shipped to defendant, which was the amount of the old note, less the freight charges paid by defendant, and the aggregate amount of collections on sales made by him and accounted for; such new notes to stand merely as security for an accounting by defendant on final settlement. Defendant agreed to sign the new note, and also "other blank forms tendered him by said Webster, as required by the plaintiff to be signed in all such adjustments, by reason of their not keeping book accounts of such matters, but required of said Webster a written showing against the said papers for his own protection." Webster thereupon wrote and delivered to defendant the instrument agreeing to receipt him for the note, a copy of which we have set forth. This instrument "was intended by the parties thereto to signify an agreement on the part of plaintiff, through its said agent, Webster, to receipt for and cancel the obligation represented by said new note, upon the defendant complying with his agreement to deliver up the unsold harrows and account for those sold. \* \* \* and the omission of apt words more fully to express said meaning was the result of accident, and was due to a mistake on the part of both of said parties. Said instrument, as it stands, moreover, by a mistake of law on the part of the draftsman and of the parties, does not fulfill, and violates in its operation, the real contract of the parties; it being supposed to be effective to secure to said defendant his rights under said settlement as against the other papers signed by him." Defendant tendered the unsold machines, the uncollected notes taken for purchases, and the amount of collections then unaccounted for, and prayed for a recovery of his commissions and the amount he had paid for freight.

The plaintiff moved "to strike that part of the amended answer which alleges and sets forth the original contract and note were not what they plainly purported to be, and which attempts to explain or in any way modify said contract and note," and "to strike, as being irrelevant, that part of the amended answer which refers to any blank form or forms." This motion was sustained, and the defendant excepted pendente lite. There was a verdict for the plaintiff "for amount sued upon, without interest or attorney's fees." The defendant assigns error upon his exceptions pendente lite and upon the judgment



of the court overruling his motion for a new trial.

1. There is no merit in the exceptions pendente lite. As was said by Mr. Justice Lumpkin, in delivering the opinion when this case was last before this court (125 Ga. 706, 54 S. E. 709), in reference to this identical plea: "In so far as the plea sought to allege that the original contract and note were not what they plainly purported to be, it was insufficient. Nor was it a sufficient plea as to other instruments beside the particular one pleaded, and as to which a mutual mistake of law was alleged. A mere general reference to 'other blank forms' required to be signed is no proper plea of mutual mistake as to such instruments as may have been thus signed."

2. The original transaction between Dolvin and the company being a sale by the company to him of the 50 harrows, as clearly shown by his absolute and unconditional note and the express terms of the written contract signed by both parties, the court properly excluded contemporaneous parol evidence to vary or contradict the terms of such writings; and, in view of the fact that so much of the plea as sought to allege that the original note and contract were not what they plainly purported to be had been stricken, it was not error to refuse to permit Dolvin to testify: "The notes that were taken by [him] for these harrows were taken on a blank form sent him by the company. They had the amount \$45 printed in the notes." Such evidence was plainly irrelevant. For the same reason, if for no other, the court properly refused to permit defendant to introduce "a letter from Mrs. Laura A. Printup to plaintiff, dated November 5, 1900, refusing to pay for a harrow, and concluding with the statement, 'The harrow has been returned to your agent,' followed by a memorandum, supposed to have been made by the plaintiff, 'J. G. Dolvin, our agent, Siloam, Ga.'"

3. The court also properly refused to permit Dolvin to testify as to transactions solely between himself and Webster, the deceased agent of the plaintiff corporation. "Where a suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation." Civ. Code 1895, § 5269 (3). The fact that such transactions were had in the presence of Dolvin's wife and brother-in-law, who were in no way connected with the company, did not make his testimony as to such transactions admissible. *American Harrow Co. v. Dolvin*, 119 Ga. 186, 45 S. E. 983; *Merchants' Bank v. Demere*, 92 Ga. 735, 19 S. E. 38.

4. The court did not err in permitting certain officers of the plaintiff company to testify that "Webster had no authority or power to make a receipt of any kind. The surrender of the original note was the only receipt he had any authority to give for this

note." Defendant, in his plea, had expressly averred that Webster did have authority to give such a receipt as defendant alleged the one actually given by Webster was intended by him and defendant to be.

5. A ground of the motion for a new trial was: "The court erred in admitting in evidence the letters passing between the plaintiff and defendant prior to the execution of the note sued on, the same having no reference to the transaction, and being in substance orders from Dolvin for various parts of machines, and requests for prompt shipment, and excuses for delay from the plaintiff, and in the fall advice about collecting the notes taken, said letters being about 22 in number and dated September, 1899, and December, 1900, fully set out in the brief of evidence. The objection made at the time was that they were irrelevant, and tended to confuse and becloud the case. \* \* \* Copies of said letters are attached, marked 'Exhibit A.'" We find that all the letters are dated in 1900, and all of them, with the exception of one, bear date after the date of the original note executed by defendant. Some of them are not open to the objection of irrelevancy; and as the objection was to them as a whole, some being relevant, the objection was not well taken. It appears, from letters written by defendant to plaintiff on November 14 and 26, 1900, that he acknowledged owing the amount of his original note and requested the privilege of paying half of it at maturity, which was January 1, 1901, and the balance a year afterwards. We think this evidence was relevant, not on the point as to whether defendant was indebted to plaintiff on the original note, for that was not in issue on the trial, but as a circumstance for the consideration of the jury on the question as to whether defendant was really making, at the time the note sued on was given, the contentions set up in his plea, and which he alleged induced plaintiff's agent to enter into the settlement as defendant claimed it was made.

6. Another ground of the motion for a new trial was: "The court erred in charging as follows: 'If there was an honest mistake of law as to the legal effect of the note on the part of both Dolvin and Webster, \* \* \* then equity would afford relief, and enforce the note according to the real intention of the parties, and not according to the legal effect of the note as appears from its unambiguous words. But the mistake must be the mistake of both parties before the note would be enforced on the idea of mutual mistake.'" The errors assigned were: (1) That this charge was not adjusted to the case, and was misleading and confusing, as it was not the contention of defendant that there was any mistake about the meaning or legal effect of the note, but the instrument which defendant alleged to be the subject of mistake was the receipt; and (2) "If the court were correct in treating the note as the instrument

in contention, the real effect of defendant's contention is to defeat and cancel it, and the mistake need not be mutual to do that, but the mistake of one party only."

Granting that this excerpt from the charge, as set out in the motion, was not technically accurate, we do not think it was calculated to mislead and confuse the jury to the defendant's hurt, especially when considered in connection with other portions of the charge which appear in the record. There was omitted from the instruction excepted to, where the asterisks appear, the following language: "Growing out of an agreement and settlement which was the basis of this note and receipt, if such a mistake might operate as a gross injustice to Dolvin and give an unconscionable advantage to the American Harrow Company." So the full charge given in this connection was: "If there was an honest mistake of law as to the legal effect of the note on the part of Dolvin and Webster, growing out of an agreement and settlement which was the basis of this note and receipt," etc. Moreover, the court in its charge fully and fairly stated all the contentions of the defendant, and in doing so instructed the jury that "another writing executed at the time, an agreement to receipt for the note, was signed by Webster as agent of the plaintiff; and Dolvin contends that the note sued on was the result of a mutual mistake on his part and the part of Webster as to the legal effect of the receipt as explanatory of the note, that they both honestly believed, in view of the receipt given and the agreement, that the note was to stand, under their agreement, simply as a security for a final accounting for the machines, and that Dolvin under the agreement was to return all machines not sold and account for those sold." And near the conclusion of the charge the court said: "If you conclude from the evidence in this case that the note in suit does not speak the real contract made between the parties, that said note, in the light of the agreement and the receipt and all the evidence touching the transaction that culminated in the note sued on, was intended simply as a security or pledge for an accounting for the machines that were in the possession of Dolvin and the notes for those sold or money collected for same, and if you further conclude that such an agreement was the result of a mutual mistake of both Dolvin and Webster as to the legal effect of the receipt and note, \* \* \* then plaintiff cannot recover, and your verdict should be for the defendant." The defendant's contention was that the note he gave and the "receipt" given by Webster did not express the real contract; and while he claimed that they were mutually mistaken as to the effect of the "receipt," and introduced parol evidence to show what he alleged was the true purpose of the "receipt" as understood by both parties, and in this way endeavored to prove what was the real contract between them, the mistake, if any

were made, must have also entered into the note, as it was an absolute and unconditional promise to pay a given amount.

We are unable to perceive any merit in the second assignment of error upon the portion of the charge now under consideration. Counsel for plaintiff in error contend that "under the facts of this case, in any view, if this whole contract was the outcome of mistake on Dolvin's part only, he should have relief, and a charge to the contrary was error"; and Civ. Code 1895, § 3982, is cited to support such contention. In that section it is said that equity may rescind or cancel a written contract "upon the ground of mistake of fact material to the contract of one party only." The question of mistake of fact was not involved in this case, and the charge under consideration expressly had reference alone to a mutual mistake of law.

7. The following charge was also excepted to: "The evidence to set up and enforce an oral agreement at variance with this note must be clear, plain, and unequivocal." The exception was that it was not adjusted to the case, because it omitted reference to the "receipt," and treated defendant's case as involving only an oral agreement to contradict the note. It was further alleged that the following charge was error: "It is a presumption of law that you are to observe that when a writing in the shape of a contract is executed between the parties, as in the case of the note the subject-matter of this suit, that the writing embodies the entire contract and covers and settles every dispute between the parties in reference to the subject-matter of the contract. This presumption holds good until it is overcome by evidence that satisfies you that the note does not speak the contract that was really made, that there was an oral agreement as alleged, the result of mistake," etc. This was also excepted to on the ground that it was not adjusted to the case, because it treated the note alone as having been executed to witness the contract, whereas, undisputably, there was also executed as equally a part of the writings this receipt, to which some meaning must be attached, and defendant did not seek, as this charge intimates, to contradict the note by a mere oral agreement, but to complement the note with the other writing, and to explain the purpose of this writing by the parol agreement. In view of what we have said in the sixth division of this opinion as to what the court charged in stating the contentions of the defendant, and other instructions given, and of the fact that the note was a part of the contract in question, and was necessarily contradicted by the parol evidence, we do not think the charges now under discussion, when taken in connection with the whole charge on the subject of the contract of settlement, which was said by the court to be the basis of the note and "receipt," were calculated to be harmful to the defendant, and therefore they were not cause for a new trial.

8. Another instruction to the jury complained of was: "In order for the act of Webster to be binding on the American Harrow Company as their agent, the act must have been by authority of the American Harrow Company, or must have afterwards been ratified by the company with a full knowledge of all the facts. A suit instituted and continued after a full knowledge of all the facts would amount to a ratification with a full knowledge of the acts of the agent in the transaction, the mutual mistake on the part of both parties, or frauds on the part of Webster, inducing an honest mistake on the part of Dolvin, such a mistake or fraud as under the law would authorize the enforcement of the agreement which resulted in the execution of the note." The exceptions were: (1) "Any charge submitting any issue of ratification was wholly inappropriate to this case, because, as soon as a plea setting up the matters alluded to in the charge was filed, plaintiffs were put to the election of enforcing or abandoning the transaction, and the pressing of the issue to trial is in law an absolute ratification, independent of any further knowledge, and no right exists to question the agent's authority to do anything he did do." (2) The charge was error, "in that it asserted that it took both the institution and continuance of a suit with knowledge to raise a ratification by implication in this way; whereas the law is that the mere continuance of it ratifies. This was harmful, because it appeared beyond dispute that this suit was begun in ignorance by the plaintiff." (3) The charge was error, "because it stated that the continuance of a suit was not ratification, unless with full knowledge of all the facts, detailed them as applied to this case. All that is requisite is notice, not knowledge."

A charge on the subject of ratification was certainly not inappropriate, as the defendant, by his plea, had distinctly raised that issue and evidence was submitted thereon; and when such plea was filed the plaintiff was not bound to accept it as true and abandon the case, but, of course, had the right to contend that what the defendant averred the plaintiff's agent did was never in fact done by the agent. There was some evidence submitted by the defendant which tended to show that the plaintiff had knowledge of the acts of its agent, Webster, prior to the institution of the suit, as defendant testified that he went to see plaintiff's attorney, and exhibited the receipt to him before suit was entered, and gave him a copy thereof, and that the attorney said that he would send the copy to plaintiff, and would see that defendant would not be hurt. In view of this evidence, the court did not err in charging as to the institution and continuance of a suit, with full knowledge, amounting to a ratification; and it was said in this case (125 Ga. 706, 54 S. E. 709): "It is a rule of law that ratification involves knowledge of

the facts on the part of the person ratifying at the time when the ratification is made."

9. Complaint was also made that "the court erred in his charge, after stating what must appear as to the existence of mistake and fraud, in adding as a thing that must appear, 'and that the plaintiffs have by some act ratified the agreement.'" The vice alleged was "that there was and could under the law be no issue for the jury as to ratification, and no such issue should have been submitted to them." As we have already said, an issue of ratification was raised by the pleadings and evidence.

10. Exception was also taken to the following charge: "In making a contract the parties are bound to exercise ordinary care and diligence to inform themselves as to any facts relating to the subject-matter of the contract, and equity will not relieve for any mistake that was solely the result of a want of such care and diligence." The exception was that this charge "was not applicable to this case, and not adjusted thereto, because only a mistake of law was involved, and of the effect of an instrument." While this charge may not have been applicable in this case, yet it was a correct statement of a general principle of law; and as it applied alike to both parties, and it not appearing that it was probably harmful to the defendant, it was not cause for a new trial.

11. The last ground of the motion was: "The verdict is evidently not the result of an agreement by the jurors on the truth of the case, but a compromise of divergent views, in that it expressly finds against interest and attorney's fees, in the face of the charge of the court, which directed them that, if they found for the plaintiff at all, they would find the full amount sued for, including interest and attorney's fees." As was held in *Pullman Co. v. Schaffner*, 126 Ga. 609 (4), 55 S. E. 933, 9 L. R. A. (N. S.) 407: "A defendant against whom a verdict has been returned cannot complain that the verdict is for a less amount than that demanded by the evidence."

Judgment affirmed. All the Justices concur.

#### MATTOX v. EMBRY.

(Supreme Court of Georgia. Aug. 15, 1908.)

##### 1. APPEAL AND ERROR—APPEAL FROM COURT OF ORDINARY—BOND—OBLIGEE.

Under the ruling in *Sims v. Walton*, 111 Ga. 866, 38 S. E. 906, in cases of appeal from the court of ordinary, the appeal bond to be given under the provisions of Civ. Code, 1895, § 4466, should be made payable to the appellee, and not to the ordinary of the county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2013-2016.]

##### 2. EXECUTORS AND ADMINISTRATORS — SELECTION OF ADMINISTRATOR — NOMINATION OF STRANGER—VOTING BY NEXT OF KIN.

Under the ruling in *Halliday v. Du Bose*, 59 Ga. 263, paragraphs 3, 6, § 3367, Civ. Code 1895, should be so construed as to authorize a

majority of the next of kin related equally near in degree to the deceased to select a stranger to administer upon the estate; it appearing that none of the next of kin, according to the law of relationship and distribution, applied for the administration, but that the contest was between one selected by the majority of such persons and another, who claimed to be interested by virtue of conveyances from a minority of the heirs, and who was recommended by others in like situation and by children of a deceased child of the intestate. Under such facts, when such selection is expressed in writing in conformity with the statute, and the person selected is of good moral character and labors under no legal disability, the person so selected is entitled as a matter of law to appointment as administrator; and on the trial of an appeal case from the court of ordinary over the right to administer, where the undisputed evidence shows that one of the contestants has been selected by a majority of the next of kin of deceased in conformity with the statute, and that he is of good moral character and is laboring under no legal disability, it is not erroneous for the judge to direct a verdict in favor of the contestant so selected.

(a) Where one of the next of kin is a minor, a legally qualified guardian of the minor has a right, in behalf of such minor, to express a choice in selecting a stranger to administer.

(b) Where one of the next of kin died without expressing a choice with regard to the selection of a stranger to administer, the children of such deceased have no greater voice in the selection of a stranger to administer than the right to represent one share in the estate in voting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 57.]

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Application for the appointment of an administrator of the estate of W. F. Mattox, deceased. From an order appointing L. D. Mattox administrator, J. W. Embry appealed to the superior court, where judgment was directed in his favor, and L. D. Mattox brings error. Affirmed.

W. F. Mattox died intestate, leaving an estate and ten children, but no widow. There was a contest for the right to administer upon the estate. One of the contestants was L. D. Mattox, who was a collateral kinsman of the deceased and the assignee of certain of the children to the extent of their respective interests in the land, which constituted the property of the estate of the deceased intended to be administered. The other contestant was J. W. Embry, who was the husband of one of the daughters of the deceased. The judgment in the ordinary's court was in favor of L. D. Mattox. Embry entered an appeal to the superior court from the judgment of the court of ordinary. The appeal bond recited payment of the costs which had accrued, and was conditioned to pay "L. D. Mattox, administrator, \* \* \* such further costs as may accrue in said case by reason of this appeal." The bond was approved and filed, and the record transmitted to the superior court. On the hearing in the superior court counsel for L. D. Mattox moved to dismiss the appeal, "upon the ground that the appeal bond was made payable to L. D. Mattox, administrator, instead of to

the ordinary of Oglethorpe county." The court was about to sustain the motion, when, in order to prevent the dismissal of the appeal, the appellant, with leave of the court and with the consent of his surety, amended the appeal bond by making the same payable "to Joel Cloud, ordinary of said county, and his successors in office, instead of to L. D. Mattox, administrator." After amendment the court overruled the motion to dismiss the appeal, whereupon counsel for L. D. Mattox filed exceptions pendente lite, and afterwards assigned error upon the ruling of the court allowing the amendment, on the ground that "It was not permissible to amend the bond," and to the ruling of the court refusing to dismiss the appeal on the ground that the appeal was a nullity.

On the trial before the jury there was no evidence to show that J. W. Embry was of unsound mind or otherwise laboring under disability. Some of the witnesses stated that in their opinion he was not a good business man, and therefore unsuitable to administer. Others stated that he was a man of honor and integrity and capable of managing the estate. It was shown that Myrt Mattox, a girl 20 years of age, and T. S. Cunningham, her guardian, together with five of the other children of deceased, who had attained their majority and labored under no legal disability, had in writing selected J. W. Embry to administer upon the estate and requested his appointment; that Sol. J. Mattox, one of the children of deceased, who had requested the appointment of J. W. Embry, had conveyed his interest in the property to Cauthen Bros. as security for a debt which was unpaid; and that the Cauthens requested in writing the appointment of L. D. Mattox. J. A. Cauthen was the assignee of a half interest in the two-tenths of the estate of W. F. Mattox, deceased, having acquired the same from John Henry Mattox and Nathan F. Mattox, sons of said deceased; and as representing such half interest he requested in writing the appointment of L. D. Mattox. G. A. Webb had married a daughter of the deceased, and after the marriage the daughter, M. M. Webb, had died, leaving surviving her the said G. A. Webb and seven minor children, the issue of the marriage; and G. A. Webb, as natural guardian of the seven children, claimed the interest of M. M. Webb in the estate of W. F. Mattox, deceased. There was no evidence that G. A. Webb had qualified as guardian by executing a bond under the provisions of Civ. Code 1895, § 2513. Claiming a right so to do by virtue of being the natural guardian of his children, G. A. Webb requested in writing the appointment of L. D. Mattox. None of the children who had selected J. W. Embry had assigned their interest in the estate, or otherwise incumbered the same, except Sol. J. Mattox, who had executed the security deed to Cauthen Bros. After all the evidence was submitted, the

judge directed a verdict in favor of J. W. Embry. Error was assigned on this ruling, and on the allowance of the amendment of the appeal bond, and on the refusal to dismiss the appeal.

E. P. Skull, H. McWhorter, Jr., and Samuel H. Sibley, for plaintiff in error. Paul Brown and Samuel L. Olive, for defendant in error.

ATKINSON, J. 1. Civ. Code 1895, § 4466, provides: "In all cases in the court of ordinary, the party desiring to appeal, his attorney at law or in fact, shall pay all costs that may have accrued, and give bond and security to the ordinary for such further costs as may accrue by reason of such appeal; this being done, the appeal shall be entered." This section was construed in *Sims v. Walton*, 111 Ga. 866, 36 S. E. 966, to mean that the bond shall not be made payable to the ordinary, but to the appellee. Under this ruling the appeal bond given by the appellant was correct without amendment. It appears that the appellant amended the bond under pain of having the appeal dismissed, and the bond was thereby so changed as to make it payable to the wrong person. In its amended condition the bond did not comply with the law as ruled in *Sims v. Walton*, supra; but inasmuch as the appeal bond was payable to the proper person in the first instance, direction will be given, under the authority vested in this court by Civ. Code 1895, § 5586, that upon the return of the case the appellant shall be allowed further to amend by striking the amendment to the bond, so as to allow the bond to stand as originally filed.

2. It was contended by counsel for L. D. Mattox that Embry was not shown by the record to have been selected by a majority of the next of kin to deceased, because Myrt Mattox was a minor and neither she nor her guardian was authorized by law to express a choice in the selection, and S. J. Mattox lost his right to the expression of a choice by conveying his interest in the property as security for a debt which was overdue and unpaid, and because the seven children of Mrs. Webb, a deceased daughter of the intestate, were each entitled to a voice, and they, as well as the holder of the security deed from S. J. Mattox, had in writing selected L. D. Mattox, and when these were considered L. D. Mattox was the choice of a majority. These contentions are untenable. It appeared that six of the children of the deceased, constituting a majority of ten, had in writing requested the appointment of J. W. Embry. One of the six children was a minor; but, inasmuch as the guardian of the minor joined her in making the written request, the fact of her minority did not affect the case. *Myers v. Cann*, 95 Ga. 383, 22 S. E. 611. Another of the six had also conveyed his interest in the land as security for a debt which was overdue and unpaid; but that did amount to a surrender of his right to express a choice in selecting the administrator. He

continued to be one of the class, "next of kin equally near in degree to deceased," and had an equitable interest in the property left, to wit, the right to redeem; and it was that relationship which, under Civ. Code 1895, § 3367, par. 3, gave him a right to a voice in the selection of an administrator. Having been selected in writing by a majority of the next of kin, under the construction given to paragraphs 3, 6, § 3367, of Civ. Code 1895, in the case of *Halliday v. Du Bose*, 59 Ga. 268, J. W. Embry was entitled as a matter of law to appointment. Neither of the contestants was one of the next of kin of the intestate. One of them was selected by a majority of the next of kin according to the statute of relationship and distribution. The other was recommended by certain persons claiming a minority interest in the estate, and himself claimed a fractional interest by conveyance to him. It appeared that the daughter of deceased, who married G. A. Webb, had died and left surviving her seven children. It was contended that each of them was entitled to a vote as next of kin in the selection of an administrator, and that, if they were to be contemplated, the six next of kin who had selected Embry did not amount to a majority of all of the next of kin. We do not think there is any merit in this contention. The Webb children, under the statute of distribution, were not in fact related to the deceased equally near in degree with the other persons who selected Embry. The interest in the estate which they acquired was by inheritance from their mother. She was entitled only to one vote, and at most the Webb children as a class could not have a greater voting power than their mother would have had if she had survived.

Judgment affirmed. All the Justices concur, except HOLDEN, J., disqualified.

#### TIFT COUNTY v. BERRIEN COUNTY.

(Supreme Court of Georgia. Aug. 12, 1908.)

#### COUNTIES — CREATION OF NEW COUNTIES — ADJUSTMENT OF RIGHTS AND LIABILITIES — TAXES ON DIVISION OF COUNTY.

Under the act creating Tift county (Acts 1905, p. 60) and the general law (Acts 1905, p. 46), that county has no right of action to recover from Berrien county (from the territory of which it was in part formed) any portion of the funds in the latter's treasury raised, during the year in which Tift county was created, by the levy and collection of taxes assessed against the property or citizens of that portion of Berrien county which was transferred to Tift county.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by Tift county against Berrien county. Judgment for defendant, and plaintiff brings error. Affirmed.

Tift county filed a suit against Berrien county, seeking to recover \$4,681, being the net amount of taxes collected by Berrien county, as taxes for the year 1905, from the

taxpayers who were residents of that portion of the territory of Berrien which was by the act of August 17, 1905 (Acts 1905, p. 60), cut off into the new county of Tift, which was by this act created. The petitioner alleges that it is without public buildings of any kind, except a jail for which it owes, and since its organization has had to bear the burden incident to a county's existence; that Berrien county has new public buildings, built by direct taxation, levied and paid by its citizens prior to the creation of Tift county, to which the citizens of Tift county contributed their proportionate share; that Berrien county was not in debt or bonded at the time Tift county was created, but had money in its treasury at the time the taxes specified were collected; and that these taxes were levied to pay subsequent expenses. By reason of these facts it is alleged that Tift county has not only been compelled by taxation to contribute to the running expenses of Berrien county for the latter part of the year 1905, and nearly all of the year 1906, but also for the same time to support itself, which is subversive of the law requiring that taxation should be uniform upon the same class of subjects and ad valorem on all property subject to taxation; and for this reason the money collected for taxes upon property and from citizens resident in Tift county during the year 1905 is money had and received by Berrien county for the use of Tift county. Demand and refusal are also alleged. The defendant filed a demurrer, which being sustained, Tift county excepted and brings error.

Denmark & Griffin, for plaintiff in error.  
Bule & Knight, for defendant in error.

EVANS, P. J. The court did not err in dismissing the petition on general demurrer. As was said in *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149: "The general fiscal policy outlined in the Constitution of 1877 for political subdivisions, such as counties, \* \* \* was to provide a system of finance for subordinate public corporations, under which there could be made each year contracts for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year." The only legitimate object of taxes for the year 1905 was, therefore, the expenses of that year. If the rate of taxation was exorbitant, or the taxes unnecessary to meet probable expenses, this might have furnished to these citizens a ground to enjoin their collection; but it certainly could not give to another county, created after the larger part of the expenses for which those taxes were presumptively levied and collected had been incurred, any right to such taxes. It was held in *Pope v. Matthews*, 125 Ga. 341, 54 S. E. 152, that while extra and unusual taxes, assessed after the passage of the act laying out a new county, could not be assessed by the authorities of the old county

against the citizens of the new, yet ordinary annual taxes for county purposes for the year in which they were created could be so assessed, even though they had not been actually levied before the act was approved. See, also, *Yow v. Sullivan*, 129 Ga. 187, 58 S. E. 662.

The general act passed on August 21, 1905 (Acts 1905, p. 48), to provide for the organization, etc., of the new counties created at that session of the General Assembly, in section 10 (page 49) expressly provides that "all taxes due the state and county by persons residing in the new county, or upon property included within the limits of the new county, shall be payable to the tax collector of the county from which said territory was taken, and the tax collector of said original county is hereby authorized to issue execution for the collection of such taxes, and the same shall be enforced and collected by the officers of the county or counties from which the territory for said new county was taken." Provision is also made, in section 5 (page 48) of this same act, for the levy of an extra tax for county purposes in the new county. Thus the law expressly provided that Berrien county should collect these taxes; and as there is nothing in the law which even remotely suggests that it was to collect them for the use of Tift county, under the maxim of "*Inclusio unius exclusio alterius*," the conclusion is irresistible that Berrien county was to collect them for its own use, just as all other taxes for that year were collected. And the provision in the general law that Tift county could collect an extra tax for county purposes is a clear recognition of the legislative intent that that should be the source of its revenues for the first year after its creation. It is no more plausible to contend that Tift county should be allowed to recover from the parent county a proportionate part of the funds, represented by the taxes against the property and citizens taken from the latter by the act creating the former, which were in the treasury of the latter unexpended, than to concede to Berrien county the right to recover from Tift county such a proportionate part of any deficiency which might have existed, had the taxes collected for that year been insufficient to have met the current expenses of that year. Surely no one would seriously assert the latter proposition.

Judgment affirmed. All the Justices concur.

GRISKELL v. SOUTHERN RY. CO.  
(Supreme Court of South Carolina. Aug. 26, 1908.)

1. RAILROADS—CROSSING ACCIDENT—PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Deceased, with several companions, hearing a passenger train approaching, started for the depot under the erroneous belief that the train was one on which deceased expected the arrival of a friend. They ran toward a path crossing

made at defendant's freight depot, which the public frequently used with defendant's acquiescence, and, reaching the track nearest the freight depot, on which a number of freight cars stood across the path, coupled together, deceased, who was ahead, climbed over the bumpers of the freight cars and jumped to the ground, when he was struck by the train and killed, while crossing the track of the passenger train, though there was sufficient space between it and the freight track to stand in safety. Held that, though the operatives of the train were negligent in running it at a rate of speed in violation of the town ordinance, deceased was himself negligent as a matter of law, precluding a recovery for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1087.]

## 2. EVIDENCE—CONCLUSIONS.

In an action for death of a pedestrian by being struck by a train at a crossing, a question whether, if the train had been, as was supposed by deceased, a slower train than that which struck him, "would you not have had plenty of time to get across?" was properly excluded, as calling for a mere conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2269.]

Appeal from Common Pleas Circuit Court of Cherokee County; R. O. Purdy, Judge.

Action by James Griskell, as administrator of Charles Griskell, deceased, against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Stanyarne Wilson and J. B. Bell, for appellant. Sanders & De Pass, for respondent.

JONES, J. On September 6, 1903, Charles Griskell, while attempting to cross the railroad track in front of defendant's moving train, was struck by the engine and killed. This action was brought by his administrator to recover damages for said death, which the complaint alleged was the result of defendant's negligence (1) in approaching the station at a great speed in violation of the town ordinance; (2) in failing to give the signal required by statute; (3) in not having some agent at said station for the purpose of apprising plaintiff's intestate of the rapid and unsignaled approach of said train. At the close of plaintiff's testimony a nonsuit was ordered, on the ground that the negligence of the deceased brought about or contributed to his death.

The main question raised by the appeal is whether the nonsuit was proper. We think it was. The undisputed facts show that on Sunday night, September 6, 1903, the deceased, who was between 16 and 17 years old, was standing with several companions about 100 yards from the depot, when he heard the station signal given by defendant's train No. 38 at the overhead bridge some 600 or 700 yards away. No. 38 was going from Charlotte towards Spartanburg, was not due to stop at Gaffney, and was running 25 or 30 miles an hour. An ordinance of the town prohibited a speed through town in excess of 6 miles an hour. This train was behind time and was running in about the time No. 40 was due. No. 40 was a much slower train

than No. 38. The deceased heard the whistle and saw the headlight of the coming train. Supposing it to be No. 40, and expecting his friend, Hiram Wessinger, to come from Clinton on that train, he proposed to his companions to meet the train. They broke out and ran in the direction of the freight depot, expecting to cross over several tracks intervening and reach the passenger depot, opposite the freight depot, before the train. They ran toward a path crossing made at the freight depot for the convenience of defendant, but which the public frequently used with defendant's acquiescence. They chose this way because it was some nearer than to go to the passenger depot by Robertson street. When they reached the track nearest the freight depot there were a number of freight cars thereon, and two stood across the path coupled together, as was frequently the case. The deceased was ahead, and climbed over the bumpers of these freight cars, and by the time he reached the ground the train was close on him.

Garfield Harman testified as follows: "Q. How far did you get between the cars? A. I got across there, and I seen it strike him. Q. Tell what you saw. A. He lit out the car, me right following him, and it jerked him around. We just jumped up between the two cars coupled together. Q. You jumped out. Where did he go? A. He went right in the engine. Q. The engine caught him? A. Yes, sir. Q. How come it didn't catch you? A. I can hardly tell. Q. He was a little ahead of you? A. Yes, sir. Q. It had already passed you? A. Yes, sir." Cross-examination by Mr. Sanders: "Q. You and Mr. Griskell came through the same cars? A. Yes, sir. Q. Went between the same cars? A. Yes, sir. Q. When he was climbing up, where were you? On the ground just behind him? A. No, sir; both of us in between the cars about the same time. Q. One right behind the other? A. Four or five, I expect, could be between the cars at once. Q. Who was the next man to Griskell? A. Me. Q. They were coupled together, were they not? A. Yes, sir. Q. You were the next man to Mr. Griskell? A. Yes, sir. Q. And he jumped up? A. Yes, sir. Q. And you followed him? A. Yes, sir. Q. When he jumped out, did he stop, or continue right straight on? A. Seemed like he sorter stumbled. Q. Did he catch himself, or fall? A. No, sir; it took him, and carried him right around into it."

The complaint alleged that intestate was proceeding across said track to the point of his destination when he was struck by the engine of defendant's train No. 38 and killed. The body was found some feet from the track on the passenger depot side; the condition and position of the body indicating that he had not been run over by the train, but thrown off by the cowcatcher of the engine. There was testimony that the bell did not ring until after the collision. The train came to a stop after the collision and pulled back

to the depot. The action happened within 300 yards of a street crossing.

Conceding that defendant was negligent in not giving the statutory signals, this could not have been a proximate cause of the injury, since intestate heard the station blow, saw the headlight, and was racing to beat the train to the depot. *Barber v. Railway*, 34 S. C. 144, 13 S. E. 630. Conceding that the speed of the train was in violation of the town ordinance, and there would probably have been no collision if the speed had not exceeded six miles an hour, still the intestate's recklessness in attempting to cross the track in front of the fast-moving engine, which he should have known was almost upon him, so manifestly contributed to his death that there could be no recovery therefor. The evidence shows there was sufficient space between the freight track and the passenger track to stand in safety, as Harman did on this occasion. If intestate had exercised ordinary care in the use of his senses, he would have observed and avoided the peril of attempting to cross the track in front of the moving train. The nonsuit is sustained by the cases of *Barber v. Railroad Co.*, 34 S. C. 448, 13 S. E. 630 and *Drawdy v. Railroad Co.*, 78 S. C. 374, 58 S. E. 980.

The exception to the exclusion of testimony cannot be sustained. The witness Hallam was asked this question: "If the train had been No. 40, coming in—you say it is a good deal slower than 38—would you not have had plenty of time to get across?" The answer to this question was properly excluded, as it would have been the mere opinion of the witness, as to a matter concerning which the jury could draw a conclusion quite as well as the witness. Besides, if the witness had answered "Yes," the testimony could not have altered the result.

The judgment of the circuit court is affirmed.

EVANS v. MAYES et al.

MAYES et al. v. EVANS.

(Supreme Court of South Carolina. Aug. 25, 1908.)

1. INJUNCTION—"TEMPORARY INJUNCTION."

The sole object of a temporary injunction being to preserve the subject of controversy in the condition in which it is when the order is made till opportunity for a full and deliberate investigation, an order to a sheriff to return articles distrained and taken in his charge is improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 302.

For other definitions, see Words and Phrases, vol. 8, pp. 6901-6902.]

2. SAME—OTHER REMEDY.

One whose goods are distrained for rent is improperly granted relief by injunction: Civ. Code 1902, § 2435, providing for sale of the goods as in case of execution, if the owner does not replevy them, and there being nothing in the complaint to show there was any obstacle to prevent plaintiff from testing the claim for

rent and the validity of the distress by appropriate legal proceedings to recover possession of his property.

Appeal from Common Pleas Circuit Court of Saluda County; before Chief Justice Pope.

On the ex parte petition of Barnard B. Evans, Chief Justice Pope made orders of injunction relative to the case of W. M. Mayes and another against said Evans, from which said Mayes and another appeal. Reversed, and injunctions dissolved.

See 61 S. E. 657.

Eugene W. Able, for appellants. Barnard B. Evans, for respondent.

WOODS, J. The following statement of facts appears in the record: "On December 5, 1906, W. M. Mayes instituted proceedings under section 2423, 1 Civ. Code 1902, to dispossess B. B. Evans of the premises occupied by him as a tenant, alleging that he was in arrears for rent due for October and November, 1906, that he was a tenant by the month, that he had had notice to quit the premises, and that he was holding over after such notice to quit, contrary to law. Upon issue joined before a jury on rule issued by Magistrate J. H. Etheredge, a verdict for the landlord was found, and order of dispossession issued. Mr. Evans appealed, and Judge R. O. Purdy sustained the appeal upon two grounds, to wit, that the magistrate erred in not granting a change of venue upon motion of Mr. Evans, and upon the further ground that the rule issued did not allow Mr. Evans the time required by the statutes in which to answer the rule. From the order of Judge Purdy, Mr. Mayes appealed, and the case is now pending in the Supreme Court. Afterward, in May, 1907, W. M. Mayes and Lizzie Stewart (she having acquired interest in the property occupied) instituted similar proceedings to the above against B. B. Evans, alleging that he was in arrears for rent for the months of December, 1906, January, February, March, and April, 1907 (note, October and November, 1906, the months involved in prior action, omitted), and that he was a tenant by the month holding over after demand for possession of the premises, all contrary to law. About the same time, this last rule to show cause why Mr. Evans should not be required to vacate the premises was issued, Mr. Mayes and Mrs. Stewart issued and lodged with the sheriff of Saluda county their distress warrant as landlord."

Thereafter on May 16, 1907, the Chief Justice issued the following order of injunction on the ex parte application of the plaintiff, Evans: "The complaint of the plaintiff, Barnard B. Evans, having been heard by me, and it appearing thereby that there is now pending before the courts of this state a cause of action in the same subject-matter, and that the plaintiff has commenced his action against the defendants, and that he has in the said complaint tendered payment of his rent due for his office to the proper parties, and that



the same was refused, and that the sheriff of Saluda county upon an unverified or unwitnessed warrant has distrained for the said rents, and has taken in his possession certain articles of personal property of the plaintiff, Evans, and now retains them, and that the said Stewart and Mayes have without due process of law entered another action for this same matter, it is ordered: That B. F. Sample, Jr., sheriff of Saluda county, do immediately, upon service of this order, return the articles distrained and taken into his charge to the plaintiff, Barnard B. Evans, in the same manner and place that he took the same, and that he be restrained and enjoined from further interfering with the peaceful occupancy of the said Evans of the said premises now in litigation between the said Evans and the said Mayes and the said Stewart. That the said W. M. Mayes and Lizzie Stewart be restrained and enjoined from further interfering with the peaceful possession of the said Evans of the said premises occupied by the said Evans. Let a copy of order be served on the said W. M. Mayes, Lizzie Stewart, and B. F. Sample, Jr., immediately. Let Barnard B. Evans execute his personal bond in the sum of \$100 to the said defendants under this injunction, and a copy of said bond served with this order."

Appellants made a motion on May 25, 1907, to dissolve this injunction on the following grounds: "Because the court was without jurisdiction to pass the said order, without a verified complaint in an action pending in the courts of the state, or upon proof by affidavit of facts warranting such an order. Because the order passed violates the rights of W. M. Mayes and Lizzie Stewart to property without due process of law. Because the order referred to is illegal, unjust, and has been improvidentially issued. Because whatever rights of Barnard B. Evans have been violated, if any, there is ample remedy at law for him, and his redress must be according to the usual processes of law when they are ample."

On the hearing of this motion, the Chief Justice had before him the complaint of Barnard B. Evans and several affidavits submitted on behalf of appellants. The hearing resulted in the following order, dated August 6, 1907: "A contention having arisen in this case between W. M. Mayes, landlord, and his tenant, B. B. Evans, as to the possession of certain property, a rule to show cause was issued by J. H. Etheredge, magistrate, under section 2423, Civ. Code 1902, requiring B. B. Evans to show cause at his office on December 7, 1906, why he should not be dispossessed. The jury found that Mayes was entitled to possession. Evans appealed to the circuit court, alleging error on the part of the magistrate in refusing to sustain his demurrer to the jurisdiction of the court, in that the magistrate called the case within two days of the date of the rule to show cause, and in that he

failed to allow a change of venue on the affidavit of the respondent. Both contentions were sustained, and the relator gave notice of appeal and served his exceptions. Thereafter on the 13th of May, 1907, relator began another action on the same subject-matter, and at the same time had the magistrate issue his distress warrant to the sheriff ordering him to take into his possession respondent's property, and dispose of it for the payment of past due rents. In order to restrain this second action pending the appeal in the former case, an injunction was issued by me on May 16, 1907. Later, after having heard both sides, another order was issued requiring things to remain in statu quo pending my further action in the matter. After due consideration of the circumstances, it is now ordered: That the injunction herein before granted, restraining the prosecution of the second action and the disposition of respondent's property for rents, be continued until the appeal in the former case be disposed of."

The appeal is from both the foregoing orders of injunction. There are several exceptions, but it will be necessary to consider only two grounds, as these are sufficient to sustain the appeal.

The order of May 16, 1907, required B. F. Sample, Jr., sheriff, to return the articles distrained and taken in his charge to the defendant Evans. The court in *Pelzer v. Hughes*, 27 S. C. 415, 3 S. E. 784, thus states the rule with respect to the issuing of injunctions: "The sole object is to preserve the subject of controversy in the condition in which it is when the order is made until an opportunity is afforded for a full and deliberate investigation. It cannot be used to take property out of the possession of one person and put into that of another."

The other objection fatal to the orders is that the plaintiff, Evans, had an ample remedy at law to recover the possession of the property distrained. It is provided by section 2435 of Civil Code of 1902: "When goods and chattels have been distrained for rent reserved and due upon any lease or contract whatsoever, and the tenant whose goods have been taken shall not within five days after such distress and notice thereof, replevy the same with sufficient security, to be given according to law, then, in such case, the person making the distress shall cause the goods distrained to be appraised by two sworn appraisers, and, after such appraisal, sell the same, in the same manner as goods taken under execution are required by law to be sold." There is nothing in the complaint to show that there was any obstacle to prevent the plaintiff, Evans, from testing the claim for rent, and the validity of the distress by appropriate legal proceedings to recover possession of his property.

The judgment of this court is that the two orders of injunction hereinbefore recited be reversed, and the injunctions dissolved.

**TRIMMIER v. ATLANTIC & C. A. L. RY. CO.**

(Supreme Court of South Carolina. Sept. 1, 1908.)

**1. PARTIES—OBJECTION TO CAPACITY TO SUE—WAIVER.**

Objections to the legal capacity of a plaintiff to maintain the action should be taken by demurrer or answer; otherwise they are waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 169.]

**2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.**

It is a duty which a railroad company owes to its employes to keep the switches in its yards in proper position so that employes can safely perform their duties; and evidence that a conductor of a train was killed while attending to his duties in a yard as the direct and proximate result of a misplaced switch makes a prima facie case of negligence against the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 935.]

**3. SAME—ACTION FOR DAMAGES—QUESTION FOR JURY.**

In an action against a railroad company for the death of an employe, where negligence of the defendant is shown, the question whether such negligence or the negligence of the deceased caused the injury is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1016, 1035, 1043, 1131.]

**4. DAMAGES—ASSESSMENT—INSTRUCTIONS—PUNITIVE DAMAGES.**

Where, in an action against a railroad company for the death of an employe through the alleged negligence of defendant, there was no evidence of willfulness or wantonness, it was reversible error to refuse a request by defendant to charge that vindictive or punitive damages could not be recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 544.]

**5. DEATH—ACTION FOR WRONGFUL DEATH—DAMAGES.**

In a statutory action for wrongful death it is not essential that the person for whose benefit it is brought should have been dependent on the deceased or that he should have suffered pecuniary loss; and, the amount of the recovery being his absolute property, his life expectancy is not an element of damages to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Death, § 111.]

**6. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.**

Where a motion for new trial involves a question of fact, the fact that the judge in overruling the same assigned an erroneous reason is not ground for reversal, unless it further appears that but for such reason a new trial would have been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408-3424.]

Gary, A. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

Action by T. R. Trimmer, administrator, against the Atlantic & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover damages alleged to have been sustained as the result of negligence, wantonness, and recklessness on

the part of the defendant, which caused the death of plaintiff's intestate.

The allegations of the complaint are as follows: "(1) That the defendant is now, and at the times hereinafter mentioned was, a corporation duly chartered under the laws of this state, owning and operating a railroad running from the city of Spartanburg to the city of Greenville, in this state. (2) That on September 9, 1906, J. W. Allison was employed as a freight conductor by defendant in running a freight train from Salisbury, N. C., to Greenville, S. C. (3) That on said day the deceased, J. W. Allison, ran his train into the yards of the defendant located at Spartanburg Junction, and delivered the same to the yardmaster, whose duty it was to receive the same, and take off the cars destined for said junction and other points requiring a shift, and add thereto cars from said junction to points beyond. (4) That defendant had taken from the train the cars destined for other points, or such cars as it decided should not go further with the train, upon which deceased was conductor, and was proceeding to shift the same onto another track than that upon which deceased was standing in a safe place, in the discharge of his duty, near his train, but instead of shifting said cars onto another track, as it was its duty to do, the defendant deliberately, carelessly, negligently, willfully, wantonly, and in utter disregard of the rights of plaintiff, deceased, and without any notice whatever to him, ran said cars back onto the track where the deceased was walking in the discharge of his duty, with his back turned to the cars just taken away, so that said cars overtook the deceased, striking him in his back, hurling him upon the track and rails, so that his body was severed in twain by the wheels of said cars, thereby taking his life instantly, to the great damage of plaintiff and those for whom he sues in the sum of \$50,000. (5) That said defendant willfully, wantonly, carelessly, negligently, and in utter disregard of the rights of the deceased, J. W. Allison, failed to provide a proper lookout on the rear of its freight train which was being shifted in its said yards, and, by reason thereof, the deceased, J. W. Allison, while in the discharge of his duty, without any warning or notice to him whatever, was ruthlessly run over by said train. (6) That on the ——— day of ———, 1906, plaintiff was duly appointed administrator of the estate of J. W. Allison, deceased, by J. J. Gentry, probate judge of said county, and brings this action for the benefit of Andrew N. Allison, the father of the deceased; he being unmarried."

The defendant denied each and every allegation of the complaint, and set up the following defenses: "(1) For a defense defendant alleges that J. W. Allison, while in charge of such train, carelessly and negligently, willfully, and wantonly failed to perform his duties as such conductor, and care-

lessly, negligently, willfully, and wantonly threw open a switch in said yard, thereby causing the said train to be diverted from the track along which the said Allison was carelessly, willfully, negligently, and wantonly walking, without paying attention and without looking to see whether he had thrown the switch in the proper way, and without paying attention to which track the cars were entering, and that any injuries which came to him were caused by his own acts as aforesaid, all of which caused and contributed to his death. (2) That this defendant further alleges that the deceased, J. W. Allison, assumed all the risks of walking along on the track where he was, and assumed the risks of being hit by a moving car or engine when he walked between the rails of the railway company, or so near that a passing car could not pass without hitting him, when he knew, or ought to have known, that it was dangerous for him to walk between said tracks, or so near to them as to be hit by a moving car or engine, and he further assumed the risks when he threw the switch, as he did, without paying attention to what he was doing, and without throwing it in the way he should have thrown it, and that his death was caused by the risks assumed by him, as hereinbefore stated. (3) This defendant for a still further defense says that when the deceased walked along the rails of the railway track, or so near as to be hit by a passing car which was being moved by his fellow servants, he assumed the risks of the carelessness and negligence of his fellow servants, and that his death was caused by the risks assumed by him as hereinbefore stated."

At the conclusion of the testimony in chief for plaintiff, the defendant moved for a nonsuit on the following grounds: "(1) Because there was no evidence showing any negligence, as alleged in the complaint, on the part of the defendant. (2) Because the evidence was altogether conjectural as to how the death of J. W. Allison occurred." This motion was refused.

At the conclusion of all the testimony, the defendant moved the court to direct a verdict in favor of the defendant on the grounds: "(1) Because the action is brought by the plaintiff in his individual capacity, and not as administrator. The title of the case is 'T. R. Trimmier, Administrator of J. W. Allison, Plaintiff, v. Atlanta & Charlotte Air Line Railway Company, Defendant.' (2) Because even if this action is brought by T. R. Trimmier 'as administrator,' instead of in his individual capacity, yet the evidence is that letters of administration were granted to T. R. Trimmier officially 'as clerk of the court' of common pleas, for Spartanburg county, instead of T. R. Trimmier individually, and the action here is brought by him, not in his official capacity 'as clerk of the court,' but by him as T. R. Trimmier, administrator; the evidence showing that there is no such ad-

ministrator of the estate of J. W. Allison. (3) Because the records introduced in evidence show that the probate court had no jurisdiction to grant letters of administration to T. R. Trimmier in his official capacity 'as clerk of the court of common pleas' for Spartanburg county, for the reason that the petition does not set out the 'value, nature, or character, of the estate' of the deceased, as the act requires. (4) Because the petition for letters of administration, which was introduced in evidence, was filed by T. R. Trimmier in his official capacity 'as clerk of the court of common pleas' for Spartanburg county before six months had expired from the date of the death of the intestate, and therefore the probate court had no jurisdiction to grant letters of administration to the clerk of court of common pleas. (5) Because there was no negligence shown on the part of the defendant. (6) Because the evidence is speculative and conjectural as to how the accident occurred, or as to how the switches were changed. (7) Because plaintiff's intestate was guilty of contributory negligence." This was also refused.

The jury rendered a verdict in favor of the plaintiff for \$18,883.38, whereupon the defendant made a motion for a new trial, on grounds mentioned in the following order, refusing the same: "A motion was made before me for a new trial in above case on the grounds set out in the notice, and I have carefully gone over the same. In my opinion the jury were justified in finding a verdict for the plaintiff under the testimony in the case. There is no doubt in my mind but that the deceased came to his death by the carelessness and negligence of the defendant in failing to furnish safe and suitable appliances and machinery and switch and keep the same in suitable repair and in operation of the same, and he did not by his own act in any manner contribute to his injury. He met his death while on track No. 1, when a train of cars which would have been switched on track No. 4 was, through the carelessness or wantonness of some one, turned on track No. 1, and collided with cars in front of him, running them back over and killing him. He had heard the order given to switch No. 4, and had every reason to assume that track No. 1, where he was standing, was safe, and it would have been had ordinary care been taken with the operation of switch, and it been kept in reasonably safe repair. Complaint is made that verdict shows on its face that it was a compromise verdict. The court has nothing to do with manner jury arrived at the verdict, so they are governed by the law and evidence, and nothing improper is shown. This has been the law from the case of Smith v. Culbertson (9 S. C. 106) until now. In Carson v. Railroad, 68 S. C. 55, 46 S. E. 525, the Supreme Court said a refusal to charge that jury could not find a quotient verdict was no error, so they can arrive at their verdict any way they see fit, as long as

they base it upon the law and evidence only. The amount is not excessive. The testimony showed deceased had an expectancy of over 25 years; that he was earning from \$115 to \$125 per month; that he was a splendid official, and, leaving out any punitive damages and the present value of money as against future earnings, it is not excessive. It is true the amount sounds large, but the verdict is not capricious. On the contrary, the juries of Spartanburg are very conservative in damage suits, and where a good man, through no fault of his, is killed by carelessness and negligence of servants of railroad under similar circumstances, the jury ought to award substantial damages, proportioned to injuries sustained. For these reasons, and without going further, it is ordered and adjudged that the motion for a new trial be, and the same is hereby refused."

The defendant appealed.

Abney & Miller and Sanders & De Pass, for appellant. I. A. Phifer and John Gary Evans, for respondent.

GARY, A. J. (after stating the facts as above). We will not discuss the exceptions in detail, but under the heads adopted by the appellant's attorneys.

The first question that will be considered is whether his honor, the presiding judge, erred in overruling the grounds numbered 1, 2, 3, and 4 in the motion made by the defendant for the circuit judge to direct a verdict in favor of the defendant. These grounds related to the legal capacity of the plaintiff to bring the action. If there is a defect of parties, the objection should be taken by demurrer or answer (which was not done in this case), otherwise the right to make the objection is waived. *Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990; *Blackwell v. Mortgage Co.*, 65 S. C. 105, 43 S. E. 395; *Delleney v. Granite Co.*, 72 S. C. 39, 51 S. E. 531.

We proceed to consider whether there was any testimony tending to show negligence on the part of the defendant. It was the duty of the defendant to keep the switch in such a position as to render the tracks in the yard safe while the trains were being made up; and, if the plaintiff's intestate was injured while engaged in the performance of his duties as conductor as a direct and proximate cause of negligence on the part of the defendant in failing to keep the switch in proper position, then the defendant became liable for such injury. *Richey v. Railway*, 69 S. C. 387, 48 S. E. 285. The appellant's attorneys in their argument say: "The death of Allison was caused by this switch being changed by some one. No one knows who did change it"—thus conceding that the switch was not in proper position when plaintiff's intestate was killed, and that was the direct and proximate cause of his death. This made a prima facie case of negligence against the defendant. *Branch v. Railway*, 35 S. C. 405, 14

S. E. 808; *Hicks v. Railway*, 63 S. C. 559, 41 S. E. 753. Furthermore, the testimony of the witness, as stated by the presiding judge in refusing the motion for a new trial, tended to show negligence on the part of the defendant. It is, however, unnecessary to refer to the testimony in detail, as we have already shown that there was a prima facie case of negligence against the company.

The next question that will be determined is whether the testimony showed that the plaintiff's intestate was guilty of contributory negligence. As there was negligence on the part of the defendant, the question whether that or the negligence of Allison was the direct and proximate cause of the injury was properly submitted to the jury.

The next question is presented by the following exception: "Because his honor erred in refusing to charge defendant's fifteenth request, to wit: 'The jury are instructed that they cannot give any damages for vindictive or punitive damages in this case'—the error being that, there being no evidence of any willfulness or wantonness on the part of the defendant, it was error on the part of the court to submit the question of vindictive or punitive damages to the jury." The appellant's attorneys presented numerous requests to charge (including the fifteenth), and, after reading them to the jury, the presiding judge said: "Now, gentlemen, I charge you all of those requests as being good law, except as modified by my general charge later on." Upon this point the majority of the court is of the opinion that there was no evidence of willfulness or wantonness, and that there was reversible error in submitting the question of punitive damages to the jury contrary to the request of the defendant. The writer, however, dissents, entertaining the view that, conceding there was no evidence of willfulness or wantonness on the part of the defendant, it has not been made to appear that a submission of such question was prejudicial to the rights of the appellant. And, if there was no such evidence, it cannot be assumed that the jury rendered a verdict including punitive damages. Furthermore, there was not a modification of the request, but a distinct proposition was announced in the general charge. *Harbert v. Railroad*, 78 S. C. 537, 59 S. E. 644.

We proceed to dispose of the question presented by following exception: "Because his honor erred in modifying the defendant's seventeenth request to charge, and in instructing the jury as follows: 'Now, I charge you as a matter of law that if plaintiff's intestate was injured through the negligence of the railroad company, and that this negligence was the direct and proximate cause of the injury, and he did not in any manner contribute towards his injury, then he would be entitled to recover such damages, as you think he is entitled to'—the error being, as it is respectfully submitted, that by this charge

and modification of defendant's request his honor permitted the jury to give any amount of damages they might think fit, instead of limiting them to an amount proportional to the injury resulting from such death to the person for whose benefit the action is brought." The presiding judge had already charged the law as requested by the defendant. One charge was specific, while the other was general. The general charge was particularly directed to the question of negligence, and not to the person for whose benefit the action was brought. When the charge is considered in its entirety, there is no reasonable ground for supposing that the jury may have been misled.

The last question for determination arises out of the following exception: "Because his honor in refusing to grant a new trial on the ground that the verdict was excessive considered only the life expectancy of the deceased, and his probable earnings during such expectancy, whereas, it is respectfully submitted his honor should have considered the life expectancy of the father, for whose benefit the action was brought, and the injury done the father as shown by the evidence, it being respectfully submitted that there was no proof as to such life expectancy, or as to any injury done the father, or as to any amount contributed by the deceased for the support of the father, nor was there any proof of anything—either in money or otherwise—given or contributed by the deceased to the father." We fail to see wherein the probable duration of the father's life has any relevancy to the issues involved as the amount recovered is the absolute property of the beneficiary under the terms of the statute. The cases of *Barksdale v. Railroad*, 76 S. C. 183, 56 S. E. 906, and *Hull v. Railroad*, 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213, sustain the proposition that it is not essential to the recovery of damages that the person for whose benefit the action is brought should be dependent upon the deceased for support, or that the beneficiary should suffer pecuniary loss. But, even if the reasons assigned by the circuit judge in refusing the motion for a new trial were erroneous, it does not necessarily follow that this court will order a new trial. "The effect of erroneous reasons assigned in refusing motions for new trials may be divided into three classes: (1) When the motion is refused on the ground that the court is without power to entertain it; (2) when the motion is based upon a question of law in which this court will look to the ground upon which the motion was made for the purpose of determining whether it was erroneously overruled; and (3) when the motion involves a question of fact, in which case it must appear that the presiding judge would have ordered a new trial but for the erroneous reasons, otherwise it will be presumed that other reasons would have been assigned, if those

had not been deemed sufficient." *Reed v. Railway*, 75 S. C. 162, 55 S. E. 218. The motion for a new trial involved a question of fact; and, even if the reasons assigned by the circuit judge in refusing the motion were erroneous, it has not been made to appear that he would have ordered a new trial but for such reasons. The foregoing views practically dispose of all the questions presented by the exceptions.

The majority of the court being of the opinion that there was error in not instructing the jury that there was no evidence to warrant punitive damages, it is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

#### CUNNINGHAM v. CLARENDON COUNTY. (Supreme Court of South Carolina. Sept. 1, 1908.)

##### 1. COUNTIES—CLAIMS AGAINST COUNTY—PROCEEDINGS TO ENFORCE.

A county board of commissioners in considering a claim against the county acts in a judicial capacity and exercises exclusive original jurisdiction, and its judgment can be reviewed only on appeal by the circuit court, which can act only on the evidence received by the board.

##### 2. SAME—APPEAL FROM COUNTY BOARD—RETURN.

On an appeal from the judgment of a county board of commissioners on a claim against the county, the minutes of the board may be taken by the circuit court in lieu of the formal return provided for by statute, where no objection is made.

Appeal from Common Pleas Circuit Court of Clarendon County; Geo. E. Prince, Judge.

Appeal by Clarendon county from a judgment of the circuit court on an appeal from the county board of commissioners allowing a claim of J. H. Cunningham against the county. Affirmed.

J. H. Lesesne, for appellant. L. D. Jennings, for respondent.

WOODS, J. The claim of the plaintiff against the county of Clarendon for 4,932 feet of heart lumber at \$20 per M, \$98.64, was considered by the county board of commissioners on July 6, 1908, and allowed at the price of only \$12 per M for the lumber, \$59.18. The plaintiff appealed, and the circuit court held the whole amount claimed should have been allowed, and so adjudged.

We are unable to see any ground upon which the judgment can be assailed. The county board of commissioners in passing upon the claim was not only acting in a judicial capacity, but it had exclusive original jurisdiction of the matter, and the only method by which the plaintiff could bring this judgment under review was by appeal to the circuit court. *Jennings v. Abbeville Co.*, 24 S. C. 543. The county board of commissioners might have required the plaintiff to have his witnesses appear in person to

testify, but on the hearing before them the plaintiff was allowed, without objection, to introduce in evidence affidavits in support of his claim, and it was too late to object to such evidence on appeal. The objection that the circuit court could not hear the appeal without a formal return from the county board of commissioners, as required by statute, cannot avail the appellant, because the minutes of the county board of commissioners were taken as the return by the circuit court without objection on behalf of the county.

It is equally clear the circuit judge could not consider affidavits on behalf of the county, which were not before the county board of commissioners when the claim was adjudicated by the board. *Moses v. Sumter Co.*, 55 S. C. 502, 33 S. E. 581.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### McTINDALL v. PIEDMONT MUT. INS. CO.

(Supreme Court of South Carolina. Sept. 3, 1908.)

#### INSURANCE—MUTUAL BENEFIT INSURANCE—REMEDY OF POLICY HOLDER.

Civ. Code 1902, § 1912, provides that a mutual insurance company may assess and collect from its members such sums as may be necessary to pay losses, the assessment and collection to be regulated by the company's constitution and by-laws. Defendant's constitution provides that losses shall be paid by assessments on all policy holders, and that those assessments shall be pro rata. Its by-laws make no provision for payment of losses other than declaring that any surplus from the fund raised by an assessment authorized to be made annually for the purpose of expenses may be used for payment of losses. Defendant, by its policy, agreed to make good plaintiff's losses "by pro rata assessments on policies liable." The policy also provided that the amount received by the company from such an assessment should fix its liability for the loss. *Held* that, where defendant made an assessment sufficient to pay the plaintiff's loss, those who responded by payment were immune from further assessment to pay that loss, but that some of the members not paying their assessment, so that plaintiff's loss was not made good in full, he might be subrogated to the company's remedy by lien to collect the assessment of them, and that, if there was any surplus from the annual assessment for expenses, it might be applied on the loss; otherwise he had no remedy.

Appeal from Common Pleas Circuit Court of Spartanburg County; G. W. Gage, Judge.

Controversy without action on an agreed statement of facts between J. H. McTindall, as plaintiff, and the Piedmont Mutual Insurance Company, as defendant, plaintiff's loss under its policy with defendant having been paid only in part, and plaintiff claiming that defendant owed to him the absolute duty of collecting from members an amount sufficient to pay the loss in full, and, that part of them having failed to pay their assessment, it could and should make further assessment against the paying members. Judgment for defendant. Plaintiff appeals. Affirmed.

The policies of members provided that, in case they failed to pay assessments when due, their insured property might be sold, and from the proceeds there might be paid the amount of such assessments.

The trial court stated its reasons for giving judgment for defendant as follows:

"The contract betwixt the parties, evidenced by the policy, stipulates that the defendant is 'strictly a mutual company.' A mutual company is one provided for by statute. Therein is declared that such a company 'may make, assess, and collect upon and from each other such sums of money from time to time as may be necessary to pay losses \* \* \* and the assessment and collection of such sums shall be regulated by the constitution and by-laws of the association.'" Section 1912, Civ. Code 1902. So that the loss in the case at bar is payable by the company out of assessments to be collected by the company from its members; and the making of these assessments is fixed by the constitution and by-laws of the company. The constitution provides that losses shall be paid by assessments on all policy holders, and that those assessments shall be pro rata, by which I understand that each policy holder shall contribute to a loss in that proportion which his policy bears to the aggregate of policies. The by-laws contain no provision for the payment of losses. The sixth by-law, however, declares that an annual per cent. premium shall be assessed on all insured property for the purpose of defraying the expenses of the corporation; and it allows any surplus of that fund to be used for the payment of losses. But there is no warrant for the directors to make that assessment on property for the purpose alone of paying losses. If reference be had to the language of the policy, which expresses the contract between the parties, it declares, that the defendant agrees to make good the plaintiff's losses "by pro rata assessments on policies liable."

"That instrument further declares, in the eleventh paragraph that a policy holder who has sustained a loss shall not sue the company for the collection of his claim until he has first procured a pro rata assessment by the company against all the policy holders; and, further, that the amount received by the company from the said assessment shall fix the company's liability to him who has lost. I understand that language to mean this: The corporation shall be the ——— for each and all the policy holders. When a policy holder loses, he shall procure the corporation to make the assessment on each of the members; and, when the members shall have complied, and paid their pro rata share, that fact alone shall finally fix the corporation's liability to pay the loss.

"And from these premises I turn to the issue of law propounded. I am of the opinion that when the company fixed an assessment of 20 per cent. of the premium dues on each policy holder to raise a fund to pay the plain-

tiff, and when that assessment was ample for the purpose, and when some of the policy holders responded by payment, while others did not, then those who did pay are immune from further assessment to pay that loss. Against those who made default the company has a remedy by lien to collect the assessment; and the plaintiff is subrogated to that remedy. And, if there be in the treasury a surplus arising from the assessment on property to defray the expenses of the corporation, then it may be applied to the payment of this loss.

"It is so ordered."

Stanyarne Wilson, for appellant. Carlisle & Carlisle, for respondent.

GARY, A. J. For the reasons stated by his honor, the circuit judge, the judgment of the circuit court is affirmed.

#### STATE v. JAMES. (two cases).

(Supreme Court of South Carolina. Aug. 31, 1908.)

##### 1. SUNDAY — PENALTIES FOR VIOLATION OF STATUTE—NUMBER OF OFFENSES.

Under Cr. Code 1902, § 500, which makes it an offense for a person to do work or business of his ordinary calling on Sunday, there can be but one entire offense on the same day, and the number of separate acts done does not increase the number of offenses.

##### 2. SAME—"WORK OF NECESSITY."

The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a "work of necessity" in a town within the exception of the Sunday law. Cr. Code 1902, § 500.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4728-4736; vol. 8, p. 7837.]

Appeal from Common Pleas Circuit Court of Clarendon County; Geo. B. Prince, Judge.

William James was convicted of a violation of the Sunday law. From the judgment of the circuit court, the decision of the magistrate, both the state and defendant appeal. Affirmed.

J. H. Le Sesne, for the State. S. Oliver O'Bryan, for respondent.

WOODS, J. The defendant, William James, was convicted before a magistrate of the offense of violating the Sunday law, contained in Cr. Code 1902, § 500. The circuit court on appeal affirmed the judgment of the magistrate.

The defendant is a butcher and ice dealer in the town of Manning. He was arrested on three warrants, charging three separate offenses of selling ice and meat, and delivering ice and meat to three different persons, and carrying on his ordinary business by such sales and deliveries on Sunday, August 4, 1907. Contrary to the contention of the counsel for the prosecution, the magistrate ordered the three charges to be consolidated into one, holding whatever might be the number of sales and deliveries, as all were on the

same day, they constituted but one doing or exercising worldly labor, business, or work of the defendant's ordinary calling within the terms of the statute. Our statute is the same as the English statute, 29 Car. 11, c. 7. In deciding under that statute the precise point here involved, in *Crepps v. Durden*, Cowp. 640, Lord Mansfield said: "On the construction of the act of Parliament, the offense is 'exercising his ordinary trade on the Lord's Day,' and that without any fraction of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration. So, whether it consists of one or of a number of particular acts, the penalty incurred for this offense is five shillings. There is no idea conveyed by the acts itself that, if a tailor sews on the Lord's Day, every stitch he takes is a separate offense; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day." This case was cited and the principle applied in holding a number of acts of adultery to constitute but one offense in *Ex parte Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658. The argument against this construction of the statute on the ground of the inadequacy of the fine of \$1 to prevent the violation of the law loses its force in view of the fact that the General Assembly has not seen fit to change the penalty, though the judgment of Lord Mansfield was rendered in 1777 and that of the Supreme Court of the United States in 1887.

The main question is whether the sale or delivery of ice or fresh meat to the residents of the town of Manning on Sunday is a work of necessity. A work of necessity within the meaning of the statute may be that labor necessary to save the worker himself from unforeseen and irreparable loss, or it may be that necessary to the community. There is no evidence that the sales or deliveries here under consideration were made to persons who had any unusual or sudden necessity for these articles, so the question here is whether such sales or deliveries on Sunday are ordinarily necessary to the people constituting the municipal community of the town of Manning. It is impossible to state in the form of a legal proposition the degree of need or inconvenience which would amount to necessity. *Lawton v. Rivers*, 2 McC. 446. "Necessity" is an elastic term. It does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. No doubt a thing which is merely needful or desirable to the residents of a town might be a necessity to the residents of a great city. So, also, that which was a luxury a century ago may have become now a necessity. There is always, however, a tendency, which ought not to be sanctioned, to claim accustomed luxuries as necessities falling within the exception of the law. The obvious intention of the statute is to set apart one day

for rest from ordinary labor, so as to give opportunity to all for leisure and the contemplation of the higher things of life. This purpose would be defeated if the courts should hold every work a necessity, the interruption of which would break into the ordinary habits of the community, or produce a degree of public inconvenience or discomfort. Assuming that supplies could not be laid in on Saturday, there is still no ground to say it is a grievous deprivation not to have ice and fresh meat every day in the week. Discussion of the numerous authorities is unnecessary. Various kinds of labor alleged to fall within the exception of works of necessity in Sunday laws are considered in the following cases: Commonwealth v. White, 190 Mass. 578, 77 N. E. 636, 5 L. R. A. (N. S.) 322; McGatrick v. Wason, 4 Ohio St. 566; Yonoski v. State, 79 Ind. 393, 41 Am. Rep. 614; Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87; Arnheiter v. State, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392; Hennersdorf v. State, 25 Tex. App. 597, 8 S. W. 928, 8 Am. St. Rep. 448; Murray v. Commonwealth, 24 Pa. 270; Commonwealth v. Louisville, etc., R. R. Co., 80 Ky. 291, 44 Am. Rep. 475; Philadelphia, etc., R. R. Co., v. Lehman, 56 Md. 209, 40 Am. Rep. 415; State v. McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638; Burns v. Moore, 76 Ala. 389, 52 Am. Rep. 332; McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119; Hamilton v. Austin, 62 N. H. 575; State v. Knight, 29 W. Va. 340, 1 S. E. 569. So far as we can find, there is no precedent for holding the continuance on Sunday of ordinary sales or deliveries of ice or fresh meat to be a work of necessity in a town, and there is no sound argument in favor of such a conclusion.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### STATE v. MALONY et al.

(Supreme Court of South Carolina. Sept. 1, 1908.)

##### 1. APPEAL AND ERROR—EXCEPTIONS—POINTING OUT SPECIFIC ERROR.

An exception that the court should have admitted a certain letter as the statement of defendant, made contemporaneously with, or prior to, the transaction in question, and constituting part of the res gestæ fails to point out any specific error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 1621.]

##### 2. SAME—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

A ruling that a letter was not admissible to show defendant could not get inspection tags for its fertilizer when it made a shipment thereof is harmless; a witness having testified to such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

##### 3. SALES—VESTING OF TITLE—PAYMENT.

The contract for sale by C. to S. provided "right draft with bill of lading attached, to be paid on presentation for each shipment," and in each bill of lading, under the words: "Consignees and Destination," were the words, "Order, C. Notify: S., O., S. Car." Held, that title

was not to vest in S. till the draft, with bill of lading attached, was paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 547.]

##### 4. APPEAL AND ERROR—PREJUDICIAL ERROR—INSTRUCTIONS—SALE OF FERTILIZERS—INSPECTION.

Where, under a contract of sale of fertilizers, title did not vest in the purchaser till payment of the draft for the price, refusal of the court to construe it, and virtually authorizing the jury to find that the sale was complete when the purchasers came into possession of the property, which was before the payment, was prejudicial to defendant in an action against the seller for the penalty provided by Civ. Code 1902, § 1536, for selling fertilizer without having the inspection tax tag attached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4230.]

##### 5. AGRICULTURE—INSPECTION—ACTION FOR PENALTY.

Though the inspection tax on fertilizer was paid before sale of the fertilizer was complete, a nonsuit, asked for on that ground, in an action against the seller for the penalty provided by Civ. Code 1902, § 1536, is properly refused; it not only being necessary under such statute that the seller pay the inspection tax, but the statute prohibiting him from receiving or delivering any fertilizer that does not bear the inspection tax tag, as evidence that the tax has been paid.

##### 6. TRIAL—NONSUIT—GROUNDS OF MOTION.

A ground of motion for a nonsuit in an action against C. for a penalty that there was no evidence to show that C. had violated the law, as alleged in the complaint, is too general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 371.]

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court, of Orangeburg County; J. C. Klugh, Judge.

Action by the state against H. W. Malony and another, doing business under the firm name of Malony & Carter, the Cudahy Packing Company, and others. From a judgment against defendant the Cudahy Packing Company, it appeals. Reversed and remanded for new trial.

Miller & Whaley and Payson & Summers, for appellant. J. F. Lyon, Atty. Gen., and Glaze & Herbert, for the State.

GARY, A. J. This action was brought by the state to recover the penalty for selling fertilizers without attaching the tag required by the statute. The complaint (omitting the formal parts thereof) alleges: That on or about the 1st day of November, at Orangeburg, S. C., the defendants the Cudahy Packing Company and Malony & Carter sold and delivered to the defendants Jennings & Smoak 25 tons of commercial fertilizers at the price of \$700, upon which fertilizers the defendants had failed to pay the inspection tax of 25 cents per ton, and which did not bear the prescribed inspection tax tags or stamps, as evidence that the inspection tax had been paid, as required by statute. That the defendants Jennings & Smoak are now in possession of the said fertilizers, and are proceeding to resell the same, and already have resold a portion thereof. That by fail-



ing and neglecting to pay the prescribed inspection tax, and to attach the inspection tags to said fertilizers, the defendants have violated the statutes of the state, and have incurred the penalty and become liable to the state in the sum of money equal to the price of the fertilizers. The defendants denied these allegations. The jury rendered a verdict in favor of the plaintiff against the defendant the Cudahy Packing Company, for \$662.50, and the said defendant appealed.

The first question that will be considered is whether there was error on the part of his honor, the presiding judge, in refusing to allow the defendant to introduce in evidence the following letter: "South Omaha, Neb., Oct. 20, 1906. Messrs. Malony & Carter, Charleston, S. C.—Gentlemen: We have your favor of the 17th. inst., and we beg to inform you, that the car for Orangeburg has not yet been gotten away, as we have been short of cars; but we are expecting to get it out, either to-day or Monday. We are shipping this from our Kansas City house, where they have not any South Carolina tags at the moment, and we have therefore advised them, to ship without tagging, rather than delay the same, and you can have it tagged on arrival. Very truly yours, The Cudahy Packing Co." The only reason assigned why there was error is that "the presiding judge should have admitted the said letter as the statement of the defendant the Cudahy Packing Company made not subsequent to, but contemporaneously with, or prior to, the transaction in question, and constituting a part of the *res gestæ*." It will thus be seen that the exception fails to point out any specific error. The appellant, however, contends that the letter was competent for the purpose of showing motive. The pleadings do not raise an issue as to the motive of the defendant; nor was there reversible error in ruling that the letter was not admissible in evidence for the purpose of showing that the defendant could not get tags when the shipment was made, as the witness Patrick Carter testified to this fact.

The second error assigned is because his honor, the presiding judge, charged the jury: "It is not for me to say whether the Cudahy Company did ship the goods to the order of Jennings & Smoak, or to their own order. That is for you to find from the testimony, if there is testimony to that effect." The general rule is too well settled to necessitate the citation of authority that the construction of a written instrument presents a question to be determined by the court, and not by the jury. Let us see if the error was prejudicial to the rights of the appellant. Section 1536, Civ. Code Laws 1902, provides that "all persons, companies or corporations engaged in the manufacture, or sale of fertilizers, or commercial manures, or cotton seed meal, shall pay to the State Treasurer an inspection tax of twenty-five cents per ton

(2,000 lbs), for such fertilizers, or commercial manures, or fertilizing material, or cotton seed meal sold or exposed, or offered for sale in this State, in order to entitle the same to inspection and delivery; and all persons, railroad companies, or common carriers, are hereby prohibited from selling, or exposing, or offering for sale, any commercial fertilizers, or commercial manures, or fertilizing materials, or cotton seed meal, that do not bear the prescribed tax tag or stamp, as evidence that the said inspection tax has been paid to the State Treasurer, or his duly appointed agents. Every person or persons, company or corporation, violating this section, shall forfeit to the state the sum of money equal to the price of the fertilizers, commercial manures, fertilizing material, or cotton seed meal, sold, or exposed, or offered for sale, received, shipped, or delivered without having the inspection tax tags attached, to be recovered in any court of competent jurisdiction. \* \* \*

In the agreement entered into on the 8th of August, 1906, between Malony & Carter and Jennings & Smoak for the sale of said fertilizers appears the following: "Sight draft with bill lading attached, to be paid on presentation for each shipment." And in each of the bills of lading is the following, except in one the "c/o" is omitted: "Consignees and Destination: Order, The Cudahy Packing Co., Notify. c/o Jennings & Smoak, Orangeburg, S. C." These words show that the title to the property was not to vest in Jennings & Smoak until the draft, with bill of lading attached, was paid. *Grocery Co. v. Brooke*, 70 S. C. 494, 50 S. E. 186.

R. H. Jennings, a member of the firm of Jennings & Smoak, testified as follows: "Q. Do you remember when the first shipment arrived? A. Yes, sir. On the 1st of November. Q. Did Mr. Mackey call your attention to the fact that there were none of these tax tags on the fertilizer? A. Yes, sir; that was my first knowledge of the matter when he called it to my attention. Q. This contract calls for a first shipment in December? A. Yes, sir; I wrote to them, and told them that I would want it a little earlier, on account of using it for oats. Q. And the reason that this first shipment was made, then, was on account of that letter? A. Yes, sir. Q. When did it get here? A. On the 1st of November. I had sold some to Mr. Bates, and he was very anxious for his—he wanted to plant oats, and I phoned to him as soon as it arrived."

Cross-examination: "Q. The drafts stayed in the People's Bank from the 8th till the 12th of November? A. I guess so, sir. Q. You could not get your bill of lading till the draft was paid? A. No, sir. Q. They did not come into your possession until the draft was paid? A. No, sir. Q. Your contract was that the fertilizer was to be shipped to you, bill of lading attached? A. Yes, sir. (Bill of lading introduced.) Q. On the afternoon of the 7th did you not receive a package of tags

for the fertilizer? A. I received them. I do not know that it was the afternoon of the seventh. Q. Those tags were canceled? A. Yes, sir. They were stamped. Q. Those were the tags for that fertilizer, and they were shipped on the 7th, and were received by you on the eighth? A. I don't remember that, sir. Q. They were to cover that fertilizer that had no tags on it? A. Yes, sir. Q. Were they ever put on the fertilizer? A. Not till a good many days after that, sir. Q. You telegraphed Malony & Carter, and received a letter from them? A. Yes, sir. Q. They told you that the tags would be sent? A. Yes, sir. Q. And you got them? A. Yes, sir. Q. The fertilizer was tagged? A. Not till a good many days after that. Q. Why did you not tag the fertilizer? A. My help was busy at the time, and they did not expect me to hire any one, and I had to wait till I got the time to do it. Q. The tax was paid and the state of South Carolina did not lose anything—the tags were paid for? A. They did not lose a cent, sir. Q. You knew that the attachment proceeding was being gotten out? A. Yes, sir; I did. Q. During the time that they were getting these papers out, you still did not pay the draft? A. No, sir; I don't know when the draft was paid. Q. Did not Malony & Carter in reply to your telegram tell you? (Objection, hearsay.) Q. What did Mr. Carter tell you in reply to your telegram? Did not Mr. Carter tell you that he was shipping you a bundle of tags to be put on that car before the delivery of that car? (Objection.) His Honor: I will allow the question. A. I would not deny that or affirm it. Q. You know that you got the tags? A. Yes, sir. They were received. Q. They must have been received the morning after they were sent to you? A. They must have been, sir. Q. Was every bag of fertilizer that came in that car tax paid? A. Yes. Q. To whom did you sell these fertilizers? A. I sold five tons to Mr. Bates in November. Q. There were seven tons sold out before the tags were received? A. Yes, sir; there were five tons sold to Mr. Bates, and two tons carried to our plantation. Q. This of Mr. Bates was sold before Mr. Mackey came around? A. Yes, sir; probably the same day. I know the fertilizer had just come in. Q. You had sold it before the inspector came around. Had you delivered any of the fertilizer before Mr. Mackey came around? A. Yes, sir; the day that goods arrived I phoned Mr. Bates and he got his. Q. Mr. Bates says that that was on the 2d? A. I don't remember, but I think it was later than that."

Recross-examination: "Q. When the car was delivered at your warehouse, you had no bill of lading? A. No, sir. Q. When the sale was made to Mr. Bates, you had not received the bill of lading? A. No, sir; it had not arrived. Q. The draft had not been paid? A. No, sir."

The following statement appears in the record: "It was admitted as testimony that Mr. H. O. Dawson, the express agent at Orangeburg, S. C., received the tags from Malony & Carter on the train that reached Orangeburg at 8 o'clock in the evening of the 7th day of November, 1906, and that these tags were delivered by him to Jennings & Smoak about 10 o'clock on the following morning, being the 8th day of November, 1906. It was also admitted that the draft, with the bill of lading attached, was received by the People's Bank on the morning of the 8th day of November, 1906, being the day the tags were delivered by the express company to Messrs. Jennings & Smoak, and that this draft was not paid until the following Monday, November 12th, on which day the bill of lading was delivered to Jennings & Smoak." Patrick Carter, a member of the firm of Malony & Carter, testified as follows: "Q. When did you first know that these fertilizers were in Orangeburg? A. I got a telegram from Jennings & Smoak in Orangeburg on the 7th of November between 1 and 2 o'clock. Q. Did you know before that, that the fertilizers were here? A. No, sir. Q. You had the bills of lading for the fertilizers? A. We did. Q. When were they sent up to Jennings & Smoak? A. On the afternoon of the 7th. Q. Did Jennings & Smoak have any right to the fertilizers before they got the bills of lading? (Objection. That is a legal question, and it is not competent for counsel to ask the witness that.) His Honor: I think that question is competent. Q. What about the delivery of the fertilizer? A. I did not know that they were here till I got this telegram from Jennings & Smoak. Q. Did they have any right to take the fertilizer? A. No, sir. Q. Did you give the railroad any instruction or any one any instructions to deliver it to Jennings & Smoak? A. No, sir; no one at all. Q. Why was it, Mr. Carter, that there were not tax tags on that fertilizer? A. Because the tags were exhausted, sir. They had no more of them on hand. Q. You know that? A. Yes, sir; this shipment to Jennings & Smoak was sent out earlier than was expected, and they had no tags on hand at the time. I got the tags and canceled them with my own hands, and sent them to Jennings & Smoak by the night mail. I knew that they could not get possession of the fertilizer without the bill of lading, and we had that; so I thought that it was perfectly safe, and, as soon as we knew the stuff had arrived, we complied with the law. Q. When did you send up the bill of lading and the invoice? A. It was mailed on the 7th. We sent it to our bank, and they sent it to the bank here. We mailed the invoice to them on the 7th. Q. You mailed the invoice to Jennings & Smoak? A. Yes, sir."

Cross-examination: "Q. You said the reason the tags were not put on the fertilizer

was because it was exhausted, because they had no more tags? A. Yes, sir. Q. You never ship your fertilizer without putting these tax tags on it? A. No, sir; we always stick up to the laws, sir. That is our motto."

It will thus be seen that the refusal of his honor, the presiding judge, to construe the contract between Malony & Carter and Jennings & Smoak, deprived the appellant of a substantial right, as the title to the property did not vest in Jennings & Smoak until the 12th of November. Under the charge of his honor, the circuit judge, the jury may have reached the conclusion that the sale of the appellant to Jennings & Smoak was complete when the latter came into possession of the fertilizers.

There is another reason why the jury should have been instructed that the title did not vest in Jennings & Smoak until the draft attached to the bill of lading was paid. J. J. Mackey, the inspector of fertilizers, testified as follows: "Q. The sheriff attached the fertilizer? A. Yes, sir. Q. Did you go with him when he attached it? A. Yes, sir. Q. Who levied on it? A. Mr. Tharin. Q. When was the attachment made? A. On the 12th of November." It seems from the testimony that the draft was not paid until the attachment had been made. If this is true, then the law took possession of the property before the title became vested in Jennings & Smoak.

The last question that will be considered is whether there was error in refusing the motion for a nonsuit, which was made on two grounds, the first of which is as follows: "(1) That there was no evidence tending to show that the Cudahy Packing Company sold and delivered, or had sold and delivered, the fertilizers in question before the inspection tax had been paid." This ground was properly overruled, for the reason that it is not only necessary for the party selling the fertilizers to pay to the State Treasurer the charge of 25 cents per ton, but such party is also "prohibited from receiving or delivering any commercial fertilizers \* \* \* that do not bear the prescribed inspection tax tags or stamps, in evidence that the said inspection tax has been paid to the State Treasurer, or his duly appointed agents." The second ground was as follows: "(2) That there was no evidence tending to show that the Cudahy Packing Company had violated the law, as alleged in the plaintiff's complaint." This ground is too general to be considered.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

JONES, J. (dissenting). I am unable to agree to a reversal of the judgment. The charge which is the subject of the second exception is a mere isolated sentence, which, when read in the light of the context, does not submit it to the jury to construe a writ-

ten contract. The context is as follows: "Where property is shipped on a railroad to the order of the party who ships, marked 'Notify so and so, shipped to the order of the shipper,' that is not a transaction which passes the title of the property to the party to whom the goods are shipped; that is, the party who is to be notified of the arrival of the goods. The title in that case is still in the shipper, and, where it is alleged that the title has passed from one person to another, that is a question of fact for the jury to decide. If as a matter of fact fertilizer or any other article is shipped to the shipper, order notify some other party, and there has been a contract made to sell this article, and if this article is afterwards found in the possession of the party to whom the shipper had contracted to sell the article, then it is for the jury to determine whether the article came into the possession of this person by or with the concurrence of the shipper or not. If that should be the case in this case, the jury has a right to consider that in reaching their verdict and in determining whether there was a sale or not. But, if the article came into the possession without the concurrence of the shipper, then the shipper could not be held to have been a party to the delivery of the goods. It is not for me to say whether the Cudahy Company did ship the goods to the order of Jennings & Smoak or to their own order. That is for you to find from the testimony, if there is testimony to that effect. It is not my duty to say whether such articles did come into the possession of Jennings & Smoak, and, if they did come into the possession of Jennings & Smoak, whether it was with the concurrence of the Cudahy Company or Malony & Carter. That is a question for you to determine."

The judgment of the circuit court should be affirmed.

#### THOMAS et al. v. OWENS et al.

(Supreme Court of Georgia. Aug. 12, 1908.)

#### 1. WILLS — NATURE OF ESTATES CREATED — FEE SIMPLE—LIMITATIONS OR OTHER PROVISIONS INCONSISTENT WITH DEVISE IN FEE.

A testatrix executed the following will and codicil:

"Item First. I devise and bequeath to my sister, Margaret W. Thomas, my interest in the family residence in Savannah, Georgia, and to her heirs. I devise and bequeath to my said sister for life my interest in Guinas plantation, Habersham county, Georgia, and on her death I devise and bequeath my said interest in said plantation to my niece, Mary B. Thomas, and her heirs. I bequeath to my said sister my interest in the furniture, plate, china, and glass, in the family residence in Savannah and in the residence at Guinas, and all my furniture, plate, glass and china, saving and excepting such pieces as I may make disposition of by any memorandum left attached to or with this will.

"Item Second. I devise and bequeath to my grandnephews, Paul T. Haskell, Jr., and Langdon Haskell, and to the survivor of them, my interest in the residence, 122 State Street East,

Savannah, Georgia, lately occupied by their mother, Mary Wallace Haskell, and now occupied by them.

"Item Third. The rest and residue of my estate of whatever kind, which I may own at the time of my death, I desire to be divided by my executors hereinafter named, as I now direct, and which I devise and bequeath as follows: One-half of the same to my sister, Margaret W. Thomas and her heirs; one-fourth of the same to my nieces, Lizzie Munnerlyn, Margaret and Julia Owens; one-fourth of the same to my niece, Mary Anderson Owens, [for] life, or so long as she shall remain unmarried. In the event of her marriage, I direct my executors to pay over to her one-fourth of said share, and to divide the remainder equally between her sister, Lila C. Carmichael, and her brothers, Benjamin L. Owens and John W. Owens. In the event of her death without having married, I direct my executors to pay over her share to her said sister and brothers.

"Item Fourth. I direct that any memoranda attached to or inclosed with this will making specific bequests be considered a part and parcel of it, and shall be carried out as fully as if incorporated in it.

"Item Fifth. I nominate and appoint as my executors, Margaret W. Thomas and my nephew, George W. Owens, and authorize and direct them, or either of them, to sell and dispose of my property at public or private sale, as may be deemed best, and to reinvest the proceeds of sale in such property as may be deemed to be the best interests of my estate, without any order of court being applied for or had for said sales or investments."

Codicil: "I republish and reaffirm said will, save and except that I direct that my estate shall not be divided during the lifetime of my sister, Margaret W. Thomas, but shall be held together until her death. I bequeath to my said sister, Margaret W. Thomas, the income from my estate during her life, and on her death direct that said estate be divided as devised and directed in my will last mentioned."

*Held*, the devise to Margaret W. Thomas in item 8 was a devise to her in fee simple, and was not reduced to a life estate by the codicil.

## 2. SAME.

A life estate for Margaret W. Thomas was carved out of the estates devised to the other legatees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1393-1416.]

## 3. EXECUTORS AND ADMINISTRATORS—COLLECTION AND MANAGEMENT OF ESTATE—RIGHT TO POSSESSION.

There being no debts, Margaret W. Thomas is entitled to have possession of the estate of the testatrix from the executor.

## 4. WILLS—NATURE OF ESTATES CREATED.

Upon the death of Margaret W. Thomas, all the property not devised to her in fee is to be divided among the other legatees in the manner indicated in the will.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Petition by Margaret W. Thomas, as executrix of Mary W. Owens, deceased, and individually, and others, against George W. Owens, executor of Mary W. Owens, deceased, and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Margaret W. Thomas, as executrix of Mary W. Owens and individually, and Mary B. Thomas and Margaret G. Thomas, daughters of Margaret W. Thomas, brought their petition against George W. Owens, executor,

and certain other defendants, named as legatees in the will of Mary W. Owens, praying a construction of the will and codicil of Mary W. Owens, and asking for direction. The headnote contains a copy of the material parts of the will and codicil attached to the petition. The several defendants answered. By consent the case was heard by the court without a jury. On the trial it appeared that the bequests in the first item of the will were not in dispute. Certain evidence, relating to the circumstances attending the execution of the codicil and the character of the estate in possession of the executors, was introduced. The court rendered the following decree:

It is decreed "that the intention of the testatrix, Mary W. Owens, as clearly expressed in her will, as modified by the codicil thereto, both to the court now submitted for construction, is that the estate left by her is not to be divided until the death of her sister, Margaret W. Thomas, the plaintiff executrix; and the court so finds and decrees.

"(2) That during the lifetime of the said Margaret W. Thomas the said estate is to be kept together by the representatives named in said will, in trust: (a) To pay the net income thereof unto the said Margaret W. Thomas during the term of her natural life. (b) To divide the said estate among those entitled thereto, and in the proper proportions, at the death of the said Margaret W. Thomas.

"(3) That the executrix, Margaret W. Thomas, and the executor, George W. Owens, have authority under said will, and are directed so to do, to sell any of the property of said estate, at public or private sale, as may be deemed best by them, and to reinvest the proceeds of any such sale as they may deem best for the interests of the said estate.

"(4) That the said Margaret W. Thomas is not individually and in her own right entitled in fee simple to a one-half interest in the residue of said estate mentioned in the third item of said will, and is not now entitled to receive the same from the representatives of said estate; the codicil having changed the interest of the said Margaret W. Thomas from a fee simple in said one-half of said residue to a usufruct in the net income in the said one-half interest, to be paid unto her during the term of her natural life by said representatives, the corpus not being payable to her, but to be held by said representatives in trust for the persons hereinafter named in connection therewith.

"(5) That the words 'her heirs,' in item third of the will, as referring to the heirs of Margaret W. Thomas, mean the children of Margaret W. Thomas living at the time of the death of the testatrix, and the said children, Mary B. Thomas and Margaret G. Thomas, petitioners, take the one-half interest in the residue, which under the will as unmodified by the codicil would have gone to their mother, by way of executory devise

or legacy in fee simple at the death of their mother.

"(6) That the said Margaret W. Thomas is entitled under said will, as modified by said codicil, not only to the usufruct of the net income of the residue of said estate as described in item third of the will, but also of the net income of the one-fifth interest owned by the testatrix in the premises known as 'No. 122 State street,' Savannah, Ga., described in item 2 of said will, to be paid over to her by said representatives.

"(7) That under the said will, as modified by said codicil, Paul T. Haskell, Jr., and Langdon Haskell, the grandnephews of the testatrix, named in item 2 of said will, take by way of executory devise a fee-simple interest in the one-fifth interest owned by the testatrix in said premises, No. 122 State street, Savannah, Ga., the enjoyment of which is postponed until the death of the said Margaret W. Thomas.

"(8) That of the residue of the said estate, referred to in item third of said will, the following distribution results at the proper time, as herein stated: (a) Lizzie Munnerlyn Margaret W. Owens, and Julia Owens take by way of executory devise or legacy, as the case may be, together a fee-simple interest in one-fourth of the residue of said estate, the enjoyment thereof being postponed until the death of the said Margaret W. Thomas; the heirs of the said first-named persons taking per stirpe. (b) Mary Anderson Owens takes by way of executory devise or legacy, as the case may be, a life interest in another one-fourth of the said residue; the said estate beginning at the death of the said Margaret W. Thomas, subject to a failure of divestiture should she, the said Mary Anderson Owens, die or marry. In either event, the said one-fourth interest in said residue goes by way of executory devise or legacy, as the case may be, in fee simple to Lila C. Carmichael, Benjamin L. Owens, and John W. Owens, per capita, or to their heirs per stirpes. The remaining moiety of said residue goes as already hereinbefore decreed. This decree is not concerned with the property mentioned in the first item of said will, that having been amicably adjusted among the parties at interest before the submission of said will and codicil to the court for construction, and the construction of the court thereon not being invited."

The plaintiffs except to the decree and the construction of the court placed on the will.

W. L. Clay, for plaintiffs in error. Walter G. Charlton, for defendants in error.

ATKINSON, J. (after stating the facts as above). This is an equitable petition for the construction of the will of the late Mary W. Owens. As has often been observed, every will is a thing to itself, and in the construction of a will it is the duty of the court to diligently seek the intention of the testator,

and give it effect where no rule of law is violated. This cardinal rule of construction is the statute law of this state. Civ. Code 1895, § 3324. The testatrix made her will and thereafter executed a codicil. It is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. 1 Jarman on Wills, § 139. This principle of construction is all the more applicable in the case of this will, as in the codicil the testatrix expressly reaffirmed her will, save and except as changed by the codicil.

In ascertaining the testamentary scheme, it is well to first consider the terms of the will before the execution of the codicil. It is clear that the original dispositive scheme was to devise one-half of the residuum of her estate to her sister, Mrs. Margaret W. Thomas. The language employed to express this intent is plain and accurate to the point of technical precision. She devised the one-half of the residuum of her estate to "Margaret W. Thomas and her heirs." A devise or grant to A. and his heirs conveys a fee to A. Craig v. Ambrose, 80 Ga. 134, 4 S. E. 1; Ewing v. Shropshire, 80 Ga. 374, 7 S. E. 554; Douglas v. Johnson, 130 Ga. 472, 60 S. E. 1041. It is also beyond doubt that she devised one-fourth of the residuum in fee simple to her nieces, Lizzie Munnerlyn and Margaret and Julia Owens. As to the disposition of the remaining fourth of the residuum the testatrix's intent is equally manifest. It was devised to Mary Anderson Owens for life, or so long as she remains unmarried. In the event of her marriage, the one-fourth residuum is to be divided between Mary Anderson Owens, her sister, Lila C. Carmichael, and her brothers, Benjamin L. Owens and John W. Owens, each taking a fee to one-fourth of this one-fourth of the residuum, or, in the event of the death of Mary Anderson Owens without having married, this one-fourth interest is to be equally divided among her brothers and sisters named in the will, each taking one-third of this one-fourth interest in fee simple. Thus it will be seen that the testator did not leave in doubt the persons who were to take the fourth of the residuum last devised. The objects of her bounty were not indeterminate, and were not to be ascertained or discovered by her executors. The testatrix did not contemplate any change in the beneficiaries; but she did contemplate a shifting of the interest among these devisees, dependent upon the death or marriage of one of them. It would seem to be clear that the various estates devised were purely legal in character. In the fifth item the testatrix appointed Mrs. Margaret W. Thomas and George W. Owens as her executors, and authorized either or both of them to sell and dispose of her property at public or private sale as may be deemed best, and reinvest the proceeds in such other property as may be deemed to the

best interest of her estate. This was a discretionary power given to the executor and executrix, and there is nothing in the will to indicate that this power was given for any other purpose than to facilitate the administration of the estate. The conference of this power created no estate in the executors, but was a grant of a naked power. It was conferred on the nominated executors, to be exercised by them, and not by an administrator with the will annexed—a mere personal power, and simply collateral in its nature. *Luquire v. Lee*, 121 Ga. 624, 49 S. E. 834; 1 *Sugden on Powers* (Ed. 1856) \*130-\*134; 2 *Washburn on Real Prop.* (8th Ed.) § 1417; *Chew v. Hyman* (C. C.) 7 Fed. 7. The distinction between a power which creates an estate and a naked power to sell is thus stated in 1 *Williams on Ex'rs* (9th Ed.) 779: "A devise of the land to executors to sell passes the interest in it; but a devise that executors shall sell the land, or that the lands shall be sold by the executors, gives them but a power." The executors, therefore, took no estate under this power, and there is nothing in the will to change the general rule, as defined in *Civ. Code* 1895, § 2313, that executors take no beneficial interest under any will (except commissions), unless the same be expressly given to them by the will.

The next question is, how far is the original dispositive scheme affected by the codicil? We will first notice the effect of the bequest in the codicil to Mrs. Thomas for life of the income of the entire estate of the testatrix as affecting the bequests in the will as originally drafted. An unconditional gift of the income of the property will be construed into a gift of the property, unless the provisions of the will require a more limited meaning. *Civ. Code* 1895, § 3323. If the gift of the income had not been limited for life, and had not been hedged by other limitations, Mrs. Thomas would have taken the fee; but, as the bequest to her is for life only, she takes a life estate in all of the testatrix's property. The devise in the codicil to Mrs. Thomas of a life estate in all of the property of the testatrix clearly carves a life estate for her out of the devises to the other devisees; and it becomes necessary to inquire what effect this provision of the codicil has on the devise to Mrs. Thomas in fee as made in the will. Was her estate in fee cut down to an estate for life? The rule is elementary that a court will not by construction reduce an estate once devised absolutely in fee by limitations contained in subsequent parts of the will, unless the intent to limit the devise is clearly and unmistakably manifested. If the expression relied upon to limit a fee once devised be doubtful, the doubt should be resolved in favor of the absolute estate. *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *McClellan v. Mackenzie*, 126 Fed. 703, 61 C. C. A. 619. When the testatrix bequeathed the entire income of her estate to Mrs. Thomas for life, it would seem that the

only purpose could have been to enlarge her benefaction to Mrs. Thomas; that in addition to the devises to her in fee simple she should receive for life the entire income of the property devised to the other legatees. This is obliged to be so, because there is nothing in the codicil inferable of an intent to disturb the fee devised to Mrs. Thomas, and because no attempt is made to dispose of the property devised in fee to Mrs. Thomas after her death. To hold that Mrs. Thomas' devise in fee is reduced to a life estate would in effect declare an intestacy as to this property after her death. A will affecting property should never be so construed as to exclude some of it from its operation, unless demanded by the context or some rule of law prohibiting the disposition. This difficulty evidently arose in the mind of the trial court, and was met by holding that the word "heirs" in the devise to Mrs. Thomas should be construed to mean "children." We think such construction is not only opposed to the legal and technical meaning of the word "heirs" in its context, but also opposed to the clearly expressed testamentary purpose. The will and codicil indicate that Mrs. Thomas was the principal object of the bounty of the testatrix, and the codicil is to be construed as enlarging the bequests to her in the will by giving to her, in addition to the property devised in fee, a life estate in the property devised to the other legatees. It was admitted on the trial, and so stated in the decree, that there was no controversy as to the property devised in item 1 of the will, as that had been amicably adjusted.

Having come to the conclusion that the devises in fee to Mrs. Thomas in the will are not affected by the codicil, and that by force of the codicil Mrs. Thomas takes a life estate in the property devised to the other legatees, the next question is whether Mrs. Thomas is entitled to the possession of the estate, or should it remain with the executors until the death of Mrs. Thomas, and then be divided by them? There is no pretense that the estate owes any debts. Mrs. Thomas is sui juris and laboring under no disability. She is entitled to the full use and enjoyment of the property devised to her, unless restrained by the will and codicil. She is as much entitled to the possession of the estate devised for life as that devised in fee, if the will does not give possession to the executors until her death. A tenant for life is entitled to the full use and enjoyment of the property. *Civ. Code* 1895, § 3090. In this respect there is no difference between realty and personalty. As was said in *Bowman v. Long*, 26 Ga. 146: "In a life estate the tenant is entitled to have the possession of the property for his own enjoyment, and all that the remainderman can require is that the 'corpus' of the property shall be kept in preservation, to be delivered to him on the termination of the life estate. \* \* \* Of course, this rule must be subordinate to the rule that the corpus

is to be so kept that it shall be preserved for delivery to the remainderman on the termination of the life estate. The law has ways by which it can effect this object, and yet not deprive the tenant for life of the use and profits of the property during his life. It can require him to give security for the forthcoming of the property at the termination of the life estate." *Crawford v. Clark*, 110 Ga. 732, 36 S. E. 404; *Brantley v. Porter*, 111 Ga. 836, 36 S. E. 970; *Walker v. Watson*, 32 Ga. 284. We take it to be well settled, therefore, that, unless otherwise provided in the will and codicil, Mrs. Thomas is entitled to the possession of the property devised to her to the exclusion of the executor.

The executor claims that as the devise to Mrs. Thomas was of the income, and the codicil expressly directed that the estate of the testatrix was not to be divided during the life of Mrs. Thomas, but was to be kept together until her death, and because of the power of sale in the will, he is required by virtue of his office as executor to retain possession of the estate until Mrs. Thomas' death, in order to execute the will and codicil of his testatrix. It is undeniably true that a testator may devise the possession of his property to his executor in order to effectuate a lawful testamentary disposition of it, which contemplates a division by the executor at a future period. See *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59. But neither the will nor the codicil in this case makes any express devise of an interest in this estate to the executor; and, if any such interest exists, it must be implied. As pointed out in an earlier part of this opinion, the conference of a power of sale does not create any estate. A power of sale may reside in one who has no legal or equitable interest in the property which is to be the subject of a sale. *Coleman v. Cabaniss*, 121 Ga. 281, 48 S. E. 927. The mere lodgment of a discretionary power of sale in an executor cannot destroy an essential quality of the estate in fee of a devisee, where there are no debts or necessity of sale. Moreover, the power of sale is in the original will, and, as we have said elsewhere, was conferred for the purpose of administering the estate in the usual and ordinary way. But it is emphasized that the testatrix directs that her estate shall not be divided during the lifetime of her sister, Mrs. Thomas, and shall be kept together until her death. This provision of the codicil emphasized the testamentary intent that Mrs. Thomas should have undisturbed possession of the whole estate until her death, when the several estates in remainder are to become estates in possession. The executor is not a trustee for any of the legatees. He holds for neither Mrs. Thomas nor the remaindermen. The codicil is satisfied if the property is not divided until Mrs. Thomas' death; and the holding should be by her, in the absence of a contrary declaration by the testatrix. Upon the assumption that the

division is to be made by the executor, still the authority to divide in a designated way among determinate and designated legatees, who are given purely legal estates, is but a naked power uncoupled with an interest, and in the absence of a devise to the executor, or words of implication, he has no right to the possession and control of the estate intermediate the period for division. *Chighizola v. Le Baron*, 21 Ala. 406.

Judgment reversed. All the Justices concur.

#### MOORE et al. v. GRINER.

(Supreme Court of Georgia. Aug. 18, 1908.)

#### APPEAL AND ERROR—RECORD—CONCLUSIVE-NESS—CONFLICT OF CERTIFICATES.

Error is assigned, in the bill of exceptions, upon the ruling of the court in directing a verdict for the defendant. The bill of exceptions recites that it was tendered within 30 days after the ruling complained of; and, while the bill of exceptions is certified as true, the judge's certificate shows further that the bill of exceptions was not tendered until April 9th—that is, not until after the expiration of 34 days from the date of the ruling excepted to. As shown by the judge's certificate, when the bill of exceptions was handed to him, he delivered it to counsel for the opposite party, who returned it to him on May 20th, then calling his attention to the fact that the bill of exceptions was not signed by counsel for the plaintiff in error. The latter then signed the bill of exceptions, and the judge certified the same, setting forth the above facts. Held, that upon motion by the defendant in error the writ of error must be dismissed, no bill of exceptions, properly signed, having been tendered to the judge within the time allowed by law. *O'Connell v. Friedman*, 117 Ga. 948, 43 S. E. 1001.

(Syllabus by the Court.)

Error from Superior Court, Irwin County: U. V. Whipple, Judge.

Action by S. B. Moore and others against Fisher Griner. Judgment for defendant, and plaintiffs bring error. Dismissed.

Haygood & Cults, for plaintiffs in error.  
McDonald & Quincey, for defendant in error.

BECK, J. Writ of error dismissed. All the Justices concur.

#### BRANTLEY v. RHODES-HAVERY FURNITURE CO. et al.

#### RHODES-HAVERY FURNITURE CO. et al. v. BRANTLEY.

(Supreme Court of Georgia. Aug. 18, 1908.)

#### 1. MALICIOUS PROSECUTION—ELEMENTS—TERMINATION OF PROSECUTION—PROCESS—ABUSE—TERMINATION OF ACTION.

In a suit for malicious prosecution of a criminal case without probable cause, or a malicious use of legal process in a civil case, consisting in maliciously instituting and prosecuting such a case without probable cause, it is necessary to allege and prove that the action in which the process issued has been finally determined in favor of the defendant therein. In an action for a malicious abuse of process by employing process, legally and properly issued, wrongfully and unlawfully for a purpose which

it was not intended by law to effect, it is not necessary to allege and prove the termination of the action in which the process issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 70.]

## 2. PROCESS—ABUSE—PLEADING—PETITION.

A petition alleged that an action to recover personal property was brought, and bail process was taken out in connection therewith, under Civ. Code 1895, § 4804; that the plaintiff in the action knew that the defendant did not have the property in her possession, custody, or control; that it was the purpose of the proceeding to compel her to give up a certain piece of jewelry which she wore on her person, and to pay a debt due by her for a balance of the purchase money on the furniture; that she was arrested, and kept in custody for five hours; that the purpose of the process and the use which it was made to serve was not contemplated by law, but was to compel her to surrender a diamond brooch and to make payment of a debt in agreed installments; that she was thus coerced into delivering the diamond and signing an agreement in regard to making payment, and was thereupon released. *Held*, that the petition set out a case of malicious abuse of legal process.

## 3. SAME—EVIDENCE—NONSUIT.

The evidence introduced in support of the action made out a prima facie case, and the granting of a nonsuit was error.

(Syllabus by the Court.)

Error from Superior Court, Fulton County: W. D. Ellis, Judge.

Action by M. L. Brantley against Rhodes-Haverty Furniture Company and another. Judgment for defendants, and plaintiff brings error. Defendants file a cross-bill of exceptions, assigning error on exceptions pendente lite to the overruling of their demurrer to the petition. Judgment on plaintiff's writ reversed, and judgment affirmed on defendants' cross-bill of exceptions.

Mrs. M. L. Brantley brought suit against the Rhodes-Haverty Furniture Company, a corporation, and Clarence Haverty. Her declaration, as amended, alleged in brief as follows: The defendant company brought an action against the present plaintiff to recover certain furniture, alleged to be in her possession, custody, or control, and, acting by and through its representative and agent, Clarence Haverty, made a false and malicious affidavit, in order that process might issue against her from the city court of Atlanta, requiring the officer of that court to arrest her; and such process was issued. The affidavit so made alleged that the company was about to institute a suit against Mrs. Brantley for the recovery of certain specified personal property; that it was in her possession, custody, or control; that the deponent and the company had reason to apprehend that it would be eluded or moved away, and would not be forthcoming to answer the judgment or decree that should be made in the case; that the value of the property was \$102.15; and that the furniture company claimed said property as belonging to it. The statements made in this affidavit as to her possession, custody, or control of the property were false, and were known to be false by the affiant at the time he made the affidavit;

and he made it with malice and without probable cause, and for the purpose of forcing Mrs. Brantley to give up a certain piece of jewelry which she wore on her person and to compel her to pay a debt. Service was made upon her by a deputy sheriff of the county, by arresting her. The arrest occurred as she was about to be seated at the dining table of the hotel where she boarded, and she was kept in custody of the sheriff from noon until 5 o'clock p. m., during that time being deprived of her liberty and subjected to the mortification and humiliation of personal detention. She was taken from the office of her attorney to that of the attorneys for the plaintiff in the bail trover action, and was informed by the sheriff that the process meant imprisonment in the county jail, unless she would give up the property sued for, or give bond, neither of which it was in her power to do. While in actual custody of the deputy sheriff, she was told by the "defendant" in the present case that, unless she gave up the jewelry or paid the money, she would have to go to jail. The purpose of the process was, not to obtain the furniture or bond, but to coerce payment. While under duress and in the custody of the deputy sheriff, to save herself from the disgrace and humiliation of imprisonment, she took from her person a diamond brooch or pin, of the value of \$75, and delivered it to one of the defendants, Clarence Haverty, who retains it in his possession and refuses to return it to her. Haverty was informed, before the bail trover action was commenced, that the furniture for which it was brought was not in the possession of Mrs. Brantley, but that possession of it had been taken from her by one Farlinger, and that a suit had been filed against him to recover it. When Haverty made the affidavit stating that the property was in her possession, custody, or control, the statement was not true, and the real facts were known to him. When she surrendered the diamond brooch, the action at law subjecting her to arrest was suspended by a promise that it would not be further prosecuted if she would continue to pay \$10 per month. The process, after being issued, was made to serve a purpose not contemplated by law as its legal function, but to coerce her, and to subserve a different purpose. All the tortious acts alleged are joined as one continuous transaction and as one count for damages. A demurrer to the petition was overruled, and the defendants filed exceptions pendente lite.

On the hearing the plaintiff testified in substance as follows: She bought furniture from the Rhodes-Haverty Furniture Company to the amount of \$282, and paid all the purchase money except \$102.15. They claimed to hold the title to the furniture until it was all paid for. It was in a house in her possession during the spring of 1905. She made a bill of sale to one Farlinger, covering the property in the house. She explained to him that there was a balance due on the fur-



niture, and she was to keep possession of it, and did so. She rented the house to another person. On May 1, 1905, without her knowledge or consent, Farlinger went there and removed to his own residence all the furniture, including that bought from the Rhodes-Haverty Furniture Company. She told Clarence Haverty this, and that she had notified Farlinger that she owed a balance, and informed Haverty that he could go and get the property. He was the manager of the furniture company, and her dealings were with him. Some time afterward, while she was boarding at a hotel, when on her way to luncheon, an officer came to her and informed her that she was under arrest unless she surrendered the property she had bought from the Rhodes-Haverty Furniture Company, and that the paper which he served on her was a ball trover process, and meant that she must give up the property, make bond, or go to jail. He allowed her to consult her attorney, and afterwards carried her to the office of the attorneys for the plaintiff. There a proposition was made to her by the "defendant" to give her diamond brooch as collateral, which she at first declined to do. Finally, after the deputy sheriff had kept her in custody for five hours, Haverty suggested that, as she could not produce the property or give bond (she told him she could do neither), she might arrange the matter by giving him a diamond brooch, which she wore on her person, and signing an agreement to pay \$10 per month until the debts should be paid. She told him she would do anything that was honorable to keep from going to jail. She was sick and faint. He suggested the delivery of the jewelry. When her attorney heard of it, he advised her not to give up her jewelry. Two hours more passed, and she told Haverty she would surrender anything, except her honor, to be released. At that time her attorney had left the office, while the sheriff still held her in custody. Then it was that she gave Haverty the diamond brooch and signed the papers which they presented to her. At that time she would have signed anything. She was sick and frightened. She had had no dinner, the day was hot, and she had been in the custody of the sheriff for five hours. She did not agree to give the pin at first; but when the sheriff, in the presence of Clarence Haverty, in the office of the attorneys for the plaintiff in the trover proceeding, told her that the process meant imprisonment unless she did one of two things, produce the property or give bond, and that otherwise she must go to jail, she took the brooch from her person and gave it to Haverty, and has not seen it since. The paper which she signed was that of which a copy was attached to the defendant's plea. The brooch was worth \$100. She afterwards demanded it from Haverty, because she did not willingly give it up.

The deputy sheriff testified, in substance, as follows: He remembered the transaction

when Mrs. Brantley was arrested. She was coming down from her room at the hotel. He showed her the ball trover writ. She asked to be taken to her attorney's office. He did so, and then took her to the office of the attorneys for Rhodes-Haverty Furniture Company; took her there after several hours. There was some discussion about her jewelry. Her attorney "told her not to surrender the jewelry that they asked her to give up." After her attorney left, she did give it to Haverty, and signed some sort of paper. She had been in custody several hours before she did so. Clarence Haverty was present when the deputy sheriff told her that she must give bond or go to jail. She said she could not give the bond. Then the officer told her that she might produce the property. She said Mr. Farlinger had it, and she could not produce it; that she was already trying to make him account to her for taking the goods. She gave the diamond brooch to Haverty, and was then released.

The copy agreement attached to the plea recited that Mrs. Brantley had purchased from the Rhodes-Haverty Furniture Company certain furniture, the title to which, by contract in writing duly executed, was to remain in the company until the payment in full of the purchase price; that there was due upon it the sum of \$102.15, unpaid; that the company had brought suit against her, and had sued out ball process, under which she had been arrested, the officer failing to seize the property described in the suit; and that "the party of the first part [Mrs. Brantley] desires to adjust the matter in some way, and whereas the party of the second part [the furniture company] is willing to suspend the present proceedings"; and declared that the parties thereupon agreed that she should at once deliver the property to the company, and, unless she did so, she should pay to it the sum of \$10 per month until the balance due should be paid, "and she now delivers to the party of the second part a certain diamond and pearl brooch, which said party of the second part is to hold as collateral security for the payment of said sum of \$102.15, and until the surrender of said property, or the payment in full of said sum, and so long as the party of the first part carries out the terms of this agreement said suit is to remain in suspense."

The presiding judge granted a nonsuit, and the plaintiff excepted. The defendant filed a cross-bill of exceptions, assigning error on the exceptions pendente lite.

J. H. Pitman, for plaintiff in error. Dorsey, Breuster, Howell & Heyman, for defendants in error.

LUMPKIN, J. (after stating the facts as above). 1, 2. This case does not require a discussion of the various forms of action which may be brought to recover damages for an injury sustained by reason of the wrong-

ful use of legal proceedings or process, according to the facts of any particular case. It is enough to consider whether this action is one for malicious prosecution (using the term in a broad sense, so as to include both criminal prosecutions and the similar malicious use of legal process consisting in instituting and prosecuting a civil case without probable cause), or whether the petition sufficiently sets out a case for a malicious abuse of legal process. If an action has been instituted and prosecuted with malice and without probable cause, a suit for malicious prosecution will lie. If a party knowingly employs process, legally and properly issued, wrongfully and unlawfully for a purpose which it is not intended by law to effect, there is a malicious abuse of process, and an action will lie therefor. In the former class of actions it is necessary to allege malice, want of probable cause, and that the action in which the process issued has been finally determined in favor of the defendant therein. In the latter class a suit may be maintained before the action in which such process was issued has terminated. It has been said that "the principal distinction between an action for malicious abuse of process and one for malicious prosecution is that, while the former lies for an improper use of the process after it issues, the latter is a malicious suing out of the process without probable cause." 19 Am. & Eng. Enc. Law, 630-632; *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123; *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; 1 *Jaggard, Torts*, 632.

Taking the allegations of the plaintiff's declaration as a whole, we think they set out a cause of action for malicious abuse of legal process. As amended, the petition alleged that the affidavit to obtain bail process was made maliciously and without probable cause, and for the purpose of forcing plaintiff in the present case to give up a certain piece of jewelry which she wore on her person, and to compel her to pay a certain debt; and again it was alleged that the purpose of the process was not to obtain the furniture or bond, but to coerce payment, and that it was used for the purpose of having her arrested, and compelling her, while under arrest, to surrender a piece of jewelry as security, and to sign a paper agreeing to pay \$10 per month until the balance due on the furniture which she had bought should be settled. The legitimate purpose of making an affidavit to require bail in an action to recover personal property is to require bond to be given for the forthcoming of the property to answer such judgment, execution, or decree as may be rendered or issued in the case, or, on failure thereof, to have the officer seize the property, or, if it is not to be found, to have the defendant committed to jail until the property shall be produced or bond be given, unless the defendant shall be released

without security, as provided in section 4608 of the Civil Code of 1895. See sections 4604-4606. It is not the legal purpose of such a proceeding to compel the defendant to give up other property as security for a debt, nor to force the defendant to enter into a new and different contract in regard to payment, or else go to jail. While debtors ought to pay their debts, and parties may settle their controversies or their lawsuits, yet, if a bail process and arrest under it are used, not for the purpose of obtaining security as provided by law, or to cause the property to be seized, but maliciously for the purpose of coercing the delivery to the plaintiff of other property as a security for a debt and the making of a new contract, this is an abuse of legal process. While the petition was originally subject to demurrer, and the pleader at first apparently had in mind both forms of action, as finally amended a cause of action for malicious abuse of legal process was sufficiently set out. It was alleged that plaintiff did not seek to recover for different torts or causes of action, but that the petition stated the facts so as to show the circumstances of a single tort. There was no error in overruling the demurrer to the petition as amended.

8. The granting of a nonsuit was erroneous. The evidence showed that the plaintiff was arrested under the bail trover process, and carried first to the office of her attorney, and then to the office of the attorneys for the plaintiff in that proceeding, that she was detained in custody for about five hours, that the representative of the then plaintiff knew that she could neither produce the property nor give bond, and was informed that the property was in the possession of another and that Mrs. Brantley was at the time endeavoring to recover possession of it. According to her testimony, the representative of the furniture company recognized her inability to give bond or to produce the property, but proposed to her to surrender to him a piece of jewelry which she wore on her person, and to enter into a contract for the payment of the balance due on the furniture in installments of \$10 per month. She at first declined to do this; but after being held in custody for a considerable length of time, and under fear of having to go to jail, she at last yielded, signed the paper which was prepared for her by the representative of the company, and gave him her diamond pin as security, so as to be released from custody. What the jury may determine, with all the evidence before them, we do not know. But there was enough to have required a submission of the case to the jury, and a nonsuit should not have been granted.

Judgment on main bill of exceptions reversed; on cross-bill, affirmed. All the Justices concur.

**LOWREY et al. v. CHEATHAM.**

(Supreme Court of Georgia. Aug. 17, 1908.)

**1. ELECTIONS — CONTEST — PETITION — DEMURRER.**

A paragraph of a petition brought to contest an election held under the provisions of an act of the General Assembly approved August 1, 1906 (Acts 1906, p. 114), which sets out the names of a sufficient number of voters to have changed the result of the election, who, it is alleged, would have voted adversely to the actual result of the election, was open to attack by demurrer, there being no allegations that the persons named offered to vote at the precincts where under the law they had the right to vote, although the paragraphs referred to alleged that the persons mentioned were in all respects entitled to vote; that they had registered, paid all taxes required by law, and were legally qualified voters; that they went "to the polling places for the purpose during the legal hours of voting and offered to vote, but were not allowed to vote, for the sole reason that their names were not on the lists of voters handed to the managers by the registrars."

**2. SAME — INTIMIDATION — PERSONS INTIMIDATED.**

A paragraph of the petition, alleging that certain conduct upon the part of the registrars tended to intimidate voters from "qualifying themselves to vote at said election," was open to demurrer, where it failed to allege the names and numbers of the persons so intimidated and deterred, although it did allege in general terms that a sufficient number of persons were intimidated and deterred from qualifying themselves as voters to have changed the result of the election, and that they would have voted contrary to the actual result of the election as declared, and that their names were fraudulently omitted from the lists of voters by the registrars.

**3. SAME — COUNTY REGISTRARS — BIPARTISAN BOARD.**

The requirements of the law that boards of county registrars shall be bipartisan is met, where the members of the board are not all of one political party.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Dispensary election contest by C. T. Lowrey and others against W. Cheatham, ordinary. From a judgment dismissing the petition on demurrer, contestants bring error. Affirmed.

Jno. R. Irwin, H. A. Wilkinson, and Raines & Gurr, for plaintiffs in error. M. C. Edwards and M. J. Yeomans, for defendant in error.

**BECK, J.** An election was held under the provisions of an act of the General Assembly approved August 1, 1906 (Acts 1906, p. 114), to determine the question as to whether the sale of intoxicating liquors through dispensaries should be prohibited in the county of Terrell. The election was ordered by the ordinary, and held in accordance with the provisions of the act above referred to. The ordinary declared the result of the election "to be in favor of the prohibition of the sale of intoxicating liquors through dispensaries in said county," whereupon a contest was in-

stituted in the superior court; the petition setting forth certain grounds as to the "cause of contest." The ordinary was named as the defendant in the petition. General and special demurrers were filed. At the hearing the case was dismissed upon demurrer, and the petitioners excepted. Many of the grounds set forth in the petition as cause of contest were expressly abandoned in the brief of counsel for plaintiffs in error, and still others are obviously without merit. But one portion of the petition is strongly and earnestly insisted upon as stating a ground for the granting of the order prayed for; that is, "an order directed to three justices of the peace, requiring them to recount the ballots cast in said election, and that they report the result to the superior court of said county." The paragraph in the petition just referred to sets out the names of some 700 persons who, it is alleged, were in all respects entitled to vote; that they had registered, paid all taxes required by law, and were legally qualified voters; "that they went to the polling places for the purpose of voting, and offered to vote, and would have voted for the dispensaries, but were not allowed to vote, for the sole reason that their names were not on the list of voters handed to the managers by the registrars." And it is alleged that these names were fraudulently omitted from the list of voters by the registrars. After a careful consideration of the allegations, which are in substance as set forth above, we are of the opinion that the court did not err in holding that portion of the petition to be demurrable. In order for the paragraph containing the allegations above set forth in substance to have been a good and valid ground of contest, it should, in addition to the averments set forth, have been alleged that the voters who were alleged to have been qualified, and who, it is alleged, went to the polling places to vote, and who, it is further alleged, tendered their ballots, actually went to the polling places at which they were entitled to vote. This is nowhere alleged in the petition, and this paragraph is attacked by demurrer on that ground. The votes of the 700 persons whose names are set forth, had they been regularly cast and counted, would have changed the result of the election had they voted "for the dispensaries," as it is alleged in the petition they would have done. But, in order for it to appear that the ballots of those persons were illegally rejected, it should have been averred that they offered to vote at that precinct at which under the law they were entitled to vote; and the failure of the petitioners to allege that those persons whose votes are contended to have been illegally rejected offered to vote at the proper precinct was fatal to the petition. Other averments in other paragraphs of the petition amplifying the allegations of fraudulent conduct on the part of the registrars could not have the effect of curing the defect in the petition pointed out above.

2. It was charged in another portion of the petition that there was an "illegal combination and fraudulent conspiracy" between the registrars and certain named citizens of the county, and that in pursuance of that conspiracy the registrars, acting in concert with certain named officials of the county, by threats of criminal prosecution and by other acts, intimidated "voters who were known to be in favor of said dispensary for the purpose of preventing them from qualifying themselves to vote at said election for said dispensaries, and, in pursuance of said conspiracy as aforesaid, the persons whose names appear on the registration list who were known to be in favor of said dispensaries, and who appeared before said registrars, were threatened by said persons, in the presence of said registrars, with criminal prosecution if they made any effort to have their names kept upon the said voters' lists." And other acts tending to intimidate the voters from "qualifying themselves" to vote at said election are charged; but the names and the number of those so intimidated and prevented from "qualifying themselves" as voters is not set forth, although it is alleged generally that a sufficient number were thus intimidated to have changed the result of said election, "making it in favor of dispensaries." However reprehensible the conduct charged against the registrars and the officials referred to as acting in combination with them may be, it will not have the effect to vitiate the election, nor will it have the effect of changing the result unless it be clearly shown who were the voters deterred from qualifying themselves, and that their votes would have changed the result of the election. The allegations touching this ground of contest, not being in conformity with this rule, were demurrable. *Cole v. McClendon*, Ordinary, 109 Ga. 183, 34 S. E. 384.

3. The contention that the board was not bipartisan, as provided by Pol. Code 1895, § 51, is not made to appear by the allegation that "all of said registrars who made said voters' lists were of the parties who were against the said dispensaries at said election, and that, therefore, they were not a bipartisan board as provided by law." There was no allegation that the registrars were not, as a matter of fact, of different political parties; and, if they were of different political parties, the board was bipartisan in the sense in which that expression is used in the Code section referred to, although all of the registrars were in favor of prohibiting the sale of liquor in dispensaries. Holding that the portions of the petition which we have dealt with above were demurrable, the petition sets forth no good and valid grounds of contest, and there was no error in dismissing the petition on demurrer.

Judgment affirmed. All the Justices concur.

## HAWES v. ELAM.

(Supreme Court of Georgia. Aug. 17, 1908.)

### EJECTMENT—VERDICT—EVIDENCE.

The evidence in this case did not demand a verdict for the defendant, and the court erred in directing the jury to return a verdict in his favor.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; N. V. Whipple, Judge.

Ejectment by B. F. Hawes, as administrator of the estate of Hector Thomas, deceased, against W. B. Elam. Judgment for defendant, and plaintiff brings error. Reversed.

B. F. Harrell and G. Y. Harrell, for plaintiff in error. S. B. Hatcher, for defendant in error.

BECK, J. Hawes, as administrator of the estate of Hector Thomas, brought ejectment against Elam. The court directed a verdict for the defendant, and the plaintiff excepted. In the brief of evidence it is recited that it was admitted "that Hector Thomas, the deceased, was the common grantor, and that Hawes was the administrator of his estate"; also, that Thomas died seised and possessed of the lands in controversy. The defendant "introduced in evidence a certified copy, from the court of ordinary of Stewart county, of the year's support setting apart 300 acres of land, valued at \$2 per acre, without any further description, to Frances Thomas, widow of Hector Thomas, and minor children. The year's support showed that the administrator acknowledged service upon the application of the widow. It was approved and admitted to record February 7, 1898." The defendant also introduced in evidence a deed to the land in controversy from Frances Thomas to J. B. Tarver. The consideration expressed in the deed "was supplies for herself and minor children and to further settle an execution obtained in 1902." There was also introduced in evidence a deed from Tarver to Elam, the defendant, conveying the land sued for and other land. Evidence was also introduced to show what property Thomas died in possession of, and that at the time of setting apart of the year's support there were minor children, and that the widow was dead. At the close of the evidence the court directed a verdict, as stated above.

We are of the opinion that the court erred in directing this verdict. It was not demanded by the evidence, but, on the contrary a verdict for the plaintiff might very properly have been directed, even if the testimony shows that, after the administrator had sold off from the lands of his intestate 100 acres of land, the remaining realty of which the intestate died seised and possessed comprised 300 acres of land, the quantity which it appears was set apart as a year's support. The return of the appraisers, setting apart the

year's support, is insufficient to effectuate its purpose, because it is too vague and uncertain to be capable of enforcement. It does not appear that the lands referred to in the return of the appraisers were a part of the estate of the deceased, or that he was in possession of them at the time of his death, or that he was ever in possession of them. It will be observed that there were no words of description whatever—nothing to show where the lands were located. In the case of *McSwain v. Ricketson*, 129 Ga. 176, 58 S. E. 655, it was held: "The judgment setting apart the year's support being, in effect, a conveyance to her of the interest of her deceased husband in the property, the description of the property must be such as to render it capable of identification. If the description is so vague and indefinite that the property cannot be identified, the title to the estate is not divested by the judgment setting apart the year's support." See, also, the authorities cited in the case from which the above extract is taken.

The ruling that we make in this case is not at all in conflict with those decisions which hold that when the return of appraisers to set apart a year's support shows that the entire estate of the decedent was appraised, and the whole of it is set apart as a year's support, but fails to minutely describe the realty belonging to the estate, such a return is not incapable of enforcement on the ground of the insufficiency in the description of the land set apart. Nor would the return of the appraisers and the judgment setting apart the year's support avail the defendant as a color of title, so that seven years' possession of the lands claimed to have been set apart would ripen into a good title by prescription. "That certainty [of the description] which is required in a deed or other conveyance is also required in a judgment setting apart a year's support, certainly so far as land is concerned." *McSwain v. Ricketson*, *supra*. And argument is not needed to show that the description of the land alleged in this case to have been set apart as a year's support would in an instrument offered as a deed of conveyance or as color of title fall far short of being sufficient. *Luttrell v. Whitehead*, 121 Ga. 690, 49 S. E. 691.

Judgment reversed. All the Justices concur.

#### GARBUTT LUMBER CO. et al. v. PRESCOTT.

(Supreme Court of Georgia. Aug. 17, 1908.)

#### TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where the husband of the payee of certain negotiable promissory notes, which were indorsed in blank by the payee, delivered them to a third person, and the wife afterwards brought trover to recover the notes, and it became material to inquire whether the husband in delivering the notes to the third person and in then giving certain directions as to what disposition

should be made of the notes, acted as a special or general agent, or whether he was authorized to dispose of the notes as completely as if he was the owner thereof at the time he delivered them to the third person, it was error for the court to charge the jury as follows: "The notes sued on, being payable to A. V. Prescott, and the check given by Garbutt Lumber Company to cash, the other note being payable to A. V. Prescott or order, were sufficient facts to put defendants on notice that they were dealing with an agent, and it was incumbent upon them to ascertain the extent of agent's authority; and, if they failed to do so, then they dealt with the agent at their own risk as to whether he was authorized to deal with them to the extent which they sought to deal with him." Such a charge invaded the province of the jury, and decided the evidentiary value of certain facts in the case which the jury alone had the right to pass upon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by A. V. Prescott against the Garbutt Lumber Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Alice V. Prescott brought an action against the Garbutt Lumber Company, J. W. Garbutt, T. W. Garbutt, F. J. Garbutt, and M. W. Garbutt, the same being an action of trover for two certain promissory notes, one for \$1,000 and one for \$2,500, with interest at 8 per cent., and providing for 10 per cent. attorney's fees, said notes being signed by H. L. Garbutt, and payable to the order of Alice V. Prescott. She claimed, "as the income or profits of the notes, \$200 per year; that being the amount of interest called for by the said notes." To this suit the defendants filed an answer, denying substantially the allegations of the plaintiff's petition, but setting up that the notes had been delivered by W. J. Prescott, agent of Alice V. Prescott, to defendants, together with another note for \$1,000, and that at the instance of plaintiff's agent the defendants had cashed the other note for \$1,000, paying that amount to the plaintiff's agent, W. J. Prescott, and setting forth that the other note had been left in the custody of the defendants in order that they might ascertain whether they would discount or purchase the remaining notes; that all of said notes were given as the purchase price of a one-fourth interest by H. L. Garbutt in a sawmill in Florida, of which W. J. Prescott owned an interest, and his wife, the plaintiff, owned an interest, and his sister owned another interest; that H. L. Garbutt had found that the purchase had been induced by misrepresentations of W. J. Prescott, and on that account desired to withdraw from the trade, and that the plaintiff, or her authorized agent, had consented to a rescission of the contract, and authorized defendants to deliver the said notes to the maker thereof, H. L. Garbutt, and that W. J. Prescott had promised to refund the sum of \$1,000, paid for the first note as above stated;

and that thereby the entire contract had been rescinded and the notes restored to the maker. The answer also set forth that the notes were not of their face value, as alleged in the petition, but that they were worthless, because H. L. Garbutt since the making of them had been adjudicated bankrupt, and had been discharged by the bankrupt court from the said indebtedness evidenced by said notes. The answer further set up that the defendants, at the first term of court, filing their defense, offered to produce the notes and surrender them to the plaintiff. A verdict was returned in favor of the plaintiff, and the defendants excepted to the overruling of their motion for a new trial.

Hal Lawson, for plaintiffs in error. Haygood & Cutts, for defendant in error.

BECK, J. The original motion for a new trial contains the general and usual grounds, it being contended that the verdict is contrary to the evidence and without evidence to support it; and the first eight grounds of the amended motion are merely an elaboration of the contention that the verdict is without evidence to support it, pointing out with particularity in what respects the verdict is not supported by the evidence in the case. The evidence set out in the record is voluminous and conflicting; and, inasmuch as the case is remanded for a new trial, no opinion is expressed as to the weight of the testimony in regard to the various issues raised.

In the last ground of the motion error is assigned upon the following charge of the court: "The notes sued on being payable to A. V. Prescott, and the check given by Garbutt Lumber Company to cash, the other note being payable to A. V. Prescott or order, were sufficient facts to put defendants on notice that they were dealing with an agent; and it was incumbent upon them to ascertain the extent of agent's authority, and, if they failed to do so, then they dealt with the agent at their own risk as to whether he was authorized to deal with them to the extent which they sought to deal with him." We are of the opinion that the court erred in giving to the jury this instruction. The evidence was conflicting on the question as to whether or not W. J. Prescott at the time he delivered the notes to the Garbutt Bros. was acting in the capacity of a general or special agent for his wife, Mrs. A. V. Prescott, and there was some evidence from which the jury might have found that he was authorized to deal with the notes as his own property and had a right to so treat them. That being the case, the question as to whether he was a general agent or a special agent in the matter of disposing of the notes, or whether he was authorized, under the facts of the case, to dispose of them as completely as if he were the owner, should have been submitted as a question of fact to the jury, without any intima-

tion or expression of opinion by the court as to the sufficiency of certain facts and evidence "to put defendants on notice that they were dealing with an agent," and that "it was incumbent on them to ascertain the extent of the agent's authority." In giving the instructions now under consideration the court invaded the province of the jury, and undertook to decide as a matter of law a question to be determined by the jury, as other issues of fact are to be determined. Such error requires a reversal of the judgment refusing a new trial. Civ. Code 1895, § 4334. Nor was the charge relied on as qualifying and correcting that just held to be erroneous sufficient to remove the injurious effect of such charge, or to withdraw it from the jury.

Other portions of the court's charge were excepted to, but, after a careful consideration of the same, we are of the opinion that they were substantially correct, and are open only to the criticism that the instructions contained in them somewhat inaptly, or, possibly, inaccurately, express the proposition of law which the court intended to enunciate for the guidance of the jury.

Judgment reversed. All the Justices concur.

#### MOORE et al. v. ENSIGN-OSCAMPT CO.

(Supreme Court of Georgia. Aug. 19, 1908.)

##### 1. ADVERSE POSSESSION—POSSESSION OF LESSEE—EFFECT—DEFENSES.

Where a claimant of land, who has a deed thereto, but does not show title in his grantor, conveys the sawmill timber to A. for a period of 12 years, and afterwards conveys to B. the land, with all appurtenances "except the pine trees growing thereon for sawmill and turpentine purposes heretofore deeded away to [A.] for a term of twelve years from the date of said deed," and B. enters into possession of the land under his deed in good faith, and remains in exclusive possession for more than seven years, the possession of B. is not adverse to A., but is for the benefit of both during the continuance of the timber lease; and, in an action of trespass by one who shows title from the state, the defendant may set up such possession of B. as establishing prescription in A.

##### 2. TRESPASS—EVIDENCE—DEEDS.

Under the pleadings there was no error in admitting the several deeds over objection urged thereto.

##### 3. ADVERSE POSSESSION — PRESCRIPTION — QUESTION OF LAW AND FACT.

Prescription, which necessarily involves good faith, is a mixed question of law and fact; and it was error, under the facts of this case, to direct a verdict in favor of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 691-701.]

(Syllabus by the Court.)

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

Action by S. B. Moore and others against the Ensign-Oscamp Company. From a judgment for defendant, plaintiffs bring error. Reversed.

Haygood & Cutts, for plaintiffs in error.  
McDonald & Quincey, J. J. Walker, F. E. Twitty, and C. W. Fullwood, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

**MAYOR, ETC., OF CITY OF BRUNSWICK  
et al. v. WILLIAMS.**

(Supreme Court of Georgia. Aug. 18, 1908.)

**1. INJUNCTION—PETITION.**

Under the allegations of the petition, it does not appear that it was brought to enjoin or prevent the institution of prosecutions for the violation of any existing penal municipal ordinance, or to inquire into the validity or reasonableness of any existing ordinance making criminal the acts for the doing of which prosecutions were threatened; but, on the contrary, the petition showed that the defendant municipality had expressly given him permission, legally granted by proper corporate action, to put up the building he was engaged in erecting in exact accordance with such permission, and that there was no existing ordinance prohibiting the erection of such a building.

**2. APPEAL AND ERROR — ORDER FOR INJUNCTION—AFFIRMANCE—AMENDMENT.**

There was ample evidence to authorize the granting of an order restraining defendants as prayed for until final trial; but as the judge, probably inadvertently, granted a permanent injunction on an interlocutory hearing, it is ordered that the judgment be affirmed, with direction that it be so amended as to make the injunction merely interlocutory.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Petition for injunction by William Williams against the mayor and council of city of Brunswick and others. From a judgment granting the writ, petitioner brings error. Affirmed, with directions.

O. Symmes, R. D. Meader, and Francis H. Harris, for plaintiff in error. Ernest Dart, for defendants in error.

FISH, C. J. Judgment affirmed, with direction. All the Justices concur.

**McCOMMONS et al. v. WILLIAMS.**

**WILLIAMS v. McCOMMONS et al.**

(Supreme Court of Georgia. Aug. 17, 1908.)

**1. EVIDENCE—PAROL EVIDENCE—WRITTEN INSTRUMENT.**

Parol evidence is generally inadmissible to contradict or vary the terms of a valid written instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1758-1765.]

**2. SAME—OMITTED STIPULATIONS.**

If the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1874-1890.]

**3. PRINCIPAL AND AGENT—MUTUAL RIGHTS—ACTION FOR WRONGFUL ACTS OF AGENT.**

Where it was charged that one who had made a contract for the sale of a stock of goods prior to the date fixed for making an inventory selected a large amount of the best goods and claimed to have hold them to a company in which he was at first a partner, and of which he became president and general manager and a stockholder after its incorporation, and that, if he had any power of sale, this was a breach of the trust confided in him, and an act in his own interest, evidence in rebuttal was not subject to the objection of irrelevancy which tended to show the incorporation of the company, that there were 56 subscribers for the stock, and that the interest of the defendant therein was comparatively small.

**4. APPEAL AND ERROR—REVIEW—PREJUDICE.**  
None of the other errors assigned require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Actions by R. L. McCommons and others against J. B. Williams. The jury found for defendant, and, plaintiffs' motion for a new trial being denied, they bring error, and defendant by a cross-bill of exceptions assigned error on the overruling of his demurrer to the petition. Judgment affirmed on main bill of exceptions. Cross-bill dismissed.

R. L. McCommons and others brought suit against J. B. Williams. They alleged that they had purchased a stock of goods from the defendant under a written contract; that the contract contained no provision whereby the defendant might sell merchandise from its date (November 18, 1906) to January 1, 1907, when it was provided that he should begin to take stock for the purpose of the sale; that they gave him parol permission to continue to sell the stock at retail in the usual course of business between those dates, but that he was not to sell any portion of it at wholesale or in job lots, or ship any of it away; that it was not in contemplation of the parties that the defendant would sell goods to himself, and thus retain for his own use and benefit the most valuable parts of the stock; that the goods consisted in part of certain staple articles, and of certain other articles which depreciated greatly in being carried beyond the season for which they were purchased; that in the usual course of retailing the stock would be uniformly reduced, but by picking the more valuable portions what was left would not be worth more than half of the original value; that in December, 1906, the defendant associated himself with others into a company for the purpose of conducting a general retail business in the same town, and on December 29th they were incorporated under the name of the Farmer's Mercantile Company; that prior to the incorporation the defendant was a partner in the company, and subsequently thereto he was elected president and general manager of its business, and was a stockholder; that in the month of December he selected from the stock of

goods which had been sold to the plaintiffs the most valuable lines thereof and removed and stored them in a warehouse and vacant store; that, if he had authority to sell at wholesale and in job lots, he could not validly exercise the power in sales to the Farmer's Mercantile Company, in which he was interested, to the detriment of the plaintiffs' rights which were thus intrusted to him; and that on January 5th they made a written demand on him for the goods so removed, which was refused. Attached to the petition was the written contract, which was as follows: "This contract made the 16th day of Nov. 1906, between J. B. Williams, party of the first part, and B. L. McCommons, J. H. McCommons, Jr., J. M. Thompson, Jno. T. Boswell, and E. F. Boswell, as parties of the second part, witnesseth: (1) The parties of the second part hereby buy the stock of general merchandise, fixtures, etc., owned by J. B. Williams and situate in the store now being operated by him in the Davis building, Greensboro, Georgia. (2) They also agree to take the lease said Williams now has on said building, and said Williams hereby agrees that they shall have the same rights he has to occupy the said building to September 1st, 1906 [1907?], at the same rent he is under contract to pay for said building, to wit, \$135 per month. (3) Said J. B. Williams shall begin taking stock on Jan. 1, 1907, and as soon thereafter as stock can be taken payment for the same shall be made to him by the parties of the second part, as follows: At the time the stock is turned over to said purchasers \$12,500 (twelve thousand, five hundred dollars) shall be paid in cash, and notes for the same date shall be executed by parties of the second part, payable to the said J. B. Williams on these terms, to wit, one-fifth (1/5) of the remainder to become due March 1st, one-fifth April 1st, one-fifth May 1st, one-fifth November 1st, and one-fifth December 1st, 1907, each of said five notes to bear interest at eight per cent. from the date on which they were signed as aforesaid. (4) The price to be paid for said stock shall be seventy-five per cent. (75%) actual cost of the stock to J. B. Williams, except as follows: (a) Shopworn or damaged goods, or goods and fixtures that have deteriorated by use are to be valued at their actual worth, and said actual worth is to be agreed on by the parties. (b) All fixtures and similar articles or property used by the said Williams in the conduct of his business are included in this sale, that is to say 75% of the cost price shall be paid for fixtures, etc., as well as for the stock, except where they are damaged or worn, in which event 75% of present agreed value shall be paid. (5) Said J. B. Williams shall, before payment is made him for said stock and fixtures, produce satisfactory evidence that title to all the stock, etc., is in him, and that he has a right to sell the same. (6) Any amount due the wholesale merchants

from which said Williams purchased his stock of merchandise, as balance of the purchase price, shall be paid by the said J. B. Williams; that is to say, said Williams is to guarantee said stock to be free of all incumbrances for purchase money, etc. (7) The notes and accounts held and owned by the said J. B. Williams are not included in this sale, and they remain the property of the said J. B. Williams. (8) Cost of taking stock in order to make this sale shall be borne by the said J. B. Williams. (9) One half the cost of drawing this contract shall be paid by each side." Also attached to it was a written demand by the plaintiffs on the defendant in the following terms: "In order that there may be no room for future misunderstanding of our position, we have reduced to writing, and herewith hand you our contentions regarding the portion of the stock of merchandise bought from you by us November 16, 1906, now situated in the warehouse of McWhorter & Armour, and also a portion in the storehouse of John C. Palmer. We discussed at the time the contract was signed first what should be your rights as to selling the goods between Nov. 16th and Jan. 1st. We agreed that you might continue to retail your stock to the general public, and carry on your business just as you had been doing. We stated to you that you should not pick the stock and sell job lots of it. We directed that none of it should be shipped away. We directed that you should not wholesale it. We considered that for you to store the most valuable part of this stock as aforesaid, or for you to have sold it in job lots to others who have stored it there, is not a compliance by you with either the spirit or the letter of our contract. We hereby request you to [furnish] us with an invoice of all the goods stored in the warehouse or storehouse, regardless of who may now claim them. We hereby state that we are ready to pay for all of said goods as per the terms of the contract. We herewith pay you for all of said goods in the store, of which you have furnished us invoice. In making this payment for so much of said goods as you have offered us, we wish it understood that we do not waive our right to contend for the other goods herein described and which you have so far failed to turn over. We are ready to receive and pay for the remainder of the goods whenever you take stock of the same and notify us of the amount due. We assure you of our desire and purpose to adjust the matter in a spirit of fairness and friendliness."

Plaintiffs allege that, by reason of the acts of the defendant as set forth, he had injured and damaged them in the sum of 25 per cent. of the cost price of the goods, to wit, in the sum of \$3,750, for which, with interest, they pray a recovery. The defendant admitted the purchase, but denied that the agreement in regard to sale as contended by the



plaintiffs, or that he was guilty of any breach thereof. He alleged that both under the written contract and under what passed between the parties by parol he had a right to sell from the stock in such quantities as he chose prior to January 1, 1907; that the plaintiffs themselves made purchases from him, and knew of his continuing the business and making other sales; that the Farmer's Mercantile Company was organized on November 22, 1906 (it was chartered in December), and the defendant became a stockholder; that the plaintiffs knew of the sales made by him, and made no objection thereto; that the sales to the Farmer's Mercantile Company were in good faith and were duly paid for; that an inventory was made of the goods remaining in the store on January 1, 1907, and they were delivered to the plaintiffs; and that the plaintiffs requested him to sell numerous articles to the Farmer's Mercantile Company. By amendment it was also alleged that by mutual mistake the written contract did not express the full intention of the parties. The defendant demurred to the petition of the plaintiffs, and the plaintiffs demurred to the defendant's answer, and also to the amendment thereto. The court overruled the demurrers, except as to a portion of the answer. The jury found for the defendant. The plaintiffs moved for a new trial, which was denied, and they excepted, assigning error, also, on their exceptions pendente lite as to overruling their demurrer to portions of the answer. The defendant by cross-bill of exceptions assigned error upon the overruling of his demurrer to the petition.

Park & Park and Miles W. Lewis, for plaintiffs in error. Jas. Davidson and Sam. H. Sibley, for defendant in error.

FISH, C. J. 1, 2. There are many points of controversy, but the case revolves about one central question: Could the defendant prove that it was agreed between the parties that he could continue to sell goods in the stock until January, 1907, the written agreement being in November, 1906, or was the written contract so complete and unambiguous on its face as to preclude proof of parol agreement on the subject? We think that it was competent to make such defense. The defendant was conducting a mercantile business of quite large proportions in a town, having a stock estimated at from \$50,000 to \$75,000 in value. The contract of sale to the plaintiffs was dated November 16, 1906. It employed the words, "the parties of the second part hereby buy the stock of general merchandise," etc., but it was evident that it was not intended to pass title immediately by the contract, but that it was an agreement to sell and deliver. Stock was to be taken beginning January 1, 1907, and payment was to be made partly in cash and partly by notes "at the time the stock is turned over." The

price was to be 75 per cent. of actual cost, except that shopworn goods and goods and fixtures which had deteriorated were to be valued at their actual worth, to be agreed upon by the parties, and as to damaged or worn fixtures 75 per cent. of their actual value was to be agreed on. The vendor, before payment, was to produce satisfactory evidence that he had a right to sell, and "cost of taking stock, in order to make this sale," was to be borne by the seller. From the date of the contract to the time provided for beginning to take stock, and thus to ascertain in detail the goods and their price, was about a month and a half. Nothing was expressly stated as to what should be done as to selling or closing the store in the meantime. The contract evidenced the intention of the purchasers to continue to conduct business at the same stand. Was it the intention of the parties or the plain meaning of the contract that during the interval named business should cease, the store be closed, and the deterioration and loss resulting from such a condition for six weeks should take place? It is rudimentary law that parol evidence cannot generally be admitted to contradict or vary the terms of a written contract. Civ. Code 1895, § 5201. But, if the writing is ambiguous, evidence is admissible to explain the ambiguity. Or, if the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing. Civ. Code 1895, § 5204; Forsyth Mfg. Co. v. Oastien, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28, and citations. Under the terms of this contract it was no violation of the general rule against contradicting a written contract by parol to show what was the agreement between the parties as to the making of sales between the date of the contract and the date when the inventory was to be taken. Moreover, when the plaintiffs brought this suit, they alleged that there was a parol agreement or permission as to such sales, stated what it was, and averred that the defendant violated its terms. On the trial they introduced a letter written by them to the defendant on January 5, 1907, stating what were their contentions; one being that there was an agreement for the defendant to continue sales at retail and carry on business in the usual way, but denying that he had the right to pick over the stock or sell in job lots. After this and after the defendant had testified on the subject, during the progress of the trial, the plaintiffs amended their petition by striking that portion of it which alleged a parol license or permission to sell; but did not withdraw the evidence which they had already introduced on the subject, or move to rule out that of the defendant. Unquestionably the defendant had the right to introduce evidence in regard to his contention. Still, further, the evidence complained of is only referred to in the most general way

in the motion for a new trial, and is not set out in the brief of evidence.

3. Error was assigned because the court admitted in evidence the subscription list of the stock of the Farmer's Mercantile Company showing 56 subscribers thereto, and their names and the amount of their stock. The ground of objection was irrelevancy. Counsel for the plaintiffs in error considered this ruling so serious that in his brief he characterized it as "catastrophic." In the plaintiff's petition it was alleged that on December 29th the defendant associated himself with others in a company for the purpose of conducting a general retail business, and they were incorporated under the name of the Farmer's Mercantile Company; that, prior to the incorporation, the defendant was a partner in the company, and subsequently thereto he was elected president and general manager of its business, and was a stockholder therein; that he selected from the stock of goods sold to the plaintiffs the most valuable lines thereof, and removed and stored them in a warehouse and a vacant store; and that if he had authority to sell prior to January 1, 1907, at wholesale or in job lots, he could not exercise this right by making sales to that company, in which he was interested as stated. It was the evident purpose of the plaintiff to show that a sale to the company mentioned was not bona fide, and that the defendant acted in bad faith, and in reality sold to himself, at least in part. It was competent for the defendant to rebut this contention by showing that the stock had been subscribed for by 56 different people, and that his interest was comparatively small. Interest being inserted as an indication of mala fides, and practically dealing with one's self, it was not irrelevant to show in rebuttal the limited extent of such interest. If the evidence was sought to be used for any purpose other than that for which it was admissible, or if it was desired to have its effect limited in the consideration of the jury, the presiding judge should have been requested to make a proper ruling or give proper instructions on that subject. The evidence was not so wholly irrelevant as to make it inadmissible on that ground. *Nugent v. Watkins*, 129 Ga. 382, 385, 58 S. E. 888. If there was no error in admitting it, and no ruling was invoked as to the limited purpose for which the jury could consider it, its admission will not require a new trial. If evidence is admissible on behalf of the defendant for any purpose, though its effect on the plaintiffs' case may be serious, this will not make its admission erroneous as being irrelevant.

4. There were numerous other assignments of error in regard to the pleadings, the evidence, charges of the court, and refusals to charge. In the light of the pleadings, the evidence, and the entire charge, none of these were of a character which make a reversal necessary.

Judgment affirmed on main bill of exceptions. Cross-bill dismissed. All the Justices concur.

# BARTOW LUMBER CO. et al. v. ENWRIGHT.

(Supreme Court of Georgia. Aug. 17, 1908.)

## 1. CORPORATIONS—INTERNAL MANAGEMENT—INTERFERENCE BY MAJORITY.

The internal management of a corporation will not be interfered with by the court at the instance of a minority stockholder, unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement or fraud is shown.

## 2. SAME—INJUNCTION—RECEIVER.

Under the evidence in this case, it was error to grant an injunction and appoint a receiver.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Petition by F. H. Enwright for a receiver for the Bartow Lumber Company and others. From a judgment granting the relief prayed, and authorizing the receiver to issue receivers' certificates to operate the corporation's plant, it brings error. Reversed.

F. H. Enwright filed an equitable petition against the Bartow Lumber Company and seven named individuals, the pertinent allegations of which are as follows: The defendant company is a corporation, and the plaintiff and the seven individual defendants are its directors. Plaintiff has been its general manager since its organization, but has recently been informed that said directors, or some of them, have requested his resignation as such. The corporate stock of the company consists of 50 shares, by mutual consent each subscriber paying \$3,478.29 per share, making the aggregate capital \$173,914.64. Petitioner is the equitable owner of four shares and the legal owner of one share, but with restriction on the right to vote the same. The company began sawing lumber in June, 1907, and continued to do so until November —, 1907, when, by order of Peter Kuntz, Jr., its president, all operations were suspended. Prior to such suspension the company had logs deposited on its premises and on line of railway aggregating about 2,500,000 feet of timber to be scaled and sawed. Said logs are rapidly deteriorating in value, and, unless sawed into lumber immediately, will soon be a total loss. "Petitioner as general manager and as a director and equitable stockholder has for the past several months been demanding of the president and of the directors aforesaid that said plant be operated at least to the extent of sawing up said logs into lumber and saving the same from utter destruction and the stockholders from loss." Said president and directors have ignored this demand, and still fail and refuse to start the plant or saw said logs, or to do anything to protect them from destruction.

The logs represent an investment of \$10,000. It would cost about \$3 per 1,000 feet additional to saw them into lumber, which would yield about 3,000,000 feet, worth in the market about \$30,000. On January 5, 1908, the directors created Peter Kuntz managing director, with all the powers of said board. He refuses to begin operating said plant or to have said logs sawed into lumber. The immediate necessity of sawing the logs into lumber is such as not to permit any further delay in attempting to secure action by the stockholders or directors; and he avers on information and belief that any such attempt would be unavailing on account of the influence exerted by Peter Kuntz and associates over them. The refusal of the defendants to cut the logs into lumber is inexcusable waste, and will cause irreparable damage to the stockholders. In an amendment to the petition additional allegations of the same nature were made; and it was charged on information and belief that Peter Kuntz was guilty of fraud in connection with sale of the output of the plant. The pleadings were read as evidence, but the verification thereof was that petitioner believed to be true the matters therein averred on information and belief; and, as there was no evidence whatever adduced on the hearing to substantiate the charges of fraud set forth in the amendment, it is unnecessary to further state the allegations with respect thereto which it contained, or the prayers for relief based on such charges.

The following is a summarized statement of the prayers contained in the original petition: That a receiver be appointed to take charge of all the property and assets of the defendant company, with authority to put the plant in immediate operation and to proceed at once to saw the logs into lumber and sell the same as fast as a market therefor can be found, the proceeds to be disposed of by the court in paying the debts of the company, or otherwise disposed of for the best interests of the stockholders; that the receiver be authorized by the court to issue receiver's certificates to an amount not to exceed \$10,000, to be used in operating the plant until the logs were sawed and sold, the receiver to exercise his discretion as to the number and amount of certificates within the limit named; that the defendants be restrained and enjoined from interfering with said receiver in the operation of the plant during the receivership; and that the receiver have authority to employ such manager, employes, and laborers as may be necessary to conduct the plant; and for general relief. The defendant demurred to the original petition on the ground, among others, that the conditions precedent to equitable relief of a minority stockholder, prescribed in Civ. Code 1895, § 1860, had not been met, and that the allegations of the petition did not entitle the plaintiff to any relief. It also filed an

answer in which it set up as a defense the contention that the financial situation, and resultant stagnancy in the lumber market with respect to the kind of lumber manufactured by it, rendered it impossible to operate its mill except at a loss; that it would cost about \$3 per 1,000 feet to cut and saw the logs which it had on hand, and that the lumber thus produced would not bring more than \$7 per 1,000 feet, entailing an additional loss of \$1 per 1,000 feet; that under these conditions it was not good business policy to cut up said logs, and on this subject the opinion of the directors stood seven to one. It denied that in so deciding its directors were actuated by any motive except an honest effort to protect its interests and the interests of its stockholders, and alleged that it was amply solvent and stood ready to pay any obligations it might owe. It asked the court to dissolve the injunction heretofore granted and dismiss the receiver. The pleadings contained other allegations which it is not material to set forth. The petition was presented to the judge on June 8th, whereupon he passed an order appointing a receiver to take charge of all the property of the defendant company; the order of appointment giving him practically all the powers sought in the petition, including the authority to issue and sell receiver's certificates as prayed, and further directing that he make report on June 11, 1908, as to the best ways and means of proceeding with the operation of the plant. The court granted a temporary restraining order, and also issued a rule nisi requiring the defendants to show cause June 29th why the receiver should not be made permanent and the injunction continued until final trial of the case. On June 10th the receiver filed a report making many recommendations, among which were that he be given authority to put the plant in operation and saw and sell lumber, stating that money would be needed for the purpose, whereupon the court approved this report and ordered the defendant to show cause on June 13th why the receiver should not be authorized to issue \$5,000 of receiver's certificates, to become a first lien on its property, in order to carry out the receiver's recommendations. The defendant filed a response to this order to show cause, setting up, among other things, that the proposed action was unlawful, and that any interference with the internal management of the corporation affairs was unwarranted under the facts presented by the petition. The defendant also on June 18th, filed a motion to dissolve the temporary restraining order and dismiss the receiver. The court on June 13th, granted an order authorizing the issuance of receiver's certificates as prayed, and set the hearing on the motion to dissolve the restraining order for June 23d, and then postponed the hearing thereof to June 29th, the date set for the interlocutory hearing by

the order on the original petition, at which time a full hearing was had, and the court entered an order continuing the receivership and injunction in force, and authorized the receiver to issue \$5,000 of receiver's certificates and dispose of the same in the payment for labor and supplies, or in obtaining money with which to operate the plant, including the commissary, and to cut the logs on the premises of the defendant company and sell the lumber. To the orders of June 8th and 13th the defendant filed exceptions *pendente lite*; and to the order of June 29th it entered a *fast bill* of exceptions to this court.

Smith, Hammond & Smith, for plaintiff in error. J. M. Neel, O. T. Peeples, and G. H. Aubrey, for defendant in error.

HOLDEN, J. (after stating the facts as above). It will not require any lengthy discussion of the evidence contained in the record, or the law applicable to the case, to elucidate the conclusion we have reached therein. The plaintiff introduced on the hearing several affidavits, the trend of which was that there were cut and piled on the premises of the defendant company from 2,000,000 to 3,000,000 feet of lumber in logs which were ready to be sawed and had been since the mill ceased operations; that these logs had already greatly deteriorated in value and would continue rapidly to deteriorate, owing to the ravages of insects and the effect of the weather, and, if not promptly converted into lumber, would become a total loss. None of the testimony offered by the plaintiff gave any indication of fraudulent conduct on the part of any of the defendants in failing or refusing to operate the plant. On the other hand, the defendant introduced affidavits and documentary evidence to the effect that the majority directors were acting in the utmost good faith in the conscientious belief that the stoppage of the plant was to the best interest of the company and its stockholders, and that it was closed down pursuant to the wishes of seven out of the eight directors of the company and the holders of nine-tenths of the stock of the company. The managing director testified by affidavit that he had examined the logs on the ground, and was familiar with the necessary steps required to convert them into lumber and with the cost of so doing, and gave estimates showing that any attempt to manufacture such logs into lumber and sell the same would result in actual loss. The position thus assumed by the majority directors and stockholders as to the wisdom of shutting down the plant was supported by the affidavits of several experienced lumber dealers.

The right to control the affairs of a corporation is vested by law in its stockholders—those whose pecuniary gain is dependent upon its successful management. The majority stockholders, or the majority of the di-

rectors, when directors are chosen to act on behalf of the stockholders, have the right to determine the business policy of the corporation, and the minority must submit to their judgment in such matters when exercised in good faith and not involving acts *ultra vires*, or in breach of trust. As was said by this court in *Hand v. Dexter*, 41 Ga. 454, 461: "The very foundation principle of a corporation is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their charter rights." No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs. In 10 Cyc. 969 the rule is thus clearly stated: "The true distinction is between acts in excess of the powers of the directors and in breach of their trust, and acts which are within their powers and which merely involve an exercise of the discretion committed to them. The rule here is that, in the absence of usurpation, of fraud, or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority merely to overrule and control the discretion of the directors on questions of corporate management, policy, or business, but will allow the majority to rule, and will leave the dissatisfied minority to redress their grievances through ordinary corporate methods." Based on decisions in consonance with the doctrine as above announced, the codifiers of the Code of this state have embodied these rules of law in two sections of Civ. Code 1895, as follows: Section 1859: "So long as the majority stockholders confine themselves within their charter powers, a court of equity will require a strong case of mismanagement, or fraud, before it will interfere in the internal management of the affairs of a corporation." Section 1860: "A minority stockholder may proceed in equity in behalf of himself and other stockholders for fraud, or acts *ultra vires*, against a corporation, its officers and those participating therein, when he and they are injured thereby. But there must be shown—(1) Some action or threatened action of the directors beyond the charter powers; or (2) Such a fraudulent transaction completed or threatened among themselves or shareholders or others, as will result in serious injury to the company or other shareholders; or (3) That a majority of the directors are acting in their own interest in a manner destructive of the company, or of the rights of other shareholders; or (4) That the majority of stockholders are oppressively and illegally pursuing, in the name of the corporation, a course in violation of the rights of the shareholders, which can only be restrained by a court of equity; and it must also appear (5) That petitioner has acted promptly; that he made an earnest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or

it was not reasonable to require it. (6) The petitioner must show that he was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law." See, also, *Lamar v. Lanier House Co.*, 76 Ga. 640; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; *Empire Hotel Co. v. Main*, 98 Ga. 176, 25 S. E. 413; *Gibson v. Thornton*, 107 Ga. 545, 33 S. E. 895; *Reynolds v. Martin*, 116 Ga. 503, 42 S. E. 796.

The plaintiff's case rests upon the theory that the refusal of the defendants to cut the logs in question into lumber, under the circumstances, was an invasion of his rights as a minority stockholder, whereby he became entitled to the aid of a court of equity to enforce his own wishes in the premises. The theory of the defendants is that there was no ground for legal interference. Which contention is correct? The course adopted by the defendants, as shown by the evidence, was after a due investigation and consideration of the situation and an inspection of the logs on hand and the making of estimates as to the cost of converting them into lumber and the price which could then be obtained for such lumber had convinced them that the company as a corporation and themselves as stockholders would sustain financial loss should they attempt for the time being to operate the plant. We do not mean to intimate that cases might not arise in which it could be made apparent to a court that to permit an entire stoppage of operation by a corporation would be so oppressive and destructive of the interests of the corporation as to justify interference on behalf of the minority stockholders opposing such action; but under the rule announced in *Civ. Code 1895, §§ 1959, 1960*, and the decisions of this court cited, *supra*, it would require a strong case of mismanagement or fraud to warrant a court in so doing. The mere fact that the court may differ with the majority of the corporation as to the wisdom of the course which their judgment directs will not justify such interference. The late Justice Blatchford, when circuit judge, announced the proposition above stated in *Flagg v. Manhattan Railway (C. C.)* 10 Fed. 413, 432, in the following words: "No court will undertake to interfere with the exercise of such discretion and judgment, even though in the same facts it might have arrived, or may arrive, at a different conclusion, and even though the stockholders of the Metropolitan may have arrived at a different conclusion." Certainly no case warranting the court in depriving the majority of the directors of the defendant company of the control of its own affairs is presented in the record before us. On the contrary, the evidence clearly presents a case in which the question of advisability of operating the plant was one solely to be determined by an exercise of judgment, and the decision of this question was the rightful

prerogative of the majority in control of the affairs of the corporation.

We think the court committed error in granting the injunction and appointing the receiver, and in not revoking the previous orders in the case; and the judgment is reversed. All the Justices concur.

#### JONES et al. v. E. VAN WINKLE GIN & MACHINE WORKS.

(Supreme Court of Georgia. Aug. 18, 1908.)

##### 1. MASTER AND SERVANT — INJURY TO BUSINESS—STRIKES—INTERFERENCE WITH LABORERS.

It is unlawful for any person or association of persons to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from entering into or remaining in the employment of his service.

##### 2. INJUNCTION — PURPOSE AND GROUNDS — STRIKES.

An injunction may issue in a proper case to restrain persons from attempting, by threats, violence, or intimidation, or other unlawful means, to prevent any person from engaging in, remaining in, or performing the business, labor, or duties of any lawful enterprise or occupation, although the acts sought to be restrained, if committed, constitute a crime.

##### 3. SAME—PICKETING—PATROLS.

Where workmen quit the service of their employer, and, as a means of inducing him to accede to their demands, establish pickets at or near the approaches of his premises for the purpose of inducing others from remaining in or entering into his employment, they and their confederates will be enjoined from the keeping of patrols when such patrols resort to intimidation or any manner of coercion to prevent others from entering into or remaining in the service of their late employer, to the irreparable damage of his business.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 27, Injunction, § 175.*]

##### 4. SAME—SOLICITATION.

Equity will not enjoin employes who have quit the service of their employer from attempting by proper argument to persuade others from taking their places, so long as they do not resort to force or intimidation, or obstruct the public thoroughfares.

(Syllabus by the Court.)

##### 5. WORDS AND PHRASES—"PICKET."

The word "picket," in connection with strikes, is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude against the individual or corporation against whom the labor union has a grievance. It is, however, possible that a picket established at or near a factory where a strike is in progress may act lawfully, and go no farther than to induce others to assist the striking employes by lawful persuasion and inducements, but the slightest evidence of threats, violence, or intimidation of any character should be sufficient to show the unlawful character of the picket, since a picket under the most favorable consideration means an interference between the employer seeking employes and the men seeking employment.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, p. 5376.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by the E. Van Winkle Gin & Machine Works against the Atlanta Lodge No. 1 of the

International Association of Machinists and members thereof. From an order granting an injunction, J. L. Jones and others bring error. Affirmed.

Jas. L. Mayson and R. R. Arnold, for plaintiffs in error. Ellis, Wimblish & Ellis and Peeples & Jordan, for defendant in error.

EVANS, P. J. The E. Van Winkle Gin & Machine Works, a corporation, brought this action against the Atlanta Lodge No. 1 of the International Association of Machinists, an incorporated body, and certain members thereof, who had lately been in the employment of the plaintiff, but who were on a strike, to enjoin them from picketing, intimidating, and otherwise interfering with the plaintiff's employes and business. The defendants showed cause against the grant of an injunction, both by demurrer and answer. After hearing evidence, the defendants were "enjoined from placing themselves, their agents or confederates, near the approaches to the petitioner's premises described in the petition and adjoining thereto to induce persons working for petitioner not to work for it, and persons seeking employment by petitioner not to enter petitioner's employment, by threats of violence, intimidation, or persuasion, until the further order of the court." Exception is taken to the judgment in its entirety, and specially to so much thereof as forbids the defendants from placing themselves in or near the premises of the plaintiff for the purpose of persuading persons not to enter the plaintiff's employment, or to quit the same, so long as the entrances to the plaintiff's premises were not obstructed, and so long as violence, force, and intimidation were not used. The points raised by the demurrer were not argued in the brief, but only the legality of the decree and the sufficiency of the evidence to support it.

The lawfulness or unlawfulness of "picketing" has been the subject-matter of discussion in a large number of cases in this country. In the absence of statutes, courts have drawn from the elemental principles of the common law certain standards by which this modern factor used by labor unions as a means of settling controversies between employer and employes must be regulated. Every individual has a natural right to pursue a lawful occupation, and to conduct his business according to his own plans and policies, where he does not offend the law, or unlawfully infringe upon the rights of others. It is the right of every person or corporation to hire and discharge men at pleasure, subject to liability for damages for breach of contract, and every man has the right to work for another or to quit his service at his pleasure, subject to the same liability. But no person or association of persons has the right to interfere with the business of another by means of force, menaces, or intimidation, so as to prevent others from

entering into or remaining in the employment of his service. In California it was held that a merchant is entitled to an injunction against the maintaining in front of his place of business by a labor union of pickets bearing placards which tend to intimidate his employes and patrons, with intent to do so, for the purpose of compelling him to pay the prices fixed by the union to his union employes. *Golberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145. In *Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions* (C. C.) 90 Fed. 606, it appeared that the unions massed large bodies around the premises in which a strike was in progress; and the defendants were restrained from collecting in and about the approaches to the complainant's mills for the purpose of picketing or patrolling or guarding the streets, approaches, and gates, for the purpose of intimidating, threatening, or coercing any of the employes or any person seeking the employment of complainant. Other cases similar in principle might be added, but these are sufficient to illustrate our point, which is that when strikers patrol the streets and approaches of the premises where the strike is in progress, and their number is so great, or their conduct is such, as to intimidate and coerce the employes into quitting their employment, or others from seeking employment, they are guilty of unlawful acts, and will be enjoined from a continuance of them. Sometimes the number of strikers engaged on the patrol may be so great that those intended to be affected by the demonstration will be intimidated by the number of the strikers or their sympathizers without special overt acts. The courts have repeatedly held that the assembling of strikers around the establishment of the employer in such numbers as will serve as a menace to those employed, or the keeping of patrols in front of or about the premises of the employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined. 24 Cyc. 835, and the numerous cases cited in the note to the text. While there is some reference in the evidence to the pickets of the strikers having spoken to some employes, the pleadings and evidence do not make a distinct issue of a combination to injure one in his business or trade by inducing by persuasion his employes to violate existing contracts of employment, to the irreparable damage of the employer, so as to require a discussion of such a claim as a basis for injunction, or a decision in regard to it.

It is a penal offense in this state to attempt by threats, violence, intimidation, or other unlawful means to prevent any person from engaging in any lawful employment, or to hinder, by such means, any person from employing laborers. The Penal Code sections are as follows: Section 123: "If any person or

persons, by threats, violence, intimidation or other unlawful means, shall prevent or attempt to prevent any person or persons in this state from engaging in, remaining in or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor." Section 124: "If any person or persons, singly or together, or in combination, shall conspire to prevent or attempt to prevent any person or persons, by threats, violence, or intimidation, from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, such offender or offenders shall be guilty of a misdemeanor." Section 125: "If any person or persons, singly or by conspiring together, shall hinder any person or persons who desire to labor from doing so, or hinder any person, by threats, violence or intimidation, from being employed as a laborer or employé, such offender shall be guilty of a misdemeanor." Section 126: "If any person or persons, by threats, violence or intimidation, or other unlawful means, shall hinder the owner, manager, or proprietor for the time being from controlling, using, operating, or working any property in any lawful occupation, or shall by such means hinder such person from hiring or employing laborers or employes, such offender or offenders shall be guilty of a misdemeanor." But a court of equity is not ousted from the exercise of its peculiar functions of preventing irreparable damage merely because, in exercising such functions, it may also prevent the commission of a crime. The court does not interfere to prevent the commission of crime, although that may incidentally result, but it exerts its force to prevent individual property from destruction, and ignores entirely the criminal feature of the act. And Mr. Pomeroy (6 Pom. Eq. Jur. 619) says that "it is everywhere the rule, following the general principle in equity, that where there is ground for equitable interference, as where an irreparable injury is threatened to property, the fact that the act is also a crime is not a reason for refusing an injunction." This principle was recognized and applied by this court in the case of an indictable nuisance. *Mayor of Columbus v. Jaques*, 30 Ga. 506. So it is no reply to the invocation of the equitable remedy to prevent irreparable injury to property that the acts which cause the damage may also be indictable.

As already said, members of a labor union, either individually or as an association, have no right by force, menace, or intimidation to prevent others from working upon such terms as they are willing to accept, or to hinder by such means any person from employing laborers. In many cases it may be difficult to draw the line of demarcation between intimidation and inoffensive persuasion. In a New York case (*Rogers v. Evarts* [Sup.] 17 N. Y. Supp. 264) it was said: "It may be

impossible to lay down a general rule as to what surrounding circumstances will characterize persuasion and entreaty as intimidation. Each case must probably depend upon its own surroundings. But, where evidence presents such a case as to convince the court that the employes are being induced to leave the employer by operating upon their fears rather than upon their judgments or their sympathy, the court will be quick to lend its strong arm to his protection. Rights guaranteed by law will be enforced by the court, whether invoked by employer or employé." The very word "picket" is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude towards the individual or corporation against whom the labor union has a grievance. To quote Mr. Eddy: "It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket under the most favorable consideration means an interference between the employer seeking employes and men seeking employment." 1 Eddy on Combinations, § 539. But the law does not forbid employes who have quit their employer from using legitimate argument to induce others to refrain from taking their places. The current of authority is that a court of equity will not enjoin employes who have quit the service of their employer from attempting to persuade, by proper argument, others from taking their places, so long as they do not resort to intimidation or obstruct the public thoroughfares. *Everett Waddy Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792; *Master Builders' Ass'n v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; *Christensen v. Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N. J. Eq. 49, 46 Atl. 208; *Union Pac. R. Co. v. Ruef* (C. C.) 120 Fed. 124; *Perkins v. Rogg*, 11 Ohio Dec. 585; *Nat. Pro. Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 108 Am. St. Rep. 477.

There was evidence before the judge that certain machinists in the employment of the E. Van Winkle Gin & Machine Works became dissatisfied and quit their employment. These machinists were members of Atlanta Lodge No. 1 of the International Association of Machinists. The appointed agent of the local lodge, acting for and in behalf of the strikers, demanded of the E. Van Winkle Gin & Machine Works that it adopt certain rules for the conduct of its business, which demand was refused. For the purpose of en-

forcing their demand, and to the end that their former employer might not engage men to supply their places, the strikers placed men at every approach to the plant of the plaintiff and the railway stations in the city of Atlanta. There were from four to twelve men doing "picket duty." These pickets accosted every stranger who evinced an intention to enter the manufacturing plant of the plaintiff for the purpose of inducing him to abandon any intent to seek employment with the E. Van Winkle Works. One of the pickets suggested to a new man that "while living and doing well they had better stay out." At another time the pickets, after endeavoring to induce a man seeking employment to desist, upon his seeming reluctance to yield to their entreaties, said to him: "God damn you, you will have to get out anyway." On another occasion a man seeking employment approached an employé of the plaintiffs, and asked to be directed to the plaintiff's shops. This employé volunteered to guide the inquirer, when one of the strikers who was near by came up and asked the person seeking employment if he was a machinist, and, upon being informed that he was a machinist looking for a job, the striker began to abuse the shop, saying it was a scab shop, and to curse the new men who had gone into the shops to take the places of the strikers, calling them "damned scabs." The man did not apply for a job. These and similar threats, and the constant surveillance of the plant by the pickets, caused other departments of the plaintiff's plant to shut down for lack of machinists. At this juncture of affairs the defendants were restrained by a temporary order from interference with the plaintiff's business; and after the grant of the restraining order, according to the testimony of the superintendent, "everything has assumed a different attitude, and a feeling of rest and confidence has taken place which did not exist while the premises were picketed." The quoted remarks of the strikers to the men who were seeking work were more than a peaceable and argumentative presentation of their grievance. The language implied a threat of harm, and the warning to stay out, if unheeded, might be attended with hurtful consequences. The language of these pickets was clearly intimidatory, and tended to coerce compliance with their request not to work for the plaintiffs; and there was no error in enjoining such conduct. The form of the injunction is perhaps too broad, in that the strikers are enjoined from using all form of persuasion. As we have pointed out, it was not unlawful for the strikers to use legitimate argument and moral suasion in presenting their case to those who offered to take their places, so long as it is neither coercive and intimidatory in character. In affirming the judgment, direction is given to so amend the decree as

to make it accord with the opinion of the court in this particular.

Judgment affirmed, with direction. All the Justices concur.

### PHILLIPS v. STATE

(Supreme Court of Georgia. Aug. 19, 1908.)

#### 1. CRIMINAL LAW—PLEA—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—ASSUMED FACTS.

The defendant's plea of not guilty put in issue every material allegation in the bill of indictment charging him with the offense of murder; and, it not appearing that the defendant either contended or admitted that the homicide charged was a crime, and there being facts in evidence from which the jury would have been authorized to find that the killing of the deceased was not a criminal act, it was error for the court to charge the jury as follows: "His [referring to defendant] contention is that he was not present at the time of the homicide, and that he did not kill the deceased. His contention is it was physically impossible for him to have committed the crime, as he was absent from the scene of the crime."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 686, 1754-1764.]

#### 2. SAME.

No error, except that pointed out in the foregoing headnote, is made to appear in any of the other portions of the charge excepted to, nor in any of the rulings of the court.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Lon Phillips was convicted of murder, and he brings error. Reversed.

Greene F. Johnson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. The accused was tried for murder, convicted, and sentenced to life imprisonment. The homicide occurred at a gathering of negroes, and was committed without apparent motive, according to the evidence for the state, though there is some evidence of a previous quarrel. In the midst of the dance several negroes began shooting, and the accused was seen to shoot at short range at the deceased, who ran out of the house, his clothing on fire from the discharge of the pistol. Before he died the next morning, he stated several times that he was shot by the accused. The accused endeavored to set up an alibi; witnesses testifying that he was not in the house when the shooting occurred. He excepts to the court's refusal to grant him a new trial.

The motion for a new trial contains several grounds, but it is unnecessary to state them in detail, as we place the reversal of the judgment upon the assignment of error contained in the fifth ground of the motion; and no reversible error is made to appear in the exceptions to other rulings of the court, nor in other exceptions to his instructions given to



the jury. The fifth ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'His [referring to the defendant] contention is that he was not present at the time of the homicide, and that he did not kill the deceased. His contention is it was physically impossible for him to have committed the crime, as he was absent from the scene of the crime'—said charge being erroneous for the reason that it did not correctly state the contention of the defendant, and misstated said contention by then and there assuming in said instruction that the defendant admitted that a homicide had been committed, and that the same was a crime, when neither in his statement to the jury nor at any other time during the progress of the trial did the defendant make such an admission, but, on the other hand, by his plea of not guilty put in issue every material fact necessary to be proved by the state in order to show that the defendant was guilty of the murder of the deceased. One of these facts was that, when the deceased died, a homicide had been committed, and another of these facts was that such homicide constituted a crime under the laws of the state of Georgia. The defendant admitted neither fact; and it was error for the court to thus misstate the defendant's contention by assuming that the defendant admitted facts which he had put in issue and of which he professed the utmost ignorance." This charge was erroneous, in that it assumes that the defendant admits or contends that the killing of the deceased was a crime. By his plea to the indictment the defendant put in issue every material allegation in the indictment. It put in issue both the fact of the killing of the deceased, and also the charge that such killing was an offense against the laws of the state. While the evidence introduced both by the state and the defendant showed that the homicide had been committed, some of the evidence introduced was of such a character as to leave open the question for determination by the jury whether the killing was, in fact, a crime. One Walker, who was sworn as a witness for the defendant, testified that he was in the house at the time of the shooting which resulted in the death of the person alleged to have been killed. This witness described the shooting and the circumstances thereof. He stated that at the time of the shooting there was "a crowd in the house. Right in front of the fireplace stood Tom Thompson, Will Benton, Sam Barber [the deceased], and Charlie Benton. Benton and Barber were killed. Tom Thompson fired the first shot, and I walked up to him and said, 'Tom, put that pistol up,' and patted him on the shoulder, and, when I

did that, he fired his pistol right straight up through the top of the house. Thompson fired first. Charlie and Sam [the deceased] and Tom and Will went to shooting. They commenced shooting all around. It looked to me like the whole house was shooting. I backed up against the side of the house, and stood there until the thing was over. There were about 15 holes in the house that I could see. \* \* \* I did not see Sam when he was shot. There was so much smoke I lost sight of all the shooting." Taking this evidence as true, the jury would have been authorized to find that, without other provocation than the fact that some one in the room had fired a shot straight up in the roof of the house, the deceased began shooting "all around him." Now, if the defendant was one of the persons who was around him and was apparently in danger of being shot by the deceased, we could not say as a matter of law that he would have been guilty of a felonious shooting if he had, in the face of such apparent danger, shot and killed the deceased; or if the defendant himself was not present in the circle of those who were around Sam Barber when he began shooting, if some one else in the crowd of those surrounding Barber at the time he began his fusillade fired upon Barber and killed him in order to put an end to his mad conduct, which apparently put in jeopardy the life of every person in the room, it could not be said that such killing was a crime. Hence it was error for the court to assume in the charge to the jury that a crime had been committed. That question should have been left to the jury. Of course, the jury would have had the right to disbelieve the witness Walker, and to believe the testimony introduced by the state, which tended to show that the killing was wanton and unprovoked murder. But they should have been allowed to pass upon that question without being influenced one way or the other by any expression upon the part of the court in his instructions to them, which contained an intimation that the killing was a crime.

The use of the word "homicide" in the extract from the charge quoted was not error, the defendant having introduced evidence showing that some one had shot the deceased; and the judge certifies that there was no contention that there was not a homicide. *Jones v. State*, 130 Ga. 274, 60 S. E. 840. Still we think it would be better in such cases, so long as the defendant does not admit that a homicide had, as a matter of fact, been committed, for the court to submit that question together with all the other questions of fact to the jury for their determination.

Judgment reversed. All the Justices concur.

**PARROTT et al. v. BARRETT et al.**

(Supreme Court of South Carolina. Sept. 7, 1908.)

**1. PARTITION — REVIEW — FORMULATION OF SCHEME OF PARTITION BY SUPREME COURT.**

The Supreme Court, in remanding a partition proceeding for an erroneous rule of valuation of the property partitioned, may formulate a scheme of partition of the lands, as a direction to the lower court, which must be carried out, and not treated as a mere suggestion.

**2. SAME — VALUATION OF PROPERTY — OVERTHROW OF RETURN OF APPRAISERS.**

In order to overthrow the valuation made by commissioners in partition proceedings, it must be shown that it is so grossly incorrect and unequal as to justify an inference that the commissioners acted from an unfair and improper motive.

**3. SAME.**

Where commissioners in partition, selected by the parties, were men of experience, intelligence, and character, who viewed the premises, and were unanimous in their conclusion, and there is nothing to show that their action was influenced by any unfair or improper motives, their valuation should be sustained, though some of the witnesses differed from the commissioners as to the valuation.

**4. SAME—RIGHT TO SELL LAND ON BID HIGHER THAN VALUATION OF COMMISSIONERS.**

The general rule that, where land is recommended by commissioners to be divided among parties to a partition suit by metes and bounds at a certain valuation, a party dissatisfied with the valuation may bring the property to sale by making and securing a bid for a material advance in price over the value assigned by the commissioners does not apply, where the Supreme Court in remanding the cause on appeal directed a scheme of partition which did not contemplate a sale of the land, but instead provided for assessments on different parcels, if necessary for equality.

**5. SAME—DUTY OF JUDGE TO VIEW PREMISES.**

There being no statute requiring a presiding judge in a partition suit to view the premises, his refusal to do so is not error.

Appeal from Common Pleas Circuit Court of Sumter County; R. W. Memminger, Judge.

Partition by Nettle F. Parrott and others against George McD. Barrett and others. From a decree confirming the return of appraisers with modifications, both parties appeal. Affirmed.

A. B. Stuckey and Geo. Johnstone, for appellants. Lee & Moise and Haynsworth & Haynsworth, for respondents.

JONES, J. This is an action for the partition of a tract of 889 acres of land in Lee county, formerly belonging to James Rembert, who died in 1858 devising the same to his daughter Jane Barrett for life, and at her death "to the heirs of her body who may be living at the time of her death share and share alike to them and their heirs forever." Jane Barrett, the life tenant, died in 1901. In 1874 she and her children, Charles, Elizabeth, George, Caleb, Samuel, Albertus, and Martha made among themselves a partition of said land in accordance with a plat made by S. M. Boykin, surveyor, in 1870. In the division tract No. 5, containing 168½ acres, was assigned to Jane Barrett, life tenant,

tracts Nos. 1 and 3, containing 106¾ acres, were set apart to Charles S. Barrett, and other tracts were allotted to the other children, and possession was taken by the respective parties. Charles Barrett died in 1880, before the death of the life tenant. In July, 1901, soon after the death of the life tenant, the plaintiffs, who are children of Charles Barrett, brought this action against the defendants, who are children of Jane Barrett or their privies or successors in interest, for the partition of said original tract according to the said will of James Rembert. On the former appeal in this case (70 S. C. 206, 49 S. E. 563) this court sustained the construction of said will made by Judge Gage, holding that the plaintiffs, as grandchildren of Jane Barrett, answered the description of heirs of her body at the time of her death, and that each of said grandchildren, taking per capita and not per stirpes, was entitled to one-tenth of the land in question. The court also held that the partition of 1874 was not binding on plaintiffs, as they were not parties thereto, but that such partition was binding among all the parties to it. Hence, in the effort to do practical justice to all parties, the court sought, not only to preserve the right of plaintiffs, but also to preserve, as far as consistent therewith, the status arising under the partition of 1874, and adopted as a scheme for partition the plan outlined in the following extract from the opinion of the court: "In the settlement of this case the court is disposed, as far as possible consistent with plaintiffs' rights, to preserve the possession of defendants or their privies of the parcels set apart to them in said partition, as they are bound as among themselves to abide by the same. The court, however, is not quite satisfied with the rule adopted by the circuit court in holding that each acre is practically as good as another, and in making one acre the unit of value, as the testimony is very meagre on the subject. We therefore think that each parcel, as set apart in the partition of 1874, should be valued by appraisers appointed for that purpose, and that plaintiffs should first be allotted tracts 1 and 3, now occupied by them, then to the extent necessary give them four-tenths of the value of the whole 889 acres. They should be allotted from tract No. 5, containing 168½ acres; then if this be still insufficient, any deficiency remaining should be made up to them by an assessment for equality of partition upon each parcel assigned to defendants in the partition, in the proportion which the value of their respective parcels bears to said deficiencies, to be paid by defendants or their privies, within such reasonable time as the circuit court may fix, and in default of such payment plaintiffs to have leave to apply to the circuit court for proper relief. After plaintiffs shall have thus received four-tenths of the whole tract of 889 acres, the

defendants shall be entitled to the parcels respectively assigned to them in said partition. If the whole tract No. 5 be not required to give plaintiffs four-tenths of the 889 acres, the remainder should be partitioned according to law among the defendant children of Jane Barrett. The judgment of this court is that the decree of the circuit court is modified in the particulars named, and the cause is remanded for such further proceedings as may be necessary to carry out the views above mentioned."

Thereafter a writ of partition was directed to five commissioners, appointed as required by the statute, containing instructions in accordance with the language of the court above quoted. The commissioners made return, showing their valuation of each parcel of the land as partitioned in 1874, and allotted to the defendants or their privies the several parcels which they then received. They allotted to plaintiffs parcels 1 and 3. This left a deficiency in value of \$10,051.50, to supply which resort was had to tract No. 5; this tract containing 168½ acres, valued at \$60 per acre, amounting to \$10,110, which exceeded plaintiffs' shares by only \$58.50, less than the estimated value of a single acre. Plaintiffs sought to have their shares allotted in kind, and to be allowed to pay the difference, \$58.50, into court, and take the whole tract. The commissioners, however, reported that it would be impracticable to so divide No. 5 as to give plaintiffs and defendants their respective shares therein, without manifest injustice to the rights of the parties, and so recommended the sale of tract No. 5 at public outcry, at a price not less than \$60 per acre, and a division of the proceeds according to the rights of the parties. The plaintiffs attacked the return of the commissioners, and under an order of reference by Judge Watts, much testimony was taken on both sides. Plaintiffs further submitted bids, with security for same, on all lands assigned to the defendants, at a materially higher valuation than that fixed by the commissioners, and also offered to subject the whole land to sale, including tracts Nos. 1 and 3 assigned to them. Defendants also sought to bring tract No. 5 to sale, by tendering secured bid of an advance of \$10 per acre. Judge Memminger affirmed the report of the commissioners, except as to their recommendation for the sale of tract No. 5. As to this matter, he held that the difference in valuation was so trifling that it would be unjust to sell the land when plaintiffs had indicated a willingness to pay the difference to the defendants and take the land in kind. He accordingly decreed that plaintiffs pay the said difference and take tract No. 5.

Responding to plaintiffs' exceptions we hold:

1. That the circuit court was correct in construing the opinion of this court on the former appeal as formulating a scheme of partition of said lands as a direction of the

court, and not as a mere suggestion. It is within the unquestionable power of a court of chancery to do this in the administration of justice and equity to all concerned. It is of little consequence whether the persons named in the writ be called "appraisers" or "commissioners"; their duties were prescribed in the writ embodying the directions of the court. Among these, they were directed to make appraisement or valuation, with a view to assessment for equality of partition, if necessary, and to allot to defendants the parcels taken by them in the partition of 1874, and to plaintiffs the parcels received by their father in said division, and to resort first, to tract No. 5 in allotting to plaintiffs their four-tenths interest in the property.

2. The established rule is that, in order to overthrow the valuation made by commissioners in partition, it must be shown that it is so grossly incorrect and unequal as to justify an inference that the commissioners acted from an unfair and improper motive. *Aldrich v. Aldrich*, 75 S. C. 369, 55 S. E. 887, 117 Am. St. Rep. 909; *Allen v. Allen*, 76 S. C. 499, 57 S. E. 549; *Bowen v. True*, 79 S. C. 394, 60 S. E. 943. After careful review of the testimony, we are content to leave undisturbed the conclusion of the circuit court sustaining the valuations made by the commissioners. The commissioners were selected by the parties, were men of experience, intelligence, and character, viewed the premises, and were unanimous in their conclusion. There is nothing to show that their action was influenced by any unfair or improper motive. Quite a number of witnesses differed from the commissioners in their opinion as to the valuations, but quite a number agreed with the commissioners. As declared in *Aldrich v. Aldrich*, supra: "It is a matter of common knowledge that men of experience may honestly differ as to the value of land. So long, therefore, as the valuation of the commissioners can be accounted for on this ground, it should be sustained, and it is not sufficient to overthrow a valuation by commissioners merely to show that, in the opinion of other honest and experienced men, the true value is higher or lower than that made by the commissioners under oath."

3. The plaintiffs contend, under the doctrine of *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93, that, having made and secured a bid at a material advance in price over the value assessed by the commissioners as to tracts other than No. 5, the court should have ordered a sale of the tracts allotted to the defendants. The rule stated in *Moore v. Williamson* is approved as a general rule, and its application may prove useful and salutary in preventing any gross injustice in making partition. In that case the commissioners made return that the land could not be divided among the parties in interest by metes and bounds without manifest injury to

all the parties. They then appraised the land at a certain sum per acre, amounting to about \$3,000, and recommended that it be vested in one of the parties, Mrs. Williamson, at that valuation, for reasons stated by them. Belk, one of the parties in interest, made an offer to make the land bring \$500 more than the valuation, if exposed to sale. Whereupon Chancellor Dargan ordered the land to be sold, holding Belk as bidder corresponding to the amount of his offer. On appeal this judgment was affirmed. The court, speaking by Chancellor Johnston, said: "A party, dissatisfied with the rate at which land is recommended to be assigned to another party, may shake the proposed assignment, and bring the property to sale by making and securing a bid for a material advance in price over the value assigned by the commissioners. The court would not attend to an insignificant advance, since such a practice would tend to hang up cases indefinitely, without sensibly promoting the justice of cases; but whenever the advance is for the substantial benefit of all the parties interested in the partition, the court is bound to attend to it." That was a case in which justice to all parties concerned required a sale of the property, because a partition by metes and bounds could not be made. As correctly held by Judge Memminger, the doctrine of *Moore v. Williamson* is not applicable to the peculiar situation in this case. The scheme of partition directed was intended to harmonize, as far as possible, with the division by metes and bounds already had among the defendants, and did not contemplate a sale of the parcels assigned to defendants in 1874, but contemplated an assessment thereon, if necessary for equality, so as not otherwise to disturb their possession.

4. In this connection we may consider the defendants' exceptions to the refusal of Judge Memminger to bring tract No. 5 to sale because of their secured bid to make that tract bring at least \$70 per acre, or \$10 per acre more than the valuation of the commissioners. The contention of the defendants is that, while *Moore v. Williamson* has no application with respect to the question of bringing to sale the tracts assigned to defendants, it has application with respect to tract No. 5. The writ in partition, issued under the order of Judge Klugh, directed the commissioners, after allotting tracts 1 and 3 to plaintiffs, to allot to plaintiffs from tract No. 5, and further directed that, if the whole of tract No. 5 be not required to give plaintiffs their four-tenths of the whole, "then you shall allot unto plaintiffs so much of tract No. 5 as may be necessary to give unto plaintiffs their said four-tenths of the whole 880 acres, and you will then allot and divide the remainder of said lot No. 5 amongst the defendants, etc.; or, in case you find that such remainder, if any, cannot be fairly and fully divided amongst the last-named six defendants without injury to the

whole or one or more of them, you can recommend a sale of such remainder, and the proceeds shall be equally divided amongst them." No exception has been taken to the directions contained in the writ. It thus appears that plaintiffs were to receive the remainder of their share in kind, and that no sale of any portion of tract No. 5 was contemplated, except as to such portion thereof as should remain after allotment to plaintiffs. It would seem to be inequitable in this partition to permit defendants to bring tract No. 5 to sale and deny to plaintiffs the privilege of bringing to sale the tracts allotted to defendants. Defendants are unwilling to accept plaintiffs' proposition to bring all of the tracts to sale. In this connection we may say that we also approve the action of the circuit court, to which defendants take exception, in allotting the whole of lot No. 5 to plaintiffs, subject to their paying to defendants \$58.50, the difference in value between their appraised interest and the appraised value of the whole tract. This affects a practical partition in kind on the basis of the approved valuation of the commissioners, and in harmony with the directions of this court.

5. Plaintiffs' remaining exceptions do not call for any extended notice. Exception 1 complains of the refusal of Judge Memminger to visit and view the premises before making his decree. The judge stated, as a reason for his refusal, that he had neither knowledge nor experience with reference to the value of agricultural lands, and that if he should visit the lands, he would probably not know anything more as to their value for farming purposes than at present before visiting them, but that, if he found himself unable to reach a decision without inspecting the land, he might consent to do so. We know of no law which makes it the duty of the court to view the premises in partition proceedings. Civ. Code 1902, § 2950, provides that the jury, at the request of either party, may be taken to view the place or premises relating to the contest, when it appears to the court that such view is necessary to a just decision; but in *Bodie v. Ry. Co.*, 66 S. C. 315, 44 S. E. 943, where the jury informed the judge that a visit to the place would not benefit them, it was held to be wholly within the discretion of the judge whether he would send the jury to view the place. For greater reason, if there is no statute requiring the judge to view the premises, it is not error to decline to do so. A far more serious question would have arisen if the judge had, at the mere request of one party, viewed the premises, and interposed his opinion, formed upon such view, against the opinion of those specially charged with that duty.

6. The failure of the circuit court to make an order substituting A. B. Stuckey in place of Nettie F. Parrott, who, since the commencement of this action, conveyed her interest to

Charleton S. Barrett, who afterwards conveyed one-half thereof to A. B. Stuckey, was a mere inadvertence. The record at folio 91 shows that such an order was directed to be made, and that the trial proceeded as though the order had been formally signed. If deemed necessary such an order may be formally made after remand to the circuit court. With respect to the substitution of the devisees of the defendant Elizabeth J. James, who died after the commencement of the action, the appellants are under a misapprehension, as it appears by reference to folio 445 of the record that such an order was made.

The exceptions, both of plaintiffs and defendants, are overruled, and the judgment of the circuit court is affirmed.

WOODS, J. I concur, on the ground that the judgment of the Supreme Court in the former appeal required actual partition of the land, according to the scheme therein laid down. But for this, I think the parties would have the right to bring the several tracts of land to a sale, by giving adequate assurance to the court that they would bid more at the sale than the assessed value, under the rule laid down in *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93.

#### JOHNSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 2, 1908.)

##### 1. DAMAGES—"MENTAL ANGUISH"—"MENTAL SUFFERING"—WHAT CONSTITUTES.

Mental anguish or suffering, as used in the statute authorizing a recovery of damages for mental anguish or suffering, means distress or serious pain as distinguished from annoyance, regret, or vexation. Mental anguish is intense mental suffering.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4475.]

##### 2. TELEGRAPHS AND TELEPHONES — DEATH MESSAGE — NEGLIGENT DELIVERY — MENTAL ANGUISH.

While mental anguish or suffering will be presumed in case of a telegraph company's failure to deliver a death message, by which the addressee is deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild, and is deprived of attending their funeral rites, no such presumption obtains in the case of more distant relatives, such as uncle, aunt, niece, nephew, and cousin, with reference to whom it must affirmatively appear from the evidence that special relations of tenderness and affection existed between them and deceased of which the telegraph company had notice, in order to entitle them to recover for mental anguish.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Chester County; C. G. Dantzler, Judge.

Action by Mary Johnson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Geo. H. Fearons, J. H. Marion, and Evans & Finley, for appellant. A. L. Gaston, for respondent.

WOODS, J. The following telegram, intended for the plaintiff, was delivered to the defendant's agent on 3d August, 1906, at Hudson, N. C.: "Miss Mary Johnson, near Sou. Dept., Chester, S. C. Allie dead. Bring here tomorrow. Answer whether you can come. S. J. Smith." Allie was the wife of the sender and the first cousin of the plaintiff. The telegram was not delivered till August 6th, and negligence on the part of the agent at Chester in not making proper efforts to find the addressee was admitted. The plaintiff recovered judgment for \$150 for mental anguish and suffering in being deprived of the privilege of attending the funeral of which the telegram was intended to give notice.

The single question made by the appeal arises from the refusal of the circuit judge to charge the following requests: "The court charges that where a party is deprived of attending a funeral by reason of delay in the delivery of the telegram, and the relationship between such party and the deceased to whom the telegram relates is that of first cousin, proof of such relationship is not of itself sufficient to raise a presumption of mental anguish, and, in order to enable such party to recover damages for mental anguish on account of such deprivation, it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the plaintiff and the deceased, and that at the time the message was accepted by the telegraph company for transmission and delivery adequate notice was given the company of such special relations." In *Butler v. Telegraph Co.*, 77 S. C. 148, 57 S. E. 757, the question being as to the presumption of mental anguish or suffering of one who, upon the occasion of the death of his wife, was deprived of the presence of his brother-in-law in his hours of sorrow, the court laid down these propositions: "(1) That a plaintiff can only recover such damages as are the direct and proximate result of a wrongful act on the part of the defendant. (2) That mental anguish by a brother-in-law may be the result naturally and reasonably to be anticipated from the failure to deliver a telegram, but there is no presumption that such injury has been sustained. (3) That, if in the particular case one related merely by affinity sustains damages, they are special, and the defendant must have notice of the facts from which it may be reasonably expected they would arise at the time the message is delivered for transmission." We are now called on to decide whether the same rule applies to first cousins. If the reasoning of the court in that case is to be regarded, it is perfectly clear there must be some line drawn in degrees of consanguinity where the presumption of suffering and anguish for such

disappointments cannot be indulged; for it is within the knowledge of all that the relationship of father-in-law, mother-in-law, brother-in-law, or sister-in-law is usually closer by intercourse and affection than that of the remoter blood relations. The reasoning and conclusion in *Butler v. Telegraph Company* are thoroughly sound, but the principle of that case would lead to absurdity, unless the court fixes some degree of blood relationship beyond which suffering and anguish will not be presumed as the results of delay in the transmission and delivery of telegrams. Our statute provides for damages for "mental anguish or suffering." It will not be doubted these words were intended to have their usual strong meaning. They do not give the slightest ground to impute to the General Assembly an intention to incumber the administration of justice, and open the flood-gates of speculative litigation by allowing suits to be brought for any unpleasant feeling or sensation, however slight. Mental suffering means distress or serious pain as distinguished from annoyance, regret, or vexation. Mental anguish is intense mental suffering. Being deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild in the great sorrows of life, and being deprived of attending their funeral rites, produces, in every man and woman with normal affections for these near kindred, distress and serious pain; that is, mental suffering or anguish within the meaning of the statute. When we leave these close family ties and reach the relation of uncle and aunt, niece, and nephew, and that still further removed relation of cousin, the deprivation ordinarily produces annoyance, regret, or vexation, but not a state of mind attaining to distress or mental suffering. This, we think, is the common-sense interpretation of the statute, viewed in the light of the general experience of men; and it is in accord with authority.

The following authorities support the case of *Butler v. Telegraph Company*, supra, holding there is no presumption of mental anguish arising from delay in telegrams affecting the feelings of those related by affinity: *Telegraph Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *W. U. Tel. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *W. U. Tel. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649; *Davison v. Telegraph Co. (Ky.)* 54 S. W. 830; *W. U. Tel. Co. v. Long*, 148 Ala. 202, 41 South. 963; *W. U. Tel. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198. In *Denham v. Telegraph Co.*, 87 S. W. 788, 27 Ky. Law Rep. 999, recovery was denied to an aunt in a suit for damages for delay in a telegram announcing the death of a nephew. In *W. U. Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482, it was likewise held there was no presumption that an uncle will suffer mental anguish from failure to attend his niece's funeral. In North Carolina the view is taken that any telegram announcing

sickness or death is sufficient notice to the company to warrant a recovery in any case where mental anguish is shown to have resulted without respect to the relationship of the parties; but, on the trial, where the relationship does not raise the presumption of mental anguish, the damages must be affirmatively proved. The rule established in this state by *Butler's Case* is that there is no presumption that telegrams announcing sickness or death involve mental anguish or suffering, rather annoyance, regret, or vexation, unless they are sent by or intended for near relations. The defendant, therefore, had a right to the instruction asked for.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

GARY, A. J. (dissenting). Conceding that there are degrees of relationship beyond which it will not be presumed that mental anguish was suffered as the result of failure on the part of the telegraph company to deliver a message promptly, nevertheless the relation of first cousin comes within the degrees giving rise to such presumption. I therefore dissent.

CITY OF COLUMBIA v. MELTON.†  
(Supreme Court of South Carolina. Sept. 2, 1908.)

APPEAL AND ERROR—DISPOSITION OF CAUSE—REVERSAL.

Defendant, a resident of plaintiff city, having filed a petition alleging the discharge of surface water on her lands, resulting from a change in the construction of the city's drains, an order for the impaneling of a jury to assess compensation to which defendant was entitled for the taking of her property, was entered, whereupon plaintiff city filed a bill to restrain such condemnation proceedings, on the theory that the facts did not justify the relief demanded, to which defendant filed an answer which did not purport to set up a defense, but consisted merely of an explanatory or qualified denial of certain facts alleged in the complaint, in effect setting forth merely defendant's view of the facts so alleged. Held that, since plaintiff would be afforded an opportunity of having the question whether condemnation proceedings on defendant's part was the appropriate remedy determined on the case being called for trial on the merits, on plaintiff attempting to show equitable grounds entitling it to an injunction, an order overruling plaintiff's demurrer to the answer for want of facts was not ground for reversal.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; J. C. Klugh, Judge.

Suit by the city of Columbia against Mary McCreary Melton. From an order overruling a demurrer to the answer, complainant appeals. Dismissed.

H. N. Edmunds, for appellant. Allen J. Green and H. P. Green, for respondent.

GARY, A. J. This appeal is from an order overruling a demurrer, interposed by the plaintiff, to the so-called defense set out in

† For opinion on rehearing, see 62 S. E. 399.

the answer of the defendant. On the — day of December, 1905, Mrs. Mary McCreary Melton filed a petition in the court of common pleas, in which she alleged that the city of Columbia, by means of pipes, was discharging surface water on her lands, which was emptied into her private ditch or drain; that in times of heavy rains the flow of surface water was unusual; and that this was caused by a change in the construction of drains and the method of drainage in certain portions of the city. Upon hearing this petition, his honor, Judge Gage, granted an order that a jury be impaneled by the clerk of the court to assess the compensation to which the plaintiff was entitled for the "taking" of her property. The plaintiff brought this action to enjoin the defendant from proceeding under said condemnation proceedings, and an order was made by the circuit judge temporarily restraining the defendant.

The defendant filed the following answer: "The defendant above named, answering the complaint in the above-entitled cause, says: (1) Defendant admits paragraphs 1, 2, 3, 4, 5, and 7 of the said complaint. (2) Answering paragraph 6 of the complaint, this defendant admits that the surface drains along the streets therein referred to were, within the past 20 years, constructed along the lines of the natural flow of the surface water from said streets, and this defendant admits that the constituted authorities of the said plaintiff have, from time to time, changed the grade of said streets, but this defendant denies each and every other allegation of said paragraph, and, on the contrary, upon information and belief, avers that the plaintiff has caused the grade of the said streets and the drains thereon to be changed within the last 20 years, and that by reason of such changes it has shortened, accelerated, and concentrated the flow of the surface waters from the area drained by said streets, and diverted it from its former more circuitous course, and by the changes made in the drains on the said Elmwood avenue now discharges the said surface waters upon the lands of this defendant in concentrated flow, as in her said petition for assessment of damages alleged, as set forth in paragraph 7 of said complaint. (3) Defendant denies paragraph 8 of the said complaint and, on the contrary, avers that she owns and is seized in fee and possessed of the said premises described in paragraph 7 of the said complaint, and that plaintiff has notice of her title thereto, and by the use of proper diligence could have informed himself thereof. (4) Defendant denies paragraphs 9 and 10 of said complaint and, on the contrary, avers that the plaintiff has, within the last 20 years, and within the last few years, made changes in the grading of the streets, and in the system of drainage of the surface water of the area of said city lying west of Bull street, north of Laurel street, east of Assembly street, and south of Elmwood avenue, and

that since and by reason of such changes in the grading and drainage, and by the piling of such surface water in concentrated flow across the said Elmwood avenue and discharging the same through such pipes upon the lands of this defendant, the said water is discharged with greater force and velocity on the lands of defendant, and by reason thereof has washed away, and still continues to wash away and damage, the said lands of this defendant, has undermined two of her said tenant houses, rendering them untenable, and has washed out a hole, in the lower end of her property, from 10 to 12 feet deep, and from 18 to 20 feet wide, and from 20 to 25 feet long, which accumulates water, and is a standing and increasing injury to defendant's said property, and wherein, since the commencement of this action, a child has fallen in and been drowned. (5) Defendant denies each and every allegation in paragraph 11 of said complaint and, on the contrary, avers that the damages to and the taking of her property, as alleged in her petition, have been done by the plaintiff without her consent and against her protests; that she has several times petitioned city council, calling their attention to the damage caused to her said property by reason of said system of drainage, and asking that the same be repaired, and that by a proper system of drainage further injury be prevented, and to induce the said plaintiff to speedily stop the said damage and prevent its recurring has offered to give the plaintiff a right of way through her said lands, free of costs, for the piling of such water through her said lands, but, notwithstanding, the plaintiff has taken no steps to repair or prevent such injury."

The plaintiff interposed an oral demurrer to the answer, on the ground that it did not state facts sufficient to constitute a defense to the plaintiff's cause of action, in that: "(1) The action herein is one in injunction, praying for a permanent injunction against defendant, seeking to compel plaintiff to condemn, by means of having a jury impaneled to assess the compensation to which plaintiff is entitled for the taking, altering, use, and impairment of her said property (described in her petition and in the said complaint), and said answer states no facts under which said right of action for such condemnation proceedings can be maintained against plaintiff, under the statutes of the state of South Carolina. (2) The answer admits that plaintiff is a municipal corporation, duly created and organized under and by virtue of the laws of the state of South Carolina, as alleged in paragraph 1 of the complaint, and admits the allegations contained in paragraphs 2, 3, 4, 5, and 7 of the complaint, and does not state any fact by which, under the statutes of the state of South Carolina, such condemnation proceedings can be maintained against a municipal corporation, on account of the alleged 'taking, altering, use, and impairment of her said property.'

(3) That the statutes of the state of South Carolina provide an adequate remedy in law, whereby defendant's rights may be determined in an action for damages on account of said alleged injuries set forth in defendant's petition and answer, which defendant is seeking to avoid, under her proceedings herein, and such remedy is exclusive of her rights." The demurrer was overruled, and the plaintiff appealed upon the grounds just mentioned.

The answer does not purport to set up a defense to the plaintiff's cause of action, but is merely an explanatory or qualified denial of certain facts alleged in the complaint. In other words, it simply sets forth the defendant's view of the facts alleged in the complaint. When the case is called for trial on the merits, and the plaintiff undertakes to show that there are equitable grounds entitling it to the injunction, it will then be afforded an opportunity, of having the question determined, whether condemnation proceedings on the part of the defendant was the appropriate remedy.

It is the judgment of this court that the appeal be dismissed.

WOODS, J. (dissenting). The sole question in this case is whether, taking the allegations of the answer as true, the defendant is entitled to have any damages sustained by her assessed under condemnation proceedings. I think the question may be decided on the demurrer, without putting the parties to the delay and expense of offering evidence, and therefore I am unable to concur in the conclusion that a trial is necessary to determine that issue. The defendant instituted condemnation proceedings against the city of Columbia to obtain compensation for loss accruing to her from voiding water from the streets on her land. Thereupon the city of Columbia commenced the proceedings, alleging, among other things, that there was no statutory authority for condemnation. Judge Gage, under a rule to show cause, granted a temporary injunction, on the allegations of the complaint raising the issues of defendant's title to the land and prescriptive right of the city to overflow the land. The record does not show that any other questions were made before Judge Gage or considered by him. The defendant afterwards answered, and the plaintiff demurred to the answer. The appeal is from an order of Judge Klugh overruling the demurrer.

The allegations of the answer on which the case depends are these: "Defendant denies paragraphs 9 and 10 of said complaint and, on the contrary, avers that the plaintiff has, within the last 20 years and within the last few years, made changes in the grading of the streets, and in the system of the drainage of the surface water of the area of said city lying west of Bull street, north of Laurel street, east of Assembly street, and south of Elmwood avenue, and that, since and by rea-

son of such changes in the grading and drainage, and by the piping of such surface water in concentrated flow across the said Elmwood avenue and discharging the same through such pipes upon the lands of this defendant, the said water is discharged with greater force and velocity on the lands of defendant, and by reason thereof has washed away, and still continues to wash away and damage, the said lands of this defendant, has undermined two of her tenant houses, rendering them untenable, and has washed out a hole on the lower end of her property from 10 to 12 feet deep, and from 18 to 20 feet wide, and from 20 to 25 feet long, which accumulated water, and is a standing and increasing injury to defendant's said property, and wherein, since the commencement of this action, a child has fallen in and been drowned. Defendant denies each and every allegation in paragraph 11 of said complaint and, on the contrary, avers that the damages to and the taking of her property, as alleged in her petition, have been done by the plaintiff without her consent, and against her protests; that she has several times petitioned city council, calling their attention to the damage caused to her said property by reason of said system of drainage, and asking that the same be repaired, and that by a proper system of drainage further injury be prevented, and to induce the said plaintiff to speedily stop the said damage and prevent its recurring has offered to give the plaintiff a right of way through her said lands, free of costs, for the piping of such water through her said lands, but, notwithstanding, the plaintiff has taken no steps to repair or prevent such injury."

In the absence of statute law providing for condemnation or any other exclusive statutory remedy, one whose property is taken without his consent may bring an action for its recovery, or for damages for the trespass, and, in case of a threatened taking or continued trespass, an action for injunction. Against a municipal corporation for the taking or threatened taking of property the owner has the right of action for recovery of possession, or for injunction, but not for damages, unless the right of action for damages be conferred by statute. Changing the grade or otherwise altering a street by a municipal corporation to the injury of a private landowner is not a taking of private property. *Cherry v. Rock Hill*, 48 S. C. 560, 28 S. E. 798; *South Bound R. R. Co. v. Burton*, 67 S. C. 522, 46 S. E. 340. Therefore, for the recovery of damages arising from such change as is here alleged, the owner of the land cannot rely on the constitutional provision against the taking of private property without just compensation. It is essential that he show some statutory authority for the recovery of damages, either by condemnation proceedings or by action. *Water Co. v. City Council*, 53 S. C. 82, 30 S. E. 699. To show such statutory authority the defendant re-



lies on the statute of March 2, 1871 (14 St. at Large, p. 569), entitled "An act to alter and amend the charter and extend the limits of the city of Columbia." Section 7 provides that the mayor and aldermen "shall have power to abate and remove all nuisances in said city; and it shall be their duty to keep all roads, ways, bridges, and streets within the corporate limits of said city in good repair; and for that purpose they are invested with all powers of county commissioners, or commissioners of roads, for and within the corporate limits of said city; and they may lay out new streets, close up, widen, or otherwise alter those now in use, subject, however, to the two provisos contained in the first section of this act." The provisos of the first section are: "That in carrying out the first section of this act in extending the wards of the city of Columbia, and in the extension of the streets thereof to the north and east to the northern and eastern boundaries, the mayor and aldermen shall conform to the 23d section of the first article of the Constitution of this state, now in force; and, provided, further, that the act of the General Assembly of this state entitled 'An act to declare the manner in which lands or the rights of way over lands of persons or corporations may be taken for the construction and use of railways and other works of internal improvements,' ratified 22d of September, A. D. 1868, shall in all respects be followed and observed." The pleadings do not state a case falling under this statute. It is true that, in referring to this statute in *Kendall v. City Council*, 74 S. C. 541, 54 S. E. 777, the court said: "If the statute to which the reference is made in the return confers upon the petitioner the right to recover damages for altering the grade of the street, it likewise provides an adequate mode for determining the amount of such damages, and we have already stated the remedy is exclusive." It is manifest from the language used that the court did not mean to decide that one whose land in the city of Columbia had been injured by the altering of the grade line of a street had the right to recover damages under this act; for, as already shown, such injury is not a taking of property. The provisos in the statute just quoted refer to section 23, art. 1, of the Constitution of 1868, and the condemnation statute of 1868, both relating to the taking of private property. The answer does not allege facts which constitute taking of the property, but facts which constitute injury to the property by the flow of water across it, caused by the change in the grading and drainage of the street. No rule of construction will allow the meaning of these provisos to extend to injury to property, and so beyond the terms of the section of the Constitution and the statute to which they expressly refer. Therefore the statute of 1871 does not authorize condemnation proceedings in a case like that stated in defendant's answer.

If the injury to the defendant's land was due to the negligence or mismanagement of the city, the defendant has a right of action for damages under section 2023 of the Civil Code of 1902, which provides: "Any person who shall receive bodily injury or damages in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation within the limits of any town or city, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceed the ordinary weight: Provided, the said corporation shall not be liable unless such defect was occasioned by its neglect or mismanagement: Provided, further, such person has not in any way brought about such injury or damage by his or her own negligent act or negligently contributed thereto." If the defendant's land is adjacent to or adjoining a street of the city, and she has demanded that the city should provide sufficient drainage through covered drains, if practicable, and the city has refused to comply with her demand, and failed to institute condemnation proceedings, then she has a right of action for the damages sustained in overflowing her property. This right is conferred by the act of 1902 (23 St. at Large, p. 1038):

"Section 1. Be it enacted by the General Assembly of the state of South Carolina: That, whenever within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare, over the private land adjacent or adjoining such thoroughfare, upon demand from owner or owners thereof, such municipality shall provide sufficient drainage for such water through open or covered drains except where the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfares, then the municipal authorities shall have the power and authority to obtain under proper proceedings for condemnation as for highways on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage.

"Sec. 2. That if any municipal corporation in this state shall fail or refuse to carry out the provisions of this act, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person."

Under the allegations of the answer, the defendant could not maintain condemnation proceedings. If she has a remedy, it is by action for damages, under section 2023 of the Civil Code or under the statute of 1902. It is to be regretted that we have not a comprehensive statute providing simple condem-

nation proceedings as the exclusive remedy, with proper limitations, saving the constitutional right of trial by jury, in all cases of damage to property, as well as the appropriation of property for public purposes, except in cases of willful trespass. This case is illustrative of the difficulties which beset the bar, as well as the courts, from the many special provisions to be found in charters and special statutes on the subject.

The judgment of the circuit court should be reversed, and the demurrer to the answer sustained.

### TERRY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Sept. 9, 1908.)

#### 1. CARRIERS — CARRIER AS WAREHOUSEMAN — ACTIONS — BURDEN OF PROOF.

In an action against a railroad for failure to deliver a parcel deposited in its parcel room, plaintiff need not show that its loss was due to the company's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 678.]

#### 2. SAME.

A carrier acted as a warehouseman in receiving goods in its parcel room for safe-keeping, and had a right to limit its liability to \$10 in case of loss of the goods, so that a receipt containing such limitation was binding upon the owner, and limited his recovery to that amount.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. O. Purdy, Judge.

Action by C. P. Terry against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

J. B. Atkinson, for appellant. H. L. Bomar, for respondent.

WOODS, J. In this action of claim and delivery, the plaintiff recovered judgment in a magistrate court for the possession of a suit case and contents, or \$70, the value thereof, in case a delivery could not be had. The judgment of the magistrate was affirmed by the circuit court. The facts upon which the appeal turns were not in dispute.

The defendant kept at its Spartanburg station a room where it received packages for safe-keeping. It there received from plaintiff the suit case, and issued to him a check or receipt of which the following is a copy: "Form 240. Southern Railway Co. Package room owner's duplicate check. — Station. Issued — M. —, 196 —. No. C43101. 10 cents each 24 hours or fraction thereof." These stipulations were printed on the back: "When a parcel is delivered to package room, this stub must be detached and delivered to owner, which must be surrendered to agent before package can be obtained. The party accepting this check hereby agrees, in consideration of the low rate at which it is issued, that no claim in excess of ten dollars (\$10.00) shall be made against the railroad company

for loss of, or injury to, any package, valise, or other article, which may have been deposited with it, and for which this ticket has been issued. W. H. Tayloe, General Passenger Agent." When the plaintiff requested a return of the case, it could not be found; and the defendant's agents testified that after careful search they were unable to account for its disappearance. There is no authority to be found in any jurisdiction for the proposition submitted by appellant that it was incumbent on the plaintiff to assume the burden of showing the loss was due to the negligence of the bailee. There can be no doubt of defendant's liability. *Fleischman v. So. Ry. Co.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519.

It is equally clear the liability was limited to \$10 as stated in the receipt. We are not called on to decide whether a common carrier is bound to have a higher and lower freight rate, and express that a limitation of the amount of its liability for goods is in consideration of the lower rate, in order to make a contract for such limitation of liability valid. That point is not involved, for respondent's counsel well concedes the keeping of a room for the deposit of parcels is not a part of the business of a common carrier; and that the defendant, as to packages received therein, contracted as a warehouseman. As such warehouseman in receiving the goods, it had a right to contract for the limitation of the amount of its liability in case of loss, and the receipt expressing such limitation was binding on the owner of the goods. *Piedmont Manf. Co. v. C. & G. R. R. Co.*, 19 S. C. 353; *Dunbar v. Port Royal & R. Ry. Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; *Hill v. Ga. C. & N. R. R. Co.*, 43 S. C. 462, 21 S. E. 337; *Cau v. Texas & P. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

The judgment of this court is that the judgment of the magistrate be modified by reducing the recovery from \$70 to \$10, the amount of the liability stipulated in the receipt.

### LIVINGSTAIN v. COLUMBIA BANKING & TRUST CO.

Ex parte BERGER.

(Supreme Court of South Carolina. Sept. 3, 1908.)

#### 1. BANKS AND BANKING — PAYMENT OF DEPOSITOR BY INSOLVENT BANK.

Money paid by a bank to a depositor in the usual course of business while the bank is a going concern, although in fact insolvent, is not impressed with a trust in favor of other creditors, where the depositor did not know the fact of insolvency, and was assured by the officers that the bank had money to pay all depositors, even though he was induced to withdraw the money by rumors of its embarrassment.

#### 2. SAME — RIGHTS OF WITHDRAWING DEPOSITOR.

Petitioner made a check on a bank for the amount of his deposit therein, and received pay-

ment in money in the usual course of business. He was induced to withdraw his deposit by rumors that the bank was in difficulty, and the knowledge that there had been a run on it for the previous two days. He inquired of the officers, however, and was told that the bank was solvent, and would pay all checks as presented. After receiving and counting the money, believing such statements in good faith, he returned it, and took drafts for the amount. The bank was in fact insolvent, and was declared insolvent the next day. The drafts were not paid because the bank on which they were drawn applied the fund to the payment of notes of the insolvent bank, which it held, and which were secured by collateral. *Held* that the money which petitioner received was not impressed with any trust in favor of other creditors, and that he stood in the same position as any purchaser of the drafts for cash, and was entitled in equity to be subrogated to the rights of the bank on which they were drawn in the collateral which it held.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 153.]

Woods, J., dissenting.

### 3. BANKS AND BANKING—"INSOLVENT."

A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 154.]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Harris Livingstain against the Columbia Banking & Trust Company, in which Martin K. Berger filed an intervening petition against the receivers appointed, B. A. Hagood and E. W. Hughes. From a decree denying the petition, petitioner appeals. Reversed.

See 57 S. E. 182.

Legare, Holman & Baker, for appellant. Benj. H. Rutledge, for respondent.

GARY, A. J. The record contains the following statement: "After the Supreme Court of this state filed its opinion in the case of *Livingstain v. Columbian Banking & Trust Co.*, 77 S. C. 305, 57 S. E. 182, the said Martin K. Berger filed his petition and affidavit, setting forth that he came within the exception, as recognized in said decision, and was entitled to subrogation, for that he obtained New York exchange, drawn on the National Bank of Commerce, for and in consideration of cash money paid into the bank. The defendant's receivers controverted the position of Berger, and gave a different version of the position, under which the said New York exchange was obtained. His honor, Judge Gage, presiding, said that he could not determine the question on affidavits, and therefore referred the matter to G. H. Sass, Esq., one of the masters of said county, to take the testimony and report conclusion of fact thereon, with all reasonable dispatch. The master made his report, stating and setting forth his finding of fact, and

no exception was taken thereto; that the bank was not put in the hands of a receiver until the 9th day of February, 1906." The master's findings of fact are as follows: "That the petitioner, Martin K. Berger, holding, along with his wife, certain deposits in the Columbian Banking & Trust Company, and being advised by rumors; that the affairs of the bank were in an unsatisfactory condition, determined to withdraw the said deposits, and that on the 8th of February, 1906, he sent his wife to the bank with the two checks representing their combined deposits, and amounting to \$2,015.75. Mrs. Berger presented the checks at the teller's window, and the same were paid to her in about one-fourth in currency and the balance, \$1,500, in three bags of silver dollars, containing \$500 each. Finding that the silver was too heavy for her to remove, she called to her husband, who had by this time reached the bank, and turned the money over to him. He received the same from the teller. The testimony is conflicting as to whether he removed the money from the window and carried it to another counter to count it, but there is no doubt at all that he did receive the money, and did count the currency. After having thus received the money from the bank, he resolved to exchange the same for a check on New York, and paid the money back to the teller, and requested that he would give him a New York check for the amount. This was done, and the said check upon New York was taken by Mr. Berger to the Bank of Charleston on the same day, and deposited to his account in that bank. I find that these were two separate and distinct transactions; that is to say, that the depositor's check was paid by the bank in the manner above stated, and that transaction closed, and that immediately thereafter the New York check was purchased with the same money which had been paid to Mr. Berger upon the depositor's checks." In refusing the petition, his honor, the presiding judge, assigned the following reasons: "The bank was insolvent when Berger put his money back there, and it became again an asset available for all, to be distributed among them under high principles of equity and justice. It has judicially been determined that the bank was insolvent on February 8, 1906, the date of this Berger transaction. Therefore all its assets constituted a trust fund, and could not lawfully be paid over to any one certain creditor in preference to others. Berger heard rumors of the insolvency, and, acting on that belief, went to draw out his money, and received the amount of his deposit. The money he received was not held by him as an innocent outside customer of the bank, but was really part of a trust fund, which was the property of all the creditors; therefore he was not within the exception set forth from the case cited. 77 S. C. 305, 57 S. E. 182. Under the statute in bankruptcy any payment to a per-

son having reason to believe that the payer is insolvent is a void act. Equity will not go beyond this principle. Berger never parted with the money, so that its identity was lost. The identification of the money is important here, because it affects the bank with knowledge that the money for which it exchanged the New York draft was not 'cash paid into the bank,' but was really the money of the general depositors, part of a trust fund which the bank had no right to appropriate to Berger's check."

The assignments of error are as follows: "First. Because his honor erred in dismissing the petition of the said Martin K. Berger, in that the undisputed testimony in the case showed, from the report of the master, that Martin K. Berger paid into the Columbian Banking & Trust Company the sum of \$2,015.75, and obtained from said bank a check on New York, drawn on the National Bank of Commerce, and that the same was drawn to his order by said bank in good faith, and without any knowledge on the part of the said Martin K. Berger that the said bank was insolvent, and that therefore the said Martin K. Berger was subrogated to the right of the National Bank of Commerce to the collateral, which it held to secure a note, which was discharged by applying money against which this check was drawn in favor of Martin K. Berger.

"Second. Because his honor erred in holding that the Columbian Banking & Trust Company was insolvent when Berger put his money back there, and that it became again an asset of the bank for the purpose of distribution among the creditors and depositors of the bank, 'under high principles of equity and justice,' whereas his honor should have held and found that Berger did not put his money back into the bank, but on the contrary that he purchased in good faith, while the bank was a going concern, New York exchange for \$2,015.75, and that he should have been held subrogated to the assets held by the National Bank of Commerce to the collaterals, which were deposited as a security to a note, the money on which, said check being drawn, having been exhausted in the payment of said note.

"Third. Because his honor erred in holding and concluding that the money received by Berger from the bank on his check, while it was a going concern, was a part of the trust fund, which was the property of all the creditors.

"Fourth. Because his honor should have held and concluded that, when Berger drew his money out of the bank, while it was a going concern, he had a right to do so, and that after it was withdrawn from said bank, it was not impressed with any trust or equity in favor of the other depositors of the bank, and that Berger had a right, if he saw fit, to purchase said New York exchange.

"Fifth. Because his honor erred in holding that the Columbian Banking & Trust Com-

pany was judicially determined to be insolvent, on the 8th day of February, 1906, the date that Berger obtained New York exchange, whereas, on the contrary, said bank was not adjudged insolvent until the 9th day of February, 1906; and there is no evidence going to show any knowledge or notice of such insolvency, further than a reported rumor that the bank was in an embarrassing condition."

The vital question in the case is whether the money when paid to the petitioner by the bank was impressed with a trust. His honor, the presiding judge, based his conclusion on two grounds: (1) The insolvency of the bank, and (2) that "Berger heard rumors of the insolvency, and, acting on that belief, went to draw out his money, and received the amount of his deposit." The circuit judge should also have found from the uncontradicted testimony that, conceding there was enough to put the petitioner upon inquiry, he followed it up with due diligence by going to the proper sources of information—the officers of the bank—and became satisfied the bank was insolvent.

M. K. Berger, the petitioner, testified: "I had a conversation with several of the men, one of which was Mr. Pearlstine, and several others who knew the circumstances of the bank; and they assured me that they would pay out every dollar to the depositors. \* \* \* I took it [the money] from the window, and counted all the money—the paper money. Then I started to count the silver; then I decided to help out the bank, and I asked the cashier of the bank, Mr. Seel, to be so kind as to give me a New York exchange for the money, which I paid him in cash. \* \* \* Q. They had satisfied you about the solvency of the bank? A. Yes, sir. \* \* \* Q. About what time of day did you get this money? A. About 10:30, I think. Q. And the bank did not close until next day? A. I think so." Mrs. Bessie Berger, wife of the petitioner, testified as follows: "Q. Do you remember whether anybody went to the window after Mr. Berger left? A. Why, yes; plenty of people went to the window. Q. Did anybody go to the teller's window between the time that Mr. Berger took the money to the teller's window and brought it back? A. Yes. Q. They were paying out everybody? A. Yes. Q. Looked like the bank had plenty of money? A. Yes, had plenty of money, and one of the officers came there, and he said: 'We have all the money to pay you off. There is too much excitement here.' Also Mr. Pearlstine came there, and he said: 'Don't you all rush. Just take your time, and we will pay you all.'" F. J. Seel, cashier, testified as follows: "Q. Do you remember what day there was a run on the bank? A. It started on the 6th and wound up on the 8th. Q. You were engaged in paying over money on the 8th? A. Yes. \* \* \* Q. What time of day was that?

[payment to the petitioner]. A. That was about half-past 11. Q. The bank closed when? A. When it had no more money to pay. Q. It stopped paying, and put up the sign 30 days? A. It stopped paying about 12. I do not know what hour the sign was put up. Q. About 12 or 1 o'clock you stopped paying? A. We stopped paying everybody. We had no more money."

The testimony does not show that the payments were made under the belief that the bank was insolvent, nor in contemplation of insolvency, nor with a design to give a preference to those receiving payment over the other creditors of the bank, but with the expectation that the bank would be able to continue business. On the contrary the bona fides of the petitioner was clearly established, and his confidence in the solvency of the bank was shown by the fact that he deposited his money with it, after the assurance of the officers that all would be paid, after knowledge of the fact that the bank had stood the run upon it from the 6th to the 8th; after seeing that the bank was conducting its business in the usual way—paying the drafts over the counter in the order in which they were presented; and after determining that he would assist in restoring confidence in others, and thereby enable the bank to meet all demands. "A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands." 3 Enc. of Law, 847. "The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had a right to rely; and, if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to deposit would constitute a fraud upon him. The title acquired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who could bring suit to recover his deposit, without any previous demand. The bank would become a trustee ex maleficio, and would hold the deposit for the use of the depositor, and subject to his right of reclamation." *Wasson v. Hawkins* (C. C.) 59 Fed. 233. In the case of *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, the rule is stated that, "if a bank, though insolvent, is still conducting its business, and pays a check of a depositor in the usual course of business, and the depositor had no notice of the insolvency of the bank, the payment is good, and the depositor will be protected. If, however, the depositor is paid, not in the usual course of business, but at a time when he has notice or knowledge that the bank is insolvent, and that the intent of the bank is to create a

preference in his favor over other creditors, the payment is not good." Syllabus.

In that case the court uses this language: "It is a well-known fact that the suspicion that a bank is insolvent causes all depositors who are acquainted with the facts leading to the suspicion to rush at once and withdraw their deposits. A run on a bank is always produced by those who think they have reason to suspect that the bank is in a failing condition; and we are not prepared to hold, if a bank is still in operation, open during the usual hours of business, paying its checks in the order in which they are presented, according to the custom of the bankers, that a depositor, who merely had reason to suspect the solvency of the bank, this being the motive for his drawing a check, would be required to repay to the bank the amount so withdrawn, less what would be his pro rata share in the assets of the bank, on the day that the amount was withdrawn, in the event that the bank was afterwards forced to liquidation, and was, in fact, insolvent. Neither are we prepared to hold that one who actually knows that a bank is insolvent, but does nothing except to draw his check and present it, and receive payment over the counter, in the usual course of business would be required to refund the amount so withdrawn, less his pro rata share, upon a final winding up of the affairs of the bank." Even under our assignment law against undue preferences (Civ. Code 1902, § 2647), the question whether the payment made by the debtor is obnoxious to the statute depends upon the intention of the parties to create a preference, and the foregoing facts would not render the payment illegal. *Porter v. Stricker*, 44 S. C. 183, 21 S. E. 635. Having reached the conclusion that the money when received by the petitioner was free from a trust, the case comes within the principle announced by Mr. Justice Woods in *Livingstain v. Banking Co.*, 77 S. C. 305, 57 S. E. 182: "Had the checks been issued for cash paid into the bank or before insolvency, the other depositors could have interposed no countervailing equity, and the petitioners would have been subject to subrogation."

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for such proceedings as may be necessary to carry into effect the views herein expressed.

WOODS, J. (dissenting). I think the judgment of the circuit court is sustained by the principles stated and the reasoning of the court in the former appeal (77 S. C. 305, 57 S. E. 182). The facts are exactly the same as there appeared, except that Berger has since filed another petition, and under it has shown that, instead of taking from the Columbian Bank a check on the Bank of Commerce in direct payment of his deposit, he received

from the Columbian Bank the cash for it, and almost immediately, without leaving the bank, paid it back to the Columbian Bank, taking in its place the check on the Bank of Commerce. The question is, whether, under these circumstances, the bank being insolvent at the time, and its assets being now in the hands of the court for ratable distribution among all creditors, Berger must be held to have an equity against the depositors to the collateral held by the Bank of Commerce. It is argued this conclusion results from the words italicized below, taken from the opinion in the former appeal: "Therefore, the issuing of the checks to these depositors was inequitable with respect to other depositors, because the bank was actually then insolvent, and all of the depositors had the equity of equal distribution of the assets, including surplus arising from the collateral held by the Bank of Commerce. The right of the Columbian Bank is not in question, and with that the court will not interfere, but it is very clear that the court should not stretch out its arm and by affirmative action, under the guise of subrogation, confer on the petitioners a lien on the collateral, thus defeating equitable distribution among all of the creditors to promote an inequitable preference. *Had the checks been issued for cash paid into the bank, or before insolvency, the other depositors, could have interposed no countervailing equity, and the petitioners would have been entitled to subrogation.* But the insuperable objection to subrogation in the case as presented is the fact that the checks were issued in payment of the debts of the bank after insolvency, and when the court, at the very moment they were issued, would have taken charge of the bank's assets, and would have enjoined the issuing of the checks, to the end that an equal distribution should be made among creditors, without preference to any." 77 S. C. 311, 57 S. E. 184. The context shows the court in the sentence relied on was laying down the general proposition that, if the isolated fact had appeared that these parties, in the ordinary course of business, had paid their money to the Columbian Bank for the purchase of checks on the Bank of Commerce, then they would have been entitled to be subrogated to the rights of the Bank of Commerce in the collateral held by that bank. But much more that is vital appears here than the mere isolated fact that the petitioner purchased a check for cash.

The court of equity looks through the form to the substance, takes into account all the circumstances, and from all the facts determines the nature of the transaction and the rights of the parties. It may be assumed that Berger actually drew his deposit in cash from the bank, that he did not know the bank was insolvent, and that he could not have been compelled to refund the money so drawn to the receivers, though there was a run on the bank at the time. Yet it does not follow

from all this that substantial justice requires that he should receive at the hands of the court of equity, the special consideration of subrogation against the interests of other creditors. It is always to be borne in mind that Berger, as holder of the check, has no legal right whatever to the collaterals in question. For him to induce the court to take them from the receivers and bestow them upon him he must convince the court he ought to have a preference in equity and good conscience. It may be the court could not have warrant in the statute law or common law, or even under the principles of equity, to take away from a depositor the preference he obtains when payment is made to him under such circumstances; but it by no means results that the court will set aside legal rights to aid such a preference. When petitioner's deposit was paid to him, the bank was insolvent; that is, in the condition in which the principles of equity required a ratable distribution, among all its creditors with preference to none, of all its assets, including the money representing petitioner's deposit which was paid to him. The repayment by Berger of the money into the bank for the check was merely an immediate restoration of conditions which enabled the court to carry out the principle and policy of equity to require equal distribution. Subrogation is a pure, unmixed equity having its principles, not in any fixed law, but in the principles of natural justice. *Gadsden v. Brown*, Speer's Eq. 41; *Ex parte Reynolds*, 68 S. C. 438, 47 S. E. 728; *American Bonding Co. v. National Bank*, 97 Md. 398, 55 Atl. 395, 99 Am. St. Rep. 480. The proposition to allow to the defendant the advantage of subrogation therefore means that natural justice requires a court of equity to stretch out its arm to make good to one creditor of a bank a preference over all others, to which he has no legal right. The equity of equal distribution is the paramount equity, but, regarding the equities equal, the legal right represented by the receivers should prevail. *Galphin v. McKinney*, 1 McCord, Eq. 280. At the moment of insolvency of the bank substantial justice, which in this case is that equality which equity always seeks to enforce, required ratable distribution of the assets. The payment to Berger of his deposit operated as a preference, whether unlawful or not, and tended to defeat the equity, the substantial justice of ratable distribution.

Looking at the transaction as a whole, therefore, the petitioner's contention comes to this: A preference over other creditors of an insolvent bank was obtained, which a court of equity would have enjoined with the real facts before it. After that preference, and by virtue of it, and with the funds obtained through it, a check was issued on the Bank of Commerce which was in effect a second assignment of funds of the Columbian Bank held to its credit by the Bank of Commerce. But this check amounted to nothing in law,

because the prior claim of the Bank of Commerce had absorbed the fund on which it was drawn. Nevertheless the court of equity is asked to make good the preference it would have refused to allow by subrogating to the payment of the check the collateral held by the Bank of Commerce, now in the hands of the court, for the administration of the equity of ratable distribution. It seems to me the statement of the proposition carries its own refutation.

### THAMES et al. v. ROUSE et al.

(Supreme Court of South Carolina. Sept. 4, 1908. On Rehearing, Nov. 23, 1908.)

#### 1. APPEAL AND ERROR—FINDINGS OF FACT—REVIEW.

On appeal from the probate court to the circuit court on probate of a will, the cause must be regarded as a law case, the issue of will or no will, both as to real and personal property, being legal in its nature, and the circuit court's findings of fact are not reviewable by the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

#### 2. WILLS—CONTEST—BURDEN OF PROOF.

In a contest of a will on the ground of fraud and forgery, the burden of proving its due execution is upon proponents; and, upon their making out a prima facie case in that respect, the burden of proving the fraud and forgery is upon those charging it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 653-662.]

#### 3. WILLS—DECREE—CONSTRUCTION.

In a will contest case, where contestants urged fraud and forgery, the judge, in his decree in opening a discussion of the evidence, used the following language: "However this may be, the law properly places the burden of proving fraud upon those who charge it. Respondents here charge fraud and forgery against the will; they must satisfy the court of it by something more than mere romance and suspicion." At the conclusion of the discussion, he stated that "the case for contestants has entirely failed, and wholly lacks convincing strength, whereas the case for the will is sufficiently made out." *Held*, that the language meant that the conclusion of the court was that the proponents had proved the execution of the will, and that the evidence offered against it had not been sufficient to overcome that conclusion, and did not indicate a holding which deprived contestants of their right to rely upon a failure of proponents to establish a prima facie case, in the first instance, as to the due execution of the will.

The above proposition was adopted by a divided court.

Appeal from Common Pleas Circuit Court of Hampton County; R. W. Memminger, Judge.

Proceedings by James F. Thames and another for the probate of the will of William H. Mears. From a judgment of the circuit court sustaining a judgment of the probate court, admitting the will to probate, contestants M. D. Rouse and others appeal. Affirmed by a divided court.

Howell & Gruber, B. R. Hiers, Jas. E. Davis, and W. S. Tillinghast, for appellants. B. W. De Loach and Bates & Simms, for respondents.

GARY, A. J. This case was commenced in the court of probate, where it was adjudged that the will in dispute was genuine and

not a forgery. There was an appeal to the circuit court, which sustained the will and dismissed the appeal, whereupon the defendants appealed to this court.

While the exceptions are numerous, the appellants' attorneys have grouped them under three heads, which present all the questions involved. The first of these is: "That the circuit judge erred in refusing to pass upon the objections noted to portions of the testimony as taken before the probate court." The order out of which this question arose was as follows: "Attorneys for both parties in the above-entitled case agreeing, it is ordered that the said case be tried by this court, on the testimony taken by the probate judge herein." All the testimony introduced before the probate judge was not reduced to writing, and the said order could not have been carried into effect if his honor, the circuit judge, was compelled to pass upon the objections to the testimony taken by the probate judge. This fact, and others mentioned by the circuit judge, induced him to reach the conclusion that the right to insist upon said objections was waived, and this finding is fully sustained by the testimony.

The next assignment is that his honor, the circuit judge, erred "in holding and deciding that the alleged will was genuine, the overwhelming weight of the proof showing that it was a forgery, and, as such, null and void." The cases of *Myers v. O'Hanlon*, 12 Rich. Eq. Cas. 196, and *In re Solomon's Estate*, 74 S. C. 189, 54 S. E. 207, are conclusive of this question, as they show that the issue of will or no will, both as to real and personal property, is legal in its nature, and therefore not reviewable by this court.

The last question presented is: "That the circuit judge was in error in holding and deciding that the law placed the burden upon the appellants to prove that the alleged will was fraudulent and a forgery." After discussing, somewhat at length, the presumptions in favor of the validity of a will, the presiding judge concluded as follows: "However this may be, the law properly places the burden of proving fraud upon those who charge it. Respondents here charge fraud and forgery against the will; they must satisfy the court of it by something more than mere romance and suspicion." The principle that the burden is upon the party alleging the validity of the will is so well settled as to render the citation of authority unnecessary. On the other hand, it is also true, as a general rule, that he who alleges fraud takes upon himself the burden of proving it. The effect, however, of alleging the fraud did not shift the burden of proof from the petitioners as to the validity of the will, but to enable the defendants to introduce testimony as to those matters, concerning which they might otherwise have been precluded. In other words, the defendants were not required to establish the allegations of fraud until the petitioners made out a prima facie case, showing that there was a compliance with

the requirements of law in the execution of the will. The ruling of the circuit judge deprived the defendants of the right to rely upon the fact that the petitioners had not made out, in the first instance, a *prima facie* case. If this was a case in chancery, the court would have the power to determine the facts, and grant relief even when there was an erroneous ruling upon a question of law. But as the issue is of a legal nature, and there was an erroneous ruling upon a question involving a substantial right, the appeal must be sustained.

The foregoing are the views of two members of the court, but as the other two members are of the opinion that there was no reversible error, the judgment of the circuit court is affirmed.

JONES, J. (dissenting). I concur in the views of Mr. Justice GARY, except on the question whether Judge Memminger improperly placed the burden of proof in this case, as to which I dissent. There is no doubt of the general proposition that the burden of proof rests on the proponent of a will to show its due execution, but when the proponent has made out a *prima facie* case the burden shifts to the contestants until they have overthrown the *prima facie* case. G. Varn, one of the witnesses to the will, testified that the testator subscribed his name to the will in the presence of Franklin Johnson, B. T. Lawton, and witness, and that these witnesses, in the presence of testator and each other, subscribed their names thereto as witnesses, and that said Johnson and Lawton were dead, and their signatures were genuine. This was *prima facie* evidence that the testator did execute the will in the presence of the witnesses thereto. Section 2492, vol. 1, Civ. Code 1902. The contestants, however, charged fraud and forgery. While this charge did not shift the burden of proof to contestants, the *prima facie* evidence in support of the will did. This is all that can fairly be deduced from the language of the court, construed with the whole decree. Judge Memminger expressly declined to indulge any presumption in favor of the execution of the will, and discussed at some length the evidence by which it was sought to overthrow the *prima facie* case made by the proponents, and used this language: "Finally it appears to me that the case for contestants has entirely failed, and wholly lacks convincing strength, whereas the case for the will is sufficiently made out."

The judgment of the circuit court should be affirmed.

WOODS, J. (dissenting). The issue in this case was not whether the making of the will had been procured by fraud or undue influence, but whether the deceased, William H. Mears, had ever signed the paper offered as his will; the allegation of the contestants being that the signature was forged. The authorities as to the burden of proof in contests over wills are irreconcilable. The rule which seems most reasonable is that the bur-

den of proving the execution is, and always remains, on him who offers the paper as a will. But when the execution is admitted or proved by the preponderance of the evidence, and the issue is whether the will was obtained by fraud or undue influence, then, as in other cases, the burden of proving the fraud or undue influence by the preponderance of the evidence rests on him who charges it. The question in this case being whether the paper was ever executed at all, the burden remained throughout on the proponents. The following language, used in the decree in opening the discussion of the evidence, does not seem to accord with the distinction just stated: "However this may be, the law properly places the burden of proving fraud upon those who charge it. Respondents here charge fraud and forgery against the will; they must satisfy the court of it by something more than mere romance and suspicion." But at the conclusion of the discussion the circuit judge distinctly holds that: "The case for contestants has entirely failed, and wholly lacks convincing strength, whereas the case for the will is sufficiently made out." This language does not admit of any other construction than that the conclusion of the circuit judge from all the evidence was that the proponents had proved the execution of the will, and that the evidence offered against it had not been sufficient to alter or overcome this conclusion.

I think for this reason the judgment should be affirmed.

#### On Petition for Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has been either overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted, staying the remittitur, be revoked.

#### DU BOSE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Sept. 8, 1908.)

#### 1. CARRIERS—INJURY TO PASSENGER BOARDING TRAIN—DUTY TO FURNISH FACILITIES—"EQUAL FACILITIES."

Plaintiff, after buying a ticket for a train, the usual place of boarding which was on the depot side, where the ground between the tracks was macadamized and smooth, and where the conductor and assistants stood during the letting off and taking on of passengers, went to the further side of and beyond the tracks, and then returning to and attempting to board the train from such further side, where the ground was lower and less smooth, was thrown and injured, the train having started up before he attempted to board it, or while he was in the act of doing so. His requested instruction that, where it is customary for passengers to alight at a station on both sides of the train, it is the carrier's duty to provide equal facilities for passengers to alight or take passage on both sides, was given with the qualification: "That would be so if the railroad company expressly or impliedly invited them to alight on both sides, but not otherwise." Held that, construing the term "equal facilities" to include the keeping of equal watch or lookout on both sides to prevent injury to passengers, there was no error, though



the carrier might know, without entering protest, that passengers for reasons of their own frequently got on or off the wrong side at the station in question.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2422.]

## 2. SAME—TRESPASSERS.

Considered in reference to the theory, finding support in the evidence, that plaintiff, after buying a ticket for defendant's train, left the station premises while the train was approaching, and thereafter, running back, attempted to board the moving train at a place where he could not be seen by those in charge of the train, and where passengers were not invited or expected to board the train, the instruction that, if a passenger goes where he has no right to be, then he becomes a trespasser, and the carrier owes him no duty except not to willfully or wantonly injure him, is correct.

## 3. SAME—PASSENGERS.

It is not the law, without qualification, that, when one becomes a passenger by the purchase of a ticket, he remains a passenger till he reaches his destination; but, having left the station premises after his purchase, he ceases to have the full rights of a passenger during his absence and until he has again presented himself for transportation at the proper time and place, according to the reasonable rules of the carrier.

## 4. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Though it cannot be well seen under what reasonable view of the testimony plaintiff could be a licensee when boarding defendant's train, yet, the court having correctly instructed as to the duty of defendant if the jury should find plaintiff was a passenger, plaintiff was not prejudiced by an instruction submitting to the jury the determination of whether plaintiff was a mere licensee, and correctly stating the law as applied to a licensee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 703-718.]

Appeal from Common Pleas Circuit Court of Sumter County.

Action by R. F. Du Bose against the Atlantic Coast Line Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Davis D. Molise and L. D. Jennings, for appellant. P. A. Willcox and Mark Reynolds, for respondent.

JONES, J. Judgment on verdict was rendered for defendant in this action for personal injuries, and plaintiff appeals on exceptions to instructions given the jury.

On January 29, 1905, plaintiff purchased from defendant's agent at Sumter, S. C., a ticket as passenger from Sumter to Mayesville, S. C., on defendant's train No. 32 from Augusta, due at Sumter about 6:30, after nightfall. After purchasing the ticket and checking his bicycle, plaintiff went from the depot across the intervening tracks to the house of Wm. H. Hodges for a bundle. This house was off the station premises, and about 30 yards from the track to be occupied by No. 32, which track was the third and last parallel track from the depot. As plaintiff was going across the tracks to Hodges', he saw No. 32 come in and stop at the water tank, which was about 100 yards from the station. After taking water 32 came to the

station. The usual place for boarding the train was on the depot side, where the ground between the tracks was macadamized and smooth, and where the conductor and assistants stood during the letting off and taking on of passengers. There was testimony, however, that passengers frequently got on and off on the other side. The ground on that side was lower and less smooth, except at the place prepared for the handling of the baggage, where the baggage car stopped. The plaintiff offered testimony tending to show that, when he secured his bundle at Hodges', he walked back to his train, which was then standing still at the station; that, with his bundle under his right arm, he caught the railing of the front end of the second-class coach with his left hand, and was on the bottom step of the platform, when the train, without stopping its usual time and without giving any signal, suddenly jerked forward, which overbalanced him, and he fell with his hand on the rail, which was crushed by the wheel, necessitating amputation. The negligence alleged in the complaint as the cause of his injury was the sudden jerking forward of the train before leaving time without signal or warning. The answer, besides a general denial, alleged that the plaintiff brought about his injury solely by his own negligence, and also pleaded contributory negligence. Defendant offered testimony tending to show that the train, after stopping three minutes at the tank, stopped seven minutes at the station; that the usual and prepared place for boarding said train was on the depot side, which was provided with lights; that the train was so constructed that it would be practically impossible to move it off with a jerk sufficient to throw a person; that as matter of fact it moved off smoothly without a jerk; that the conductor made the usual call of "All aboard!" and the bell was sounded before starting; that plaintiff's presence on the opposite side of the train was unknown to defendant's agents. One witness testified that he saw plaintiff running towards the train as it pulled out. The verdict of the jury shows that the issues of fact were found in favor of the defendant; but the foregoing reference to the testimony will aid in the consideration of the exceptions to the charge.

The plaintiff requested the court to charge as follows: "Where it is customary for passengers to alight from passenger trains at any station of the railroad company on both sides, it is the duty of the railroad company to provide equal facilities for passengers to alight or to take passage on both sides." In response to this request the court gave the charge with this qualification: "That would be so if the railroad company expressly or impliedly invited them to alight on both sides; but not otherwise." It is contended that the charge should have been

given without modification, or that the court should have charged that if passengers had been accustomed, with the knowledge of the railroad company, to get on and off on both sides of its train at this particular passenger station, and the company acquiesced in it, then it became the duty of the company to either provide equal facilities on both sides for passengers to get off and on, and equal protection, or the company should have notified the passengers not to get off and on on both sides, but should have informed and directed them at which side to get off and on, and should have further charged that, if it was the custom of passengers to get on and alight on both sides with knowledge of the company, then the company was bound to take equal precautions for the safety of passengers getting off and on their trains on both sides before starting their trains. In the first place, it may be observed that the injury is not alleged to have resulted from any failure to provide proper facilities for passengers on both sides of the train, but that the delict consisted in not stopping the train a reasonable length of time, and in suddenly starting it with a jerk and without a signal. If the term "equal facilities" must be construed as including the keeping of equal watch or lookout on both sides, to prevent injury to passengers boarding or disembarking, it is clear that the instructions desired would place a burden too onerous on the carrier, unless the circumstances show an invitation to passengers to use both sides. It is perfectly reasonable for a railroad to adopt a particular side for the use of passengers, and make its arrangements for the protection of passengers with respect to that side. It is impossible for a conductor and his assistants to keep equal watch on both sides of the train at the same time, and it would be unreasonably onerous to require such a duplication of servants as would equally protect both sides. When a railroad has selected its usual place for boarding and alighting from its trains, and reasonable facilities, assistance, and lookout are there maintained for the safety of passengers, and circumstances show that such is the regulation of the company, it is the duty of passengers to conform. Many belated, impatient, careless, or reckless people may choose to take the risk of not conforming, or passengers for reasons of their own may prefer to get on or off on the wrong side. The company may know that such is frequently done, and enter no protest against it, and yet, if it does not hold out any invitation to so use its property, but, on the contrary, invites the use of a particular place under reasonable precautions for safety, it cannot be held to be duty bound to provide equal safeguards at all other places which the passengers wrongfully choose to use. This must in fairness be the

rule, and it grows out of the duty of the carrier to exercise the highest degree of care practicable in making provision for the safety of passengers in getting on or off its trains, the impracticability of providing equally effective safeguards at every possible point of entry or exit, and the correlative duty of passengers to comply with the reasonable rules and regulations adopted to promote safety.

The remaining exceptions are to the following portions of the charge: "The law requires common carriers of passengers to exercise the highest degree of care for the safety of their passengers. When a person goes to a railway station a reasonable time before the departure of a train, bona fide intending to become a passenger, he is in law a passenger, and entitled to the rights of a passenger, while there intending to become a passenger and while he is in the place provided by the company for waiting passengers, or on the place provided by the company for passengers to approach and get on its trains, or in the place where the company expressly or impliedly invites passengers to get on, if he is then approaching the train to get aboard, or if he is actually getting aboard the train, in a proper way and at the proper time. If he goes where he has no right to be, then he becomes a trespasser, and the company owes him no duty, except not to willfully or wantonly injure him. The company would be liable, however, if it willfully or wantonly injured even a trespasser. If a person goes where he is not invited to get aboard the train, but where passengers do get on and off with the knowledge, acquiescence, and permission of the company, then he would be a licensee, and would not be entitled to the degree of care required by the company for the safety of passengers, which, as I have said, is the highest degree of care, but he would be entitled, under those circumstances, to the exercise of ordinary care for his safety; that is, such care as an ordinary prudent person would exercise under the circumstances of the situation. Now, it is for you to say whether at the time of his alleged injury the plaintiff was a passenger, entitled to the highest degree of care, or a licensee, and entitled to the exercise of ordinary care, or a trespasser, to whom the defendant owed no duty, except not to willfully or wantonly injure him." The second, third, and fourth exceptions charge error in the sentence: "If a passenger goes where he has no right to be, then he becomes a trespasser, and the company owes him no duty except not to willfully or wantonly injure him." The specifications are: (1) When a person once becomes a passenger, he remains a passenger until he reaches his destination, and, even though he goes where he has no right to be, the carrier throughout is bound to exercise the highest degree of care to avoid injuring him. (2) That it is the duty

of a carrier to prevent a passenger from going where he had no right to go, and to protect the passenger and warn him of danger. It will be observed that the charge imposed upon the carrier to exercise the highest degree of care for the safety of a passenger "while he is in the place provided by the company for passengers to approach and get on its train, or in the place where the company expressly or impliedly invites passengers to get on, if he is then approaching the train to get aboard, or if he is actually getting aboard the train in a proper way and at the proper time." When the court was instructing with reference to the degree of care a passenger is entitled to when he is where he has no right to be, he was no doubt endeavoring to state the law which should govern in case the jury should adopt a theory finding support in the evidence, viz., that plaintiff, after purchasing his ticket, left the station premises while the train was approaching, and thereafter, running back, attempted to board the moving train at a place where he could not be seen by those in charge of the train, and where passengers were not invited or expected to board the train. Considered with reference to this theory of the case, the instruction was correct. We cannot without qualification indorse appellant's view that once a passenger always a passenger until destination is reached. In *Taylor v. A. C. L.*, 78 S. C. 55, 59 S. E. 641, the general rule as to the relation of passengers and carrier is thus stated: "When one is on the carrier's station premises with a bona fide purpose of becoming a passenger, within a reasonable time before the departure of the train to be boarded, he is entitled to protection as a passenger. *Johns v. Railway Co.*, 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709; *Holcombe v. Railway Co.*, 66 S. C. 10, 44 S. E. 68. As a corollary of this rule, when a passenger has reached his destination and alighted from the train, he is still entitled to protection as a passenger until he has had a reasonable time to leave the station premises. 4 *Elliott on Railroads*, § 1592; *Brunswick, etc., Ry. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Glenn v. Lake Erie, etc., Ry.*, 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255."

In *Martin v. Railway Co.*, 51 S. C. 158, 28 S. E. 303, the court held that the contractual relation of passengers and carrier is created when a ticket is purchased, and when a person with a ticket and with the intention to ride as a passenger goes upon the train upon which his ticket entitles him to ride as passenger, even if he boards the train at an unusual time and at an unusual place, he is entitled to the rights of a passenger, at least to the extent of not being mistreated by the employes of the company. In the last cited case the court further said: "The testimony tended to establish the following: (1) That plaintiff had a ticket entitling him to ride

on the train mentioned in the complaint. (2) That it was his intention to ride on the passenger car of said train when he boarded it. (3) That the car upon the platform of which he entered was divided into two apartments, one of which was used as a place for baggage and the other for second-class passengers. (4) That the train was moving slowly when plaintiff got upon the platform, but he was not injured while boarding the train. (5) That passengers had previously ridden on said platform, and whenever seen by the baggage master were always brought inside. Whether the plaintiff was a passenger or a trespasser depended upon the inference to be drawn from the testimony under proper instructions from the court, and was peculiarly a matter for the consideration of the jury." There was also testimony in *Martin's Case* that, when he got on the platform, the baggage master ordered him off, and moved towards him threateningly, which caused him to jump off the moving train, to his injury. In such a situation he should not be so mistreated whether passenger or trespasser. When it is stated that one becomes a passenger when he purchases a ticket, that, of course, means so long as he remains or goes where he is expressly or impliedly invited by the carrier in effectuating the contract of transportation. One may be a passenger while waiting with a ticket in the station building, but he would not be a passenger while climbing onto the roof of the building for the purpose of waiting there. One, though having a passenger's ticket, ceases to have the full rights of a passenger during the time he is off the station premises. To restore his full rights as such, he must again present himself for transportation at the proper time and place, according to the reasonable rules of the carrier. *Merrill v. Eastern Ry. Co.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Webster v. Fitchburg R. Co.*, 161 Mass. 263, 37 N. E. 165; *Jones v. Boston & M. R.*, 163 Mass. 245, 39 N. E. 1019. We are not considering a case involving inquiry as to a carrier's duty on discovering one attempting to board its train as a passenger in a position of peril.

The foregoing views involve a consideration of the fifth exception, except in so far as it submits to the jury to determine whether plaintiff was a mere licensee, and entitled only to such care as an ordinary prudent person would exercise under the circumstances of the situation. The rule of law as applied to a licensee was correctly stated. While we do not well see under what reasonable view of the testimony plaintiff could be a licensee at the time of boarding the train, it was certainly not prejudicial to him to submit this view to the jury, after having correctly instructed them as to the duty of the defendant in case they should find that plaintiff was a passenger. Treating the case as a whole, it was fairly submitted to the jury under a

clear and able charge covering every possible phase of the case.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

### JETER et al. v. KNIGHT.

(Supreme Court of South Carolina. Sept. 8, 1908.)

#### 1. JUDGMENT—OPENING—STATUTORY RIGHT TO RELIEF.

Cr. Code 1902, § 195, providing that a court may in its discretion, within one year after notice, relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, should have a liberal construction in furtherance of justice.

#### 2. PARTITION—PARTIES—GRANTEE OF EASEMENT BY TENANT IN COMMON.

Two of the three tenants in common of a tract of land granted an easement to petitioner to flood a portion of the same by a dam. Subsequently, and without notice to petitioner, and, as charged, with a design to render its grant ineffective, a decree in partition was procured by the co-tenants, by which the greater portion of the flooded land was apportioned to the one who did not join in the grant. *Held*, that it was a necessary party to such suit, and was entitled, on its petition of intervention, to have the decree opened, and the partition so made as to allot the part of the tract affected by the easement to the grantors thereof, so far as could be done without prejudice to their co-tenant.

Appeal from Common Pleas Circuit Court of Union County; R. C. Watts, Judge.

Action for partition by Sue R. Jeter and Mary A. Jeter against Sara Ida Knight. From an order refusing to permit the Union Manufacturing & Power Company to intervene, such company appeals. Reversed.

William Elliott, Jr., and J. Ashby Sawyer, for appellant. J. Gordon Hughes and Wallace & Barron, for respondents.

JONES, J. This is an appeal from an order of Judge Watts refusing to allow the Union Mfg. & Power Co. to intervene in the suit of Sue R. Jeter and Mary A. Jeter against Sara Ida Knight. It appears that Sue R. Jeter, Mary A. Jeter, and Sara Ida Knight were owners as tenants in common of a tract of land on Broad river in Union county. On January 15, 1903, Sue R. Jeter and Mary A. Jeter executed to the Union Mfg. & Power Co. a release or grant of an easement to overflow a portion of said tract by the erection of a dam across Broad river. After the dam was erected, and on March 1, 1906, Sara Ida Knight, who had not granted easement to overflow, brought an action against the Union Mfg. & Power Co. for damages to her undivided one-fourth interest by reason of said overflowing. Among other defenses, the Union Mfg. & Power Co. alleged its equity to have the tract so partitioned, among the said tenants in common, as to have allotted to granting tenants that portion of the tract affected by the alleged easement in so far as it may be practicable and equitable to do so, without injury to the nongranting tenant.

While this action was so pending, on August 26, 1907, Sue R. Jeter and Mary A. Jeter commenced an action against Sara Ida Knight for partition of said land. The petition for intervention alleges that service of summons in said action was accepted by Wallace & Barron, attorneys for Miss Knight, dated August 26, 1907; that on the back of the summons there is an indorsement, dated September 5, 1907, consenting to the docketing of the case, and the said case was docketed September 6, 1907; that the writ in partition, being dated September 3, 1907, was filed September 6, 1907; that commissioners were appointed and sworn September 3d, and made return, which was filed on September 6, 1907; and that decree and partition was made by Judge Watts at chambers on September 6, 1907. In this petition tract No. 1, alleged by petitioner to be most affected by the backed waters, was allotted to Sara Ida Knight. The petition alleged that the partition was greatly injurious and prejudicial to the rights of petitioner, and was so intended. The facts stated in the petition were not denied, and the petition was dismissed in a formal order, without stating the reasons therefor. After careful consideration this court is of the opinion that it was error not to allow petitioner to intervene with a view to have partition made, so as to secure petitioner's rights in the premises, provided the same may be done without prejudice to rights of the nongranting tenant, Sara Ida Knight. Section 195, Cr. Code 1902, provides that the court may in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. This section should have a liberal construction in furtherance of justice. According to the allegations of the petition, the proceedings were had without any notice to petitioner, and no opportunity whatever was given to protect petitioner's rights in the premises. Petitioner was not only taken by surprise, but, according to the untraversed allegations, the proceedings were conducted with a design to render the easements granted by some of the co-tenants ineffective. A court of equity should be slow to admit its impotency to correct such glaring injustice.

In Railroad Co. v. Leech, 35 S. O. 146, 14 S. E. 730, the court held that the grantee of a right of way from one co-tenant is not such a party to partition proceedings as would authorize the grantee to participate in the appointment of the commissioners, and there was some expression to the effect that such a grantee was not a necessary or proper party to the partition proceedings, but, notwithstanding these expressions, as matter of fact partition was ordered in said action at the instance of the railroad company, and its rights were carefully guarded by explicit directions in the writ enjoining the commis-

sioners, who were sworn to carry out such directions, if practicable, to partition the land so that the railroad bed and right of way shall lie upon the part (if any) assigned to Mrs. Leech, the granting tenant. The case of *Railway Co. v. Leech* was three times in this court (33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667; 35 S. C. 146, 14 S. E. 730; 39 S. C. 446, 17 S. E. 994), and the case throughout was controlled by the principle that, where a tenant in common had placed a burden on the common property, justice and equity demanded that partition should be, if practicable, so made as to allot to such tenant in common the portion upon which the burden has been placed, and on the last-mentioned appeal that principle was so far enforced as to hold that the heirs at law of Mrs. Leech taking her interest, which exceeded the damage done by the construction of the railroad, were estopped to claim compensation, although actual partition was rendered impracticable because the children of Mrs. Leech became owners of the whole upon her death. It was considered by the court that under such circumstances, the children took Mrs. Leech's share burdened with the easement.

It is hard to reconcile such a strenuous enforcement of the rights of the easement holder, as against the interest of the burdening co-tenant, with the view that the easement holder has no such interest in the partition as would make him a proper or necessary party to such partition. We think the better view is that the petitioner, in the circumstances stated in this case, is a necessary party to the partition proceedings, as it is delusive to recognize a right while denying opportunity and remedy for its protection. In *Freeman on Cotenancy and Partition* 465, the learned author says: "In those states where such a conveyance is regarded as void against the co-tenants of the grantor, the grantee is not usually considered as a necessary party defendant to a suit for partition; and such suit may be prosecuted to a final decree without taking any notice of him whatsoever. But there can be no doubt that the grantee of a specified parcel will become seized thereof in severalty if, upon partition, it should be assigned to him or his grantor, and that if not so assigned he will lose his entire interest. He is more deeply interested in partition than any of the tenants in common of the entire tract. It little matters to them where their respective purporties may be located. But with the grantee of a special location it is all-important that such a division may be made as will allow his deed to become operative. He is entitled to the consideration of the court, and will, whenever his claims are known to the court, be protected as far as possible, without doing injustice to the co-tenants of the whole tract. He has therefore been regarded as a proper party defendant even in states where his conveyance has been spoken of as void

against the co-tenant of his grantor. In such states the making of such a grantee a party defendant may, perhaps, be required by the courts rather by reason of their desire to do complete justice than as a matter of absolute right; but in states where his conveyance is regarded as valid, and as investing him with all the rights and interests which his grantor had in the tract conveyed, his right to be a party defendant is as absolute as that of a co-tenant of the whole tract. *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 167; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. 175, 22 L. R. A. 641, 39 Am. St. Rep. 546. In the case of incumbrances, such as judgments or mortgages against the interest of a co-tenant, it may not be necessary as a rule, to make such lienholders parties, because after partition in kind the lien will merely be transferred to the tenant's share in severalty, or in case of sale the tenant's share in the fund, and thus complete justice be effected, but in *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809, 28 Am. St. Rep. 838, where a tenant in common gave a mortgage on a specific part of the common property, the mortgagee was held to have an equity to require partition, if practicable, without prejudice to other co-tenants, so as to allot the specific portion covered by the mortgage as the share of the mortgagor and thereby save the lien of the mortgage. In this case the right of the easement holder cannot be protected at all, unless it is done in the partition proceedings, and under the allegations this right was wantonly disregarded in the partition proceedings.

The judgment of the circuit court is reversed, and the case remanded, with instructions to open the judgment, allow the intervention of petitioner, and proceed to make partition under specific directions to commissioners to make partition, so far as practicable, without injury to the interest of the nongranting co-tenant, Sara Ida Knight, so as to allot to the granting tenants, Sue R. Jeter and Mary A. Jeter, the portion of the tract burdened by them with the alleged easement.

#### McCANDLESS v. MOBLEY et al.

(Supreme Court of South Carolina. Sept. 11, 1908.)

#### 1. APPEAL AND ERROR — REVIEW — HARMLESS ERROR—REFUSING TO STRIKE OUT PLEADINGS.

An order refusing a motion to strike out portions of an answer as frivolous, irrelevant, and redundant is not reversible error, though the matter might well have been stricken out, since such an order is not appealable.

#### 2. WITNESSES — COMPETENCY — TESTIMONY CONCERNING TRANSACTION WITH DECEDENT.

In an action by an executor on two notes given his decedent, where the issue made by the pleadings was whether defendant received full new consideration when he gave the second note, or whether he gave it in payment of the first note and \$25 in cash, defendant testified in answer to a question as to the form in which he received money from decedent when the second

note was given: "Well, it was greenbacks. That is what I called it, but I think it was two \$10 bills"—*held*, that the testimony was as to a transaction between defendant and decedent, and was incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 681.]

Appeal from Common Pleas Circuit Court of Chester County; Chas. G. Dantzler, Judge.

Action by John McCandless, executor of Hamilton McCandless, against D. M. Mobley and another on two notes. From a judgment for plaintiff on one note only, he appeals. Reversed and remanded for a new trial.

Henry & McLure, for appellant. J. H. Marlon, for respondents.

WOODS, J. This action was brought on two promissory notes given by the defendants to Hamilton McCandless, plaintiff's testator, one dated January 22, 1900, due December 1, 1900, for \$250 and interest from date at the rate of 7 per cent., payable annually until paid in full, and the other dated February 18, 1901, due two years after date for \$176, with like provision for interest. On the first note the complaint alleged the only payment was \$100 on October 26, 1900. There was no dispute as to the payments on the second note.

The defendants alleged in their answer that Hamilton McCandless, the payee of the notes, had remitted the interest on the first note, and that the second note was a renewal of the first, together with an additional loan of \$25, and \$1 paid to Mr. McLure for writing the note; the amount being made up in this way:

First note.....	\$250
Credit .....	100
	150
Additional loan.....	25
Paid Atty. for drawing note.....	1
	—
	\$176

A motion was made to strike out certain portions of the answer as frivolous, irrelevant, and redundant. We think the words "solemnly swears" might well have been stricken out as redundant, for pleading should present the issues in a plain way, and every verified complaint is presumed to be solemnly sworn to. The other allegations referred to in the motion also might have been stricken out with propriety as incumbering the answer with evidentiary matter. But there was no reversible error in refusing the motion, for an order refusing such a motion is not appealable. *Herbert v. A. C. L. R. R. Co.*, 74 S. C. 13, 53 S. E. 1001. The plaintiff asked the court to direct a verdict for the full amount claimed as due on the two notes, on the ground that there was no evidence to establish the defense that the whole debt was represented by the second note. This motion was refused. The jury found a verdict for \$136.69, the amount

claimed as due on the second note only; thus sustaining the contention of defendants. A motion for a new trial was refused.

The next exception relates to the admission of testimony. D. M. Mobley was allowed to testify as follows concerning his transaction with Hamilton McCandless, the deceased payee of the notes, when the second note was given: "Q. I say, Mr. Mobley, you admit getting some money on that occasion. How was that paid you? In what form? (Objection.) Court: I do not know about that. Q. The form in which you received it? A. I received it in Mr. McLure's office. Q. In what form did you receive it? A. Paid out of hands—no check, no check at all. Q. What kind of money was it? A. Well, it was greenbacks. That is what I called it; but I think it was two \$10 bills. Q. Don't say—I don't ask you about the denominations." The vital issue made by the pleadings on which the case hinged was whether Mobley received full new consideration of \$176 when he gave the second note, or gave it in payment of the first note and \$25 cash. The question asked related by its terms to the \$25 alleged by Mobley to have been received as the only fresh consideration when the second note was given. His answer to the question, therefore, was testimony to the effect that he received on this occasion from Hamilton McCandless \$25 in currency, and no more. This testimony as to a transaction between the defendant and the deceased testator was clearly incompetent in this action brought by his executor; and was of the utmost importance to the plaintiff to exclude it, because it tended to completely destroy one of the notes involved in the suit. For this material error there must be a new trial.

With this incompetent statement of Mobley admitted, there was certainly some testimony before the court tending to sustain the defense. As the evidence on the second trial may be different, a discussion of the question whether there was any other evidence to sustain the verdict could be of no value. So, also, the bank account of the payee of the note may have great significance, or no significance at all, in the light of the testimony adduced at the next trial. Hence a discussion of its relevancy would be useless and possibly misleading to the court on the second trial. The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

JONES et al. v. PARKER et al.

(Supreme Court of South Carolina. Sept. 1, 1908.)

# 1. APPEAL AND ERROR — RESERVATION OF GROUNDS OF REVIEW—FAILURE TO OBJECT.

If the presiding judge misstates the issues raised by the pleadings, a failure of counsel to call his attention to the fact, that there may be

an opportunity for correction, is a waiver of the right to raise the question on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1309-1314.]

## 2. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—LIABILITY OF AGENT.

If a distress warrant upon its face purported to be the act of P., as landlord, and the tenants upon whose property distress was made, as well as a magistrate making the levy, had no notice that P. was acting merely as agent, P. was estopped to claim that he was a mere agent, in so far as the rights of the tenants are concerned.

## 3. TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for assault and battery, committed while levying under a distress warrant, a charge that, if P., a defendant, had issued his warrant to L., a magistrate, and authorized him to take with him such persons as might be needed to enforce the distress, that was not authority to appoint somebody to go, without L.'s presence, as a substitute for him, was not erroneous, in that it should have charged that L. had the right to appoint others who might perform the services without his presence, where L. was present throughout the difficulty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

## 4. SAME.

In an action for assault and battery, committed while levying under a distress warrant, a charge that, if persons should go to a house to levy on goods, and should state that the goods were levied on, but would be left there until they were ready to come and get them, and should leave without the goods, there would be no levy was not objectionable because, under the circumstances stated, the goods would be constructively levied upon and liable for the lien; since, as the action was not for damages arising out of the levy, it was immaterial whether the goods were constructively levied upon and liable for the lien.

## 5. LANDLORD AND TENANT—EVICTION—DISTRESS WARRANT.

One having a distress warrant properly issued for past due rent must get peaceable possession of the property, and cannot break the house in order to make entry for the purpose of levying.

## 6. ASSAULT AND BATTERY — SELF-DEFENSE—GROUNDS.

In an action for assault and battery, committed while levying under a distress warrant, a charge that one has no right, because he has a distress warrant against a person and his goods, to come to his house and break locks to make distress, and if the owner appears while he is there, the owner can order him out and use force necessary to put him out, and he cannot act in self-defense, but must retire, even though excessive force be used against him, because only he can act in self-defense who has been without fault in bringing about the difficulty, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 11.]

## 7. SAME—INSTRUCTIONS.

In an action for assault and battery upon a wife, committed while levying under a distress warrant, a charge that, if plaintiff is entitled to recover, if defendants were wrongfully there, or if they assaulted her without being attacked, the mere fact that she came into her own house with an axe in her hand would not justify anybody in assaulting her, unless she came in such a manner as to indicate an intention to use the axe on the person; that in that event, if they were there and rightfully in possession of the goods under a distress warrant, they would have the right to defend themselves, but, if they undertook to take wrongful possession of her husband's goods, she had a right to defend them;

that a wife has the right to defend her husband, or his goods in his home, against anybody who is undertaking to take possession of them, and if that is what she was doing, defendants had no right to assault her, if they were in the wrong in getting unlawful possession of the goods—was not erroneous as failing to limit the wife's right to defend the goods against any one undertaking to take possession of them to a taking unauthorized by law.

## 8. TRIAL — INSTRUCTIONS — CHARGE ON THE FACTS.

The instruction was not a charge on the facts.

## 9. PRINCIPAL AND AGENT — MISCONDUCT OF AGENT—LIABILITY OF PRINCIPAL.

Where a person sues out a distress warrant, and sends others to levy under it, he is liable for their misconduct while acting within the scope of their agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 599-613.]

## 10. ASSAULT AND BATTERY — INSTRUCTIONS—MEASURE OF DAMAGE.

In an action for assault and battery, committed while levying under a distress warrant for unpaid rent, a charge that, if at the time of levy the rent was paid, the levy was unlawful, because it was defendant's duty to stop the levy, and, if he did not so do, he was liable for any actual damage, but if his failure was merely inadvertence, he was only liable for actual damages, provided his agent making the levy was not guilty of any conscious wrongdoing, and did not act in a high-handed manner in making the distress, was not erroneous as stating an improper measure of damages, when taken in connection with another portion of the charge, where the court stated that the only question for consideration was an alleged assault on the plaintiff's wife, and that the action was not brought to recover damages for the wrongful entry of the husband's home, he being made a party plaintiff only because he was his coplaintiff's husband.

## 11. TRIAL—REQUESTS FOR CHARGES—WAIVER OF OBJECTION.

Where, after the court had given his charge, he asked counsel if his requests had been covered thereby, and, upon counsel's stating that one or two of them had not been charged, the court offered to read the requests, but counsel stated that he would not insist upon the court's reading them, *held* that he thereby waived the right to raise the question that the requests were not charged.

## 12. APPEAL AND ERROR—HARMLESS ERROR—VERDICT AGAINST ONE OF SEVERAL DEFENDANTS.

If a defendant, in an action against several for an assault and battery, is liable, he is not prejudiced because the verdict is against him only, and in favor of his codefendants, where no issues were raised by the pleadings as to the rights of the defendants among themselves.

Appeal from Common Pleas Circuit Court of Richland County.

Action by Eliza Jones and husband against E. W. Parker and others. Judgment for the named plaintiff against the named defendant, who appeals. Affirmed.

Robt. Moorman and Frank G. Tompkins, for appellant. Washington Clark and Jas. H. Fowles, for respondent.

GARY, A. J. The complaint alleges that on the 9th of January, 1906, the defendants violently assaulted the plaintiff, Eliza Jones, thereby producing a miscarriage, to her damage \$5,000. The defendants interposed a

general denial, and the defendant Parker also set up as a defense: "That at the time mentioned in the complaint, he was engaged in the business of real estate agent in the city of Columbia, and, as such, represented Mrs. Mamie McCreary Melton in renting out, in his own name as agent, about 25 cottages, in what is known as 'Spring Park,' including the cottage known as 'No. 26 Spring Park.' That prior to the time mentioned in the complaint this defendant had rented the said No. 26 Spring Park to one Eli Jones, and on or about January 6, 1906, there being then some \$8 of rent in arrear and due to this defendant, he issued his distress warrant in due form of law, addressed to E. A. Lorick, a magistrate of Richland county, authorizing and requiring him to call to his aid such persons as might be necessary, and to enter upon the said premises, and there make distress of the goods and chattels of the said Eli Jones, for the said sum of \$8 of rent in arrear, and due as aforesaid. Upon information and belief that, under said warrant, and about the time stated in the complaint, the said E. A. Lorick, calling to his aid his constable, J. A. H. Geiger, entered upon said premises, and proceeded to make said distress in a legal and proper manner, but that while so doing the plaintiff Eliza Jones, interfering with them in the discharge of their said duty, assaulted them. \* \* \*" The jury rendered a verdict in favor of the plaintiff for \$250, against the defendant E. W. Parker, who appealed upon exceptions, the first of which is as follows: "(1) That his honor erred in charging the jury as follows: 'So far as they [Lorick and Geiger] are concerned, they do not plead any justification for their conduct'—(a) in that the same is a charge on the facts, in violation of the Constitution, as it assumes that the said defendants, sued as agents of appellant, had been guilty of conduct for which there should have been some justification; (b) in that their general denial of the complaint, did plead justifications for their acts, as it denied that their acts constituted an assault, or that they were done for any purpose other than to protect themselves from the assault of the plaintiff." There are a number of recent decisions to the effect that, if the presiding judge makes a mistake in stating the issues raised by the pleadings, it is the duty of counsel to call his attention to such fact, in order that he may have an opportunity of correcting the same; otherwise there is a waiver of the right to raise this question on appeal.

The second exception is as follows: "That his honor erred in charging the jury as follows: 'And if he [Parker] undertook to issue a warrant [a distress warrant] in his own name and to Mr. Lorick, then Mr. Lorick is his agent, and he is responsible for Mr. Lorick's conduct, for everything he does within the scope of that agency, and if Mr. Lorick acts in a high-handed, unlawful way in un-

dertaking to carry out the authority conferred upon him by Mr. Parker, Mr. Parker would be responsible for Lorick's conduct, so long as Lorick was acting within the general scope of his agency'—(a) in that it was shown by the evidence that Parker was the agent for Mrs. Melton, and his honor should have charged that Parker was not liable, if the jury found that he was the agent of Mrs. Melton, even though the distress warrant was issued in his own name; (b) in that it charges, as an instruction to the jury, that Lorick was not responsible jointly with Parker, even though the unlawful act was actually performed by Lorick." The facts in the case of *Steedman v. Givens*, 2 McM. 202, were similar to those in the case under consideration; and in that case the court uses the following: "The defendant, Givens, avows the taking, thus importing a justification in his own right, and shows the rent due to Mrs. Wigfall, and Nathans acknowledges, as bailiff of Givens, whom the avowry shows not to have been the landlord. Any agent to make a distress is termed a 'bailiff.' 'If a man takes cattle for services due to the lord, if the lord afterwards agree to the taking, he shall be adjudged his bailiff, though he was not his bailiff in any place before.' 1 Bac. Ab. Tit. Bailiff, 6. Subsequent assent amounts to authority. 1 Saun. 847, n. 4. If Givens had any actual share in making the distress, and they had authority from Mrs. Wigfall, or she was willing to adopt their act, both should have justified as bailiffs. Or perhaps, if Givens was not actually present at the taking of the distress, but had authority from Mrs. Wigfall to employ Nathans as bailiff, he might have pleaded non cepit. In that case the authority of Nathans would have been direct from Mrs. Wigfall, and he should have justified her as her bailiff; while Givens, being merely regarded as the medium through which the authority was conveyed, could not have been considered as a party to the taking." The distress warrant upon its face purported to be the act of E. W. Parker, as landlord, and there was no testimony that either of the plaintiffs had notice that it was the distress warrant of Mrs. Melton, acting through her agent E. W. Parker; nor does it appear that the defendant E. A. Lorick had notice of such fact. Under these circumstances the defendant Parker is estopped from claiming that he was a mere agent, in so far as the rights of the plaintiffs are involved. *Long v. McKissick*, 50 S. O. 218, 27 S. E. 636. Furthermore, the question whether he was the agent of Mrs. Melton in issuing the warrant was submitted to the jury by his honor, the presiding judge.

The third exception is as follows: "That his honor erred in charging the jury as follows: 'If you find that he [Parker] issued his warrant to Lorick, and authorized him to take with him, to call to his assistance, such persons as might be needed to enforce



the distress, that was not authority to appoint somebody to go without Lorick's presence; that was not authority to substitute somebody else for him—in that he should have charged that Lorick had the right to appoint others, and they might go and perform the service without his presence." The complaint is not for damages to the property of the plaintiffs, but for an assault and battery upon Eliza Jones, during which time Lorick was present throughout the difficulty. He, therefore, did not appoint somebody to go without his presence, nor did he "substitute somebody else for himself" on that occasion.

The fourth exception is as follows: "That his honor erred in charging the jury as follows: 'In other words, if you were to come to my house and levy on my goods, either under distress warrant, as special agent of the landlord, or if you come as sheriff of the county to levy an execution, you come into my house and say: "I levy on these things, Prince. These are levied on now; I give you notice they are levied on. I am going to leave them until I get ready to come back and get them," and go off—that is no levy"—in that, under the circumstances stated, the goods would be constructively levied upon and liable for the lien." As the action is not for damages arising out of the levy, but for assault and battery, the question whether the goods were "constructively levied upon, and were liable for the lien," is immaterial.

The fifth and sixth exceptions are as follows: "(5) That his honor erred in charging the jury as follows: 'I charge you that one having a distress warrant, properly issued, for past due debt for rent, must get peaceable possession of the property'—in that the law does not require that the possession of the property shall be peaceably taken. (6) That his honor erred in charging the jury as follows: 'He cannot break the house in order to make the entry,' meaning for the purpose of levying a distress." The appellant's attorneys have not cited any authorities to sustain these propositions, and we deem it unnecessary to cite authorities to show that they are untenable.

The seventh exception is as follows: "That his honor erred in charging the jury as follows: 'If you are wrongfully in my house, and I come upon you, and then if I use excessive force, you must run, you must get away'—in that he should have charged the jury that a party placed in such a predicament would have a right to use such force as was necessary to prevent the use of excessive force. He may and would have a right to protect himself from a deadly assault as long as he used only such force as is necessary to restrain the attacking party, and did not attempt to do any injury." The entire sentence in which the charge appears, is as follows: "You have not the right, because you have a distress warrant against me and against my goods, to come to my house and break locks in order to make distress, and

if you do so, you are doing wrong, and if I get home while you are there, I can order you out, and I can use all the force necessary to put you out, and you cannot act in self-defense. You have got to run. If you do me any harm, you cannot plead self-defense, for you are in the wrong, if you are wrongfully in my house and I come upon you, and even though I may use excessive force, you must run, you must get away. If you slay me you cannot plead self-defense. The most you can do would be to get off for manslaughter, because he who pleads self-defense must be without fault in bringing about the difficulty." When the whole sentence is considered, it will be seen that there was no error.

The eighth exception is as follows: "That his honor erred in charging the jury as follows: 'A wife has the right to defend her husband, or his goods in his home. She has a right to defend them against anybody who is undertaking to take possession of them; and if that is what she was doing, these parties had no right to assault her, if they were in the wrong in getting unlawful possession of these goods'—(a) in that the same violated the Constitution by charging on the facts, by assuming, that the agent of the defendant assaulted the plaintiff, and by assuming that the agent of the defendant had gotten unlawful possession of the goods; (b) in that it states that the wife, under these circumstances, has the right to defend the goods against anybody who is undertaking to take possession of them, when he should have limited the statement by saying 'anybody not authorized by law.'" Immediately preceding the charge set out in the exception, the presiding judge used these words: "Now, if you find that she is entitled to recover, if they were wrongfully there, or if they assaulted her without being attacked, the mere fact that she came into her own house with an axe in her hand would not justify anybody to assault her, unless she came in such a manner as to indicate an intention to use the axe on the party. In that event, if they were there and rightfully in possession of the goods under a distress warrant, why they would have the right to defend themselves. If these parties undertook to take wrongful possession of her husband's goods, she had the right to defend her husband's goods." As thus explained the charge was free from error.

The ninth exception is as follows: "That his honor erred in charging the jury as follows: 'Of course, if they went down there not acting under this warrant, and all that they did was to raise a disturbance, you could find against them [meaning Lorick and Geiger], and not against Parker; but if they acted as agents, within the scope of their agency, he would be responsible for whatever they were responsible for'—in that the said charge puts everything that the agents did, or might have done, in the scope

of their authority as such, if they went to the house for the purpose of distraining under the warrant, when the law is that the principal would only be liable for acts done directly, in the prosecution of the principal's business." The charge is not quoted correctly. The presiding judge said: "Of course, if they went down there not acting under this warrant at all that he had issued, and raised a disturbance, you could find against them, and not against Parker, but if they acted by agents, within the scope of their agency, he would be responsible for whatever they would be responsible for." The ruling of the circuit judge is sustained by the case of *Williams v. Tolbert*, 78 S. C. 211, 58 S. E. 908, in which it was held that, where the power to make seizure of personal property under a chattel mortgage, after condition broken, is delegated to another, the manner of taking possession is incidental to the authority, and within the scope of the agency, and the principal is liable for any misconduct of the agent in taking possession, although he acted contrary to the instructions of his principal.

The tenth exception is as follows: "That his honor erred in charging the jury as follows: 'Now the question I submitted to you is, at the time of the levy, that that warrant, if levied, \* \* \* if at that time the rent was paid, then that was an unlawful distress, because if the rent was paid to Parker, it was Parker's duty to stop that levy, distress warrant. If he did not do it, he is responsible for any actual damage. If his failure to do it was merely inadvertence, he is only liable for actual damages, provided the agent was not guilty of any conscious wrongdoing, any conscious invasion, and did not act in any high-handed manner in making the distress, he would be only liable then for actual damages'—when he should have charged that, under these circumstances, the plaintiff would not be entitled to recover any sum whatever, as the suit was not for damages by reason of the unlawful distress, but for unlawful assault made by the plaintiff." The charge in the request must be construed in connection with the following words, also used in the charge: "We are not here to try anything except the grievances alleged in this complaint. Eli Jones is only made party plaintiff because he is the husband of his coplaintiff, Eliza Jones; and this complaint is not brought to recover any damages for the wrongful entry of Eli Jones' home. This action is brought because of the alleged unlawful and wrongful assault upon Eliza Jones' wife, wife of Eli Jones. It is for the assault and battery upon her person that this action is brought." When the two portions of the charge are considered together, it will be seen that the exception cannot be sustained.

The eleventh, twelfth, and thirteenth exceptions are as follows: "(11) That his honor erred in refusing to charge the defendant Parker's eighteenth request, which was as

follows: 'If the jury believes from the testimony that the plaintiffs are entitled to a verdict, and the testimony satisfies them that the defendant Parker acted for the landlord, within the scope of his authority, then the jury cannot render any verdict against the defendant Parker'—in that under the circumstances stated the defendant Parker would not be liable. (12) That his honor erred in refusing to charge defendants' twentieth request, which was as follows: 'The defendants had a right to assume that Eliza Jones' condition of health was normal.' (13) That his honor erred in refusing to charge defendants' fifteenth request, which was as follows: 'A distress made in the name of the landlord, even if not made with the precedent authority, is valid by subsequent adoption of landlord.' The following appears in the record: "Mr. Clark: You have covered all my requests. I withdraw my requests. The Court (to Mr. Moorman): Do you know whether I have covered yours? Mr. Moorman: You have not charged one or two of my requests. The Court: It may be I did not mean to charge them, or maybe they escaped my attention. I will read these requests. Mr. Moorman: I shall not insist upon your reading them." This shows that the appellant's attorneys waived the right to raise the question that said requests were not charged.

The fourteenth exception is as follows: "That his honor erred in charging the jury 'that if they [the defendants] consciously committed an assault on that woman, they are responsible for the damages'—such charge being in response to a request to charge that the defendants had a right to assume that the plaintiff was in a normal state of health." This exception does not assign error in the charge, but its object, seemingly, is to raise the question that the twentieth request should have been charged. It is therefore disposed of by what has already been said.

The fifteenth exception is as follows: "That the verdict of the jury was improper, in that it held Parker responsible for the tortious acts of the agents employed by him, and did not hold them liable for their own acts." No issue is raised by the pleadings as to the rights of the defendants between themselves. Therefore, if the appellant was liable, we fail to see in what respect his rights were prejudiced by reason of the fact that the verdict was in favor of other defendants, who may also have been liable. *Battle v. Lumber Co.*, 72 S. C. 322, 51 S. E. 873.

The sixteenth exception is as follows: "That the verdict of the jury was contrary to the charge of his honor and the law, by finding Parker liable and the agents who actually committed the tort not liable, in that his honor charged in the following words: 'I will tell you more than that, if the agent is not responsible, then Parker is not responsible'—when all the evidence goes

to show that Parker was not present and had no hand whatever in, nor knowledge of, the damage alleged to have been done until long thereafter." The case of *Williams v. Tolbert*, 76 S. C. 211, 56 S. C. 908, shows that this assignment of error cannot be sustained.

The judgment of the circuit court is affirmed.

# **BANKERS' LOAN & INVESTMENT CO. v. SPINDLE.**

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

## **1. BROKERS—CONTRACT FOR SERVICES — PERFORMANCE—RIGHT TO COMMISSIONS.**

Plaintiff procured a purchaser for certain of defendant's property at \$6,100, the price fixed, payable \$100 earnest money, \$400 on delivery of the deed, and 56 notes each for \$100, payable monthly, to be executed by the purchaser, complainant to receive for his services \$305 to be paid out of the last three of the notes so given. The purchaser paid the earnest money on the execution of the contract, but refused to accept a deed until certain defects in the title were cured. Defendant insisted that the title was good, and refused to remove the alleged defects, though the purchaser was financially responsible, was acting in good faith and anxious to obtain a good title. Defendant, admitting the validity and enforceability of the contract, permitted the purchaser to rescind, and returned to him the earnest money, without complainant's consent. *Held*, that complainant was entitled to the contract commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 92.]

## **2. SAME—INTEREST.**

Where a broker was only entitled to commissions out of the last three of a series of notes to be given by the purchaser for the property which were to be executed as of September 1, 1902, and would mature on the first days of July, August, and September, 1907, the broker on his principal's failure to complete the contract was only entitled to recover interest on the contract commissions from August 1, 1907.

Appeal from Circuit Court of City of Roanoke.

Action by T. W. Spindle against the Bankers' Loan & Investment Company. Decree for plaintiff, and defendant appeals. Amended and affirmed.

Hart & Hart and L. H. Cocke, for appellant. Hunt & Staples, for appellee.

**CARDWELL, J.** This is an appeal from a decree of the circuit court of Roanoke city, and the facts out of which the controversy arises are practically undisputed.

The complainant in the court below was at the time of the transaction which gave rise to the controversy a real estate agent doing business in the city of Roanoke under the style and firm name of T. W. Spindle & Co., and the defendant below was a corporation organized under the laws of the state of New York, with its chief office in the city of New York, and the owner of a certain dwelling house and lot in the city of Roanoke.

The defendant company entered into an

agreement with the complainant, authorizing the latter to make sale of the said house and lot, and pursuant to that agreement the complainant sold the property to one Thomas Lee Moore, and the terms and conditions of the sale were embraced in a contract dated and duly executed by the defendant company, the vendor, and Moore, the vendee, on the 29th day of July, 1902; the price being fixed at \$6,100, which was to be paid as follows: On the execution of the contract, as earnest money, \$100; on delivery of the deed of conveyance to Moore \$400; and 56 notes, payable monthly, with interest, each for \$100, were to be executed by Moore for the remaining purchase money. The complainant, Spindle, was to receive for his services \$305, which was to be paid out of the last three of the notes to be given by Moore.

Moore paid the earnest money, \$100, in cash when the contract between him and the defendant company was executed, but, upon having the title to the property examined by an attorney, the attorney reported certain defects therein, and, acting upon the advice of his attorney, Moore refused to accept a deed to the property until these defects were cured, and as the defendant company insisted that the title was good, and that there was no flaw in the same, it refused to have removed the alleged defects, although Moore, the vendee of the property, was anxious to obtain a good and valid conveyance therefor.

Moore was financially responsible, and the defendant company admits his good faith and fully recognizes that the contract of sale to him put the company in a position to compel compliance therewith on his part. Still the defendant company, in the light of Moore's responsibility, and admitting the validity and binding effect of the contract on Moore, allowed him to rescind the contract and returned to him the \$100 which was paid as earnest money without the consent of the complainant. Thereupon this suit was instituted by the complainant to recover of the defendant company the sum of \$305 stipulated for in the contract between the parties.

Upon the record, showing the above-mentioned undisputed facts, the circuit court decreed in favor of the complainant for the amount claimed, with interest thereon from the 1st day of September, 1902, together with the costs of the suit.

It is not denied that the complainant performed fully and completely his contract with the defendant company when he brought the company, the vendor of the property, and Moore, the vendee, together, and the contract between them of the 29th of July, 1902, was made and entered into. True, the complainant was to be paid for his services out of the proceeds of the last three notes to be given by the purchaser; but when the vendor (the defendant company) refused on its part to carry out the sale, which admittedly it could have enforced, and voluntarily released

the vendee without the assent of the complainant, returning to Moore the cash that he had paid, the defendant company could not in equity and good conscience be heard to deny the right of the complainant to his compensation for making the sale.

The case here is wholly different from the cases of *Crockett v. Grayson*, 98 Va. 354, 36 S. E. 477, and *Murray and Wife v. Rickard*, 103 Va. 132, 48 S. E. 871.

In the first of these cases *Crockett* made a contract with *Grayson*, whereby authority was given *Crockett* to sell a farm, with the provision that *Crockett* was to have all the purchase money over and above \$11,000. Acting under this authority, *Crockett* negotiated a sale with *Spiller* for \$14,000, \$10,000 of which was to be paid by the conveyance of other property, and the remaining \$4,000 by the assumption on the part of *Spiller* of certain debts then existing as liens on the property, which *Grayson* represented as being the entire amount of liens thereon, and with the additional understanding and agreement that of the amount, if the liens against the property should exceed \$4,000, *Spiller* was at liberty to declare his agreement to purchase the property void. It turned out that the liens against the property were much more than \$4,000, and thereupon *Spiller* declined to consummate the purchase, as he clearly had a right to do under the contract pursuant to which the sale of the property was made to him. *Crockett* thereupon brought suit against *Grayson* for \$3,000, his commissions, alleging that he had complied with the terms of his agreement, that it was no fault of his that the sale to *Spiller* was not consummated, but that the failure to consummate the same was due to the misrepresentation of *Grayson*, who had represented that there was only \$4,000 of liens against the property. This court, however, refused to permit him to recover, for the reason that the right to recover his commissions was conditioned upon a consummation of the sale of the property, and the contract of sale reserved the right to *Spiller*, under certain conditions, to refuse to take the property, and his exercise of this right made it impossible to consummate the sale. The language of the opinion by *Keith, P.*, in part is as follows: "A real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commissions. When he has found such a purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract." But, as stated, *Crockett's* right to a commission in that case was denied, for the reason that the sale of the property to *Spiller* was not defeated by the fault of the seller, *Grayson*, by his misrepresentation, etc., but because *Spiller*, pursuant to the

conditions of the contract of sale to him, had the right, under certain conditions, to refuse to take the property.

That is not the case here. The defendant company was not, so far as this record discloses, hampered by any condition beyond its control which prevented it from complying with its contract to sell and convey a good title for the property to *Moore*; nor did the contract reserve to *Moore* the privilege of rescinding it. It was completed so far as the agent to make the sale was concerned, and the defendant company admits that by the contract it was in a position to compel *Moore* to comply, but it saw fit, in utter disregard of *Spindle's* rights, to fail to do so.

In *Murray v. Rickard*, *supra*, the vendors acted in compliance with the terms of the contract of sale, which were that the agent was to receive his commission out of the payments as they were made from time to time, and, upon the failure of the vendee to make the payments as provided, all previous payments made by him were to be forfeited and the land was to be returned to the vendors without liability either to the vendors or the vendee. The agent was to be paid a proportionate part of his commissions out of the payments as received, and he well understood and agreed that if the vendee defaulted and refused to make further payments, and forfeited the payments he had already made, the agent would not be entitled to commissions on the unpaid deferred payments. The vendee did make default, the land was returned to the vendors, and this court held that the agent was not entitled to commissions on the unpaid deferred payments of purchase money for the land agreed to be purchased by the vendee, according to the very terms of the agent's contract.

Unquestionably a broker or real estate agent may contract to have his commissions paid ratably out of the installments of purchase money, or out of any or either of them, and by his contract alone he can claim his commissions on the sale; but, when a vendor has it in his power to consummate the sale and voluntarily and without the assent of the agent refuses to consummate it, it would be unjust, unfair, and inequitable to deny the agent a recovery of his commissions thereon. In the present case the contract of sale could have been enforced by the vendor. The agent had found a purchaser ready and willing to comply with the terms agreed upon; a valid contract had been entered into; the sale was completed, so far as the agent was concerned, and according to the contention of the defendant company the title to the property was good, or, at the most there were only clouds upon it which the defendant believed were remediable only and could be removed; but, as stated, it declined to go further towards a consummation of the sale to *Moore*, and voluntarily released him from his contract.

We are of opinion that the claim asserted by the complainant for his services in making the sale agreed to be made by the defendant company to Moore comes clearly within the control of the rule stated in the opinion in *Crockett v. Grayson*, supra; but we are also of opinion that the circuit court erred in decreeing that the complainant was entitled to interest on the amount due him from September 1, 1902. The contract between Moore and the defendant company provided that Moore was to execute as of September 1, 1902, 56 notes for \$100 each, with interest from their date, the aggregate of the principal sum of these notes being the amount of Moore's purchase money not paid before or at the time Moore was to receive his deed of conveyance; and complainant, by his contract with the defendant company, was, as stated, to receive \$305 out of the proceeds of the last three of said notes; i. e., one-third of \$305 out of the notes that were to mature, respectively, on the first days of July, August, and September, 1907—and is entitled to interest on the several installments of the amount due him from the date on which the same would have become payable. Therefore the decree of the circuit court should have allowed a recovery in favor of the complainant of the \$305, with interest as just stated, or (which would have given practically the same result), the \$305, with interest thereon from August 1, 1907; and the decree will be amended so as to entitle complainant to a recovery of the defendant company of the principal sum of \$305, with interest thereon from August 1, 1907, till paid, and, as so amended, the decree will be affirmed, with costs to the complainant, appellee here.

Amended and affirmed.

#### NORTON COAL CO. v. MURPHY.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

##### 1. MASTER AND SERVANT—MINES—INJURY TO SERVANT—PLACE TO WORK.

Where defendant's mine foreman, whose duty it was to inspect the mine, had been notified that the roof of the haulway where plaintiff was injured by the fall of slate, was in a dangerous condition, and, if it was not timbered or taken down, some one would be injured or killed, but notwithstanding this warning the foreman failed to make any proper inspection of the roof, and directed plaintiff and his assistant to tear up the track in the haulway and relay it before they came out of the mine, during which operation the slate fell and plaintiff was injured, defendant was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 209.]

##### 2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff and his assistant were ordered to tear up the track in the haulway of a mine, and relay it before coming out. They commenced the work when plaintiff heard something fall. He testified he thought it was caused by a "rat running around the gob." The substance which fell was about 10 feet from him, and, plaintiff knowing that this was an indication that the roof was unsafe, tapped the roof immediately above him to ascertain its condition, and, finding

it safe at that point, continued his work without further examination either at the point from which the substance might have fallen, or in the direction he was about to work. Some two hours afterwards the slate fell which caused plaintiff's injury at a point 40 or 50 feet distant and near the face of the heading. *Held*, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

##### 3. SAME—ASSUMED RISK.

Under the rule that an employé is not chargeable with risks which may be obviated by reasonable care on the master's part, and only takes the risks of the employment which cannot be so obviated, plaintiff did not assume the risk of such injury; it being the duty of the mine foreman to inspect the roof, and see that it was reasonably safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 557.]

Error to Circuit Court, Wise County.

Action by A. W. Murphy against the Norton Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ayers & Fulton, Bullitt & Kelly, and J. W. Chalkley, for plaintiff in error. Vicars & Peery and A. N. Kilgore, for defendant in error.

BUCHANAN, J. A. W. Murphy, the defendant in error, while engaged in repairing tracks in the coal mine of the Norton Coal Company, the plaintiff in error, was injured by a piece of slate, some 9 feet long, 5 feet wide, and 17 inches thick, falling upon him from the roof of the room or hallway in which he and another employé named Hanks were working. To recover damages for that injury this action was instituted.

The defendant company demurred to the evidence. Its demurrer was overruled, and judgment rendered in favor of the plaintiff. To that judgment this writ of error was awarded.

Considered as on a demurrer to the evidence, the negligence of the defendant is established. Its mine foreman, whose duty it was to inspect the mine, had been notified by one of the defendant's employés that the roof of the haulway where the plaintiff was injured was in dangerous condition, and if it was not timbered or taken down, some one would be injured or killed. Notwithstanding this notice and warning, the foreman failed to make any proper inspection of the roof in the light of the information he had as to its condition, but directed the plaintiff and his assistant or associate, Hanks, on the evening of the accident, to tear up the track in the haulway and relay it before they came out, so that the mining machine could get through to the face of the coal that night. While engaged in that work the plaintiff was injured, and Hanks was killed by the falling slate.

The defendant's contention is that, even though it was negligent, the court erred in overruling the demurrer to the evidence (1) because the plaintiff was guilty of contributory negligence; and (2) because having knowledge of the dangerous condition of the roof of

the haulway, he assumed the risk by continuing to work therein.

It appears that very soon after the plaintiff and Hanks, who had gone from another part of the mine, went into the haulway and commenced to tear up the track, the plaintiff heard something fall—whether it was a small piece of slate from the roof or coal from the side of the haulway he did not know. When he heard it, he thought it was caused by a rat running “around the gob.” The substance which fell was about 10 feet from him, between him and Hanks, and about 5 feet from the latter. The plaintiff knew that small pieces of slate falling from the roof of a mine—which is called “dripping”—is an indication that the roof is, or may be, in an unsafe condition. When he heard the substance fall, he tapped upon the roof immediately above him to ascertain its condition, and, finding it safe at that point, continued his work without further examination of the roof, either at the point from which the substance might have fallen, or further on in the direction in which he was tearing up the track. Some two hours afterwards, at a point 40 or 50 feet distant and nearer the face of the heading, the slate fell which caused the injury.

While it was the duty of the mine foreman to inspect the roof and see that it was in a reasonably safe condition, it was also the duty of the plaintiff to keep a lookout for his own safety.

The roof was not unsafe at the place where he heard the dripping, and his continuing to work there did not result in injury to him. Whether or not he was guilty of contributory negligence in working under the roof where he was when injured, at a place 40 or 50 feet distant, was a question for the jury, and not for the court. The court could not say as a matter of law that it was contributory negligence to work 40 or 50 feet away from where the “dripping” occurred without making more examination of the condition of the roof of the mine than was made by the plaintiff.

Neither can it be said, under the facts of this case, that the plaintiff is not entitled to recover as a matter of law because, by remaining in the haulway after he heard the “dripping” of the mine at the place where he commenced to tear up the track, he assumed the risk of slate falling from the roof 40 or 50 feet distant.

The defendant, as we have seen, had been informed that the roof at the place where the plaintiff was injured was in a dangerous condition. It was its duty, therefore, to have inspected it and seen that it was in a reasonably safe condition before ordering the plaintiff to perform work which would necessitate his going under the roof at that point, or at least to have warned him of its condition.

An employé is not chargeable with the assumption of risks which may be obviated by

the exercise of reasonable care upon the master's part. The rule that the employé takes the risk of the employment presupposes that the employer has exercised that degree of care and caution which the law casts upon him. The risks which the employé assumes are those which cannot be obviated by the adoption of reasonable measures of precaution by the employer. 1 Labatt on Master & Servant, §§ 2, 270; Pantzar v. Tilly, etc., Mining Co., 99 N. Y. 368, 376, 2 N. E. 24; Bailey's Personal Injuries, § 463.

Of course, if the employé knows of the danger, or in the exercise of due care for his own safety ought to have known of it, and chooses to remain, he assumes the risk and cannot recover.

Whether in this case the “dripping” of the roof which the plaintiff heard made it his duty to make a further inspection of the roof than he did make, before going on with his work, is a question about which reasonably prudent men might differ, and was therefore a question for the jury and not for the court. See Labatt, § 413a; Russell Creek, etc., Co. v. Wells, 96 Va. 416, 428, 31 S. E. 614.

We are of opinion, therefore, that there is no error in the judgment complained of, and that it must be affirmed.

**Affirmed.**

#### CLINCHFIELD COAL CO. v. WHEELER'S ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

##### 1. MASTER AND SERVANT—DEATH OF SERVANT—ACTION—DECLARATION.

Where a count in a declaration for the alleged wrongful death of a servant merely alleged that deceased was a miner, that he obeyed instructions to run defendant's motor and was killed, but there was no allegation touching the ways, appliances, and machinery that were unsafe, or by what means or in what way decedent was killed, such count was fatally defective.

##### 2. NEGLIGENCE—ACTION—DECLARATION.

It is not sufficient in a declaration for an alleged negligent injury for plaintiff to allege that the injury resulted from defendant's careless and negligent conduct; but the facts relied on to establish the negligence must be stated with reasonable certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 182.]

##### 3. PLEADING — AMENDED OR NEW DECLARATION.

Where plaintiff voluntarily abandoned his first declaration before there was any appearance, and had the case remanded to rules, a new writ issued, and filed a new declaration, after which defendant appeared and demurred and on this the parties went to trial, such second declaration could not be regarded as an amendment of the first.

##### 4. EVIDENCE—OPINION EVIDENCE—CUSTOMS—KNOWLEDGE.

A witness was not competent to testify as to the usual custom touching the grade that ordinary traction or sprocket motors are run on where he testified that he did not know what the usual custom was, and his further examination showed that his knowledge of the subject, if any, was very limited.

**5. SAME—ACTS OF OTHERS.**

In an action for death of a motorman by jumping from the motor as it was descending a grade, evidence as to how other companies operated similar motors was inadmissible.

**6. APPEAL AND ERROR—REVIEW—DISCRETION OF COURT—QUALIFICATION OF WITNESSES.**

A ruling allowing a witness to testify as an expert in the exercise of the trial court's discretion will not be reversed on appeal, unless it clearly appears that he was not qualified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3852.]

**7. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.**

In an action for death of a servant, an instruction which did not confine plaintiff and the jury to the acts of negligence alleged in the declaration, and required a preponderating probability if it existed in the minds of the jury in order to justify a recovery, instead of requiring the jury to believe from the evidence, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 539-548.]

**8. MASTER AND SERVANT—DEATH OF SERVANT—ACTIONS—PROOF REQUIRED.**

In an action for death of a servant, defendant is not liable unless there is affirmative and preponderating proof of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 934-977.]

**9. SAME—APPLIANCES—CARE REQUIRED.**

A master was not required to provide a motor with brakes sufficient to guard the motorman against his own negligence.

**10. SAME—EVIDENCE.**

In an action for death of a motorman by jumping from the motor while descending a grade, evidence held insufficient to sustain a finding that the motor was defective, or that defendant was negligent in providing a traction, instead of a sprocket, motor for use on the grade in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 958-968.]

**11. SAME—ASSUMED RISK.**

Where decedent, a mature man, was placed in charge of defendant's traction motor at its mine used in hauling cars therefrom, and had been thoroughly instructed by an expert in the operation thereof, and had been directed to make repeated examinations of the motor and to report anything that might be wrong, he having operated the same many times up and down the road prior to the time he permitted it to get away from him, and jumped from the motor and was killed, he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 581.]

Error to Circuit Court, Russell County.

Action by A. J. Wheeler's administrator against the Clinchfield Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Phlegar & Powell and C. O. Burns, for plaintiff in error. W. H. Werth, for defendant in error.

**HARRISON, J.** This action was instituted in the circuit court of Russell county by the administrator of A. J. Wheeler, deceased, against the Clinchfield Coal Company, to recover damages for the death of his intestate, which it is alleged was caused by the negligence of the defendant company.

A declaration containing two counts was filed to December rules, 1906. On January 14, 1907, before there was any appearance,

the plaintiff moved the court for leave to amend the writ, and also for permission to the sheriff to amend his return upon the writ. This leave was granted and these amendments made at bar, but four days later, on the 18th of January, the case was, on further motion of the plaintiff, remanded to rules, with directions to the clerk to issue a new writ against the defendant company, returnable to the first Monday in February, 1907. At the second February rules, 1907, the plaintiff filed his second declaration containing three counts.

At February rules the defendant appeared and pleaded in abatement, seeking to have the case dismissed upon the ground that the second process had not been properly served. This plea was on motion of the plaintiff rejected. Thereupon, on motion of the plaintiff, leave was given him to amend his second declaration, which was done at bar. The defendant company then appeared and filed its demurrer to the plaintiff's second declaration and to each count thereof, which demurrer was overruled, and thereupon the defendant company pleaded the general issue, and stated, as required to do, its grounds of defense.

Upon these pleadings the case was tried, and a verdict reached in favor of the plaintiff for \$4,000, and judgment given thereon for the plaintiff, after the refusal by the court of the defendant's motion to set the verdict aside as contrary to the law and the evidence. The case is now before us for review of certain rulings made during the progress of the trial.

We are of opinion that it was error to overrule the demurrer to the third count of the declaration. This count does no more than inform the defendant that the deceased was a miner; that he obeyed instructions to run a motor, and was killed. There is an entire absence of information touching the ways, appliances, or machinery that were unsafe, or by what means or in what way the plaintiff was killed.

Negligence is a conclusion of law from facts sufficiently pleaded. This court has repeatedly held that the office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare and make its defense. It is not enough to say that the plaintiff was injured, and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty. *Lynchburg Traction Co. v. Gull*, 107 Va. 87, 57 S. E. 644.

There was considerable evidence introduced under the third count; but, without pointing out such evidence in detail, it is sufficient to say that all evidence which rests upon this bad count, as the basis for its introduction, and which was not admissible un-

der the two good counts, was improperly admitted. The court cannot tell on which count the verdict was rendered.

To meet this difficulty the defendant in error falls back on the first declaration filed by him, and insists that the evidence in question was admissible under the counts of that declaration. This contention is without merit. The second declaration was not an amendment of the first. The plaintiff voluntarily abandoned his first declaration, containing two counts, before there was any appearance, and had the case remanded to rules and a new writ issued. With this new process as the foundation of his action, he filed a new declaration containing three counts, which was subsequently amended at bar; and thereupon the defendant appeared and filed its demurrer to this second declaration as amended, and to each of its three counts. This was the whole declaration upon which the parties went to trial. If the new declaration had been an amendment of the old, there would have been five counts in the declaration upon which the parties went to trial instead of three; and yet the record shows conclusively that the demurrer was to the new declaration and each of its three counts, and that the parties treated the second declaration as alone containing the grounds of the plaintiff's action, and went to trial and conducted the case throughout upon that understanding.

We are further of opinion that it was error to permit the witness, Henry Wheeler, the plaintiff, to testify as to the usual custom touching the kind of grade that ordinary traction and sprocket motors, respectively, are run on. It is clear that the witness was not competent to speak on the subject inquired of. The following question was propounded to the witness: "I will ask you to tell the jury, if you know, what the usual custom is with reference to the kind of grade ordinary traction and sprocket motors are run on." To it he replied: "No, sir; I do not. If there is any standard grade for those motors, I do not know what it is." The whole subsequent examination of the witness on this subject shows that his knowledge, if any, was very limited; his answers being confined for the most part to telling how some other company operated, which this court has held is not permissible. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

We are further of opinion that the objection taken to the competency of the witness J. W. Hawes to speak as an expert cannot be sustained. This witness was asked to tell the jury whether or not it was reasonably safe to operate a 20-ton electric traction motor on a 10 per cent. grade, equipped, as the motor in this case was, with brakes, and upon a track in the condition of the track in this case. Over the objection of the defendant, the witness was permitted to answer:

"No, sir; to the best of my knowledge, I don't think it was."

The evidence is not satisfactory that this witness had sufficient knowledge of the subject to be considered an expert, but a trial court will not be reversed for allowing a witness to testify as an expert, unless it appears clearly that he was not qualified, as the question of the qualification of the witness is largely in the discretion of that court. *Richmond L. Works v. Ford*, supra.

We are further of opinion that it was error to give instruction No. 2, asked for by the plaintiff. This instruction does not confine the plaintiff and the jury to the acts of negligence alleged in the declaration. It is also defective, in that it speaks of a preponderating probability, "if it exists in the minds of the jury," instead of saying "if the jury believe from the evidence."

The instruction is also erroneous because it conflicts with the rule repeatedly announced, that there must be affirmative and preponderating proof of the defendant's negligence to hold it liable. *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *N. & W. Ry. Co. v. Johnson's Adm'r*, 103 Va. 787, 50 S. E. 268.

We are further of opinion that instruction No. 14, asked for by the plaintiff, was erroneous, and should not have been given. This instruction is confusing and its meaning obscure. Its effect seems to be to tell the jury that it was the duty of the defendant to provide brakes which were sufficient to guard the plaintiff's intestate against his own negligence. The only other view that can be taken of the instruction is that it creates a case of concurring negligence of the deceased and the defendant, which the law will not weigh or apportion. *C. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E. 182; *Southern Ry. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477.

We are further of opinion that, in view of the salient facts established by the record, no verdict could be rightfully found for the plaintiff under any instructions. It was therefore error for the circuit court to refuse to set the verdict aside as contrary to the law and the evidence.

It appears that the defendant company was conducting a coal mining operation at Dante, in Russell county, and in connection therewith operated an electric railway between the mines and the Lake Erie Railroad. The first 1,900 feet of this electric railway, beginning on the mountain at the mouth of the mine, was a 10 per cent. grade, the following 600 feet a 5 to 7 per cent. grade, and tapering off rapidly from that to a level. The plaintiff's intestate was an employé of the defendant, and is shown to have been an experienced and intelligent motorman. It was intended to use a "sprocket motor" on the heavy grade—the third rail which was laid was notice of that. The defendant had purchased a 20-ton sprocket motor, and also a 20-ton traction motor. A short time before



the accident the traction motor arrived, and was put to work in charge of the plaintiff's intestate as motorman, hauling from the mines. There is no evidence tending to prove that this motor, or anything about it, was out of order, or that anything was out of order with the railway track anywhere within more than a mile of the place of accident. The wheel brake is shown to have been in perfect condition immediately after the accident, and to have remained so for many months thereafter, controlling the motor over the same track with a heavier load than that carried by the intestate. The motor is shown to be capable of carrying on the track 19 tons over its 10 per cent. grade.

On the occasion of the accident the deceased was leaving the mines with a load of not more than 8,600 pounds. By his failure to apply the brakes sufficiently the car got beyond his control, when he jumped off and was killed.

The theory of the plaintiff is that a "sprocket motor" alone could have been used with safety on a 10 per cent. grade, and that it was negligence to use a traction motor on that grade. The evidence does not sustain this view. Without, however, discussing the evidence, it is sufficient to say that whatever danger may have attended the use of the traction motor was a risk assumed by the deceased, with full knowledge of all the facts. Every fact which it is claimed contributed to the accident appears to have been as fully known to the deceased as it was to the defendant. The deceased knew that he was undertaking to operate a traction motor. The uncontradicted evidence shows that he was fully instructed in every detail of such operation by a highly competent and experienced expert, under whose immediate supervision he ran the motor time and again up and down the road; that under this instructor he stopped the motor and started it, applied and released the brakes, and tested its operation generally; and that, when his attention was especially called to the grade, he said he had not run on a 10 per cent. grade, but had run on one nearly as heavy. He was cautioned to make repeated examinations of the motor, and to report anything that might be wrong.

A servant, when he enters the service of the master, assumes all the ordinary risks of such service, and also, as a general rule, assumes all risks from causes which are known to him, or should be readily discernible by a person of his age or capacity, in the exercise of ordinary care. *Robinson v. Dinlany*, 96 Va. 41, 30 S. E. 442; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839.

When the employé is not placed by his employer in a position of undisclosed danger, but he is a mature man, doing the ordinary work which he has engaged to do, and whose risks are obvious to anyone, he assumes the

risk of the employment, and no negligence can be imputed to the employer for an accident to him therefrom. 4 *Thomp. on Negligence*, §§ 4608, 4609.

The judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial, if the plaintiff shall be so advised, to be had not in conflict with the views expressed in this opinion.

Reversed.

#### DOWELL v. COX.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

##### 1. LIMITATION OF ACTIONS—RAISING DEFENSE—DEMURRER.

Where a statute of limitations affects the right as well as remedy, and it appears of record that the period of limitations has expired, the defense may be raised by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670-675.]

##### 2. DEATH—WHAT LAW GOVERNS.

Where the alleged wrongful death of plaintiff's decedent occurred while he was temporarily in North Carolina, the laws of that state relating to liability for wrongful death, certainly as to the extent of the remedy, controlled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 12.]

##### 3. STATUTES—FOREIGN LAWS—PLEADING.

The statutes of a foreign state will not be judicially noticed, but if relied on must be pleaded and proved as other facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 380.]

##### 4. DEATH—STATUTES—REMEDY—ENFORCEMENT—TIME.

Revisal 1905, N. C., § 59, gives a right of action for death by wrongful act, and declares that the action must be brought within one year. *Held*, that the time within which the action must be brought was a part of the right created by the statute, and hence no action thereon could be maintained in Virginia after the expiration of the time so fixed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 52, 53.]

Error to Circuit Court, Grayson County.

Action by one Dowell, as administrator of Grimsley Halsey, against Edward Cox. Judgment for defendant, and plaintiff brings error. Affirmed.

W. S. Poage and J. H. Rhudy, for plaintiff in error. A. A. Campbell and R. L. Kirby, for defendant in error.

HARRISON, J. This action was brought, and an attachment issued and levied as ancillary thereto, for the purpose of recovering damages from the defendant, Edward Cox, for killing, as alleged, Grimsley Halsey, the plaintiff's intestate.

A general demurrer to the plaintiff's declaration was sustained, and the action dismissed, upon the ground that the alleged trespass, if committed at all, had not been committed within 12 months next preceding the institution of the action, and that the plaintiff's right to recover was therefore barred by the statute of limitations.

It was properly conceded at the bar of this court that the defense of the statute of limitations could be made in this case by demurrer. Wherever the statute affects the right as well as the remedy, and it appears of record that the period of limitation has expired, the defense can be made by demurrer. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

In the case of *Manuel, Adm'r, v. M. & W. Ry. Co.*, 99 Va. 188, 37 S. E. 957, this court held that, when the declaration in an action for death by wrongful act shows on its face that the death occurred more than 12 months before action brought, advantage may be taken of the limitation by demurrer. This conclusion was clearly because, in such cases, the limitation affects the right as well as the remedy.

The grievance here complained of is alleged to have been inflicted while the parties were temporarily absent from this state, and in the state of North Carolina. It is therefore properly conceded that the laws of North Carolina govern—certainly as to the extent of the remedy. *Dennis v. Atlantic Coast Line R. Co.*, 70 S. C. 254, 49 S. E. 899, 106 Am. St. Rep. 746; *Nelson v. C. & O. Ry. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

The statute of a foreign state being relied on as the ground of recovery in this case, it is necessary that such statute should be alleged in the declaration. The statutes of foreign states will not be judicially noticed, but are considered facts which must be pleaded and proved as any other facts. 20 Ency. Pl. & Pr. pp. 598-601.

The laws of other states are universally regarded as facts which, independently of statute, must be specially pleaded wherever the *lex fori* requires other facts under like circumstances to be pleaded. *Minor, Conflict of Laws*, § 212.

The declaration in the case at bar sets forth, with sufficient particularity, section 59 of the North Carolina Code (Revisal 1905), which gives a right of action for the death of a person caused by the wrongful act, neglect, or default of another. By this statute, as alleged, which is known as "Lord Campbell's Act" the action must be brought within one year. Nowhere in the statute, as alleged, is there a saving clause. This statute, limiting the time within which the action must be brought, has been construed by the Supreme Court of North Carolina, in the case of *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 525, 526, where it is said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect

would be unavailing, as there is no saving clause as to the time within which the action must be begun."

The action in the case at bar not having been brought, as shown by the declaration, for more than 15 years after the right accrued, the statute alleged and the decision mentioned construing it would seem to be conclusive that the plaintiff's right of action was lost.

It is, however, insisted that the state of North Carolina has a statute which is very similar to section 2933 of the Virginia Code of 1904, under which it is claimed the limitation upon the right of action has been all the time suspended, by reason of the uninterrupted absence of the defendant from the state of North Carolina since the grievance complained of was committed.

It is not necessary to decide whether or not the saving statute mentioned has any application to the case at bar, for the reason that no such statute has been alleged in the declaration, and therefore cannot be considered.

There is no error in the judgment complained of, and it must be affirmed.

#### HESS v. HESS.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### 1. APPEAL AND ERROR—TIME FOR APPEAL—INTERLOCUTORY DECREE—ACCOUNTING—DISALLOWANCE OF CLAIM.

A decree, disallowing the claim of the committee of certain incompetents for their support, in a suit to compel the committee to account and for a partition, was an interlocutory decree, from which such committee was not bound to appeal until within a year after the final decree had been rendered, though he was authorized, at his election, by Code 1904, § 3454, to appeal from such interlocutory decree within a year from the rendition thereof.

#### 2. INSANE PERSONS—COMMITTEE—SALE OF REAL ESTATE—WILLS.

Testatrix gave her property, consisting largely of real estate, to her six idiot children, in fee. She expressed a desire that defendant should act as their guardian and see that they were taken care of, and authorized him to apply the proceeds of the property to their benefit. *Held*, that defendant, on being appointed committee of such insane persons, was not authorized by the will to appropriate any part of the corpus of the estate, in addition to its issues and profits, to their support.

#### 3. SAME—ACCOUNTING.

Where, in a suit to compel the committee of certain incompetents to account, he did not claim an allowance of more than \$600 for maintenance, it was error to allow him for their maintenance for 3 years \$1,991.35, which was more than their property was worth.

#### 4. SAME—CORPUS OF ESTATE—CHARGE FOR MAINTENANCE.

Code 1904, § 2804, provides that no disbursements shall be allowed to any guardian, where the deed or will under which the estate is derived does not authorize it, beyond the annual income of the ward's estate. Section 2805, providing for the disbursement of personal estate, declares that neither the ward personally nor his real estate shall be liable for such disbursements. *Held*, that the committee of certain in-

competents, in the absence of authority of the court previously obtained, was not entitled to charge disbursements in the support of his wards against their interest in real estate, nor was he entitled, after the death of two of them, to reimbursement out of their share of such real estate for such disbursements.

Appeal from Circuit Court, Russell County.

Bill by William L. Hess against James H. Hess, as guardian and committee of certain incompetents, for a settlement of his accounts. From a decree sustaining exceptions to the account, James H. Hess appeals. Affirmed.

Ayers & Smithdeal and J. C. Gent, for appellant. Finney & Gilmer, for appellee.

HARRISON, J. The record shows that Susan Ann Hess died in the year 1900, leaving a will, which was admitted to probate in August, 1902, and leaving surviving her eight children, six of whom were idiots. By her will the testatrix gave all of her property, real and personal, to these six unfortunate children, whom she describes as persons of feeble mind, and unable to take care of their property. The will then appoints James H. Hess, one of her two sane sons, as guardian, "to see that the children are taken care of, and to apply the proceeds of the property to their benefit, and to keep them in order."

James H. Hess, the guardian thus designated, upon the death of his mother, assumed control of the property and the care and supervision of his six feeble-minded brothers and sisters, but did not formally qualify until November, 1903, at which time two of the number had died, and his qualification was as committee for the remaining four.

The bill in this case was filed by William L. Hess, the other sane brother, charging James H. Hess, the guardian and committee, with neglect of duty, abuse of his trust, and committing waste on the land of his cestui que trust. The bill then alleges the death of two of the idiots without issue, calls upon their guardian for a settlement of his accounts, and prays for a partition of the real estate among those entitled thereto.

James H. Hess filed his answer to this bill, denying its allegations of neglect, waste, or any other violation of his trust. He avers his willingness to have the lands partitioned and assigned to the parties entitled thereto, and asks that in such partition the interests of the two decedents be allotted to him, provided he can show that he has fully paid for same, by exhausting such interests in disbursements made by him for their benefit. The respondent then states "that upon a fair settlement of his actings and doings as guardian and committee, it will be found that the estate of his brothers and sisters is indebted to him, at least in the sum of \$600."

The answer does not ask that it be treated as a cross-bill, makes no parties thereto,

and does not ask that the \$600, which respondent claims would be due him upon a settlement with his six wards, be allowed him in this case. It appears that the appellant had made no annual settlement of his accounts.

A commissioner, to whom the cause was referred to take certain accounts, reported that James H. Hess, the acting guardian and committee, was entitled to a total of \$1,991.35 for the support of his six wards. This aggregate is inadvertently stated in the report and the decree to be \$1,642.08. The decree appealed from sustains exceptions taken to this report, denying the right of appellant to the allowance made in his favor for the support of his cestui que trust, and appoints commissioners to partition the land in accordance with the prayer of the bill.

The report of the commissioner shows that the testatrix left personal property of the value of only \$55.50, and a tract of land containing 184 acres. The evidence shows that this land is poor, and capable of furnishing a very inadequate support to six persons. The evidence further shows that these unfortunate people have lived on this land in great poverty and wretched discomfort. It further appears that the appellant, who was a poor man with a family, contributed occasionally, in a small way, to the help of his wards, and that they worked at times for the appellant, who lived on a small place near to them.

A preliminary question is raised by the appellee, who contends that the decree appealed from was final as to the right of appellant to the allowance ascertained by the commissioner, and that no appeal will lie therefrom after one year from May 12, 1906, the date of the decree disallowing such claim.

This contention is without merit. Conceding that the decree was such as the appellant had the right to appeal from, he was not obliged to appeal, because it was an interlocutory decree. By virtue of section 3454 of the Code of 1904 a party is given the right to appeal from certain interlocutory decrees if he desires to do so. He is, however, not bound to appeal from such decrees at the time they are rendered, but may do so at any time within a year after a final decree has been rendered in the cause, provided all the other requisites for an appeal exist. *Southern Ry. Co. v. Glenn's Adm'r*, 98 Va. 309, 36 S. E. 395.

The first contention of appellant is that under the will of Susan Ann Hess he was authorized to use, if necessary, the corpus of the real estate devised to her feeble-minded children for the purpose of taking care of them; that the language "see that the children are taken care of, and to apply the proceeds of the property to their benefit," authorized him to sell or charge both the real and personal property in order to take care of the devisees.

This position is not tenable. The testatrix

gives her estate to her six idiot children in fee. She expressed a desire that the appellant act as their guardian and see that they were taken care of. She vested no express power in the suggested guardian to sell or dispose of the real estate left to her children, and if there could be an implied power, in a committee, or guardian, to sell the wards' real estate (as to which we express no opinion), we are satisfied that no such implied power can be gathered from the language employed. In speaking of the proceeds of their property being applied to their benefit, she plainly had reference to the personal property and the issues and profits of the real estate. If the intention of the testatrix was as contended by appellant, the entire estate, according to the value thereof shown by the record, would be insufficient to support the objects of her bounty for three years, at the rate of maintenance allowed appellant by the commissioner.

We are of opinion that the allowance for maintenance ascertained by the commissioner was not justified by the evidence. In his answer to the bill appellant did not claim that there would be due him on settlement more than \$600, and yet the commissioner finds that there is due him in three years, for the maintenance of these wards, an aggregate of \$1,991.35, far more than their home is shown to be worth.

Apart from these considerations, however, the circuit court was plainly right in sustaining the exceptions to the commissioner's report, upon the ground that appellant had no power to charge the corpus of his wards' real estate with their maintenance.

Section 2604 of the Code of 1904 provides that "no disbursements shall be allowed to any guardian, where the deed or will under which the estate is derived does not authorize it, beyond the annual income of the ward's estate," except in case of certain exceptions, which do not arise here.

Section 2605, after dealing with the disbursement of personal estate, says: " \* \* \* But neither the ward personally, nor his real estate, shall be liable for such disbursements."

A like rule prevails with respect to the sale of lands under the control of the committee of an insane person. Code 1904, §§ 1702, 1703.

These are salutary provisions for the protection of the real estate of those under disability, and they cannot be violated with impunity. The strict observance of these statutes is regarded of such importance that this court has repeatedly declined to ratify sales, or any other disposition, made of a ward's real estate by the guardian without the authority of the court previously obtained. The jurisdiction of the circuit courts to authorize the application of the proceeds of the corpus of infants' real estate to their maintenance is altogether statutory, and according to the statute (which, as this court has

said, must be strictly construed), such authority must be given, if at all, before and not after the expenditure has been made. *Rinker v. Streit*, 33 Grat. 663; *Gayle v. Hayes' Adm'r*, 79 Va. 542; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195; *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. 159.

Appellant further contends that, even though it be held that he is not entitled to charge the real estate of his wards, during their lifetime, with disbursements made by him on account of their support, he is entitled to the satisfaction of his claim for the support of his two deceased wards out of their interest in the real estate left by their mother.

The statute, which must be strictly construed, expressly provides that the wards' real estate shall not be liable for such disbursements. Under this statute disbursements made by the guardian, without the authority of the court previously obtained, while permitted to be paid out of personalty, are practically declared to be no debt or valid demand against the ward or his real estate. The wise purpose of this statute is to protect and preserve the real property of those under disability. The statute is controlling in this case, and leaves no room for the contention that a guardian can, after his ward is dead, charge his real estate with a claim that was invalid as against such real estate while the ward was living. The death of the ward cannot cause a claim that has no vitality to spring into life and become an enforceable charge upon real estate which the statute expressly says shall not be liable for such demand. See *Gayle v. Hayes' Adm'r*, supra; *Garrett, Ex'r, v. Carr*, etc., 1 Rob. 208, 222. The object of the statute would be in large measure frustrated if the contention under consideration were to prevail.

Upon the whole case, we find no error in the decree appealed from, and it is affirmed. Affirmed.

#### STEINMAN v. JESSEE et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### 1. MINES AND MINERALS — TITLE — ADVERSE POSSESSION — BILL — LACHES.

Where, in a suit to quiet title to certain mineral rights in vacant land, complainant alleged that though more than 21 years had elapsed since the cause of action accrued, he had no knowledge that defendant, the owner of the surface, was claiming any interest in the minerals until within a year before the institution of the suit; that as soon as plaintiff purchased the minerals, he had the same placed on the land books of the county for taxation, and had continuously paid taxes thereon; that he had occasionally visited the land, and seeing that there was no actual adverse possession, and not learning of any adverse claims, had relied on the covenant of general warranty in his deed for the perfection of his title—complainant was not required to plead further excuse for delay.

## 2. PROCESS — PUBLICATION — CONSTRUCTIVE SERVICE.

A notice by publication is constructive service only, and the order of publication, as well as the statute authorizing it on prescribed conditions, must be strictly construed, in order to bind the party so served.

## 3. NAMES—IDEM SONANS.

The doctrine of idem sonans is unavailable to cure variations in the spelling of a name, unless the combination of letters and syllables produce the same sound as the true name.

## 4. SAME—PUBLICATION OF NOTICE.

Complainant, whose name was "A. J. Steinman," was sought to be made a party to a suit by publication of notice, in the caption of which his name was spelled "Stainman," while in the warning part of the publication it was spelled "Stinman"; the initials being correct. *Held*, that such names were not idem sonans, and that the publication was insufficient to charge complainant as a party to the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Names, §§ 13, 14.]

## 5. TRUSTS—CONSTRUCTIVE TRUSTS.

Complainant having purchased certain mineral rights in the land in controversy from the equitable owner, defendant purchased the surface of the land, subject to complainant's prior equitable rights, with full knowledge thereof, and agreed to pay off and discharge the debts due by such equitable owner to the C. estate, the owner of the title. In a suit by the latter for specific performance, defendant received from a commissioner a deed to the entire land, without being compelled to pay either more or less than he had agreed to pay in accordance with his contract of purchase from such equitable owner. *Held* that, while such conveyance carried the legal title to defendant, he thereby became a trustee thereof for complainant's benefit, to the extent of his interest.

## 6. MINES AND MINERALS—TITLE — ADVERSE POSSESSION—LACHES—RIGHT TO RAISE.

Where defendant acquired the whole title to certain land by means of a commissioner's deed, with knowledge of complainant's prior equitable rights to the minerals under a prior transfer from defendant's original vendor, without paying either more or less than he was required by his original contract to pay, he could not set up the defense of laches to complainant's claim to the minerals, unless complainant had slept on his rights for an unreasonable time, with knowledge that defendant was claiming title to both the surface of the land and its underlying minerals.

## 7. SAME.

Where complainant, having a prior right to underlying minerals in certain land, took no steps to enforce the same for more than 21 years after defendant had acquired title under a commissioner's deed to the entire property, but complainant had no knowledge, until within a year prior to suit brought, that defendant was making any claim to the minerals, or that any one else was denying complainant's right thereto, and complainant's delay had not changed the status of the parties so as to make it inequitable to grant complainant relief, his right thereto was not barred by laches.

Appeal from Circuit Court, Wise County.

Suit by A. J. Steinman against Martin V. Jessee and another. From a judgment dismissing the bill on demurrer, complainant appeals. Reversed.

Irvine & Morison, for appellant. Ayers & Fulton, for appellees.

CARDWELL, J. This appeal brings under review a decree of the circuit court of Wise

county, sustaining a demurrer to and dismissing a bill, as amended, filed by appellant against appellees, the object of which was to quiet the title claimed by appellant to the minerals in, under, and upon a certain tract of land, and to extract from appellee, M. V. Jessee, the legal title to said minerals and the mining interests therein.

The facts alleged in the bill are substantially as follows: By deed dated December 21, 1874, A. D. Parsons sold and conveyed to appellant and one J. D. Price the minerals and certain mining rights in, under, and upon two tracts of land situated in the county of Wise, Va., containing, respectively, 206 and 30 acres. A few days thereafter Price sold and conveyed to appellant his interest in said minerals, and appellant has claimed to own the same ever since, paying the annual taxes thereon. Parsons held only the equitable title to these parcels of land, and this was in the form of a title bond from one Dale Carter, the holder of the legal title, dated March 31, 1873. Carter died without having conveyed the land, and suit was brought in the circuit court of Wise county by his administrator, against Parsons and others, for the purpose of specifically performing the said contract of sale, some of the heirs at law of Carter being non sui juris. In the meantime, and after the sale of the minerals to appellant, Parsons had sold the surface of said lands, but not the minerals, to other parties in separate parcels, and these subpurchasers agreed that as a part of the consideration for their respective purchases they would pay off and discharge in full their proportional part of the balance due from their grantor to Dale Carter's estate. Thereafter, a part of the surface of said lands was bought by Martin V. Jessee (appellee here), and as a part of the consideration for this sale Jessee undertook and agreed to pay to Dale Carter's estate the same proportion of the original purchase money which his vendor had agreed to pay, and which agreement on the part of Jessee bound him to pay, not only the principal sum, but interest and costs of the proceeding necessary to enforce the original contract.

The suit of Carter's Adm'r v. A. D. Parsons et al. proceeded to the point where E. M. Fulton, as a special commissioner, was directed to sell the lands, according to the several subdivisions, unless the remainder of the purchase money due Carter's estate was paid; and all this remainder was paid by the respective parties, except the costs, whereupon Fulton, as commissioner, sold the respective interests of these parties for the purpose of paying these costs. At this sale Jessee (appellee) himself became the purchaser of his part of the land for \$17.48, this part being 105 acres of the surface, and Fulton executed to Jessee a deed for the same, but in this deed there was no reservation of the minerals, the deed in form being a deed for

the fee in the property; but the real transaction, as claimed in the bill here, was a sale of the surface only, or rather it is claimed that the effect is the same as if there had been no such sale of the property, as Jessee and the other parties, purchasing their respective interests in the surface of the land, merely paid the sums which they had agreed to pay.

Appellant was made a party to the bill in the said suit of Carter's Adm'r v. A. D. Parsons et al., but he was proceeded against only by order of publication, the notice of which, as published, giving his name as "A. J. Stainmau," and nowhere in the publication was his name correctly given. Appellant was at that time, and has at all times since his purchase from Parsons in 1874, been a resident of the state of Pennsylvania.

Appellee Jessee, having obtained his commissioner's deed in the cause of Carter's Adm'r v. Parsons et al., took possession of the surface of the 105-acre parcel of land, and has owned, occupied, and used it from that time to the bringing of this suit; but, according to the facts stated in the bill, he set up no claim whatever to the underlying minerals, or the right to mine the same, until a short while before this suit was brought. It is further alleged that appellant did not know that appellee Jessee was claiming said minerals until within one year before the institution of this suit; that no actual possession has ever been had of these minerals, as they are now, and have at all times been, remote from railroad development, so that it has not been practicable to mine them; that, as soon as appellant had purchased this tract of minerals, he caused the same to be placed on the land books of Wise county for assessment for taxes, and they have at all times since been regularly assessed to him, and he has paid the taxes thereon; that he (appellant) has made open and notorious claim to said minerals and the right to mine the same during all these years, and received no information or notice of any kind that his rights thereto were disputed, and had no actual knowledge of the existence of the cause of Carter's Adm'r v. Parsons et al., instituted in 1883, until a short time prior to the institution of this suit; that appellant occasionally came to Virginia during that period, looking over his lands, of which he had a large quantity in the counties of Wise and Dickenson, including the tract in controversy here, and seeing that there was no actual adverse possession thereof, and, not learning of any adverse claims thereto, he relied, as he was advised he had a right to rely, upon the covenant of general warranty in his deed from Parsons for the perfection of his title. Both Parsons and appellee Jessee, it is alleged, lived and still live in the immediate neighborhood of this tract of minerals, and it is charged that the claim set up by Jessee to them is, in view of the facts known to him, fraudulent, etc.

The first ground of demurrer, viz., that the bill does not account for the delay in bringing this suit, and sets up no excuse therefor, is without merit. Facts are set out in the bill to show that appellant had no reason for bringing this suit until a short while before it was brought, and upon these facts (admitted to be true by the demurrer) it was not incumbent on him to set up any further excuse for not sooner taking action to protect his rights.

As a second ground of demurrer it is said, substantially as in the first, that the bill on its face shows that all of appellant's pretended rights are barred by laches and the statute of limitations. This ground of demurrer, mainly relied on by appellee Jessee, proceeds upon the theory of the third ground stated, viz., "that the bill shows on its face that complainant (appellant) was a party defendant to the suit of Carter's Adm'r v. A. D. Parsons et al., and was regularly proceeded against as such. His only remedy, therefore, was by petition into that suit within the time prescribed by the statute, which time having elapsed, complainant is forever precluded by the said proceedings." In other words, more than 21 years having elapsed since the deed from Fulton, commissioner, to appellee Jessee, in 1885, at which time appellant's right of action accrued, he is now barred from bringing this suit by reason of his long delay.

In no view of the case made by the bill can this contention be sustained. If appellant were in fact a party to the suit of Carter's Adm'r v. Parsons et al., the decrees in that case, of course, bind him, and the grounds of demurrer relied on by appellee Jessee would be attended with much force; but, in order to bind appellant by those decrees, the proceeding against him by publication must have been strictly in compliance with the statute authorizing notice to a party to a pending suit by publication. Such a notice is constructive only, and the order of publication, as well as the statute authorizing it on prescribed conditions, is to be strictly construed; otherwise a party's rights cannot be taken from him without a day in court.

Unquestionably the doctrine of *idem sonans* may be invoked to cure immaterial variations in the spelling of a name, but the authorities agree that the combination of letters and syllables must produce the same sound as the true name. To apply the doctrine to this case, where in the caption to the order of publication the name is spelled "Stainmau," which is the notice, while in that part of the publication regarded as the warning the name is spelled "Stinman," and hold that appellant should have understood that Steinman was meant, would be not only to carry the doctrine beyond any authority cited, or that we have been able to find, but beyond sound reasoning. That the initials of the Christian name of the party for whom the notice is intended are correctly printed is

of no importance, except as a matter of secondary consideration, since the attention of one reading the notice, perchance, it might be, would not be attracted by the initials of the Christian name, but by the surname, far less commonly in use, in the great majority of cases, than the initials of a Christian name.

If, however, appellant could be considered as properly a party to the cause of *Carter's Adm'r v. Parsons et al.*, and therefore bound by the decrees therein, still the question would remain whether or not the effect of that suit merely transferred to appellee Jesse the title, legal and equitable, to the minerals which are the subject of the controversy we are dealing with. Conceding that this was the effect to be given the proceedings in that cause, could appellee Jesse retain the equitable title to these minerals when he had never acquired the same or paid any consideration therefor? He, according to the allegations of the bill, purchased the land subject to appellant's prior equitable rights, with full knowledge of these rights, and agreed to pay off and discharge the debts due Carter's estate, the effect of which agreement, when carried out by him, would have saved appellant and his predecessors in title harmless. What was really done, if the allegations of the bill of appellant be true, was that appellee Jesse paid Fulton, commissioner, no more nor less than he was obligated to pay in accordance with his contract with Parsons; therefore the sale of the land to him by the court's commissioner was a mere formality and a useless one, and in fact, so far as appellee Jesse is concerned, it was to all intent and purpose a fraud upon the rights of appellant and his predecessors in title. Under these circumstances, while the conveyance carried the legal title to Jesse, he thereby became a trustee, holding this legal title for the benefit of appellant, when his bill was filed in this cause, and could not be heard to set up against appellant the defense of laches, unless appellant had slept upon his rights for an unreasonable time, after knowledge that Jesse was claiming title to both the surface of the land and its underlying minerals.

The allegations of the bill show, as stated already, that appellant had no knowledge of the facts upon which appellee, Jesse, rests his claim of right to these minerals until within about a year before the bill was filed; and, taking as true, upon demurrer, all the facts alleged and well pleaded, as is the established rule, there has been neither unreasonable delay in bringing this suit, nor change in the status of the parties, which would make it inequitable to grant the relief prayed. These allegations plainly excuse appellant for not having sooner brought his suit to protect his rights in and to the minerals in question, for it is made to appear, not only that he did not know of appellee Jesse setting up any claim to them, but that prior to one year next preceding the institution of

his suit, he (appellant) had no knowledge of any fact which was sufficient to put him on inquiry as to whether appellee Jesse or any one else was denying his right thereto. Under these circumstances laches is not imputable to appellant. 18 Am. & Eng. Enc. L. 99-101, 113, 114; *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; *Gish's Ex'r v. Jamison*, 96 Va. 312, 31 S. E. 521.

A case directly in point is *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869. See, also, the authorities there cited.

No fixed rule has been, or can be, laid down as to when a court of equity will or will not enforce a right, where there has been laches in asserting the right, but the authorities agree that the question must be determined upon the facts of each particular case.

In the case at bar the bill shows that the transactions involved are few and simple, and are almost entirely matters of record. The principal, if not the only, actors in the matter were appellant and appellees, Jesse and A. D. Parsons, all of whom are living and capable of testifying, and all the records are in existence for use in ascertaining the real facts touching the controversy.

For the foregoing reasons, we are of opinion that the circuit court erred in sustaining the demurrer to the bill, and therefore the decree appealed from will be reversed and annulled, and the cause remanded, to be further proceeded in to a hearing upon its merits.

Reversed.

#### MANSON v. CITY OF COLLEGE PARK et al.

(Supreme Court of Georgia. Aug. 19, 1908.)

##### 1. STATUTES—TITLE—SCOPE.

The act approved August 7, 1906 (Acts 1906, p. 121), entitled "An act to provide for the change of county lines lying within the limits of incorporated towns and cities, and for other purposes," is not unconstitutional as referring to more than one subject-matter in its title, nor as containing matter in the act itself different from that expressed in its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 125, 126, 171.]

##### 2. SAME—GENERAL LAWS—COUNTY LINES.

It is not a special, but a general, law, and therefore is not in conflict with that provision of the Constitution which declares: "County lines shall not be changed, unless under the operation of a general law for that purpose" (Civ. Code 1895, § 5926); nor with the one which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law" (Civ. Code, 1895, § 5732).

##### 3. MANDAMUS—ACTS OF ORDINARY—COERCION—PETITION—PARTIES.

After an election has been held in accordance with the provisions of this act, and "a majority of the votes cast thereat [is] in favor of changing the county lines so as to bring the municipality wholly within the lines of [a] particular one of the adjacent counties," and the mayor and clerk of the municipality have, with-

in 30 days thereafter, certified "the result of such election to the ordinaries or boards of county commissioners or other officer having the control of the county business in each of the counties affected," and the proper officer or officers of each of the respective counties and the municipal authorities have thereafter proceeded to readjust and change the lines of the counties affected in such manner as to include the municipality wholly within the limits of the particular county fixed upon by said election, and have had proper surveys and maps made showing the county lines as required to be fixed by the result of the election, the municipality, its officers, and any of its citizens and taxpayers have such a common interest in the matter as will authorize them to join in a petition for mandamus to compel the ordinary, who has charge of the business of one of the counties, and who fails and refuses to join in completing the readjustment and change of the county lines, to join with the proper authorities of the other county and those of the municipality in completing such work in accordance with the provisions of the act. See, in this connection, *Town of Roswell v. Ezzard*, 128 Ga. 43, 57 S. E. 114.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 55-57.]

#### 4. SAME—PETITION—PRESUMPTIONS.

Where the petition for mandamus in such a case alleges that the municipal authorities of the town or city in question, "in pursuance of and in conformity with the" above-mentioned act, "submitted to the lawful voters of said municipality, at a special election held on" a named date, the question of changing the county lines so as to bring the municipality wholly within the limits of one county only, after advertising the same as the act requires, and there is attached to the petition as an exhibit, and made a part thereof, a copy of the notice of the call of the election by the municipal authorities, the petition is not demurrable because it fails "to set out any order of the mayor and council ordering said election." The presumption from these allegations is that proper municipal action was taken authorizing such election to be called.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 301.]

#### 5. SAME—CONDITIONS PRECEDENT—DEMAND.

It was not necessary to present a petition to the ordinary, requesting "him to certify and pass an order authorizing the publication in papers of said county lines," before mandamus would lie against him to compel him to do so. The petition alleged that a written demand had been made upon him to perform the acts in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 44.]

#### 6. SAME—MINISTERIAL DUTIES—DISCRETION.

As indicated in the third headnote, the acts which the petition for mandamus sought to compel the ordinary to perform were, under the allegations of the petition, ministerial duties imposed upon him by the statute in question, and not matters as to which he could exercise his own discretion and judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 133, 134.]

#### 7. JURY — RIGHT TO TRIAL BY JURY — MANDAMUS.

The court did not err in overruling the demurrer to the petition, nor in passing an order upon the hearing making the mandamus absolute; all questions of law and fact, having been, by consent, submitted to the court without the intervention of a jury, and the evidence being amply sufficient to sustain the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 106.]

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Mandamus by the city of College Park and others against Z. F. Manson, ordinary, to compel respondent to join in completing the readjustment and change of certain county lines in accordance with Acts 1906, p. 121. From a judgment granting a peremptory writ, the ordinary brings error. Affirmed.

J. W. Wise and W. L. Watterson, for plaintiff in error. Perry S. Pearson, and J. F. Gollightly, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

### JONES v. BUSH.

(Supreme Court of Georgia. Aug. 19, 1908.)

#### 1. LIBEL AND SLANDER—ACTIONABLE WORDS—SPECIAL DAMAGE.

To charge one with having stolen the land of another is not actionable without alleging special damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 52.]

#### 2. SAME—PETITION—AMENDMENT.

In an action of slander, where the alleged defamatory words charged the plaintiff with having stolen the land of another, the petition is not amendable by striking the subject-matter of the alleged larceny and leaving the spoken words as charging the plaintiff with having stolen.

#### 3. SAME—INJURY TO PROFESSION.

To charge a physician with having stolen the land of a certain person is not a charge made on another in reference to his profession, so as to be actionable without an allegation of special damage.

Fish, C. J., and Lumpkin, J., dissenting in part.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; W. N. Spence, Judge.

Action by O. B. Bush against Z. H. Jones. Judgment for plaintiff, and defendant brings error. Reversed.

Pope & Bennet, for plaintiff in error. Bennet & Cox, for defendant in error.

BECK, J. 1. The action was for slander. The alleged slanderous words were: "Haven't you heard about Dr. Bush [meaning petitioner] going out here and stealing the Widow Klerce's lands [meaning thereby that petitioner had stolen the lands of Mrs. Klerce]?" It was also alleged that at the time and place the defendant used of and concerning petitioner the following: "Well, it is true; I can prove it. It is on record here in the Farmers' Bank. Come and go with me over there [meaning over to the Farmers' Bank], and I will prove it to you [meaning thereby, if the person to whom the words were spoken would go with him to the Farmers' Bank, he would prove that petitioner had stolen the lands of Mrs. Klerce,



and had committed the offense of larceny]." It was alleged that the plaintiff was a physician, and that these words were maliciously spoken of him to injure him in his practice as a physician. No special damage was claimed. A demurrer was filed, on the ground that the words were not actionable without special damage being alleged, whereupon the plaintiff offered to amend by striking out the words "the lands of Mrs. Klerce" wherever they occurred. The amendment was allowed, over objection that its effect was to state a new cause of action. The demurrer was overruled, and exceptions were taken to this judgment and to the allowance of the amendment.

Slander consists (1) in imputing to another a crime punishable by law; (2) charging one with having some contagious disorder, or being guilty of some debasing act which may exclude him from society; (3) in charges made on another in reference to his trade, office, or profession, calculated to injure him therein; or (4) any disparaging words productive of special damage flowing naturally therefrom. In the latter case the special damage is essential to support the action; in the three former, damage is inferred. Civ. Code 1895, § 3837. There is no such crime as the larceny of land, and the alleged spoken words cannot be embraced in any of the other classes which our Code declares to be actionable without showing special damage. No special damage was alleged, and for this reason the alleged spoken words, though disparaging in their tenor, are not actionable. The petition was subject to general demurrer.

The plaintiff sought to avoid a dismissal of his petition by striking out the words which referred to the subject-matter of the larceny, viz., the land of Mrs. Klerce, leaving words imputing a crime and actionable per se. The court allowed the amendment, against the defendant's objection that the effect of striking the words was to allege a new and distinct cause of action. The mere fact that a petition is open to general demurrer does not necessarily preclude its amendment. The allegations of such petition may be amplified or added to if it contains a well-defined basis of a cause of action. For instance, this petition may have been amended by an allegation of special damage. But a petition which alleges that certain, disparaging words were used, and no special damage is claimed, cannot be vitalized by lopping off some of the words, so that what is left imputes a crime. The basis of the plaintiff's case was disparaging words; he could build thereon by alleging matter which would make such words actionable. To completely alter their import by sheer curtailment changes the basis of the plaintiff's cause of action as alleged, and introduces an entirely distinct cause of action. The difference between the petition before and after its amendment was as radi-

cal as if entirely different words were substituted. Where a petition for slander states a cause of action, the words as alleged may be varied by amendment, so long as their substance is not changed. So far as relates to other words of the same character, or imputing the same crime as that already charged in the petition, the plaintiff may amend. The cause of action is the same, the effect of the words is the same, and the amendment only serves to relieve the plaintiff of the consequences of a variance. Thus it has been held that a petition alleging words directly charging a particular forgery may be amended by the substitution of other words charging the same forgery. *Hawks v. Patton*, 18 Ga. 52, 63 Am. Dec. 266. See, also, *Craven v. Walker*, 101 Ga. 845, 29 S. E. 152. In these cases there was no departure from the original charge; the amendment still clung to the original basis of the action. In the present case the amendment converts the disparaging words, which are not actionable per se, into words which impute a crime, which are actionable themselves.

It may be added, although it is stated in the petition that the spoken words were intended to injure the plaintiff in the practice of his profession, that the alleged charge of stealing land has no reference to, nor did they concern, the plaintiff's profession as a practicing physician, and therefore were not actionable without alleging special damage. The court erred in allowing the amendment and refusing to dismiss the petition.

Judgment reversed. All the Justices concur, except FISH, C. J., and LUMPKIN, J., who dissent.

LUMPKIN, J. (dissenting). The fact that a petition may be subject to a general demurrer as it stands does not necessarily prevent its being amendable. *Ellison v. Ga. R. Co.*, 87 Ga. 601, 13 S. E. 800. In a suit for slander, where the petition merely alleged that the defendant had spoken certain words of the plaintiff, but did not allege that they were spoken in the presence of any person, it was certainly subject to general demurrer, and it failed, as it stood, to set out a cause of action; but it was held to be amendable by alleging that they were spoken in the presence of a named person. *Wolfe v. Israel*, 102 Ga. 772, 29 S. E. 935. It would be incompetent to add by amendment a distinct and separate cause of action, or to add words spoken at a different time, or a distinct and different publication of a libel. *Colvard v. Black*, 110 Ga. 642, 36 S. E. 80 (3); *Cent. of Ga. Ry. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687. But in the case at bar the amendment did not refer to a different occasion or conversation than that referred to in the petition, but merely varied the allegation as to the words used in the same conversation and of the same general character. It was alleged in the petition that on a given occasion, in the presence of others, and in a conversa-

tion with a named person, the defendant said: "Haven't you heard about Dr. Bush [the petitioner] going out here and stealing the Widow Klerce's land?" and also stated that he could prove it, "meaning thereby, he could prove that petitioner had stolen the lands of Mrs. Klerce, and had committed the offense of larceny." The amendment merely struck the words "the lands of Mrs. Klerce," and added after the expression "in conversation with" the words "and in the presence of." Thus in the petition and the amendment there was the same occasion, the same conversation, the same statement therein in part, and the same innuendo, to wit, an intention to charge him with having committed the offense of larceny. The only difference was a varying of the words alleged to have been spoken by striking a part of them. In other words, the amendment amounts to asserting in effect that the pleader had inaccurately copied the statement actually made, by adding words which did not in fact form a part of the sentence uttered, and by striking the erroneously added words. This was not said in terms, but such is the effect of the amendment. This was permissible. The case is practically controlled by the decisions in *Hawks v. Patton*, 18 Ga. 52, 63 Am. Dec. 266, and *Craven v. Walker*, 101 Ga. 845, 847, 29 S. E. 152. In the case of *Hawks v. Patton*, it appears from the record on file that the words alleged in the original petition were: "Mathew J. Patton forged a promissory note on Isaac Sterling and traded it to me." The amendment struck out those words, and inserted in lieu of them the following: "Speaking of a note which said Wm. H. Hawks, in a conversation with Wm. H. Everett and James G. Thomas, said he had obtained from your petitioner on one Isaac Sterling, and alluding to a charge prevalent against Allen Goldsby of forging notes, he said, 'Goldsby [meaning said Allen] is no worse than some of his kin [meaning petitioner]. I believe it is a forged note,' meaning the note aforesaid, and meaning thereby to charge your petitioner with the crime of forgery." The amendment was allowed, and the judgment was affirmed. In the case of *Craven v. Walker*, supra, the words alleged in the original petition to have been spoken were that the plaintiff, a woman, "was not virtuous, and that she had been guilty of fornication with divers persons, and adultery and fornication with" a named person. The amendment alleged that the defendant had also said that she had been guilty of unlawful sexual intercourse with another named person, and that he (the defendant) had delivered her of a child. It was held that this did not add a new cause of action. See, also, Civ. Code 1895, §§ 5097, 5098; *Eagle & Phenix Mills v. Muscogee Mfg. Co.*, 129 Ga. 712, 716, 59 S. E. 804.

I am authorized to say that Chief Justice FISH concurs in the views here expressed.

ATLANTA, K. & N. RY. CO. v. TILSON.  
(Supreme Court of Georgia. Aug. 19, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—VERDICT—EVIDENCE.

The presiding judge did not err in overruling the motion for a nonsuit, and the evidence was sufficient to support the verdict.

2. SAME—TRIAL—INSTRUCTIONS—TERMS.

That the judge in one portion of his charge used the expression "ordinary care" in connection with the duty of a railway employé, instead of "ordinary care and diligence," or did not use the expression "skill and diligence," will not require a reversal, especially where he defined the term "ordinary care," and the entire charge, taken together, shows that the jury were not likely to have misunderstood or been misled by the expression used.

3. SAME.

When considered in connection with the charge as a whole, none of the other charges of which complaint was made contained error requiring a new trial.

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT.

The newly discovered evidence, set up as a ground for a new trial, merely tended to impeach or disprove some of the testimony of the plaintiff as to the extent of his damages, and the refusal to grant a new trial on that ground was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 221-223.]

(Syllabus by the Court.)

5. WORDS AND PHRASES—"ORDINARY CARE"—"ORDINARY DILIGENCE."

"Ordinary care" and "ordinary diligence" are commonly treated as synonymous and interchangeable when applied to the same conduct in cases of injury.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739-7740; vol. 6, pp. 5043-5044.]

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by H. J. Tilson against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, from which, and from a refusal of a new trial, defendant brings error. Affirmed.

Tilson sued on account of personal injuries alleged to have been sustained by him in consequence of the negligence of the railway company. The petition alleged: At the time he received his injuries, and for some time prior thereto, he was employed by defendant as a freight train hand, his position being that of head brakeman and flagman. It was his duty, in switching cars, to look out for the turning and managing of switches in front of the engine, and to ride on the pilot of the engine, and "watch out" for danger in going into side tracks. "An iron plate projects from the bottom and side of the pilot, which is about 3 or 4 inches wide and about 12 inches in length, for the head brakeman to stand upon to keep a watch out for danger in going into side tracks." On the day when plaintiff was injured the train arrived at a station called Oakhurst, in Cobb county; and the conductor ordered plaintiff to turn the switch

and get on the pilot of the engine, so as to keep a watch out and let said train run into the side track at this place, so that a passenger train could pass the same. Plaintiff turned the switch as he was told, "and got on the iron plate above described, \* \* \* to ride into said side track and keep a watch out for danger." After he did so, the engineer began to run the engine up the side track at a rate of speed of about six or seven miles per hour. The engine had only gone a short distance upon the side track when it gave a sudden quick jerk or jar, which caused plaintiff to lose his balance and his feet to slip from the iron plate attached to the pilot, whereby he was thrown on the side track, and the wheels of the engine passed over his left leg, and mashed and crushed it so that it had to be amputated just below the knee. The jar or jerk of the engine, from which plaintiff's injuries resulted, was caused by described defects in the side track, of which defendant was aware and plaintiff had no knowledge when he started over the same, and by alleged negligence on the part of the engineer. Plaintiff was inexperienced and unacquainted with the dangers of railroading, and the conductor had ordered him to the position where he stood when hurt. He was free from fault, and his injuries were caused by negligence of defendant in specified particulars. The age of the plaintiff at the time of the occurrence complained of, his then physical condition and earning capacity, and the amount of expense incurred by him in consequence of his injuries were alleged. He sought to recover for permanent diminution of earning capacity, physical and mental pain and suffering, and the expenses incurred. The defendant denied all of these allegations of the petition; and alleged that, if plaintiff was injured at the time and place alleged, it was the result of an accident, without negligence on its part, for which it was not responsible. It also pleaded that, if plaintiff was injured at the time and place as alleged, the injury was caused by his own want of care and diligence, and that, by the exercise of ordinary care, he could have avoided the injury, and that for these reasons he was not entitled to recover.

Upon the trial the plaintiff testified, in part, as follows: "I was the front brakeman. \* \* \* We arrived at Elizabeth a short time after leaving Marietta. At Elizabeth we stopped, \* \* \* and the conductor \* \* \* passed me while we were there, \* \* \* and he said, 'Tilson, we will meet No. 1 passenger train, south-bound, at Oakhurst,' and asked me if I knew anything about that switch, and I told him I didn't think I did, and he said, 'Ride the pilot of the engine, and see if there is any monkey switches.' I was to do that at Oakhurst. \* \* \* I was under the conductor. The conductor gave me orders as to what I should do at the various stations and sidings. When

we arrived at Oakhurst, I threw the switch, and got on the pilot and started in. The siding there is a spur that leads out from the main line and stops. \* \* \* There was a little place on the pilot, 3 or 4 inches wide, for a man to stand on. It was constructed to stand upon. It is 3 or 4 inches in width, and 12 to 18 inches long. It is iron. It is on both sides of the pilot. \* \* \* I went straight from the switch stand to the track when I boarded the pilot. \* \* \* I stood up on the pilot with both my feet. As my train went into that siding I felt a very sudden jerk, and it jerked me off. I had ridden some 12 or 15 feet on the pilot before I felt the jerk. It was something more than an ordinary rock of the engine; it jerked me off. I felt the engine give down and give a sudden jerk, and it jerked me off." A portion of his cross-examination is reported as follows: "I don't know whether it [the engine] was rolling or not at the time that I got up. It was either still or very near still. I have forgotten about that. It was not running from four to six miles an hour. I don't remember how fast it was rolling—whether it was rolling any or not. I don't think it was rolling from four to six miles an hour. I don't think it was rolling at that rate. It was not rolling but very little, if any. I was sworn on the trial of this case formerly, and examined as a witness in my behalf. Q. Were you not asked this question: 'Isn't it a fact that the train was rolling at the rate of five or six miles an hour?' And didn't you answer, 'I don't remember; I couldn't say about that; I got on so many times, I don't remember about that?' A. I believe I stated it about that way. Q. Then were you not asked this: 'Now, what do you say as to whether or not the train was moving?' Answer: 'I couldn't say anything about that; I don't remember whether it was moving, or how fast, or anything about that.' Isn't that the answer you gave at that time? A. I don't remember whether— I believe I did—something near that. At the time I got on the engine it was somewhere near the switch stand. The engine was very near still, if not plumb still; I couldn't say how fast or how slow. I said I didn't get on it when it was rolling very fast. It had to be very slow, or I would not have got on at all. I got on them standing still a heap of times. Q. From the fact that you got on them so often while they were rolling, you couldn't say at this particular time whether it was rolling or not? Witness: Did I say I got on it rolling several times? Counsel: You said this: 'I don't remember; I couldn't say about that; I got on so many times, I don't remember about that.' Witness: All I say is that it was rolling when I got on. Q. Mr. Tilson, you haven't got any recollection about how fast that engine was moving? A. No, sir; but I think it was very near still. I can't remember as to how fast

It was rolling at that time. \* \* \* I don't remember whether that was a straight side track or not; I don't think it was exactly straight. It was a practically straight spur track, right out before you, on level ground, with a little cut where it started out—a very small affair. A monkey switch is a switch that throws one rail. The purpose of the monkey switch is, if there is a number of dead cars standing on a side track, and that by any reason they should be moved or get to rolling and roll down the side track, they would go out on the monkey switch, and not on the main line; to prevent obstructing the main line and to prevent wrecks. \* \* \* A monkey switch on that side track would have been 50 or 75 yards, possibly 100, from the switch where we turned it. \* \* \* I had ridden a pilot before. It looked to be a very dangerous place to ride. It looked to be such a place as to be a warning to any man that it was a dangerous place to be. It was something like a little rim that came around part of the cowcatcher not wider than your three fingers—3 or 4 inches. It was put there to aid the man who has to lift the drawhead. It is its purpose to furnish a foothold when a man goes to lift the drawhead up for the purpose of connection with something in front of the engine, and to ride on it when it is necessary to ride in front. \* \* \* The drawhead on my engine was one that had to be raised to couple cars in front. The drawhead was a very heavy object; and therefore the necessity for a place to stand upon. That rim is something like 12 or 14 or 18 inches long. If it was 18 inches, a man with about ordinary sized feet would occupy the whole length of it. I expect his foot was wider than the rim. \* \* \* I believe it was 12 or 15 feet—10, 12, or 15 feet after I had gotten upon this rim, before I got this fall. \* \* \* I did not fall off almost immediately after I attempted to mount the rim of this engine. The way it was rolling, 12 or 15 feet would not be but a very little while. I couldn't say how many revolutions of the driver. \* \* \* I had not been railroading very long. I was very green about them things. I was very green, and went upon a place that was very dangerous to ride upon, when I had orders. If I hadn't, I could not stay with them very long. I had to obey his orders. If he had told me to jump in front of the engine, I wouldn't have done it if I knew it was dangerous." The plaintiff also testified: "I don't think the man on the engineer's box could see the track clear ahead. It was grown up in grass and weeds, and I don't think he could have seen the rail. I don't swear he could not. \* \* \* The engineer can see the rails ahead of him on a straight track. \* \* \* He has a box out to one side that gives him a plain view of a straight track, but a monkey switch is hard to see."

Jones, the fireman who was on the engine, and the only other witness for plaintiff as to what occurred at the time he received his injuries, testified: "Mr. Tilson was front brakeman, and was placed out on the front of the train. When there were switches to turn, I suppose it was his place to turn them. It was the front brakeman's job. As we got to Oakhurst, Mr. Tilson threw the switch. He was standing at the switch stand when I saw him throw the switch. I could see him from where I was throw the switch; and, as I pulled down in the side track, I saw him turn away from the switch, and [he] got out of my sight. He turned his face towards the track. That would have put him on the track right at the switch stand. I did not see him when he got on the pilot. I felt the engine jerk—give down—as we went in on the side track. When I felt the engine give down, we had just got, I think—the engine was right on the switch point. The front trucks was somewhere about 10 or 12 feet, maybe 15; I couldn't say exactly how far it was. \* \* \* When I felt that drop, the engineer put his air on, in emergency. \* \* \* He stopped right immediately after he put his air in emergency—didn't go, I don't suppose, more than 3 or 4 feet, or maybe not that far. The engine was going at that time about three or four miles an hour. The effect of putting air in emergency brings the train to a very sudden stop. I stepped down in the gangway as soon as he put his air on, and saw Mr. Tilson lying in the ditch. \* \* \* I couldn't say how far Mr. Tilson was lying from the switch point. It must have been 10 feet, or something like that. \* \* \* Our train stopped before we reached the switch. Before we stopped, Tilson got off and went to the switch. I don't remember where he was when he got off the engine to throw the switch, but he was on the engine. \* \* \* I don't remember whether he left the engine before we stopped or not; I couldn't say. \* \* \* When I got off my seat and walked out to where I could see him, Tilson was lying down in the ditch, nearly opposite the engineer, right under the cab window. As well as I remember, he was in 3 or 4 feet of the cab. \* \* \* I suppose the distance from the pilot to where he was lying was the distance the engine ran after he fell; I suppose it was. \* \* \* The engineer was on his seat and looking out at the time I felt this jerk. There was nothing about the handling of the engine to cause the jerk. The engine was going along at an even pace. \* \* \* He was not handling the engine. It was rolling into the side track without working any steam. He shut his steam off, and the engine rolled on, and when that gave down, he put his brake in emergency and stopped. I suppose an engine is about 30 feet long, or something along there. \* \* \* Tilson was at the front trucks, I suppose. He was not there when

I saw him. He must have got on the front trucks. I saw mud on the steps, where his feet was on it. It was slick and muddy all around there." He testified also that the engine stopped about 30 feet before it reached the switch that Tilson went to turn. The defendant moved for a nonsuit, which was refused. The trial resulted in a verdict for plaintiff. A motion for a new trial was made, which was overruled, and the defendant excepted to each of the rulings stated.

D. W. Blair and Tye, Peeples, Bryan & Jordon, for plaintiff in error. Arnold & Arnold and N. A. Morris, for defendant in error.

LUMPKIN, J. 1. After a careful examination of the evidence in this case, we are of the opinion that the presiding judge did not err in refusing to grant a nonsuit. The plaintiff testified, among other things, that the conductor gave him orders what to do at the various stations and sidings; that he had to obey orders, or, if he had not done so, he could not have stayed with the road very long; that at the time of the injury he was acting under such orders in riding on the pilot of the engine at a siding to see if there were any "monkey switches"; that "monkey switches" are hard to see from the engineer's box, because many of them have no "stand out" on the side of the track; that, being lately employed, plaintiff was not familiar with this siding; that there was a little place on both sides of the pilot, 3 or 4 inches wide and 12 to 18 inches long, for a man to stand on, constructed for that purpose, and to furnish a foothold when one went to lift the drawhead in order to connect it with something in front of the engine, and "to ride on when it was necessary to ride in front"; that while thus engaged he was thrown off with a sudden jerk (which the evidence indicated resulted from a defect in the track); that at the time he got upon the engine it was nearly or quite still, and at the time when he was thrown off it was running three or four miles an hour. Whether he was guilty of negligence in getting upon the engine in obedience to the order of the conductor or in the manner in which he discharged his duty was a question of fact for the determination of the jury, not to be solved by the grant of a nonsuit. It is true that he said that "it looked to be a very dangerous place to ride." If asked whether it was not dangerous to couple cars, or to climb up the side of a freight car on a ladder, or ride on any part of the engine when at full speed, a witness might be compelled to answer in the affirmative. Still it will not necessarily bar a recovery, as matter of law, to engage in an occupation involving some danger, or to occupy a position prepared for the purpose, and which an employé is directed to occupy, unless doing so amounts plainly to negligence, or unless the injury results from a risk which he assumes. While

an employé assumes the ordinary risks of a dangerous occupation, it could hardly be said that carelessness on the part of the engineer in the operation of his engine, or on the part of the company in regard to its track, of which he had no notice, was one of the usual and ordinary risks assumed by a "freight hand" in the discharge of his duty, so as to present a legal bar to a recovery by him, under our statute allowing a recovery by an employé of a railroad who is not at fault, and who is injured by negligence of the other employés. Civ. Code 1895, § 2323. The cases in which it was held that a plaintiff could not recover are readily distinguishable from that at bar, upon an examination of their facts. Thus, for instance, in *Roul v. East Tenn., Va. & Ga. Ry. Co.*, 85 Ga. 199, 11 S. E. 558, a servant of the railroad company obeyed the order of a superior servant to mount a locomotive running at a speed of from 6 to 12 miles an hour. In *Mayfield v. Savannah, Griffin & Northern Ala. R. Co.*, 87 Ga. 374, 13 S. E. 459, the plaintiff undertook to get upon the rim of the pilot of an engine, which was only 1½ inches broad, while the engine was running at a speed of four or five miles an hour. Under the evidence, we are of the opinion that it was for the jury to say whether it was necessary for the plaintiff to have ridden in front of the engine at the time when the injury occurred, or whether he was negligent in obeying the order of the conductor, or in the manner in which he performed his duty. It is not to be determined, as matter of law, that the plaintiff should have refused to obey, and should have run along the track ahead of the engine, instead of getting upon the place prepared for an employé to stand when it was necessary to ride in front. The judge correctly refused a nonsuit; and there was sufficient evidence to sustain the verdict.

2. One ground of the motion for a new trial assigned error on the following charge: "Now you are instructed that the plaintiff was bound to use only ordinary care, in view of the actual circumstances of the situation. Ordinary care, as I have said, is that care which every prudent man would use under the same or similar circumstances. If the jury believe that, under the circumstances in this case, the plaintiff was exercising such reasonable care as I have defined to you, and if you further believe that he was injured by the running of the defendant's cars or engine, and was free from fault, then I charge you that the law presumes that the railroad company was negligent, and are liable in this case; that is, unless they show that the plaintiff was at fault." The errors assigned in this charge were: (1) It was error to restrict the duty of the plaintiff to only "ordinary care," whereas the law required that he must exercise both "ordinary care and diligence" to prevent injury to himself. In lieu of the language given the court should have instructed the jury that the

plaintiff was "bound to exercise his own skill and diligence to protect himself." The language used by the court put a less burden upon the plaintiff than that imposed by law, and consequently was hurtful to the defendant. (2) The charge did not restrict the jury in their finding to conclusions from the evidence in the case, but authorized them to make a verdict, in favor of the plaintiff, from what they believed under the circumstances in the case. (3) The charge excluded from the jury the defense that the railroad company and its other employes were free from fault and negligence, and restricted them to showing that the plaintiff was at fault. (4) It was calculated to confuse the jury. We shall not consider whether this charge may have been open to any possible objection, but shall only deal with the assignments of error made in regard to it. The first objection is that the court used the expression "ordinary care," instead of "ordinary care and diligence" or "his own skill and diligence." We do not understand this assignment as raising a contention that the employe was bound to use more than ordinary care and diligence, or would be prevented from recovering by negligence less than that involved in lack of ordinary care, but rather as to the mere use of the words "ordinary care," without adding thereto "skill" or "diligence." The court instructed the jury that "if you further believe that he was injured by the running of defendant's cars or engine, and was free from fault," a presumption of negligence would arise against the company; and that if he was free from fault, and the defendant was negligent, the latter would be liable; and that, if he made out a prima facie case, the defendant could rebut it by showing, either that he was negligent, or that it was free from fault. The terms "ordinary care" and "ordinary diligence" are commonly treated as synonymous or interchangeable when applied to the same conduct in cases of injury; and the mere employment of the expression "ordinary care" in a particular portion of a charge, instead of "ordinary care and diligence," will not require a new trial, especially where the presiding judge defined the meaning of the term "ordinary care" as employed in the law, and the entire charge showed that there was no peculiar or restricted meaning attached to its use in the particular part to which exception was taken. *Cen. of Ga. Ry. Co. v. Mote*, 62 S. E. 164; *Goodwyn v. Cen. of Ga. Ry. Co.*, 2 Ga. App. 470 (4), 58 S. E. 688. When considered in connection with the entire charge, the portion of it on which error was here assigned was not subject to the criticisms made upon it, and did not require a new trial.

3. Several complaints were made of charges and omissions to charge; but when the entire charge is read, as well as the statement of the presiding judge that no requests

were made to charge as to the matters involved in the alleged omissions, there was nothing requiring a new trial.

4. The newly discovered evidence was merely impeaching in its character, and tended to show that the pecuniary loss resulting to the plaintiff was not as great as he had claimed in his testimony. The refusal to grant a new trial on this ground will not require a reversal.

Judgment affirmed. All the Justices concur.

#### HAWKINS et al. v. JOHNSON et al.

(Supreme Court of Georgia. Aug. 18, 1908.)

##### 1. EXECUTION—LEVY—SALE—DESCRIPTION.

A sheriff's levy described the property as "all that tract of land in said [Baldwin] county on which Nathan Hawkins \* \* \* lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres, subject to the widow's dower in seven hundred and one acres, \* \* \* adjoining lands of Mrs. Little, Rose, and others." Subsequently the sheriff made an entry on the same execution, which, after reciting that the above-mentioned levy had been arrested by an affidavit of illegality, and a sale thereunder prevented, stated that, such illegality being withdrawn, "the said levy is hereby renewed on the same tract of land called 'Stovall Place,' as containing seventeen hundred acres more or less, excepting the widow's dower therein of Nathan Hawkins' widow." The advertisement under which the sheriff sold the property described it as "all that tract of land of seventeen hundred acres, more or less, known as Nathan Hawkins home or 'Stovall Place,' adjoining lands of Mrs. Little, Howell Rose, Mrs. Kenan, and others, except the widow's dower or life estate in seven hundred and one acres thereof, including the dwelling house and appurtenances." The sheriff's deed to the purchaser at such sale described the property conveyed as "that tract of land in said [Baldwin] county consisting of seventeen hundred acres, more or less, known as Nathan Hawkins' home or 'Stovall Place' adjoining lands of Mrs. Little, Howell Rose, Mrs. Kenan, and others, excepting the widow's dower or life estate in seven hundred and one acres thereof." *Held*, that none of these writings was "void because of indefinite and insufficient description of the land mentioned" therein; that there was no material conflict in the descriptions in the levies and those in the advertisement and the deed; and that the particular portion of the tract which had been set aside as dower was not excepted from the levies, the advertisement, or the deed, but the only exception was of the dower interest or life estate of the widow in the dower land.

##### 2. SAME—FINAL PROCESS—RETURN—CONTRA-DICTION—PAROL.

The return of a sheriff upon final process cannot be attacked by parol evidence, except under a traverse thereof, based upon a legal ground, by a party to the cause in which such return is made.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 21, *Execution*, §§ 1033-1040.]

(Syllabus by the Court.)

##### 3. WORDS AND PHRASES—"SUBJECT TO WIDOW'S DOWER."

Where a levy on land described it as all that tract of land in a specified county, on which H. lived at the time of his death, containing 1,666 $\frac{3}{4}$  acres, subject to the widow's dower in 701 acres, the words "subject to the widow's dower" indicated that the fee in the whole tract

was levied on, and was to be sold subject only to the life estate of the widow in that portion of the land which had been set aside to her as dower.

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by A. S. Johnson and another against S. W. Hawkins and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. S. Johnson and Mrs. Elizabeth Johnson, as testamentary trustees of the estate of Thomas Johnson, deceased, brought an equitable petition against S. W. Hawkins, whereby they sought to restrain the defendant, who was alleged to be insolvent, from trespassing upon certain described lands, alleged to be the property of such estate and to have been taken possession of by defendant, and from interfering with the right of plaintiffs to occupy the same, and also to recover the land. Subsequently, by consent of parties, Mrs. Lizzie P. Myrick and J. C. Hawkins, sister and brother of the original defendant, were, with their consent, made parties defendant to the cause, and plaintiffs amended the petition by praying that title to the premises in dispute be decreed to be in them. The tract of land in controversy consisted of 556 acres, which, upon the death of Nathan Hawkins, the father of the defendants, had been set apart as dower to his widow, Mrs. Amanda Hawkins, from a larger tract of about 1,700 acres, which Nathan Hawkins owned when he died; and, the widow having died, defendants claimed title to and possession of the same as his heirs at law. Nathan Hawkins had been a member of the firm of N. Hawkins & Co., which was indebted to Thomas Johnson, and in a suit against this firm and the several partners therein, Johnson had obtained a judgment against the defendants. An execution issued from this judgment was, after the death of Nathan Hawkins, levied upon the tract of land from which the dower had been assigned to his widow, as property which belonged to him at his death, and the property levied upon was, after some delay, caused by an injunction, affidavits of illegality, and a claim, sold by the sheriff, and Thomas Johnson, the plaintiff in execution, became the purchaser at such sale and received the sheriff's deed thereto. The plaintiffs claimed that the sheriff had levied upon and sold the entire tract of about 1,700 acres, subject to the widow's dower in a portion thereof; that therefore Thomas Johnson, under whose will they claimed, purchased the reversionary interest in the dower tract, and the deed of the sheriff conveyed the same to him, and that, the dowress having died, they were entitled to the possession of this land, the premises in dispute. The defendants claimed that the sheriff never levied upon the reversion in the dower tract, but only upon the balance of the 1,700-acre tract, which remained after a described tract of 556 acres had been set apart therefrom to Mrs. Aman-

da Hawkins as her dower; that consequently the sheriff, who sold the land levied upon, never advertised or otherwise undertook to sell the reversionary interest in the dower land; that the title to this interest in such land vested in them upon the death of their father, Nathan Hawkins; and that they acquired the full title to the premises in dispute upon the death of the dowress, Mrs. Amanda Hawkins.

Upon the trial the plaintiffs introduced the following evidence: (a) A deed from J. B. Wall, as sheriff of Baldwin county, to Thomas Johnson, dated February 4, 1873, purporting to have been executed by the sheriff in pursuance of a sale by him, on that day, of certain lands therein described, as the property of Nathan Hawkins, by virtue of a levy thereon by Obediah Arnold, former sheriff, of an execution issuing from the county court, in favor of Thomas Johnson against Nathan Hawkins and others, after due advertisement. It described the land as follows: "That tract of land in said county, consisting of (1,700) seventeen hundred acres, more or less, known as Nathan Hawkins' home or 'Stovall Place' adjoining lands of Mrs. Little, Howell Rose, Mrs. Kenan, and others, except the widow's dower or life estate in seven hundred and one acres thereof, including the dwelling-house and appurtenances. The habendum clause was: To have and to hold all the said seventeen hundred (1,700) acres of land, less the widow's dower or life estate as aforesaid, in seven hundred and one (701) acres thereof, to the said Thomas Johnson, his heirs," etc. (b) An execution from the county court, dated May 26, 1866, in favor of Thomas Johnson against "Nathan Hawkins, Walter H. Mitchell, and Theodore G—, of the firm of N. Hawkins & Co.," issued upon a judgment rendered on May 21, 1866, the *fi. fa.* being for \$7,820 principal, and stated amounts as interest and costs. Upon this execution there was an entry of a levy upon a city lot in Milledgeville, as the property of Walter Mitchell, followed by an entry that, before any sale under such levy, a claim had been interposed, etc. Then came this entry of levy: "While the above-stated claim is pending and waived, I also levied this *fi. fa.* on all that tract of land in said county in which Nathan Hawkins, one of the defendants, lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres, subject to the widow's dower in seven hundred and one acres, all in Baldwin county. Gave notice to the tenants in possession, and advertised according to law, this March 25, 1871, adjoining lands of Mrs. Little, Rose, and others. Obediah Arnold, Sheriff." This was followed by an entry by the sheriff that the sale under this levy had been "arrested by an affidavit of illegality, filed by L. H. Briscoe, Exr. of Nathan Hawkins." After this was the following: "The levy of March 25, 1871, on the 'Stovall Place' of sixteen hundred and sixty-six and three-fourths acres, or except-

ing the dower therein of Martha Hawkins, widow, being arrested by affidavit of illegality of L. H. Briscoe, Exr. of Nathan Hawkins, deceased, and sale thereunder of said land being thus prevented, and now said Briscoe having withdrawn said affidavit of illegality, the said levy is hereby renewed on the same tract of land called 'Stovall Place' as containing seventeen hundred acres, more or less, excepting the widow's dower therein of Nathan Hawkins' widow; and also I this day levied this *fi. fa.* on five and a half shares of Milledgeville Hotel stock, and on another tract of land of eight hundred and fifty-eight acres, called the 'Ladd Place' in said county, adjoining the first-named tract called 'Stovall Place,' the lands of Dr. Wm. A. Jarrett and others—all levied on as separate property of Nathan Hawkins, one of the defendants, it being pointed out by plaintiff's attorney as subject to the execution; also gave notices to the tenants and advertised according to law in this behalf. December 1, 1871. Obediah Arnold, Sheriff." Then followed other entries that the sale had been enjoined; that the injunction had been dissolved, and the *fi. fa.* proceeded; and the land was advertised again for sale; that certain parties had filed a claim and stopped the sale; and an illegality had also been interposed "by L. H. Briscoe as Ex. of Nathan Hawkins, deceased." There was a subsequent entry, dated December 28, 1872, that, the claim being withdrawn, "this *fi. fa.* proceeds, and the sale of said 'Stovall Place' is again advertised for next February sale day. [Signed] Obediah Arnold, Sheriff." Following this was an entry, dated February 4, 1873, that "the tract of land above levied on, called 'Stovall Place,' was this day sold according to law, to the plaintiff, Thomas Johnson, at the bid or price of nine hundred and five dollars," etc. (c) The following advertisement: "Baldwin Sheriff's Sale. Will be sold on the first Tuesday in Feb. next, in lawful sale hours, before the courthouse door in Milledgeville. \* \* \* Also all that tract of land of seventeen hundred acres, more or less, in said county, known as Nathan Hawkins home or 'Stovall Place,' adjoining lands of Mrs. Little, Howell Rose, Mrs. Kenan, and others, except the widow's dower or life estate in seven hundred and one acres thereof, including the dwelling house and appurtenances, \* \* \* levied on as separate property of Nathan Hawkins, deceased, to satisfy a *fi. fa.* from Baldwin county court in favor of Thomas Johnson against Nathan Hawkins, Walter H. Mitchell, and Theodore A. Goodwin, as co-partners. Property pointed out by plaintiff's attorney. Dec. 30, 1872. Obediah Arnold, Shff. B. C."

The defendants moved that the court rule out the foregoing evidence, direct a verdict for them against the plaintiffs, upon the grounds that the entries of levy, the advertisement, and the deed were illegal and void because of indefinite and insufficient descrip-

tion of the lands mentioned in them; that such description failed to put prospective bidders at the sale on notice of what was to be sold, and was not followed in the advertisement and the deed, but the descriptions "were grossly at variance and irreconcilable and void"; and that "the 556 acres constituting the dower lands of Mrs. Amanda Hawkins, as carved out of the 'Stovall Place,' were not covered by nor included in said levy or levies, or in said advertisement or deed, but were explicitly and expressly excepted therefrom." The court overruled this motion. The defendants then introduced: (a) Two sheriff's advertisements, one of which was dated April 4, 1871, and gave notice that, "on the first Tuesday in May next," etc., the following property would be sold: "One tract of land in the county of Baldwin, on which Nathan Hawkins lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres, subject to the widow's dower in seven hundred and one acres—adjoining lands of Mrs. Little, Rose, and others." The other, which was dated December 1, 1871, was for a sale by the sheriff, "on the first Tuesday in Jan. next," of the following property: "All that tract of land in said county known as the Nathan Hawkins 'Stovall Place,' containing seventeen hundred acres more or less, excepting the widow's dower, adjoining lands of Mrs. Kenan, Howell Rose, and others." (b) "The record of the assignment of dower to Mrs. Amanda Hawkins, widow of Nathan Hawkins, from and out of the 'Stovall Place.'" (c) J. C. Hawkins, one of the defendants, offered to testify that at the sale of the Stovall Place, in the presence of witness and Thomas Johnson, and in the hearing of both, the sheriff, J. B. Wall, stated that the dower lands of Mrs. Amanda Hawkins were not to be sold; "that he [witness] bid at said sale, and bid on that part of the 'Stovall Place' exclusive of the said dower, and understood, from statements by the sheriff, that others were bidding on the same land that witness bid on." This testimony was repelled, on objection. (d) S. W. Hawkins, another of defendants, offered to testify that, immediately after the Stovall Place was first levied on, he was present at the office of Wm. McKinley, attorney for Thomas Johnson, and heard a conversation between him and Mrs. Amanda Hawkins, the mother of witness, in which "McKinley stated that the 556 acres of land constituting the dower \* \* \* was not included in the levy, and would not be sold under it, and further agreed that he would not have the said 556 acres levied upon under Johnson's *fi. fa.*" This testimony also was rejected. The court directed a verdict for the plaintiffs for the lands in controversy, and perpetually enjoining defendants, as prayed for in the petition. The defendants excepted to each of the rulings stated.



D. B. Sanford, D. S. Sanford, and C. T. Crawford, for plaintiffs in error. Allen & Pottle, for defendants in error.

FISH, C. J. (after stating the facts as above). 1. The levies were not "illegal and void because of indefinite and insufficient description of the lands mentioned in them," nor was the sheriff's advertisement under which the land was sold, or the deed which he made in pursuance of the sale, open to this objection. The land levied upon was described in the first entry of levy as "all that tract of land in said county on which Nathan Hawkins \* \* \* lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres, subject to the widow's dower in seven hundred and one acres, all in Baldwin county, \* \* \* adjoining lands of Mrs. Little, Rose, and others." While "a levy on land is void for uncertainty which fails to describe the land levied upon with such precision as to inform a purchaser what he is buying, and enable the officer selling to place the purchaser in possession" (Bird v. Burgstener, 100 Ga. 486, 28 S. E. 219), yet, so far as description is concerned, a levy in contemplation of law is sufficient if it enables one to locate the property and to identify it when found (Wiggins v. Gillette, 93 Ga. 20, 23, 19 S. E. 86, 44 Am. St. Rep. 123; Collins v. Boring, 96 Ga. 360, 23 S. E. 401). So the property levied upon was sufficiently described in the first entry of levy, as the description was sufficient to enable a prospective purchaser and the officer selling to locate and identify the property. It located the land in Baldwin county, and as being "all that tract in said county on which Nathan Hawkins \* \* \* lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres," and "adjoining lands of Mrs. Little, Rose, and others"; and the language of exclusion, "subject to the widow's dower in seven hundred and one acres," tended to aid the description, as any one desiring to bid on the land might ascertain from what tract of land belonging to Nathan Hawkins at the time of his death dower had been set apart to his widow. It is obvious that it would be an easy matter for any one, sufficiently interested in the subject to contemplate bidding at the sheriff's sale, to ascertain upon what tract of land, in Baldwin county, Nathan Hawkins lived at the time of his death, especially when informed by the levy that such tract adjoined the lands of Mrs. Little, Rose, and others, and that dower had been assigned therefrom to the widow of Hawkins; and he could likewise easily ascertain, from the record in the office of the clerk of the superior court, just what portion of such tract had been set apart as dower, as the law requires the plat of the "survey of dower" to be recorded, with the return of the dower commissioners, in that office. Civ. Code 1895, § 4701. But the

contention of counsel for plaintiffs in error on this point in their brief is that the description in the levy "was too indefinite and uncertain," in that "it failed to put prospective bidders on notice of \* \* \* what interest in [the] lands was to be sold"; that "it did not appear whether the fee of the entire Stovall Place or the fee of the 1,100 odd acres only was to be sold." This is certainly not a sound criticism of the first levy. That levy, as we have seen, was upon, "all that tract of land in said county on which Nathan Hawkins \* \* \* lived at the time of his death, containing sixteen hundred and sixty-six and three-fourths acres, subject to the widow's dower in seven hundred and one acres." This clearly was a levy upon the entire tract described, and could not be construed to be a levy upon only that portion of it not included in the plat of the survey of the dower. The words "subject to the widow's dower in seven hundred and one acres" clearly indicate that the fee in the whole tract was levied upon, and was to be sold, subject only to the life estate of the widow of Nathan Hawkins in that portion of such land which had been set aside to her as dower. They were very apt words for this purpose. The widow's dower in 701 acres was simply her interest therein, which was a life estate, and, subject to this life estate, the fee in the whole original tract from which the dower had been carved was levied upon. This seems clear and definite.

Why the sheriff should have deemed it necessary to make a second levy we cannot understand. However, judging from the language of the second entry of levy, he seems to have been under the impression that as the progress of the former levy had, after advertisement thereunder, been arrested by an affidavit of illegality until the time fixed by the advertisement for the sale had passed, the first levy had become stale or dormant and needed to be revived, or, as he termed it, "renewed." It is obvious, though, that the first levy was in full force and effect when the second was made, as it had never been dismissed, and the second levy cannot be considered as being equivalent to a dismissal of the former one, for it was clearly intended to be in aid of the first. The most that can be claimed as to the effect of the second entry of levy is that it is explanatory of the first, and that the two entries should be construed together. There is no inconsistency in the description of the property levied upon in these two entries of levy. Instead of there being such inconsistency, the description contained in the first is, by reference thereto in the second, made a part of the description in the latter. The second levy describes the land embraced in the first levy as "the 'Stovall Place' of sixteen hundred and sixty-six and three-fourths acres"; that is, that the land described in the original levy as that tract of land in Baldwin county on which Nathan Hawkins lived at the

time of his death is the tract called the "Stovall Place." This simply somewhat enlarges the description contained in the first levy, affording an additional means by which to locate and identify the land levied upon. The same may be said in reference to the substitution in the second levy of the words "seventeen hundred acres, more or less," for the words "sixteen hundred and sixty-six and three-fourths acres," which appeared in the first entry. The clause in the second entry of levy, "excepting" from the levy upon the entire tract of 1,700 acres, more or less, "the widow's dower therein of Nathan Hawkins' widow," does not necessarily conflict with the expression, "subject to the widow's dower in seven hundred and one acres," which appears in the first levy. "The widow's dower" in the land levied upon was the widow's life estate in that portion of such land which had been set apart to her as dower. But, even if these two clauses of exclusion, when construed separately, seem to conflict, when they are construed together, as they should be, they unmistakably refer to the legal right of dower in the land set apart to the widow, and not to the dower tract itself.

Counsel for plaintiffs in error cite McAfee v. Arline, 83 Ga. 645, 10 S. E. 441, and Wells v. Dillard, 93 Ga. 682, 20 S. E. 263, to support their contention that the reversion in the dower land was not sold. In the first of these cases it was held that "the clause, in a deed, 'except the dower of fifty acres and fully described in deed given to Corbin Banking Co., the said tract or parcel of land hereby conveyed \* \* \* contains all the dwellings and ginhouse except the old original dwelling house,' is strictly an exception." There the grantor excepted from his conveyance, not the widow's dower in the tract conveyed, nor the dower in 50 acres of such tract, but he described the land excepted as "the dower of fifty acres," which was the same as if he had said, "except the dower land of fifty acres." The word "dower" there was descriptive of land, and not of an interest in land. The second case cited is on the same line. There an administrator conveyed to the widow of the intestate "lot 154, in 31st dist. Marion county, except the widow's dower and ten acres off southeast corner," and the deed recited that the widow "bought all of said lot except the widow's dower and ten acres off of the southeast corner of said lot." The widow at the time of the sale was in possession of a definite portion of the lot, which portion had been previously laid off as her dower; and it was held that "the proper construction of the conveyance is that both this portion and the 10 acres in the southeast corner were wholly excepted from the sale made by the administrator, the phrase 'widow's dower,' as used in the conveyance, meaning, not the legal right of dower, but the parcel of land itself over which that right had been asserted and

exercised." Had the description in the conveyance been "all of lot 154, in the 31st dist. of Marion county, except the widow's dower therein," and if the deed had recited that the widow "bought all of said lot except the widow's dower therein," we apprehend that the ruling as to the effect of the deed would have been different. For the widow's dower in a described tract of land must mean either a life estate in the whole of such tract, or such an estate in a designated and described portion thereof. In the present case, however, the meaning of the words, in the second entry of levy, "excepting the widow's dower therein of Nathan Hawkins' widow," if not precisely clear from the words themselves, is made clear by reference to the first levy, of which the second was, by its very terms, intended to be simply a renewal.

The sheriff's advertisement, introduced by plaintiffs, was not "void because of indefinite and insufficient description of the lands" therein mentioned. The description, "all that tract of land of seventeen hundred acres, more or less, known as the Nathan Hawkins' home or 'Stovall Place,' adjoining lands of Mrs. Little, Howell Rose, Mrs. Kenan, and others, except the widow's dower or life estate in seven hundred and one acres thereof, including the dwelling house and appurtenances," was clearly sufficient for prospective purchasers to locate and identify the land to be sold, and it also clearly indicated that the whole interest, in the entire tract of about 1,700 acres, was to be sold, except the life estate of the widow in the dower lands. The language "except the widow's dower or life estate in seven hundred and one acres" plainly shows that it was the life estate of the widow, in that portion of the tract set apart as her dower, which was excepted from the sale to be had under the levy, and not the dower tract itself. This advertisement was certainly perfectly consistent with the first levy, and it was not at all inconsistent with the second one, when it is construed, as it should be, in connection with the first. The sheriff's deed followed the language of this advertisement, and therefore there was no conflict between the description in the deed and the description in the advertisement, and none between the description in the deed and those in the levies. The fact, to which counsel for plaintiffs in error call attention in their brief, that the dower tract actually consisted of only 556 acres, instead of 701 acres, as indicated in the levies, the advertisement, and the deed, is immaterial; for, as we have shown, it was not the dower tract which was excepted in these writings, but the widow's life estate therein; and if she in fact only had a dower or life estate in 556 acres, then it was only this interest which was excepted. Even if it could be held that, under the levies, the advertisement, and the deed, a life interest in the widow in 701 acres of the land was excepted, the result in this case would be the same, as after

her death the whole or complete legal title to the entire original tract of land which had been levied upon and sold by the sheriff to Thomas Johnson would be in the plaintiffs, as trustees under the will of Johnson; the fact that the plaintiffs held whatever title he had in his lifetime being shown by documentary evidence introduced by them and uncontested by the defendants. This documentary evidence it was not necessary to set out in the statement of facts preceding this opinion, as the questions presented and relied on by plaintiffs in error did not involve its discussion. The sheriff's advertisements of sale, introduced by defendants, have not been considered, for the simple and sufficient reason that the land was not sold under these advertisements or either of them. Each of them was *functus officio*, by lapse of time, when the land was finally exposed for sale by the sheriff and sold by him. The sale took place on the first Tuesday in February, 1873, in pursuance of an advertisement that it would be sold on that day, dated December 30, 1872. No bidder or prospective bidder at that sale was concerned in an advertisement dated April 4, 1871, giving notice that on the first Tuesday in May thereafter certain property would be sold by the sheriff, nor in an advertisement dated December 1, 1871, of property to be sold on the first Tuesday in January, 1872, although each of these advertisements may have been intended to be based upon the identical levy under which the sale advertised for the first Tuesday in February, 1873, was to take place. The two advertisements introduced by defendants were wholly irrelevant and immaterial.

2. The exceptions to the exclusion of the testimony of J. C. Hawkins, offered by defendants for the purpose of contradicting the return of the sheriff as to the property sold under the execution, and the deed which he executed to the purchaser at such sale, were not well taken. The return of the sheriff as to the sale entered on the *fi. fa.* was, so far as material here, as follows: "Feb. 4, 1873. The tract of land above levied on called 'Stovall Place' was this day sold according to law, to \* \* \* Thomas Johnson, at the bid or price of nine hundred and five dollars," etc. From this entry it appears that the whole tract of land called "Stoval Place," as levied on, was sold by the sheriff. If the return of the sheriff on the execution had been that "the tract of land called 'Stovall Place' was this day sold," etc., such return, standing alone, would clearly mean that all the interest of the defendant in execution in such tract, or any portion of the same, had been sold. Most assuredly it would mean that no distinct and separate part of the land itself had been excepted from the sale. But the return stated that "the tract of land above levied on called 'Stovall Place' was this day sold," etc., and, construed in the light of the levy or levies, this means that the tract of

land known as "Stovall Place" was sold as levied on; that is, subject to the widow's dower in a portion of such tract. The description "the tract of land above levied on called 'Stovall Place'" necessarily includes the whole tract; and parol evidence that 556 acres thereof, which had been set aside as the widow's dower, was not sold would directly contradict the return of the sheriff as to the sale. Such evidence would also contradict the deed which the sheriff made to the purchaser at the sale, which, as we have seen, purported to convey this entire tract of land, "except the widow's dower, or life estate in seven hundred and one acres." In *Parler v. Johnson*, 81 Ga. 254, 7 S. E. 317 (2), it was held: "The sheriff's entry upon the *fi. fa.* and his deed executed in pursuance thereof, after the lapse of more than 20 years, are better evidence than the parol testimony of a single witness as to what property was sold. And the entry is not traversable by third persons upon the trial of an action against them for the premises." In the opinion, at page 259 of 81 Ga., at page 318 of 7 S. E., Chief Justice Blackley said: "One witness testified that the land actually sold by the sheriff was not that embraced in the sheriff's return and in his deed of conveyance; that the reversion in the land covered by the widow's dower was not sold. More than 20 years had elapsed; and surely the recollection of this one witness was not sufficient to match and master official documents like these. The defendants in the action wanted to traverse the return; that is, make up a collateral issue denying its truth. The court declined to allow this, and we suppose correctly, for we never heard of the like. They who proposed the traverse were not parties to the cause in which the return was made." It will be seen that the court there passed upon two questions in reference to an attack upon the return of the sheriff as to the sale under the execution. The first was as to the sufficiency of the parol evidence—apparently introduced without objection—to overcome this return and the deed made in pursuance thereof. The second was as to the right of persons not parties to the cause in which the sheriff's return was made to traverse such return. Under the ruling upon the first question, if, in the present case, the court had permitted J. C. Hawkins, one of the defendants, to testify that he was present at the sheriff's sale in question, and heard the sheriff state that the dower lands were not to be sold, such testimony could not have changed the result of the trial, as the evidence in the case would have demanded a verdict in favor of the plaintiffs; for here we have the testimony of a single witness as to what property was sold at a sheriff's sale, offered more than 30 years after such sale, to contradict the return of the sheriff and the deed which he made to the purchaser at that sale. Under the ruling on the second question persons who were not parties to the cause in which the return of the sheriff was made cau-

not traverse the return. Under the decision in *Jinks v. Am. Mortgage Co.*, 102 Ga. 694, 28 S. E. 609, such a sheriff's return, "so long as it stands unchallenged upon the record, is presumptively correct"; and, in the absence of a traverse thereof, it is conclusive upon the parties to the case, and of course it must follow is conclusive upon those claiming under a party to the case. In the opinion Mr. Justice Cobb, after citing decisions of this court, to the effect that "the entry of a sheriff on process in his hands is generally not traversable," but "such entry may be traversed, however, for fraud or collusion," and that "the Code 'widened the laws of traverse as to the returns of service,'" said: "But the returns of sheriffs and other levying officers upon final process in their hands are still governed by the law as it stood before the Code was adopted. \* \* \* As long as the entry of the sheriff, reciting a sale at an amount more than that due on the execution, stands upon the records unimpeached and unchallenged, such entry is conclusive upon the plaintiff in execution. If the entry is false, the officer making it is liable in damages to any one injured thereby. If it was made fraudulently or collusively, it may be attacked and set aside at the instance of any one who is the victim of such fraud or collusion." We think it necessarily follows from these two decisions that the court rightly excluded the parol evidence offered to contradict the sheriff's return of the sale under the execution and his deed made in pursuance thereof. Under the first decision third parties cannot traverse the return of the sheriff; and under the second such return is conclusive upon a party to the cause until it is traversed upon proper ground, and, consequently, must be conclusive upon those holding under him. Our ruling, of course, applies to the rejection of the testimony of S. W. Hawkins as to a statement made, in his presence, to his mother, by an attorney for the plaintiff in execution, which testimony was otherwise inadmissible as an effort to contradict the levy entered upon the *fi. fa.* by parol evidence. According to the testimony of this witness, which appears in the record, he might have been "a little over 15 years of age" when he heard the statement in question, but it is doubtful whether he was even that old, and about 35 years had elapsed since he heard it.

There being no error in any of the rulings complained of, the judgment of the court below is affirmed. All the Justices concur.

#### TAYLOR v. ALLEN.

(Supreme Court of Georgia. Aug. 19, 1908.)

#### 1. COVENANTS—BREACH—ACTION—JUDGMENT—CONCLUSIVENESS—WARRANTY.

Where a defendant in an action of ejectment may have an action over against a warrantor of title, and vouches him into court by giving notice of the pendency of the suit, the judgment rendered therein will be conclusive up-

on the party vouched as to the right of the plaintiff to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 223.]

#### 2. SAME—DEFENSES CONCLUDED.

As to a defense which the person vouched could have set up in the ejectment case, and which, if sustained, would have defeated a recovery, he is concluded, and cannot set it up in a suit for a breach of his warranty of the title, on account of the recovery in the ejectment cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 223.]

#### 3. SAME.

This is also true if the defense was actually set up and passed upon in the first suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 223.]

#### 4. SAME—WARRANTY—BREACH—MEASURE OF DAMAGES—ELEMENTS.

As a general rule, on a breach of warranty the measure of damages is the purchase money, with interest and expense of litigation; attorney's fees, and traveling expenses are not proper elements of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 249.]

(Syllabus by the Court.)

Evans, P. J., and Atkinson, J., dissenting.

#### 5. WORDS AND PHRASES—"PURCHASE MONEY."

The words "purchase money," as used in the rule that, in an action for breach of a covenant of warranty, the measure of damages is the "purchase money" and interest, include the actual consideration paid for the land, whether in money, property, or otherwise.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5857.]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by Mrs. M. J. Taylor, as administratrix, etc., against Lee Allen. Judgment for defendant, and plaintiff brings error. Reversed.

W. P. Wallis and Lane, Maynard & Hooper, for plaintiff in error. Shipp & Sheppard, for defendant in error.

LUMPKIN, J. Mrs. Nettie McCall Allen made a deed to her brother-in-law, Lee Allen, and on the same day the latter made a warranty deed to the American National Building & Loan Association, which conveyed by quitclaim deed to Taylor. Afterwards Mrs. Allen brought ejectment against Taylor to recover the land. The defendant vouched Lee Allen as a warrantor. Mrs. Allen recovered judgment. Taylor brought suit against Lee Allen for a breach of warranty. The defendant pleaded that his deed to the association was without consideration; that he was never in possession of the land, and never owned or claimed title to it; that the deeds from Mrs. Allen to him, and that from him to the association, were made to settle a criminal prosecution against Mrs. Allen's husband, on a charge of embezzlement preferred by the association against him; that this mode of conveyance was used at the instance of the association; and that "it was upon this consideration, and for this reason alone, that a

deed was accordingly made by the said Nettie Allen to this defendant, and from this defendant to the said association, with full knowledge of all the facts herein set out; and this defendant further avers that, in consideration of said aforementioned agreement, the prosecution instituted by the plaintiff against Thos. E. Allen was dropped, and was not pressed further by plaintiff or his association, or by any of its officers or stockholders"; and that the deed made by him was "a part and parcel of an illegal scheme to compound a felony." Also, that the deed to him and that by him to the association were for the purpose of effecting a payment by Mrs. Allen of her husband's debt to the association, and that the dual conveyance was made at the suggestion of the present plaintiff as president of the association. In the present case the defendant testified, among other things, as follows: Tom Allen was arrested on a charge of embezzlement. "A few days after that my brother's wife, Mrs. Nettie McCall Allen, sent for me to come to her house. I went to her house, and she was crying, and asked me to go down to the Building & Loan Association and offer them this property of hers at Buena Vista. Well, at her request I went down to the Building & Loan Association. I did not make a statement of this matter then. I went to Judge Fort in regard to the matter that day. He was the attorney representing the Building & Loan Association, and assisted the prosecution of my brother by this company. I went to him, and offered him this property in settlement of my brother's. I went to Judge Fort's office that afternoon, the afternoon of the day my brother's wife had sent for me, and offered him, as attorney and agent for the Building & Loan Association, a deed from brother's wife to the association, with the understanding that these criminal cases against my brother should be dismissed." A ruling on a demurrer to the petition will be found in 121 Ga. 841, 49 S. E. 799.

1-3. It is thus evident that Allen claimed the making of the deed by Mrs. Allen to him, and that by him to the association, to be parts of an illegal scheme. The record in the ejectment case was introduced in evidence. The jury found for the defendant. "Where a defendant may have a remedy over against another, and vouches him into court by giving notice of the pendency of the suit, the judgment rendered therein will be conclusive upon the party vouched, as to the amount and right of the plaintiff to recover." Civ. Code 1895, § 5234. It was admitted on the trial that the defendant was vouched in the ejectment case. He was therefore bound by the judgment as to the right of Mrs. Allen to recover; and, if he failed to appear and protect his warranty by defending against her suit, in an action on his warranty he was bound as to any defense which he could have set up in the first case. If the deed from Mrs. Allen to Lee Allen and from him to the

association were parts of a scheme to compromise a prosecution for a felony, and this was known to Taylor, as now contended, this would have been a good defense to the action of ejectment; the conveyance and delivery of possession having been consummated. If he failed to set up this, he was bound by the judgment, and precluded from setting up the same issue in a suit on the warranty. If he did appear when vouched, and set up this defense, he is of course bound by the judgment. Civ. Code 1895, § 3742. If the evidence be considered in order to show that the point was actually passed on in the former suit (*Irvin v. Spratlin*, 127 Ga. 240, 55 S. E. 1037), it is clear that it was so. The defendant testified that he was a witness in that suit, and gave evidence by interrogatories touching the illegality of the consideration. There was also other evidence on that point. The charge of the court in that case more frequently referred to the deed of Mrs. Allen, but it was not confined to her deed alone, as distinct and disconnected from that of the defendant. It seems to be clear, therefore, that not only was the matter of the illegality of the transaction a defense which could have been made in the ejectment suit, but also that it was actually passed upon. The present defendant was accordingly concluded on the subject, and could not again set up that defense. Nor was it any defense against a suit on his warranty that Mrs. Allen made her conveyance to pay the debt of her husband. The restriction on the right of a married woman as to conveying her property, and her right to recover it if conveyed for the purpose of paying her husband's debt, and if received and held by one with notice of that fact, is for her protection. Civ. Code 1895, § 2488. It is not for the protection of a man *sui juris*, who takes a deed from her and warrants the title to another. The very object of the interposition of this conveyance to him was probably to place a warrantor between her and the company, who could be held on his warranty if she repudiated her conveyance. So a minor may repudiate his contract or conveyance; but, if another warrants or guarantees that the minor's conveyance shall be good, he is not relieved by the minor's refusal to abide by it. The very reason for taking the warranty, if lawful, can hardly be a defense to a suit for its breach. A general warranty covers a known defect in the title. Civ. Code 1895, § 3615; *Allen v. Taylor*, 121 Ga. 841, 49 S. E. 799. The point was raised by objection to evidence, to the charge, and by attacking the verdict as not authorized by the evidence. The objection to the evidence is not well stated, but the assignment of error upon the charge and verdict is valid, and we think should be sustained.

4. The general rule in Georgia is that, on a breach of warranty of title to land, the measure of damages is the purchase money, with interest, unless the use of the prem-

ises is equal to the interest in the opinion of the jury. Civ. Code 1895, § 3804; Gragg v. Richardson, 25 Ga. 506, 571, 71 Am. Dec. 190; Wimberly v. Collier, 32 Ga. 13, 20. It has been held by two judges (one dissenting) that even a remote warrantor can show the purchase money actually paid, in spite of a recital in the deed as to the consideration. *Martin v. Gordon*, 24 Ga. 533. Speaking for myself, I think the dissent of Judge McDonald, as to an innocent purchaser without notice, presents strong reasoning. Taylor could not recover more than he had paid, with interest. If the purchase money or consideration of the deed of Allen to the association was more than that of the deed to Taylor, his recovery would be limited to his loss, with interest. If that were more than the consideration of the warranty deed of Allen, no recovery could be had beyond the amount of the latter, with interest, if the ruling of the majority of the court in the *Martin* Case be followed, and certainly it is the same as to one who buys with notice. The expression "purchase money," as here used, includes the actual consideration, whether paid in money, property, or otherwise. If a breach of warranty is proved, but no amount of purchase money is shown as a measure, nominal damages only are recoverable. Civ. Code 1895, § 3801. Expenses of litigation, attorney's fees, and cost of traveling were not proper elements of damages.

Judgment reversed. All the Justices concur, except EVANS, P. J., and ATKINSON, J., dissenting.

EVANS, P. J., and ATKINSON, J. (dissenting). We differ with our Brethren as to the extent of the estoppel of the judgment in the ejectment case. Under the record in that case it appears that Mrs. Allen sought to evade the estoppel of her own deed by showing it was given to settle her husband's debt, and the defendant attempted to thwart that effect by urging that the real consideration of Mrs. Allen's deed was to suppress a criminal prosecution, and that the law would not aid her in a recovery of the land. See *Taylor v. Allen*, 112 Ga. 330, 37 S. E. 408. The capstone of the legal principle asserted by the defendant to prevent a recovery was that Mrs. Allen had engaged in an illegal transaction; that her deed was made to suppress a prosecution for crime. The participation of Lee Allen in her effort to suppress the prosecution was not an independent issue. The fact for adjudication was not that Lee Allen gave his deed to the association to suppress the prosecution, but did Mrs. Allen give her deed for that purpose? Now it may have been that Mrs. Allen gave her deed to settle her husband's debt, without any purpose to settle the warrants against her husband. It may have been that Lee Allen's only purpose in the transaction with Taylor and the association was to stifle the prosecution against his

brother, and that Mrs. Allen had no connection therewith. The issue in the ejectment case did not cover the independent action of Lee Allen, and he could plead in bar of the action of the covenant of warranty that he made his deed in pursuance of an understanding between him and the association and its president, the plaintiff in this case, that the warrants against his brother were to be dismissed and further prosecution suppressed.

### GENERAL SUPPLY & CONSTRUCTION CO. v. LAWTON.

(Supreme Court of Georgia. Aug. 19, 1908.)

#### 1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—PETITION.

The petition in this case states a cause of action, and a general demurrer thereto was properly overruled.

#### 2. SAME.

The plaintiff having alleged in his petition that, while passing under a scaffolding, he received certain injuries because of certain defects in the scaffolding which caused it to fall upon him, and that he was, at the time of receiving the injuries, passing under the scaffolding "by direction of the agent or foreman of the defendant company," the petition was demurrable, upon the ground "that the name of such agent or foreman was not given, and that the petition fails to state whether the person by whose direction the plaintiff passed under the scaffolding was agent or foreman, or to state what duties or services the alleged agent or foreman performed, so that it might appear whether such agent or foreman was acting as a fellow servant of plaintiff or as vice principal of the defendant."

#### 3. APPEAL AND ERROR—PLEADING—RULING ON DEMURRER—ERROR—EFFECT.

Where a demurrer is improperly overruled, and the case proceeds to trial, all that takes place in the trial subsequently to the overruling of the demurrer is nugatory.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Ed. Lawton against the General Supply & Construction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton brought suit against the General Supply & Construction Company, for damages on account of personal injuries. The petition alleged that the plaintiff was employed as a general laborer to work in and about the National Bank Building in Savannah, which building was being constructed by the defendant company; that while engaged in his work, going from one part of the building to another, plaintiff, by the direction of an agent or foreman of the company, passed beneath some scaffolding on the first floor of the building, and while passing beneath this scaffolding, some one called, "Look out!" and before he could escape from the room the scaffolding fell and injured him; that he was in the exercise of due care and caution, he had no knowledge of the defective condition of the scaffolding, nor could he

have discovered the same; that the injuries received by him were due to the negligence of the company in allowing the scaffolding to be so defectively constructed or in such defective condition that it would fall; that the company was further negligent in permitting him, while in its employment, to go through the room and beneath such defective scaffolding, and that the company knew the defective condition thereof. He amended by alleging, that said scaffolding was erected by the defendant or its agents, and was at all times under the company's control; and that the company had removed two of the central and main supports to the scaffolding for the purpose of removing an engine from beneath the scaffolding, and thereby weakened it to such an extent as to cause it to fall.

The defendant demurred to the original and amended petition, both generally and specially. The demurrer was overruled. It filed a plea and answer; and the case proceeded to trial upon the issues made. After the plaintiff had closed his testimony the defendant moved for nonsuit, and the motion was overruled. A verdict was rendered in favor of the plaintiff. The defendant's motion for a new trial was overruled, and it excepted to each of the rulings stated.

Gordon & Charlton, for plaintiff in error.  
Cann, Barrow & McIntire and U. H. McLaws, for defendant in error.

BECK, J. (after stating the facts as above).

1. We are of the opinion that the petition set forth a cause of action, and that the court was right in overruling a general demurrer thereto.

2. Besides filing a general demurrer, the defendant demurred to the petition specially, on the grounds that "said declaration is vague and insufficient in that it does not set out the name of the 'agent or foreman' of this defendant under whose direction plaintiff was working at the time of the alleged accident"; and upon the further ground that "the said declaration is vague and insufficient in that it states that the plaintiff was acting under the direction of one of the agents or foremen of the defendant company, and yet it fails to specify whether agent or foreman, and, further, it fails to state in detail what duties, services, or labor such agent or foreman performed, so that it may appear whether such agent or foreman was acting as a fellow servant of plaintiff or as vice principal of defendant." Considering these two grounds of demurrer together, we are of the opinion that they should have been sustained, no appropriate amendment to the petition to meet them being offered. Had the plaintiff stated in his petition what "duties, services, or labor the alleged agent or foreman performed," so that the defendant would have been put upon notice as to whether such agent or foreman was acting as a fellow servant of plaintiff or as vice principal of the defendant, the mere failure

to give the name of the person alleged to be the agent or foreman would not of itself have been good ground for demurrer. *Pierce v. Seaboard Air Line Ry.*, 122 Ga. 664, 50 S. E. 468; *South Ga. Ry. Co. v. Ryals*, 123 Ga. 330, 51 S. E. 428. But the failure both to state the name of the alleged agent or foreman, and to set forth what duties or services his position required of him, left the petition open to attack by special demurrer. The information called for by this special demurrer was of such a character that the defendant was entitled to have it given in the plaintiff's statement of his case in the declaration. It was material for the defendant to know, in preparing to meet the case made by the plaintiff in his pleadings, whether or not the plaintiff would insist that, in passing under the scaffolding, by the falling of which the plaintiff was injured, "by direction of the said agent or foreman," the direction or order to pass under the scaffolding was given by one whose position and duties were of such a nature as to make him the vice principal of the defendant, or whether he was a mere fellow servant with the plaintiff himself.

There were other grounds of special demurrer, but, so far as they were meritorious, they were met by proper amendments; or at least, as they were stated, they will not require a reversal.

3. The court having erroneously overruled the ground of the demurrer which we have held to be a proper criticism of the petition in this case, all that took place subsequently upon the trial was nugatory and of no effect, the erroneous refusal to sustain a demurrer vitiating the entire trial; and questions made by assignments of error upon rulings of the court, during the trial and upon certain portions of the charge to the jury, will not be considered. *Seaboard Air Line Ry. v. Smith*, 3 Ga. App. 1, 59 S. E. 199.

Judgment reversed. All the Justices concur.

#### SHELLNUT v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 19, 1908.)

##### CARRIERS—RECEIPT OF GOODS—CONVERSION.

A common carrier is bound to receive all goods offered that he is able and accustomed to carry, and to transport and deliver such goods in pursuance of the bailment; and, where he receives goods offered, the possession thereof by the person offering the same as freight being apparently rightful, though as a matter of fact it may not be actually so, the carrier will not be liable as for a conversion, in an action brought by the true owner, unless the latter intervenes before the goods are delivered and demands them, or gives notice of his right to the property in question and of his intention to enforce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 98, 99.]

(Syllabus by the Court.)

Error from Superior Court, Haralson County; R. W. Freeman, Judge.

Action by J. T. Shellnut against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Spencer R. Atkinson and J. S. Edwards, for plaintiff in error. J. Branham, G. E. Maddox, and E. S. Griffith, for defendant in error.

BECK, J. The plaintiff's suit was for the conversion of 33 described bales of cotton, of the value of \$1,800, which were alleged to have been wrongfully taken and carried away by the railroad company. On the trial the plaintiff testified, in substance, as follows: He was familiar with the buying and selling of cotton, and had been shipping cotton for several years. The cotton sued for was part of a lot of 300 bales, which he had bought, and which he was negotiating to sell to the E. S. Ehney Cotton Company of Atlanta, through their agent S. O. Haney, with whom plaintiff was dealing personally. The cotton was stored in the Merchants' & Planters' warehouse in Bremen, and it was customary, in making sales, to make out an invoice of the cotton and deliver the invoice to the buyer when payment is made. The plaintiff agreed with the agent Haney to sell to the E. S. Ehney Cotton Company the 300 bales of cotton at a certain price per pound, and delivered to Haney, and also to the warehouseman, a copy of the invoice above referred to. The purchase price amounted to \$13,000, and Haney paid plaintiff \$8,000, which he received on account. Plaintiff's agreement with Haney was that the latter should get the cotton out of the warehouse, line it up, and grade it preparatory to shipment. As to who should make delivery of the cotton to the railroad company, and the circumstances under which such delivery should be made, the plaintiff's evidence is somewhat confused. At one time he testifies that he expected Haney to have the cotton loaded on the cars, receive the bill of lading, and settle with him afterwards as to the balance of the purchase money, while from other portions of his testimony it seems that Haney had authority merely to prepare the cotton for shipment, and was not to deliver to the railroad except in conjunction with the plaintiff. But the agreement between the plaintiff and Haney contemplated a cash sale, and a payment by Haney of the balance of the purchase money before plaintiff's claim upon the bill of lading was finally surrendered to Haney. The plaintiff had given the railroad company no authority to ship the cotton. After delivering the warehouse invoice to Haney, and receiving the \$8,000 from him, the plaintiff left Bremen for a few days, and upon his return discovered that the cotton had been shipped away. Upon inquiry of the railroad agent at Bremen the plaintiff learned that Haney had shipped the cotton to the E. S.

Ehney Cotton Company of Atlanta, the railroad agent stating that he thought it was all right. Plaintiff then made a demand of the railroad agent for the bill of lading, which was refused. No demand was made for the price of the cotton. Upon inquiry it was ascertained that Haney had left the place, and was not to be found. Plaintiff then proceeded to Atlanta, and demanded the balance of the purchase price from the E. S. Ehney Cotton Company, who stated to him that they did not "know him in the transaction," but bought the cotton from Haney, who was their road agent, buying under instructions from them, but who had no authority, in this instance, to purchase the 300 bales of the plaintiff. However, they paid the plaintiff \$4,000, which he received, but under protest that it was not sufficient to satisfy the balance due him. The amount due him was \$1,800, and the value of this in cotton the plaintiff calculated to be 33 bales of the weight, grade, and price per pound set forth in the petition; and the 33 bales sued for were the last 33 described in the warehouse invoice of the 300 bales. The cotton had been shipped in 100 bale lots, and the 33 bales in question were selected from the last lot shipped. Two bills of lading, covering 50 bales each of this lot, were introduced in evidence, showing shipment by Haney, consigned to "order notify E. S. Ehney Cotton Company, Atlanta, Ga." Plaintiff offered in evidence the receipt given by him to the Ehney Cotton Company for the \$4,000 paid him, in which it was recited that the receipt was in full for all demands, "excepting my claim against the Ehney Cotton Company for the value of certain bales of cotton claimed by me to have been converted by the Ehney Cotton Company." The receipt was ruled out, upon the objection that it was irrelevant and a declaration of plaintiff in his own interest, to which ruling plaintiff excepted.

Plaintiff also excepted to the refusal of the court, upon objection upon the ground of irrelevancy, to allow him to testify that he owned a plantation at the time of the contract of sale of this cotton, and had produced on his plantation during that year 30 bales of cotton. Upon this evidence the court, on motion, granted a nonsuit, and the plaintiff excepted. Even if we view the evidence most favorably to the plaintiff in this case, we must affirm the judgment of the court below granting a nonsuit. Admitting that the title to the cotton had never passed from Shellnut, and that, when Haney took possession of it and delivered it to the railroad company, he was not rightfully in possession of the same, still he was apparently, so far as the railroad company knew, so far in the rightful possession of the property that he had a right to deliver it for shipment, and take the bill of lading which was issued to him by the company. And, the bill



of lading having been issued in the name of Haney, the cotton was shipped and delivered under that bill of lading; and when it was so shipped and delivered, the company was free from any liability for a conversion, as no demand was made upon it for the property while it was in its possession. It seems to be a well-settled principle that a common carrier is guilty of no conversion "though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner. \* \* \* Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion. The authorities on this point are abundant: *Greenway v. Fisher*, 1 Car. & P. 190; *Ross v. Johnson*, 5 Burr. 2825; *Fowler v. Hollins*, 7 L. R. Q. B. 616; *Hiorst v. Bott*, L. R. 9 Ex. 86; *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289; *Smith v. Colby*, 67 Me. 169; *Strickland v. Barrett*, 20 Pick. (Mass.) 415; *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Waring v. Railroad Co.*, 76 Pa. 491." *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; *Cooley on Torts* (3d Ed.) 877; *Hutch. Car.* §§ 148, 753. See, also, 6 Cyc. 472, and numerous cases there cited. "A common carrier must accept freight from every one offering the same, and is not guilty of conversion in accepting freight from a party in possession thereof, unless the true owner intervenes before the goods are delivered and demands them." *Robert C. White Live Stock Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 30. To lay down a different rule would be productive of results that would not only work great hardships upon common carriers, but, in many cases, would amount to the grossest injustice, especially in view of the provisions of Civ. Code 1895, §§ 2278, 2286. The first of these sections provides that: "A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public." The latter section declares that: "The carrier cannot dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him."

If the doctrine insisted upon by the plaintiff in this case should be set up and adhered to as a rule of law, then a common carrier, when property was offered to it for shipment, could not, with safety, receive the same for transportation until it had taken

time to investigate and ascertain whether or not the person in possession of the property was the owner of it, or rightfully in possession of it. Our attention is called, in the brief of counsel, to the case of *Sou. Express Co. v. Palmer*, 48 Ga. 85, where it is apparently held that "a carrier who receives goods to carry from one not authorized to deliver them to him is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be." An examination of that case, however, shows that the extract which we have quoted is mere obiter, as the question, which is there apparently ruled, was not involved in the case. The case of *Charleston Ry. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374, is cited as one recognizing and applying the rule apparently laid down in the *Southern Express Co. Case*, last above referred to. But an examination of the case of *Railroad Co. v. Pope* reveals that, at the time of bringing the action against the railroad company by *Pope & Fleming*, the carrier company had not parted with the possession of the goods for the conversion of which they were sued. While in the case of *Georgia Railroad Co. v. Haas*, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327, it was held that a carrier cannot refuse to recognize the demand of the true owner of the property, made while such property is in the carrier's possession, and duly pressed, and carry it away, and deliver it to a person who does not own it, or his order, merely because the carrier received it from such person as consignor, there is no intimation in that case that, if the property had been carried and delivered in pursuance of the directions given by the person who, being in possession of it, offered it for carriage, before demand was made by the true owner, the carrier would have been liable as for a conversion. Indeed, the argument and the reasoning in that case tend very strongly to the conclusion which we have reached in this. We do not think it could be said that, where a railroad company receives property for transportation, which the law imperatively demands that it shall receive when it is offered, and then, acting, as was said in the case of *Nanson v. Jacob*, supra, "as a mere conduit," delivers it in pursuance of the bailment, it can be said to exercise "a dominion over it in exclusion or in defiance" of the true owner's rights, because, if the true owner should, before the delivery of the property by the carrier in pursuance of the bailment, make demand for it, or show his right to the possession of it, and give notice of his intention to enforce that right, then the carrier would be bound to recognize that right, or, refusing to do so, would refuse at its peril.

Exceptions were taken to the refusal of the court to admit certain evidence tendered by the plaintiff. It is not necessary to pass upon the question raised by these assign-

ments of error, as the decision which we have made upon the controlling question in the case could not possibly be affected, if we consider the evidence which was tendered and repelled by the trial court, which is here as a part of the brief of evidence in the case.

Judgment affirmed. All the Justices concur.

## McCOY v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Aug. 19, 1908.)

### 1. RAILROADS—BLOW POST LAW—CROSSINGS.

The plaintiff brought suit for the recovery of damages alleged to have been sustained as a result of personal injuries caused by the negligent failure of the defendant's employes to observe the requirements of the blow post law, embodied in the Civ. Code 1895, § 2222. The recital of the facts upon which the cause of action was based, showing that the right to recover against the defendant was dependent upon the question whether the road crossing at or near which the injuries were alleged to have been sustained was a public crossing, when the evidence showed unquestionably that the crossing was not a public crossing as alleged, the verdict in favor of the defendant was demanded by the evidence.

### 2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

That being true, a mere inaccuracy in the charge will not work a reversal of the judgment denying a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036.]

(Syllabus by the Court.)

### 3. WORDS AND PHRASES—"PUBLIC ROAD."

"Public road," as used in Civ. Code 1895, § 2222, requiring railroads to blow the whistle and reduce speed after reaching a point 400 yards from a public road crossing, is not confined to a road laid out and established by county authorities by regular proceedings, but includes as well highways which came into existence by legislative action, by proceedings of the county authorities, by dedication, or by prescription.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5819-5821; vol. 8, p. 7773.]

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by Martha McCoy against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Martha McCoy brought suit to recover damages alleged to have been sustained by reason of the negligence of the railway company. She alleged that, while going from the eastern side (the side of her residence) to the western side of the track of the defendant, "it became necessary that plaintiff should travel upon the Middle Ground public road, and thence by another public road, and across the point where said railroad intersects with and crosses the public road"; that she was traveling in a wagon drawn by a kind and gentle horse; that at the moment when petitioner, on said public road, was

crossing the track of the defendant, the north-bound passenger-train, without any notice or warning whatever of its approach, passed over said crossing at the instant when plaintiff's horse and wagon had cleared the western side of the track, and because of the sudden appearance and the terrific speed and noise produced by the passage of said train, and the proximity of her vehicle thereto, her horse became terrified and dashed into the woods, hurling her against the logs and stumps, bruising and rendering her unconscious, and causing her by such contact to lose almost her entire left ear; and that she was permanently injured, crippled, disfigured, and maimed. The specific acts of negligence complained of are as follows: That the engineer failed to blow the whistle of the locomotive until it arrived at the public road, and did not simultaneously check and keep checking the speed thereof so as to stop should any person or thing be crossing the track; that the agents in charge of the train wholly failed to give any warning whatever of its approach; and that the defendants and its agents so operating the train failed to slacken the speed of the same before reaching said crossing, and after the time when they did see, or could in the exercise of reasonable care and diligence have seen, that the plaintiff was in a dangerous position. By amendment she alleged that the dirt road over which she was traveling at the time she received said injuries had been used continuously by the public for 20 years or more, and was the only road at or near her residence whereon she could travel from her home across the track to the western side thereof. It appears from the evidence as adduced at the trial that there was a sharp curve in the railroad track just south of where the accident occurred, and that the land outside of the right of way had grown up in woods and trees, making it difficult for a person to see a train until it came around the curve. Witnesses testified that the road in question had been used by the public for a number of years, some saying over 20 years, but none testified that it had ever been worked by the county authorities as a public road; and it was shown without conflict that they had not recognized it as such, or worked or maintained it, and that it was not a public road. A verdict was rendered in favor of the defendant. The plaintiff made a motion for a new trial, which was overruled, and she excepted.

D. H. Clark and J. K. Hines, for plaintiff in error. H. W. Johnson and Lawton & Cunningham, for defendant in error.

BECK, J. (after stating the facts as above). The plaintiff's cause of action, as declared on in this case, was for damages resulting from personal injuries alleged to have been sustained in consequence of the failure up-

on the part of the agents and employes of the defendant company to observe the requirements of the statute, making it the duty of the engineer to blow the whistle of the locomotive and to check the speed of the train as required under the provision of section 2222 of the Civil Code of 1895. While there was a general allegation, in specifying the acts of negligence of which the defendant was guilty, that the agents of the defendant, operating the train, failed to slacken the speed of the same before reaching the crossing, and, after the time when they saw, or in the exercise of ordinary care could have seen, that the plaintiff was in a perilous position, this must be considered in connection with that part of the petition which precedes, and which was intended by the pleader as a statement of the facts of the case. The specification of the acts of negligence must have some relation to the previous recital of the facts and circumstances attending the plaintiff at the time of the injury; and these, taken together, show clearly that the suit was brought for damages arising out of the failure of the railway company to comply with the requirements of the law in regard to public crossings, under the section just cited. This being true, the court did not err in instructing the jury that the plaintiff would not be entitled to recover in this action, unless it appeared from the evidence that the road upon which the plaintiff was traveling at the time of her injury was a public road in the meaning of the law.

In the same connection, after thus making the plaintiff's right to a recovery depend on the question as to whether or not the crossing at or near which the occurrence took place, resulting in injury to the plaintiff, was a public road, the court defined a public road as one "which had been laid out and designated by the proper county authorities as a public road or worked by the public as such." Error is assigned upon that portion of the charge containing the definition quoted above; and we have to consider whether or not the charge was erroneous for the reason assigned, and whether, if erroneous, the error was hurtful to the plaintiff. The question as to whether a public road might come into existence by prescription has been before this court several times; and in the case of *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508, it was held that within the meaning of the law requiring certain precautionary acts to be done by railroad companies and their engineers at points where railroads crossed public roads—commonly called the "Blow Post Law"—the term a "public road" or "highway" was not confined to one which had been laid out and established by the county authorities by regular proceedings, but included highways in any of four ways: (1) By legislative action; (2) by formal proceedings by the county authorities establishing it; (3) by dedication; (4) by prescription.

Evidence was admitted in that case to show that the road which was crossed by the railroad at the point involved was at that time and had been for many years (according to some of the witnesses upward of 30 years) in use by the public as a road for wagons, etc., and had been worked during that time by the county authorities as a public road. To this objection was made on the ground that such use and work would not make a public road in the meaning of the road law. What was said in the opinion must be read in the light of the case before the court and of the questions involved. It was said that continuous user for 20 years and work by the county authorities during that period showed a public road; but this was not held to be an exclusive rule as to evidence admissible to show a prescriptive highway. That certain evidence was sufficient to show prescription or authorize the jury to find it does not imply that nothing else may suffice. Indeed, in the opinion of Mr. Justice Cobb in the *Combs* Case he said: "It is certain that a road may become a public road when it has been used by the public and worked by the public authorities for 20 years, and it is unnecessary now to determine whether a use by the public and a working by the public authorities for a less period would make a road a public road." We do not think that the decision in that case should be construed as ruling that under no circumstances could a road be proved to be a public road without proof of actual work by the county authorities thereon. It is possible, for instance, that a road might be used by the public and claimed and controlled by public authorities, and clear and undoubted acts of dominion over it might be exercised, and yet the road might not need and might not have work done for its maintenance. The language of the *Combs* Case was doubtless in the mind of the presiding judge when he used the expression "or worked by the public as such." These words were too restrictive, as negating any other possible mode of proving a recognition, control, or assertion of claim of dominion on the part of the county authorities. This is not a controversy with a landowner as to the acquisition of a right of way, public or private, over his land, nor as to whether public accommodation or private rights have intervened so as to prevent the withdrawal of a dedication. Civ. Code 1895, § 3951. It is a question of whether there was a failure on the part of the railroad company to discharge a duty imposed by statute in regard to a place where its track crosses a public road or highway, and whether this was a public road crossing in the sense of that statute. Civ. Code 1895, § 2222 et seq. The law requiring the erection of "blow posts," the sounding of the whistle of the locomotive, and the checking of the speed of the train, applies to public road crossings only, not to those of private ways. Georgia

R. Co. v. Cox, 61 Ga. 455; Georgia R. Co. v. Partee, 107 Ga. 789, 33 S. E. 668; Hart v. Taylor, 61 Ga. 156.

The plaintiff relied on showing the existence of a public road or highway by user or prescription. Two theories have been advanced as the basis for the acquirement of a highway by prescription—one that, after use for the necessary time and of the necessary character, it would be presumed that there had been an antecedent grant or dedication, the other that the presumption which arises is that at some anterior period the road was established by competent authority. Indeed, there are two views as to prescription generally based on adverse possession alone for the necessary time—the one presuming a grant, the other interposing a bar from lapse of time. The theory of the presumption of a grant is that adopted in this state. *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669. And the doctrine of a presumption of a dedication has been applied to the acquisition of a street. *Georgia R. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256; 2 Dill. Mun. Corp. (4th Ed.) § 637 et seq.; *Swift v. Lithonia*, 101 Ga. 706, 29 S. E. 12. The other theory would apparently operate against miners as well as persons *sui juris*, since condemnation can be had and a road established against a minor as well as an adult. See *Elliott on Roads and Streets* (2d Ed.) §§ 170, 171; *Wash. Eas.* (4th Ed.) 191 (\*118) 197 (\*125) et seq. In view of our statutes as to public roads and the powers of the county authorities in regard thereto, we are of the opinion that mere user by the traveling public for 20 years, though adverse, does not suffice to impress upon the road the character of being a public one, unless the public authorities have accepted it directly, or exercised dominion over it, or asserted a claim to it in such manner and to such an extent as to show an acceptance by them. And, as such acceptance would impose on the county authorities duties and responsibilities connected with a public road, these acts should be such in character and extent as to clearly indicate such acceptance. Work and maintenance as a public road is the most usual evidence of recognition and assertion of dominion by the county authorities; but it is not exclusive. If 20-year user, with the requisite characteristics, as a public highway, raises a presumption of grant or dedication against the owner, yet, to complete the status as a public road within the meaning of our laws, there must be action on the part of the county authorities having power over public roads of the character above indicated. We do not think, however, that it is necessary that the county authorities should have done such acts continuously for 20 years, in addition to 20 years adverse user, as of right, by the traveling public, of the road as a highway. It is enough, if, in addition to such user, for that time, there should have been acts of

the county authorities of the character and to the extent above stated. In the case of *Branan v. May*, 17 Ga. 136, the question arose on the admissibility of parol evidence of the use of a road as a public highway, the objection being that there was higher evidence, namely, the order of the inferior court. It was held competent to introduce parol evidence to show a prescriptive highway. In the case of *State ex rel. Habersham v. Savannah Canal Co.*, 26 Ga. 665, the proceeding was by mandamus in the name of the state, on the relation of certain parties, thus sounding as a 'public proceeding. In *Green v. Betha*, 30 Ga. 896, the county commissioners were asserting a claim to remove gates from an alleged highway. The question of recognition by the authorities was not apparently contested or discussed. In *Savannah Ry. Co. v. Gill*, 118 Ga. 737, 45 S. E. 623, it appeared that the county authorities had attempted to establish the road, and the order was admitted to show assertion or claim of an opening of a public road, and that the user was thereunder.

We are aware of decisions of courts and statements of text writers which declare that user alone by public passage will create a conclusive presumption of both dedication and acceptance, or of the creation of a road, so as to impose upon the public authorities the duty of working and repairing it. But the duties and powers of the county authorities in this state in establishing, altering, or abolishing public roads are quite broad, and may not coincide with the powers of the officials in the jurisdictions where these rulings have been made, or at least in some of them. At any rate, under our laws as to public roads, we are not prepared to hold that the county authorities may have a public road or highway forced upon them by mere user without their knowledge or assent, or even against their will, or after refusal to open it, upon application, as provided by law, and that indictment may be found against the road commissioners for not keeping in repair a road so established against the will or without the acceptance of the county authorities. It has been said that the county authorities are but the agents of the public, who are the real principals. But, while this may be so in a sense, yet, where our statute gives discretionary power to the authorities, we think they have the right to exercise it; and that the road commissioners or overseers cannot be made indictable for a failure of duty in reference to a road by mere user against the judgment or will of the authorities as to the creation of the road. If any other construction than that herein indicated were placed upon the law touching public road crossings, this anomalous situation might result: The superintendent of the railroad and the engineer might be indicted for failing to comply with the statutory provisions touching such crossings. Pen. Code 1895, §§ 517, 518.

At the same term of court the road commissioners or overseer might be indicted for failure to perform their duty in regard to the same road. Pol. Code 1895, § 532; Acts 1896, p. 79; Acts 1903, p. 103. The railroad superintendent and engineer might be convicted upon proof of user alone, because the road was a public one; while the road commissioners, or overseer, might be acquitted, in spite of the user, because the county authorities had never accepted the road, and perhaps had declined to do so, and because the road was not a public one. Sections 516-519 of the Political Code of 1895 do not control the case, especially as they are only operative on recommendation of the grand jury. Since the repeal of the statute of limitations as to suits for the recovery of land, leaving prescription to control instead, a presumption of dedication or grant does not follow the old limitation period by analogy (*Williams v. Turner*, 7 Ga. 348, 353), but the analogy is now to the period of prescription as to lands or easements, unless fixed by statute. In the case at bar the evidence for the plaintiff tended to show user of the road by the public for more than 20 years; she adding in general terms "as a public road." The evidence introduced by her, however, showed that the public authorities had never worked the road, and one of the witnesses for her testified that "this dirt road is nothing but a neighborhood road, and has never been worked by the public authorities." The defendant showed that the road was not, and had never been, a public road; that there was no order on the records of the county commissioners (extending back to 1871, when the board was established) designating it as a public road; that "the county authorities have never taken charge of this road, nor worked it"; and that it was a mere neighborhood road leading across the railroad at a turpentine still. Thus, taken together, the evidence showed clearly that the road was not a public one, or the crossing a public crossing within the meaning of the statute commonly called the "Blow Post Law." This being so, and the case depending on that point, there could be no recovery; and the inaccuracy in the charge mentioned will not require a new trial.

It is argued that, even if this is not a public road, there is evidence of negligence; but the petition is predicated on the allegation that the plaintiff was at a public crossing. She was not injured by being struck, but by reason of her horse being frightened by the noise of the train. There was no allegation of unusual and unnecessary noises, nor other averments sufficient to authorize a recovery on any basis except that of a public road crossing and the failure to comply with the law on that subject.

Judgment affirmed. All the Justices concur.

## PENICK v. MORGAN COUNTY.

### MORGAN COUNTY v. PENICK.

(Supreme Court of Georgia. Aug. 19, 1908.)

#### 1. HIGHWAYS—DEDICATION — OPENING ROAD—STATUTES.

Where land is dedicated by its owner for public use as a public road, the county authorities having jurisdiction over roads can accept such dedication and open a new public road over it without complying with the requirements of Civ. Code 1895, § 520 et seq.

#### 2. SAME—PROOF.

An express dedication of land by the owner thereof for public use as a public road, and an express acceptance thereof by the proper county authorities, need not be shown; but such dedication and acceptance, respectively, may be shown by the acts of such owner and authorities.

#### 3. SAME—PUBLIC ROAD—WHAT CONSTITUTES.

A dedication of land by the owner thereof for public use as a public road, and the use of such road by the public as a route of travel, without some recognition of such road on the part of the county authorities, would not make such a road a public road.

#### 4. SAME—CUL-DE-SAC.

A cul-de-sac may be a public road.

#### 5. SAME—EVIDENCE — RECORDS — ENTRIES — TIME.

A book the contents of which state it is a road register of a certain county, and show entries describing a road as a public road, is not admissible, upon the trial of a case, to show such road was a public road several years prior to such trial, when there is nothing to show, or from which it can be inferred, when such entries were made.

#### 6. SAME—HIGHWAYS—ESTABLISHMENT— ACTS OF OFFICERS.

Where a county, in a suit against it, denies that a certain road is a public road, and there is evidence that the county superintendent of roads opened the road, built bridges on it, and worked it for several years thereafter, the minutes of the county commissioners having jurisdiction of roads, showing that upon an application to them to open the road and make it a public road, two of them were appointed a committee "to go over the ground and investigate it and report to the next meeting," and that "the committee appointed to look into the practicability of opening [such road] \* \* \* report in favor of the same and the report is adopted," are admissible, in connection with such oral testimony, to show that the county commissioners intended to open the road as a public road.

#### 7. SAME.

Where it appeared that county commissioners having jurisdiction of roads appointed two of their body to open and lay out a public road, under the facts in this case, it was not error to admit testimony that such two commissioners opened and laid out the road, or that they showed the county superintendent of roads where they laid it out.

#### 8. SAME.

Where one of the questions involved in a case is whether or not a public road was a public road at a particular time when an injury occurred, evidence that the county hands, under the county superintendent of roads, worked the road after such time, was admissible in connection with evidence that such road had been worked by the county authorities prior to such injury.

#### 9. BRIDGES—INJURIES—PETITION.

The petition in this case was not subject to the general demurrer.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by J. H. Penick against the county of Morgan. At the conclusion of the evidence, the court directed a verdict for defendant, and plaintiff excepted, and brings error, and defendant filed a cross-bill of exceptions. Reversed on both bills of exceptions.

Foster & Butter, for plaintiff in error.  
O. L. Williford and George & Anderson, for defendant in error.

HOLDEN, J. The plaintiff brought suit against the county of Morgan, alleging that since December 29, 1888, the county authorities of said county caused a bridge to be erected on one of its public roads, and that in November, 1903, while the plaintiff, with his wife and child, were driving across said bridge in a buggy drawn by two horses, the bridge broke in the middle and fell through, causing the damages for which he sued; that he was without fault, and the damages resulted from the defective construction of said bridge, which defective construction was known to the county authorities. The plaintiff offered in evidence a book. At the top of each page thereof was printed the words, "Public Road Register." This book showed a public road named, "Road leaving Buckhead and Park's Mill Road, Swords, Ga.," and described as leading from Buckhead, Park's Mill Road, via Swords, to Buckhead and Park's Mill Road,  $1\frac{1}{2}$  miles in length, 20 feet wide, and in the second class of roads. The plaintiff also introduced the book minutes of the county commissioners of December 13, 1900, containing the following entry: "Mr. J. B. Swords appeared before the board, asking that an old road near his place be opened and made a public road. Messrs. Walker and Walton are appointed a committee to go over the ground and investigate it and report to the next meeting." Also an entry dated January 1, 1901, as follows: "The committee appointed to look into the practicability of opening a road near J. B. Swords, in Kingston district, report in favor of the same, and the report is adopted." The only oral evidence of the plaintiff necessary to be set out is as follows: The county authorities were petitioned to open the road from Swords to Park's Mill. There was a petition signed by Swords and others. The superintendent of public roads in 1900 cut the road and built the bridge in question with pine poles as sleepers. The life of a pine pole would not be longer than two years. Oak timbers would last a good many years. The road was laid out in 1899 or 1900. Walker and Walton, two of the county commissioners, laid out the road. After the accident the bridge was rebuilt, and the county authorities have worked the road since that time. The public has traveled the road ever since it was laid out. Usher Thomason owned the land through which the road runs where the bridge was built at the time the road was laid out and the bridge built. J.

B. Swords went before the county commissioners and asked them to lay out the road. Before doing this, he went to Thomason and asked permission to run the road through his land. He gave the permission, and after that they went forward and made the road. The road had been worked regularly as a county road ever since it was first laid out, as other roads in that section of the county have been worked. When Swords brought the matter to the attention of the board, they appointed two of their members to go and open the road. It passed through Thomason and Swords' land, and a short space on Mrs. Knight's land. Since it has been laid out the road has been worked and used by the public as a public road. Thomason testified that he agreed to allow the county authorities to have a road, and "I yielded to it, and always permitted them to have a road." Plaintiff testified that in October, 1903, the bridge fell in while he was driving over it, causing injuries which he detailed and for which the suit was brought. He knew nothing of the defective condition of the bridge. Upon the conclusion of the evidence, the court directed a verdict for the defendant, and the plaintiff excepted. The defendant by cross-bill excepted to rulings hereinafter stated.

1. The main question involved in this case is whether or not the proved facts were such as to authorize a jury to find that this road on which the alleged injuries occurred was a public road. One method by which a public road can be established is by complying with the requirements of Civ. Code 1895, § 520 et seq. By the use of this method private property can be condemned. These sections provide a way for the citizen to have brought before the county authorities the question whether or not a public road shall be established in a particular location; and the citizen can, at least in some instances, review by certiorari the action of the county authorities in determining the question as to whether or not the road should be established. *A. & W. P. R. Co. v. Redwine*, 123 Ga. 736, 51 S. E. 724. Even when the owner of the land through which persons desire a public road is willing to dedicate it to the public for this purpose, and the county authorities refuse to accept the dedication and open a public road, such persons can petition the county authorities, whose duty it will be to appoint the committee as provided in Civ. Code 1895, § 520, and pass upon the question as to whether or not the new road shall be opened. The method provided in these sections for opening a new road is not the only method. If it were, a new road could never be established by prescription; but it is now the law, without question, that this can be done. *Savannah Ry. Co. v. Gill*, 118 Ga. 737, 45 S. E. 623; *Sou. Ry. Co. v. Combs*, 124 Ga. 1004, 1010, 53 S. E. 508; *McCoy v. Cen. Ry. Co.*, 62 S. E. 297; *Johnson v. State*, 1 Ga. App. 193, 58 S. E. 265.

The method provided for in these sections is not an exclusive, but only a cumulative one. If a person wishes to give his land to the public for a public road, and the county authorities are willing to accept it and open a public road, they can do so without incurring expense and delay in following the requirements of these sections. Under these sections no alteration or discontinuance of a road, or the opening of a new road, can be had unless application is made by some one for this purpose; and to hold that the only method by which county authorities can open new roads is provided for in these sections would mean that they could not open a new road without some one making an application therefor. If the owner of land dedicates land for use as a public road, the county authorities can, in their discretion, accept it for a public road, and open a public road over it, without any petition being filed therefor, notice published, or even any order to that effect. They cannot take land for a public road against the owner's consent without condemning it according to law and paying for it; but, if the owner wishes to give the land for this purpose, the county authorities can, in the exercise of a sound discretion, accept it, and can, in the exercise of such discretion, open a new road without delay or any formalities whatever. The acceptance of land dedicated and the opening of a new road over it is a matter in their discretion. The question whether their action in the exercise of a sound discretion can or cannot be reviewed by a higher court is not before us for decision; but, when a dedication is made and accepted and a new road opened, their acts stand as valid and the new road is a public road, as far as the public is concerned, until their action is set aside, by themselves, or by a higher court, if it can be reviewed by a higher court. The citation provided for in section 521 was not published, and the road in question did not become a public road under sections 520 et seq., because section 523 provides that all public roads established without a substantial compliance with the provisions of these sections are void. If only a part of the provisions of these sections are complied with, the road does not become a public road under these sections. But the fact that the road does not become a public road under these sections, because of the failure to fully comply therewith, does not prevent it from becoming a public road by dedication of the land as a public road by the owner thereof and acceptance of it by the county authorities. This ruling does not conflict with the decisions of this court holding roads not to be public roads when the question involved is whether or not the road in question was properly established under these sections.

2. Was the evidence sufficient to authorize the conclusion that the owners of the land on which the road was established, and where the injury occurred, dedicated the land

to public use for a public road, and that the county authorities accepted it for this purpose? The evidence admitted by the court showed that the road was from  $1\frac{1}{2}$  to 2 miles long, and indicated that it ran from one road to another across the lands of Swords, Thomason, and Mrs. Knight. Thomason owned the land where the injury occurred. Swords was one of the applicants before the county authorities for the establishment of the new road, a portion of which was to run through his land. The evidence of Thomason was that he agreed to give the land to the county commissioners; that he had agreed to let them have the road through it, and "yielded to it, and always permitted them to have the road." Swords testified that Thomason "had stood by his donation ever since" the road was opened. There was evidence to the effect that the road had been worked by the county authorities, had been used by the public, and had been considered a public road since it was first laid out. Was not this evidence, in connection with the minutes of the county authorities and the other evidence in the case, sufficient to make it proper to submit to the jury the question whether or not there had been a dedication of the land by Swords and Thomason, and an acceptance by the county authorities? There can be no dedication of property to public use without an intention on the part of the owner to dedicate, and, before dedication can become complete, there must be an acceptance. Whenever there is a question as to the good faith of a party involved in a case, he can testify that he acted in good faith. *Hale v. Robertson*, 100 Ga. 168, 27 S. E. 937; *Acme Brewing Co. v. Cen. R. Co.*, 115 Ga. 494, 42 S. E. 8. It is likewise true that, when there is involved in a case a question as to what was the intention of a party, he can testify what was his intention. *Ga. R. Co. v. Atlanta*, 118 Ga. 486, 489, 45 S. E. 256. The testimony of Thomason stated what was his intention. The testimony of Swords and Thomason, indicating their acquiescence in the continuous use of this road by the public since it was first laid out, and the other facts in the case, were such as to make it proper that the court should leave it to a jury the question as to whether or not there was a dedication by Swords and Thomason. *Parsons v. Trustees*, 44 Ga. 529; *Swift v. Lithonia*, 101 Ga. 706, 29 S. E. 12; *Ga. R. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256; *Mayor v. Franklin*, 12 Ga. 239; *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749. The order of the county authorities adopting the favorable report of the committee appointed by them to investigate the question whether or not the road should be opened and made a public road, the working of the road and the building of the bridge on it by the county authorities, and the use of it by the public since it was first laid out constituted sufficient proof to make it proper that the court should leave to a jury

the question as to whether or not there had been an acceptance of the dedication by the proper county authorities if the land was offered as a dedication. *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138, and authorities lastly cited above.

3. Under Civ. Code 1895, § 3591, if an owner of land expressly or by his acts makes a dedication of it for public use as a public road, and the property is so used for such a length of time that the public accommodations or private rights may be materially affected by an interruption of the enjoyment, such owner cannot afterwards appropriate it for private purposes. However, the dedication of land by the owner thereof for use as a public road, and use by the public of such road as a route of travel, would not of itself make the road a public road so as to charge the county with the burden of its repair and maintenance, unless the dedication was accepted by the county authorities having jurisdiction over roads, or there was evidence of their recognition of the road as a public road showing acceptance. *Georgia R. Co. v. Atlanta*, 118 Ga. 496, 45 S. E. 256, 489; *Parsons v. Trustees*, 44 Ga. 529, 539; *Kelsoe v. Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138. The existence of a public road carries with it burdens on the county of working it and keeping it in repair, and these burdens could not be imposed on the county simply by an individual dedicating his land for use as a public road, and by the public using the road for travel. Before a road can become a public road, there must at least be some recognition of it as a public road by the county authorities having jurisdiction over roads.

4. Whether the evidence would authorize a finding that Mrs. Knight made a dedication of the land which she owned, and over which the road passed, it is not necessary now to be considered. The evidence admitted by the court was sufficient to authorize the conclusion that this road ran from one road to another, and had an opening at both ends. If Mrs. Knight owned the land over which the road passed at one point, and the facts were sufficient to make the road a public road except where it passed through her land, and it therefore had an opening at one end, it would be a public road up to the land of Mrs. Knight. A cul-de-sac may be a public road. A road may go to a park, or some public institution, or, indeed, through a neighborhood, without being open except at one end, and it is not essential that a highway should be open at both ends in order for it to be a public road. 15 Am. & Eng. Enc. Law, 351; *Elliott on Roads and Streets* (2d Ed.) § 2.

5. Inasmuch as the judgment of the court below, in the direction of a verdict for the plaintiff, is reversed, it is proper that the assignments of error made in the cross-bill of exceptions filed by the defendant should be

passed upon. The defendant objected to the introduction in evidence of the book called the "Road Register," and assigns error to the action of the court in overruling such objections. It appears that a witness for the plaintiff went to the office of the county commissioners and asked their clerk for the road register of the county, and the clerk gave him this book as such register. The mere declaration to some one by the clerk that a certain book was the road register would not be admissible to prove it to be the road register, and his physical act in giving him the book as the road register in response to a request therefor would be no more than his declaration that it was such book. The clerk might make a certified copy of what appears on the road register, and it would be admissible in evidence; but a mere declaration of his, or a physical act of his amounting to a declaration, to some one that the book was the road register, would not make it admissible. It is true that the book was obtained from the office of the county commissioners, but it does not show when the book came into existence, or when the entries appearing therein were made. The testimony showed that the bridge was rebuilt and the road worked after the injuries were sustained; and, as far as the record shows, this book may have come into existence, or the entries therein in reference to this road may have been made, after the injuries sued for were sustained. If the entries were not made until after the date of the injury, the book would not be admissible. We are clearly of the opinion that the court committed error in overruling the objections to the admission of the book in evidence.

6. Defendant complains that the court committed error in admitting in evidence the book of minutes of the county commissioners because the entries therein did not show that the requirements contained in Civ. Code 1895, § 520 et seq., had been complied with in establishing the road as a public road. While it is true that these entries do not comply with these requirements, the action of the county authorities, as evidenced by the entries, was admissible to show the date at which the road was opened. There was evidence to the effect that the road had been worked and used by the county authorities since it was first opened. These facts, in connection with the evidence of Thomason, might become material in considering the question as to the length of time he acquiesced in the use of the road by the public in determining the question as to whether or not a dedication by him was made. This action of the county authorities referring to the road as a public road, in connection with the other testimony, was admissible, also, for the purpose of showing that it was intended to be laid out by the commissioners as a public road, and intended by the commissioners for use as a public road. The admission of these



entries was not subject to the objection made, and the court committed no error in overruling it. *Savannah Ry. Co. v. Gill*, 118 Ga. 748, 749, 45 S. E. 623.

7. Defendant complains that the court committed error in admitting testimony that a petition headed by Swords was made to the commissioners to open this road; that Walker and Walton, two of the commissioners, went there and laid it out; that Walker went with Daniel, the county superintendent of roads, to show him where he and Walker laid out the road; and that the road was made public by the board. The testimony that a petition was made and giving the names appearing thereon was not proper evidence, because there was higher evidence of these facts. The minutes of the county authorities do not with particularity describe this road, and testimony showing that the road in question was the one referred to in the minutes would be admissible under the facts of this case. We do not mean to hold that such testimony would be admissible if the only question involved were whether or not the road was properly established under Civ. Code 1895, § 520 et seq.; as it has been ruled that, where a road is established under these sections, the location of it must be so described in the order that the record will clearly designate the road to be worked. *Green v. Road Board of Bibb County*, 126 Ga. 693, 56 S. E. 59. But, as the minutes were proper evidence, it was proper to admit testimony to show that the road referred to in the minutes was the road testified about. It was not proper, however, to admit oral testimony of the contents of the petition or minutes. There was no error in admitting testimony that Walton and Walker laid out the road, or that Walton showed Daniel where they laid it out, because it appears from the evidence of Swords, to which no objection was made, that the county commissioners appointed Walker and Walton,

two of their members, "to go and open the road."

8. Complaint is made that error was committed in admitting the following testimony of the plaintiff: "The county hands worked said road since the bridge fell in under the county superintendent." One of the main questions involved in this case was whether the public authorities had exercised acts of dominion and control over the road and bridge in question, indicating that it was a public road and was so treated by them. As an isolated fact it would not be admissible to show work done by the overseer on the road after the injury occurred; but where there was evidence of work done by the county authorities before the injury, and of other acts of control exercised by them, it was competent to show a continuance of such control by showing other like acts, although one of them took place after the injury occurred.

9. Defendant filed a general demurrer to the plaintiff's petition, and complains that the court committed error in overruling it. The petition alleged that the bridge was on a public road of the county, and was constructed since December 29, 1888. The petition detailed the injuries sustained, and alleged that the plaintiff was without fault, and that his injuries were due to the defective construction of the bridge, setting forth wherein it was defective, and alleged that such defects were known to the county authorities, but were unknown to him until after the injuries were sustained. The petition was so constructed as not to deserve the demurrer filed thereto. Civ. Code 1895, § 603; *County of Tatnall v. Newton*, 112 Ga. 779, 38 S. E. 47; *Hackney v. Coweta County*, 117 Ga. 327, 43 S. E. 725; *Howington v. Madison County*, 126 Ga. 699, 55 S. E. 941; *Warren County v. Evans*, 118 Ga. 200, 44 S. E. 936.

Judgment reversed on both bills of exceptions. All the Justices concur.

## HARRISON v. BRYAN et al.

(Supreme Court of North Carolina. Sept. 16, 1908.)

## APPEAL AND ERROR—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

An appeal from an order dissolving an order restraining a city from cutting down a tree, issued in a suit for injunctive relief only, will be dismissed, without prejudice to the right to commence an action for damages, on it appearing that, pending the appeal, the tree has been cut down by the city authorities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

Appeal from Superior Court, Craven County.

Action by Mary H. Harrison against J. A. Bryan and others for an injunction to restrain the cutting down of a shade tree standing at the curb of the street and in front of plaintiff's property. From an order dissolving the restraining order issued, plaintiff appeals. Dismissed.

D. E. Henderson and G. V. Cowper, for appellant. W. W. Clark and W. D. McIver, for appellees.

**PER CURIAM.** It appearing to the court upon affidavit of defendant, which is not contradicted, that since the dissolution of the restraining order in this case, by his honor Judge Gulon, and pending this appeal, the tree described in the pleadings has been cut down by the city authorities of Newbern, and that there is nothing now to enjoin, and this being an action for injunctive relief only, it is ordered that the action be dismissed, without prejudice to any rights the plaintiff may have to commence another action for damages, if so desired.

WINDSOR BARGAIN HOUSE v. WATSON.  
(Supreme Court of North Carolina. Sept. 16, 1908.)

## 1. LANDLORD AND TENANT — "ADVANCEMENTS."

The "advancements" for which a lien is created in favor of a landlord, by Code, § 1754, providing that crops raised on leased lands shall be vested in possession of the lessor until the rent is paid and the lessor reimbursed for advancements in making the crops, embraces anything of value supplied by the landlord to the tenant in good faith, for the purpose of making and saving the crop; and, when the advancements are appropriate and necessary to the cultivation of the crop, they will be presumed to create the lien, but where not in themselves so appropriate and necessary, it must appear that they were made in aid of the crop.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 218; vol. 8, p. 7567.]

## 2. SAME.

Plaintiff had a valid agricultural lien and chattel mortgage to secure advancements to defendant, to enable him to cultivate a crop for 1895. Advancements were made for the year. In March of the following year, defendant had paid the account except \$78.10, and had enough of the crop and property on hand to pay such balance. On his application, it was agreed that

he might retain the crop, together with the mortgaged chattels, to enable him to make a crop for 1896, and that plaintiff should make advancements for 1896, not to exceed \$150, and that the balance of \$78.10 should constitute a part of the amount to be advanced for 1896. *Held*, that the demand for \$78.10 was an advancement for 1896, and was valid, both as an agricultural lien on the crop for 1896, and as a chattel mortgage on the mortgaged chattels.

Appeal from Superior Court, Bertie County; O. H. Allen, Judge.

Action of claim and delivery by the Windsor Bargain House against Frank Watson. From a judgment for plaintiff, defendant appeals. Affirmed.

Formal execution of the lien, containing, in addition, a chattel mortgage on the property seized, a mule and farm cart, having been admitted, issues were submitted, and responded to by the jury as follows: "(1) Is the defendant indebted to the plaintiff, and if so, in what amount? Ans. Yes; \$88.35. (2) What part of said debt, if any, was a debt of the previous year? Ans. \$78.10. (3) Did the defendant agree that the said amount might be included in the amount named in the crop lien of 1906, upon surrendering and canceling liens on crop and mule and cart, to enable him to make crop of 1906? Ans. Yes." There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

W. R. Johnson, for appellant. Winston & Matthews, for appellee.

**HOKE, J.** (after stating the facts as above). The evidence tended to show that plaintiff had a valid agricultural lien on the crop of defendant for 1895, the instrument containing in addition a chattel mortgage on the defendant's mule and cart, the property seized by process in the present action; that advancements were made for the year 1895, and in March, 1896, defendant having paid the account except \$78.10, defendant had enough of the crop and property in hand to pay the plaintiff's claim in full, but, on defendant's application, it was agreed that defendant might retain the crop of 1895, together with the mule and cart, to enable him to make the crop of 1896, and that plaintiff was to make advancements for the year 1896, to an amount not to exceed \$150, and that this balance of \$78.10 should be considered and constitute a part of the amount to be advanced for the year 1896. Speaking to this question, John T. Smithwick, a witness for plaintiff, among other things, testified: "In March, 1906, Watson came in, and said if we would let him keep his mule to make another crop, and also let him keep his crop under mortgage to us, and would carry the balance of \$78.10 as a part of \$150 he wanted for the year 1906, that he would make a good crop, and pay out and would secure it with a crop lien with a chattel mortgage clause. This arrangement was made, and we balanced his account, took the crop lien with chattel

clause for 1906, and charged him, on his account for 1906, with \$78.10 balance. After that he got \$10.25 in cash, and did not trade any more." On this testimony we are of opinion that the claim of plaintiff should be upheld, both as an agricultural lien on the crop of 1896, and as a valid chattel mortgage on the property seized, to wit, the mule and the cart. While the court has held that, in order to be effective as an agricultural lien, the requisites of the statute must be complied with, and, among other things, that the advancements must be made after the agreement is perfected (*Clark v. Farrar*, 74 N. C. 630), our decisions are also to the effect that, if part of the advancements are made at the same time the instrument is executed, both acts being part of one and the same transaction, this requirement of the statute is satisfied (*Reese & Co. v. Cole*, 93 N. C. 87), and this claim of plaintiff of \$78.10 should clearly be considered an advancement. The plaintiff had a lien to secure this amount, undoubtedly good, on the crop of 1895 remaining on hand, and on the mule and the cart. There is no good reason in requiring the plaintiff, in order to make this claim a valid advancement on the crop of 1896, to foreclose and realize on his lien and then turn the amount over to defendant. It was competent for them, as they did, to make the agreement that this interest of plaintiff in the crop of 1895, then on hand, and the mule and the cart to be used in making the crop of 1896, should be considered as an advancement of 1896. And, these facts having been established by the verdict, the property seized, to wit, the mule and cart, comes within the exact terms of the lien and the chattel mortgage contained in the same.

In *Brown v. Brown*, 109 N. C. 124, 13 S. E. 797, the court held that "(1) The 'advancements,' for which a lien is created in favor of a landlord by section 1754 of the Code, embraces anything of value supplied by the landlord to the tenant or cropper, in good faith, directly or indirectly, for the purpose of making and saving the crop. (2) When such advancements of such things as in their nature are appropriate and necessary to the cultivation of the crop—e. g., farming implements and work animals—they will be presumed to create the lien; but, where they are of articles not in themselves so appropriate and necessary—e. g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop." And in *Thigpen v. Maget*, 107 N. C. 39, 12 S. E. 272, it was held that where a landlord allowed his tenant to retain parts of the undivided cotton seed and crops of one year, to enable him to make the next year's crop, it should be regarded as an advancement, for which the claimant could enforce a landlord's lien. These authorities fully support the conclusion that, under the

agreement established, this demand for \$78.10 is an advancement for the year 1896, and, as heretofore stated, this being true, this amount is part of the debt for which plaintiff holds the chattel mortgage on the property. The court is not inadvertent to the case of *Lowdermilk v. Bostick*, 98 N. C. 299, 3 S. E. 844, in which an item for corn, retained from the crop of a former year, was disallowed as a claim secured by an agricultural lien, for the current year. But an examination of that case will disclose that there was no agreement between the parties that the item in question should be secured by the agricultural lien, nor was there any sufficient or satisfactory evidence that said item was an advancement in aid of the crop for the current year. Even if the defendant should establish his position that the claim is not within the protection of the present lien held by plaintiff, there is doubt if it would avail for his protection. There is authority to the effect that in such case, and on the facts presented here, the plaintiff would be remitted for his security to the original lien, which was undoubtedly good before it was canceled, on taking the present security. *Sheldon on Subrogation*, § 20; *Davidson v. Gregory*, 132 N. C. 393, 43 S. E. 916.

There is no error, and the judgment below will be affirmed.

No error.

#### RUE v. CONNELL et al.

(Supreme Court of North Carolina. Sept. 16, 1908.)

#### 1. WILLS—"ADEMPTION."

The term "ademption" describes the act by which testator pays to his legatee in his lifetime a legacy which by his will he had proposed to give him at his death, or denotes the act by which a specific legacy has become inoperative on account of testator having parted with the subject of it. The alteration in the character of the subject-matter of a specific legacy must be made or authorized by the testator himself after making his will, or it will not operate as an "ademption," and the intention of the testator, if reasonably clear, will largely govern.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1978.

For other definitions, see Words and Phrases, vol. 1, pp. 179-181.]

#### 2. SAME—CONSTRUCTION—ESTATES DEVISED.

Testator gave to his wife during widowhood "all and every right, title and interest in" a plantation, and "all its belongings," and provided that at her death or remarriage the plantation should be the property of a daughter. Held, that the descriptive words in the will were sufficient, not only to pass the fee simple of the plantation to the daughter in remainder, but to pass any lesser interest which testator might hold therein.

#### 3. SAME—ADEMPTION.

Testator gave to his wife during widowhood all right, title, and interest in a plantation and its belongings, with a gift over, on her remarriage or death, to a daughter. Testator at the date of the will and at his death was in possession of the plantation and deemed

himself the owner in fee. He had acquired it at a sale under a trust deed, giving at the time an agreement to sell the same within a time fixed to any one whom the mortgagor might name for a certain sum, and at the date of the will a suit by a third person to enforce the agreement was pending, which suit resulted in favor of testator, but was renewed after his death and resulted in a judgment in favor of the third person. The interest of testator was fixed at a specified sum, and on payment thereof the heirs and devisees executed a deed to the third person. *Held*, that the daughter was entitled to the proceeds paid by the third person; the gift to her not having been adeemed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1986-1989.]

Appeal from Superior Court, Warren County; O. H. Allen, Judge.

Controversy without action by Mary Ann Rue against W. A. Connell and others. From a judgment in favor of plaintiff, defendants Maude Connell and another appeal. Affirmed.

T. M. Pittman and J. H. Kerr, for appellants. Shepherd & Shepherd, for appellee.

BROWN, J. The material facts in this controversy are as follows: Thomas Connell died in Warren county on January 1, 1905, leaving a will which was duly probated. The first clause of the will is: "To my wife Addie May Connell, during her widowhood, I give, grant and bequeath all and every right, title and interest in and to my Tusculum plantation and all its belongings after paying all my honest debts and my burial expenses. But should she bring forth an issue or issues (children) by me, they shall be the rightful heirs thereto at her marriage or death. But should there be no issue (children) by me from her, at her marriage with another man, or at her death, it shall be the rightful property of my daughter Mary Ann Rue, her heirs and assigns." Addie May Connell had no issue by Thomas Connell. She married Sturges in the year 1903, and is still living. She dissented from the will in due time, and was allowed her dower in her husband's other lands and a child's part of his personal estate; the latter not having been yet distributed. At the date of the will and at the death of the testator, he was in possession of Tusculum plantation and deemed himself the owner in fee. The plantation had been sold under a trust deed and acquired by testator, but at the date of the will a suit was pending by P. G. Alston to redeem the property. This suit resulted in favor of the testator in June, 1903, but was renewed in January, 1905, after testator's death, and finally resulted in a judgment in favor of Alston. The facts are set out in the report of the case in 140 N. C. 485, 53 S. E. 292, which facts are made a part of the record upon this appeal. After an accounting had in pursuance of the decree of this court, the case was again brought here, and is reported in 145 N. C. 1, 58 S. E. 441. Under the final decree, the interest of Thomas Connell in the

Tusculum property is fixed at \$2,950, and, upon payment of that sum, the heirs and devisees of the said testator were required to and did execute a deed to P. G. Alston. The costs and expenses of said action, including counsel's fees, to the estate of Thomas Connell, were \$1,000. The fund received from Alston is now in the hands of the executors, and is not needed for the payment of the debts of the said testator. Upon the foregoing facts the plaintiff, Mary A. Rue, claims that the executors of said estate were bound to defend said action and title, that the costs thereof are no charge upon Tusculum or her, and that the \$2,950 should be paid over to her, as it represents what was devised to her of Tusculum by her father.

The defendants claim that Tusculum did not belong to deceased at his death or the making of the will, and was not, therefore, his to give away, and therefore nothing passed to plaintiff, and she is entitled to no part of said fund received from it, but only as a residuary legatee or devisee. It is contended by the learned counsel for the appellants that the existence of the contract of sale at the death of the testator worked an ademption of the devise to the plaintiff, and that she takes nothing under that clause of the will. The term "ademption" is used in legal parlance to describe the act by which the testator pays to his legatee in his lifetime a legacy which by his will he had proposed to give him at his death, or to denote the act by which a specific legacy has become inoperative on account of the testator having parted with the subject of it. 1 Roper, Leg. 385; Langdon v. Astor, 16 N. Y. 40. There must be an alteration in the character of the subject-matter of a specific legacy made or authorized by the testator himself after making his will, or it will not operate as an ademption. If the change in the form of the property is brought about by the act of another, it will not effect an ademption of the legacy if the property in its new form is in the possession of the testator at his death. 1 Underwood, Wills, § 411. So it has been held that where the testator has made a binding offer of sale of his property bequeathed in a will already executed at the time, which offer is not accepted and the sale not finally consummated until after the death of the testator, no ademption of the legacy is worked, but the legatee will receive the proceeds. In re Pearce, 8 Reports, 805; Gardner on Wills, p. 566. So, where a testator bequeathed certain notes specifically described, and then changed them by renewal into another form, securing the same debt, it was held that the legatee was entitled to the new securities. Ford v. Ford, 23 N. H. 212; Gardner v. Printup, 2 Barb. (N. Y.) 83. Where the intention of the testator with regard to the effect of his subsequent acts is reasonably clear, such intention will largely govern.

Tested by these general principles of the

doctrine, we find nothing in the facts agreed which tends to work an ademption of the specific legacy to the plaintiff. The descriptive words in the will are sufficient, not only to pass the fee simple of the Tusculum plantation to the plaintiff as remainderman, the estate *durante viduitate* having terminated, but to pass any lesser interest which the testator may have held in the property. The intention is plainly manifest that whatever rights he owned therein should ultimately become the property of the plaintiff. Between the time he made his will and his death the testator not only had made no change whatever in respect to his ownership of Tusculum, but the courts had made none for him. His status was exactly the same when he made the will as when he died. He was during all the time in possession of the property, claiming the fee as his own, and doubtless died believing it was his without incumbrance. The will was made October 11, 1901, and testator died January 1, 1905. The contract of sale to P. G. Alston was made December 5, 1898, and upon its face expired October 1, 1899. The suit to enforce the contract was begun after the testator's death and against his heirs, and the decree of the court is based upon findings of fact as to what transpired between the testator and Alston, but the facts in the record show that the testator repudiated the contract during his lifetime and refused voluntarily to perform it. There is not a word or act of his from which an intention can be inferred to revoke, cancel, or change the legacy bequeathed to plaintiff. On the contrary, she received it on the death of testator in exactly the legal form in which he owned it at the time he made his will. This brings the case squarely within the authority relied on by appellant's counsel, who quote from a learned author, viz.: "By its very nature as the gift of a specific, identified thing, operating as the mere gratuitous transfer of the thing without any executory obligation resting on the testator or his personal representative, it follows that, unless the very thing bequeathed is in existence at the death of the testator, and then forms a part of his estate, the legacy is wholly inoperative." Pomeroy, *Eq. Jur.* § 1131. The very interest which the testator owned at the date of his will passed unchanged at his death to his legatees, unmodified by his own acts or by any legal decree that had then been made. The very thing devised remained in exactly the same condition at the time of the testator's death as it was in when he made his will, and he never in his lifetime made or consented to any change in it. The doctrine is well illustrated by the other authority (*Chambers v. Kerns*, 59 N. C. 280), cited by appellant's counsel. In that case the deviser after making his will devising the land to A. sold it to B., taking B.'s note, and giving him a bond to make title. Here was a clear conversion, and, in effect, a revocation of the

will. The court says, however, even then the result would have been otherwise had his intention not to revoke been manifested by a codicil. The foregoing case is where there is nothing in the will but a devise of the bare land, but the doctrine is that, where even there has been a technical conversion, it will not defeat the intention of the deviser that the proceeds or all that belongs to it shall go to the devisee. In the present case there is a manifest purpose that the devisee shall have, not the land merely, but every "right, title and interest therein," and "all its belongings." Judge Redfield says (2 Redfield on Wills, p. 339): "It has ever been held that the term 'personal estates' in a will may have the effect to pass real property where it is manifest from the whole instrument that such was the testator's intention." This shows that the intention governs. The same author says in volume 2, p. 346: "It seems to have been supposed that a devise of an estate by name, which the testator had contracted to sell, would only pass the legal estate for the purpose of enabling the devisee to carry the contract into effect. *Knolys v. Shepherd*, cited by the Master of the Rolls, in *Wall v. Bright*, 1 J. & W. 499. In this case the Lord Chancellor thought the purchase money would not pass under the devise, but, unless there was some special reason leading to that conclusion, it would seem natural to conclude this would be the purpose of such a devise. It ought to be construed a devise of estate subject to a contract, and of the price, when that came into the place of the estate." In speaking of the effect of the voluntary alteration of the estate, after the making of the will, Lord Mansfield said that the doctrine had been carried to an "absurd extent," and adds that the alteration must have been a "material one," and concludes that "all that is requisite is that the testator shall at the time of his death be seised of substantially the same estate of which he was seised at the time of making the will." 2 Redfield on Wills, p. 345.

Upon a review of the case, we agree with the court below that the plaintiff is entitled to receive the proceeds of the sale of the Tusculum property paid by Alston under the contract of sale and now in the hands of the executors. His honor deducted the costs and expenses of the Alston suit, but, as plaintiff did not except and appeal, this point is not before us.

The judgment of the superior court is affirmed.

#### STRAUS, GUNST & CO. v. SPARROW & CO.

(Supreme Court of North Carolina. Sept. 16, 1908.)

#### 1. PARTNERSHIP—RETIREMENT OF PARTNER—NOTICE TO CREDITORS.

When a creditor, seeking to recover for a firm debt against a retired partner, has never

had any dealing with the firm prior to dissolution, a notice of such retirement, published in a local paper having general circulation in a full and proper manner and for a reasonable time, will be sufficient to relieve the retiring partner from liability; but, if the claimant has had previous dealings with the firm, actual notice of the dissolution or the existence of facts brought home to the creditor, which would put a person of reasonable business prudence on inquiry, is required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partnership, §§ 658, 660.]

## 2. SAME—QUESTION FOR JURY.

Publication of notice of dissolution of a firm in a local paper is insufficient to take to the jury the question of notice, to a person having had previous dealings with the firm, of the retirement of a partner, unless it is also shown that such person was in the habit of reading the paper at the time, or that a copy of the dissolution notice was specially sent to him.

## 3. PRINCIPAL AND AGENT—NOTICE TO AGENT.

Defendant A. retired from the firm of S. & Co. in July, 1905, selling his interest to C., at a time when the firm was not indebted to plaintiff. A formal notice of dissolution was published in not less than 30 editions of a local paper, during a period of 60 days, a copy of the paper having been sent to plaintiff by mail. In August or September following, plaintiffs' salesman visited the firm, and was informed of A.'s retirement, and introduced to C. as the person who had purchased A.'s interest. The bill of goods then purchased from the salesman was paid for, and later another bill was purchased, for which the firm made default. Held, that plaintiffs were charged with the knowledge of its salesman of A.'s retirement from the firm, and could not enforce its claim against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 675.]

Appeal from Superior Court, Beaufort County; Oooke, Judge.

Action by Straus, Gunst & Co. against Sparrow & Co. Judgment for defendant W. H. Albert, and plaintiffs appeal. Affirmed.

The evidence tended to show that plaintiffs, distillers and liquor dealers, in Richmond, Va., sold whiskies on running account to T. O. Sparrow & Co., a firm doing business in Washington, N. C., from January, 1905, to October 6th of same year, the balance due being \$99.08, that the firm of T. O. Sparrow & Co., composed originally of T. O. Sparrow and defendant W. H. Albert, was dissolved in July, 1905, when W. H. Albert retired, having sold out his interest to one C. H. Spears, and that defendants T. O. Sparrow and C. H. Spears, the purchasers of Albert's interest, continued to do business under the firm name of T. O. Sparrow & Co. At the time the original firm of Sparrow & Co. was dissolved by sale and transfer of Albert's interest to Spears, there was nothing due from this firm to plaintiffs, and the amount now sued for, and remaining due, was for items sold by plaintiff firm to Sparrow & Co., on October 6, 1905, all former items of charge having been paid by credits duly entered on the account. The question in debate was as to the liability of W. H. Albert for the debt of defendants, and whether sufficient notice had been given plaintiffs of Albert's retirement

from the firm. On issues submitted, verdict was rendered as follows: "(1) Was the partnership composed of T. O. Sparrow and W. H. Albert dissolved on or about July 12, 1905, as alleged? Ans. Yes. (2) Were the plaintiffs duly notified of such dissolution? Ans. Yes." There was judgment on the verdict in favor of defendant Albert, and plaintiffs excepted and appealed.

W. C. Rodman, for appellants. Small, MacLean & McMullan, for appellee.

HOKE, J. (after stating the facts as above). It is well established that when an ostensible or known partner retires from a firm which continues the business, in order to protect him from liability for future obligations of the partnership, proper notice of his retirement must be given. Ordinarily, when a creditor seeking to enforce recovery against such a partner has never had any dealings with the firm, a notice published in a local paper having a general circulation, in a full and proper manner, and for a reasonable length of time, will be regarded as sufficient. Where, however, the creditor claimant has been a customer of the firm, actual notice must be shown, or the existence of such facts, brought home to the creditor as would put a person of reasonable business prudence on inquiry, which would lead to knowledge of the dissolution of the firm or the retirement of the partner resisting the claim. In such case, and particularly when a former customer is resident in a distant community, publication of notice in a local paper is not, as a rule, recognized as sufficient of itself to affect the customer with notice, or to carry the question to a jury, unless it could be further shown that the creditor was in the habit of reading the paper at the time a proper publication was being made, or that a copy of same, containing the publication, was especially sent to him. These additional facts, while not conclusive, would present a case from which the jury would be required to consider and determine the question of notice. This general statement, for the most part elementary in its nature, will find support in the text-books (Strong on Everyday Law; George on Partnership, pp. 259-261; Story on Partnership, Gray's Edition, § 161; Lindley on Partnership [1888] marginal pages, 218-220), and is in accord with our own decisions on the subject (Ellison & Harvey v. Sexton, 105 N. C. 356, 11 S. E. 180, 18 Am. St. Rep. 907; Scheffelin, Hains & Co. v. Stevens, 60 N. C. 106, 84 Am. Dec. 1355). And applying the principles expressed to the facts presented here, we are of opinion that no error has been committed which gives the plaintiffs any just ground of complaint.

There was testimony to the effect that W. H. Albert retired from the firm of T. O. Sparrow & Co. in July, 1905, about the 13th of the month, selling his interest to C. H. Spears, and at the time the firm owed plain-

tiffs nothing; that formal notice of this dissolution and change was published in a local paper for 60 days; and that this notice was inserted in not less than 30 editions of the paper; and, further, that a copy of the paper containing the notice was folded in a wrapper addressed to plaintiff firm at Richmond, and regularly mailed, postage paid. There was further testimony to the effect that in August or September, 1905, one Henry Gunst, a salesman for plaintiff firm, who had traveled in this section for several years, selling liquors and collecting for them, was in the place of business of T. O. Sparrow & Co., and that Sparrow and Spears and W. H. Albert were present, and at that time W. H. Albert told Henry Gunst, plaintiffs' salesman and agent, that he had sold out his interest in the firm to Spears, and had nothing further to do with the business, and Spears was then and there introduced as Sparrow's partner. And further, at this time, which was about the 1st of September, Gunst sold for plaintiffs to the new firm a bill of goods, which was paid for, and later this present sale was made by plaintiffs to Sparrow & Co. While, as stated, the authorities are to the effect that actual notice is required in the case of a former customer of the firm, certainly one who has formerly extended its credit, they also hold that this notice is not required to be in any special or formal manner, and this, like other knowledge, will be at times imputed to the creditor. There was testimony to the effect that plaintiffs' salesman and agent, in the present discharge of his duty, and within the scope of his agency, was expressly notified that the firm of Sparrow & Co., as formerly constituted, had been dissolved, and that W. H. Albert had retired from the business; and, under the general principles of the law of agency, this knowledge of their salesman was the knowledge of the firm. Reinhardt on Agency, § 354; Mechem on Agency, § 721. And while the goods sold at the time when this information was given were paid for, and the present demand is for another and later sale, it is not open to the plaintiff firm to repudiate the knowledge obtained by their agent in the course and scope of his duties, and charge defendant for a debt which he had not contracted, and for which he was not otherwise liable. Such a position would require that a new notice should be given wherever a creditor firm saw proper to change its salesman, and it would well-nigh establish the doctrine that once a partner, always a partner, for it would be very difficult, if not impossible for a member to retire from a firm so as to protect himself from future liability.

The question has been considered and decided in the case of *Cox v. Pearce*, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563. In that case it was held: "(1) The failure of an agent to communicate to his principal information acquired by him in the course and

within the scope of his agency is a breach of duty to his principal; but as notice to the principal, it has the same effect as to third persons, as though his duty had been faithfully performed. (2) If a person gives notice of his withdrawal from a firm to an agent with authority to receive orders for an article, when the latter seeks from him, as a supposed partner, an order from the firm for such article, it is of no consequence, so far as the effect of the notice is concerned, that on a subsequent sale to a new firm of the same name, the agent had forgotten the notice. (3) Notice to a party, actual or constructive, in a particular transaction, of a fact which exempts another from liability in that transaction is notice in all subsequent transactions of the same character between the same parties." The judge below, therefore, could well charge the jury that, if they found the facts to be as testified to by the witnesses, they would answer the second issue, "Yes." We do not understand that the principle applied in the case of *Cowan v. Roberts*, 133 N. C. 629, 45 S. E. 954, to which we were referred by plaintiffs' counsel, militates in any way against the disposition we make of the present appeal. That case only held that notice, given to an employé or a bookkeeper in the home office of a creditor firm, of the retirement of a certain partner was not sufficient unless it was shown that the employé had something to do with the credit department of the creditor firm. The decision, while eminently sound in principle, goes very far, certainly on the facts of that particular case in upholding a demand against a retired partner, but, in no aspect of the decision, as we understand it, does it sustain the position of defendants here; for, according to this testimony, the agent who was notified of the retirement of defendant Albert was at the time, and had been for several years, the recognized agent of plaintiff firm, selling goods and collecting debts for them throughout this section, and so came directly within the principle applied in *Cowan v. Roberts*. He was connected with the credit department at the time the notice was given and received.

There is no error, and the judgment below will be affirmed.

No error.

## EUREKA LUMBER CO. v. SATCHWELL et al.

(Supreme Court of North Carolina. Sept. 16, 1908.)

1. CONTRIBUTION—GROUNDS OF OBLIGATION. A right of contribution can arise only after payment by one of the debtors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contribution, § 10.]

2. MORTGAGES—FORECLOSURE—INJUNCTION.

Where a mortgage was executed by two landowners, who on the face of the mortgage were co-principals, the mortgagee or the as-

signee of the bond secured thereby could not be required to defer the collection of his debt and the enforcement of his security until the debtors adjusted their liability between themselves.

**3. SAME—SUBSEQUENT PURCHASES—PRIORITY—RECORD—INDEXING—ERRORS.**

Where a mortgage executed by two landowners, and covering property belonging to each, was duly filed for record, failure of the register of deeds to properly index it against the name of one of such owners was not a fault of the mortgagee, and was ineffective to discharge the land of such mortgagor from the lien of the mortgage in favor of a subsequent purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 408.]

Appeal from Superior Court, Beaufort County; Lyon, Judge.

Suit by the Eureka Lumber Company against J. L. Satchwell and another. From a decree denying complainant relief, it appeals. Affirmed.

Wiley C. Rodman, for appellant. Small, MacLean & McMullan, for appellees.

OLARK, C. J. On May 5, 1905, Elijah Sheppard and H. A. Windley executed their bond for \$220 to defendant Satchwell, and to secure the same executed a mortgage upon 25 acres of land belonging to Sheppard, and 60 acres of land, the property of Windley, who since conveyed his tract to the plaintiff. The bond has since been assigned to the defendant McLean. The 60-acre tract has been sold under the power of sale in the mortgage, and the defendant W. D. Grimes became the purchaser. There was a restraining order granted to prevent payment over of purchase money and completion of the sale, on the ground that Windley and Sheppard were co-principals, and that Windley being insolvent, the plaintiff is entitled to be subrogated to his rights to contribution against Sheppard.

The defendants contend that Sheppard was surety for Windley, and that the latter's property ought to be subjected first. On the face of the mortgage (the bond was not put in evidence) they were co-principals, and there is no evidence to the contrary. But, however that may be, taking it most strongly for the plaintiff that Windley and Sheppard were co-principals, the judge properly dissolved the restraining order. The right of contribution can arise only after payment by one of the debtors. Then, whether Windley can recover contribution out of Sheppard will depend upon the finding of a jury whether Sheppard was surety or co-principal. We need not pass upon the question whether the plaintiff, as purchaser of the property, is subrogated to Windley's right to contribution, if any he has. The mortgagee or the assignee of the bond cannot be required to defer the collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves.

The plaintiff further contends that the mortgage was indexed only in the name of Sheppard, and that therefore it obtained a good title. "The filing of the deed for registration is in itself constructive notice, hence the failure of the register of deeds to index it after registration cannot impair its efficacy." *Davis v. Whitaker*, 114 N. C. 270, 19 S. E. 689, 41 Am. St. Rep. 793. This case draws the distinction between failure to index a judgment and index a conveyance, and was approved in *Glanton v. Jacobs*, 117 N. C. 420, 23 S. E. 335. If the mortgage, duly filed, was not properly indexed, the fault is not that of the mortgagee, but of the register of deeds. What remedy, if any, the plaintiff has against the latter is a question which does not arise in this case.

The judgment dissolving the restraining order is affirmed.

BROWN, J., did not sit.

S. R. FOWLE & SON v. MITCHELL et al. (Supreme Court of North Carolina. Sept. 16, 1908.)

**APPEAL AND ERROR—DISMISSAL—FAILURE TO PROSECUTE PROCEEDINGS—DISMISSAL BY APPELLEE.**

Supreme Court rule No. 17 (53 S. E. vii) provides that, if appellant fails to bring up and file a transcript seven days before the court begins the call of the cases from the district from which it comes, at the term of this court at which such transcript is required to be filed, appellee, on exhibiting the certificate of the clerk of the trial court showing the names of the parties, the time when the judgment and appeal were taken, the names of appellant and the date of the settling of the case on appeal, if settled, and filing such certificate or certified transcript in this court, may have the appeal docketed and dismissed at appellant's cost. *Held*, that a motion to docket and dismiss will be allowed, where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal.

Action by S. R. Fowle & Son against Alex Mitchell and others, in which defendants appeal. Motion by appellee to docket and dismiss. Motion granted.

Ward & Grimes, for appellees.

PER CURIAM. Motion to docket and dismiss under rule 17 (53 S. E. vii). Judgment was rendered July 31, 1908, continuing a restraining order as an injunction to the hearing. Notice of appeal was served August 6th. No case on appeal is necessary. No transcript has been docketed.

Motion allowed.

TABER v. SEABOARD AIR LINE RY. (Supreme Court of South Carolina. Sept. 11, 1908.)

**1. PLEADING—ELECTION.**

An action for personal injuries resulting from defendant's negligent and willful misconduct, the only reference in the complaint



to the contract between the parties being merely to show the existence between them, at the time of the wrongs, of the relation of carrier and passenger, from which flow duties imposed by law, claimed to have been violated by defendant's acts, is an action *ex delicto*, in which, under Code Civ. Proc. 1902, § 186a, all the acts of negligence, or other wrongs, causing or contributing to the injury for which suit is brought, may be set forth, without any right in defendant to require an election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1199.]

## 2. SAME.

Under Code Civ. Proc. 1902, § 186a, allowing all the acts of negligence, or other wrongs, causing or contributing to the injury for which suit is brought, to be set forth in the complaint, without any right in defendant to require an election, it is immaterial that some of the acts occurred out of the state; an action being maintainable in the state for an injury occurring out of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1199.]

## 3. EVIDENCE—PRESUMPTION—LAW OF OTHER STATE.

In the absence of evidence as to the law of the state where the injury occurred, the action therefor is governed by the common law of the forum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101; vol. 10, Common Law, §§ 14-16.]

## 4. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—DAMAGES—PUNITIVE DAMAGES.

Punitive damages may be awarded against a master for the willful acts of his servants, done within the apparent scope of their authority, without proof that he directed or ratified their conduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1273.]

## 5. TRIAL—NONSUIT AND DIRECTION OF VERDICT.

It being impossible to say that there was no evidence of negligence of defendant resulting in some actual damages to plaintiff, it was not error to refuse to grant a nonsuit, or to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381-389.]

## 6. CARRIERS—DELAY TO PASSENGERS—RIGHT TO DAMAGES.

Where the train on which plaintiff was a passenger was late at H., so that she could not make the desired connection for P., and with the conductor's knowledge she continued on the train to N., for the purpose of making connection for P., and shortly after her arrival at N. a train left for P., with which she could have made connection had the conductor of her train informed her thereof, missing which she was delayed eight hours, resulting, in addition to the loss of time, in some bodily fatigue and some extra expense, she was entitled to recover therefor, if the delay was the result of the carrier's negligence.

## 7. SAME—DUTY TO RUN ON SCHEDULE TIME.

Ordinarily it is the duty of the carrier to run its trains on schedule time, and make the usual and advertised connections, negligently failing to do which it is liable for any injury to a passenger directly resulting therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1039.]

## 8. SAME—RIGHT OF PASSENGER TO DAMAGES—NERVOUS BREAKDOWN.

While, in an action for injury to a passenger from delay in carriage, there can be no recovery for mere mental suffering, disconnected from bodily injury resulting from the carrier's

negligence, yet she may recover for nervous breakdown directly due to such negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1082.]

## 9. SAME—FAILURE TO MAKE SCHEDULE TIME—NEGLECT—PRESUMPTION—BURDEN OF PROOF.

It being shown that a carrier failed to make its schedule time and connections, resulting in injury to a passenger, a presumption of negligence arises, putting on the carrier the burden of showing that such failure was not due to its negligence.

## 10. SAME—EVIDENCE OVERCOMING PRESUMPTION.

The presumption of negligence of the carrier in failing to make schedule connection at H. is not conclusively overcome by testimony that the delay was due to being 28 minutes late from C., to loss of 20 minutes on account of a trestle being on fire, to delay of 9 minutes at a station in loading baggage, and to 21 minutes lost owing to bad coal.

## 11. SAME—WANTON BREACH OF DUTY—PUNITIVE DAMAGES—EVIDENCE.

Willful or wanton breach of duty by a carrier, authorizing punitive damages, is not shown by testimony that a passenger was required several times to change her seat in the Pullman, she testifying that the porter said in a rough way that it was the conductor's orders, but it appearing that the change was required to enable berths to be made up for other passengers; the passenger in question not desiring her berth made up.

## 12. SAME—UNLAWFUL EJECTION.

An unlawful ejection, or any willful disregard of plaintiff's rights as a passenger, authorizing punitive damages, is not shown by testimony that, when her train reached H., the natural and contemplated place for her to change for P., but where she thought she would only have to step from the coach on which she was to the coach for P., the porter picked up her baggage, and told her she would have to get off there, and, on her protesting that she had been told that she would only have to step into another coach, carried her things off, saying it was the conductor's orders; she having, when it was discovered that her train for P. had gone, been let back on to the train from which she had alighted, with a view to making connection for P. at another point, though she testified that when this was suggested to the conductor by a stranger, the conductor said "in a rather gruff kind of way" that he supposed she could get back on the train.

## 13. SAME—LIABILITY FOR ACTS OF PULLMAN CAR PORTER.

A passenger testified that she requested the Pullman car porter, at what she thought was 1 o'clock at night, to make up her berth, and he said she could have it made up for two hours, whereupon she declined to have it made up for so short a time. The train did not reach her destination till 6 o'clock in the morning. Held that, if the porter was negligent, or even willfully disregarding of the passenger's request, the carrier was not liable, in the absence of evidence connecting it with the special contract of the Pullman company, any defect being a breach of such company's duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1578, 1582.]

## 14. APPEAL AND ERROR—REVERSAL—NECESSITY OF NEW TRIAL.

The question of punitive damages having been improperly submitted to the jury, and there being no means of determining that the verdict excluded such damages, new trial must be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4043.]

Appeal from Common Pleas Circuit Court of Richland County; J. C. Klugh, Judge.

Action by Louisa B. Taber against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Reversed.

Lyles & McMahan, for appellant. Frank G. Tompkins and Edgar M. Thomson, for respondent.

JONES, J. The plaintiff as passenger recovered judgment against defendant as carrier for \$2,791.75, as damages for personal injuries alleged to have resulted from defendant's negligent and willful misconduct, in particulars which will hereafter more fully appear. The defendant's exceptions to this judgment raise questions which will now be considered in connection with the relevant facts.

1. The circuit court did not err in refusing to require plaintiff to elect on which cause of action she would proceed. The contention is that the complaint stated several distinct causes of action jumbled together, viz. (1) a breach of contract in failing to carry plaintiff comfortably and promptly from Columbia, S. C., to her destination, Portsmouth, Va.; (2) a willful tort by mistreatment and humiliation after the car left Columbia, S. C., and at other times on said trip; (3) a willful tort in ejecting plaintiff from the train at Hamlet, N. C.; (4) a willful breach of contract in failing to prepare a berth in the Pullman car; and (5) in willfully failing to give plaintiff information as to connections, and compelling her to leave the train at Norlina, N. C., upon false information as to connections. Some of these grounds or causes of action originated in South Carolina, and some in North Carolina; and it is argued that section 186a, Code Civ. Proc. 1902, does not apply to a case like this. We think the action is *ex delicto*, and so far as reference is made to the contract, it is merely for the purpose of showing the existence of the relation of carrier and passenger, from which flow certain duties imposed by law. *Hellams v. Tel. Co.*, 70 S. C. 87, 49 S. E. 12. In an action *ex delicto* section 186a allows the pleader to set forth all the acts of negligence, or other wrongs, causing or contributing to the injury for which suit is brought, and denies the right of defendant to require an election. *Roundtree v. Railroad*, 73 S. C. 271, 53 S. E. 424. The link which prevents severance under the statute as a matter of pleading is the fact that the various acts are set forth as causing the injury sought to be remedied. Nor does the fact that some of the acts alleged occurred in North Carolina affect the question. An action may be maintained in this state for an injury occurring in another state. *Crosby v. Seaboard Air Line Railway*, 61 S. E. 1064, manuscript decision recently filed.

2. We cannot sustain defendant's contention, made in motion for nonsuit and in request to charge, that this action is to be

governed by the law of North Carolina as to occurrences in North Carolina, and that under the law of North Carolina punitive damages cannot be recovered against a corporation unless it is shown that the corporation has authorized or ratified the acts of its servants, or been negligent in their employment. There was no evidence before the court as to the law of North Carolina. The rule of law in this state is that, in the absence of evidence as to the law of a sister state where the injury occurred, the action is governed by the common law of the forum. *Crosby v. Seaboard, etc., Ry.*, *supra*. The law in this state warrants the finding of punitive damages against a master for the willful acts of his servants, done within the apparent scope of their agency, without proof that the master directed or ratified such conduct. *Quinn v. Ry.*, 29 S. C. 386, 7 S. E. 614, 1 L. R. A. 682; *Rucker v. Smoke*, 37 S. C. 380, 16 S. E. 40, 84 Am. St. Rep. 758; *Schumpert v. Ry.*, 65 S. C. 338, 43 S. E. 819, 95 Am. St. Rep. 802.

3. There was no error in refusing to grant a nonsuit as to the cause of action based upon negligence, nor in refusing to direct a verdict for defendant, because it cannot be said that there was no evidence whatever of negligence resulting in some actual damages to plaintiff. There was testimony that, when on April 17, 1906, plaintiff's agent bought her ticket from Columbia to Portsmouth, the defendant's agent at Columbia represented that the train would arrive at Portsmouth at 8 o'clock next morning, and that at Hamlet, N. C., the Portsmouth Pullman would be attached, and that she would not have to change trains, but would simply have to pass from one car to the next without getting off the train. Plaintiff was anxious to make prompt connections, as she was on her way to the bedside of her daughter, who was critically ill at Norfolk, Va. The train left Columbia about 7 o'clock p. m., April 17th, some minutes late, and arrived at Hamlet about 11 o'clock, too late to make connection there for Portsmouth. After leaving the train at Hamlet, and discovering the failure to make connection, she, with the knowledge of the conductor, returned to the car she had left, with the view to go on to Norlina, and there connect with the train for Portsmouth. On this train, after leaving Hamlet, she contracted for a berth on the Pullman car, with a right of transfer to Portsmouth train at Norlina, paying therefor \$2.50 to the Pullman conductor. About 1 o'clock, as she supposed, she requested that her berth be made up, and was told by the porter that she might have it made up for two hours, and she thereupon declined to have it made up, sitting up all night. The belated train reached Norlina about 6 o'clock on morning 18th, where she disembarked. Not wishing to stay in the waiting room in the depot, where there were a number of men, on her application to the depot agent an escort was

provided for her to the hotel nearby, where she remained until 2 o'clock p. m., when she took train for Portsmouth, reaching that place about 8 o'clock p. m. There was testimony that, if the conductor had given her the information, she could have made immediate connection at Norlina with a train to Portsmouth, as such a train left shortly after the arrival of her train at Norlina. The delay resulted in some loss of time, some bodily fatigue, some extra expense, for which plaintiff should receive compensation if the delay was the result of defendant's negligence. Assuming that mere representations as to schedules and connections are considered as guaranties, still it is ordinarily the duty of the carrier to run its trains on schedule time, and make the usual and advertised connections, and it is liable for any injury directly resulting from any negligent failure to make such schedule and connections. The plaintiff also testified as follows: "Q. Did you get any sleep to speak of that night at all? A. No, sir. Q. The night you traveled? A. No; I could not sleep. Q. How did it affect you; were you very nervous? A. Yes, and traveling alone. I am rather of a nervous temperament, and it worried me a great deal. Q. Were you worrying about your daughter during this time? A. I certainly was. Q. Did you hear anything of her during your trip? A. No, sir; I could not hear a word. Q. What effect did it have on you after you had finally arrived at your destination? A. I was broken down, and I had to go right in to nursing my daughter. Q. What was your nervous condition? A. Broken down, and broken up about it." There can be no recovery in this action for mere mental suffering, disconnected from bodily injury, resulting from defendant's negligence. *Taylor v. Atlantic Coast Line*, 78 S. C. 559, 59 S. E. 641. But if there was a nervous breakdown as a direct result of defendant's negligence, for such bodily suffering there should be compensation. On reaching a just conclusion on this line a jury should be very cautious not to hold defendant liable for any bodily suffering or nervous breakdown not directly due to its negligence. The plaintiff was an elderly lady, about 63 years old, of a nervous temperament, unaccustomed to travel, was alone, and was naturally very anxious about her ill daughter, and possibly would have spent a sleepless night and have been greatly fatigued and worn out on reaching her destination, even had she made the connection at Hamlet precisely as she supposed she would do. The defendant, of course, would not be liable for any nervous breakdown involving bodily suffering or injury due to these causes, but would be liable only for what could be fairly attributed to its negligence. When it is shown that the carrier has failed to make its schedule and connections, and this results in injury to the passenger, a presumption of negligence arises, and the burden is

cast upon the carrier to show that such failure was not due to its negligence. *Miller v. Southern Ry.*, 69 S. C. 135, 48 S. E. 99. The defendant did offer explanation by testimony, to the effect that the delay was due to being 28 minutes late from Columbia, to loss of 20 minutes on account of Jumping Gully trestle being on fire, to delay 9 minutes at Camden, loading baggage, to 21 minutes lost between Columbia and Hamlet, due to bad coal, and to other causes of delay beyond Hamlet, but as it cannot be said that such explanation conclusively negated negligence affecting the schedule and connections, it was properly submitted to the jury for determination. Moreover, there was testimony from which it might be inferred that defendant's conductor was negligent in not informing plaintiff of the chance of connecting at Norlina with an earlier train, which the agent at Norlina informed her she might have taken.

4. We are of the opinion, however, that there was no evidence whatever tending to show any wilful or wanton breach of duty by defendant, and that it was reversible error not to grant defendant's motion for nonsuit, as to the cause of action based on willfulness, and in refusing to instruct the jury not to award punitive damages as requested. We deem it necessary to notice only the two main circumstances relied on to show a wilful breach of duty. The first appears in the following testimony by plaintiff: "Q. On the way from Columbia to Hamlet, state whether you were annoyed by the officials of that car? A. Yes, sir; I changed my seat two or three different times. The porter would come and tell me, would take up my satchel, and would say I must get up. I said, 'Why?' I said, 'I have changed my seat.' He said it was the conductor's orders. I got up and changed, and that same thing was done again. I had three different seats after I got on the Pullman. Q. Did you protest against being moved? A. Yes, sir. He said it was the conductor's orders. Q. Did he allow you any option? A. No, sir. Q. How was his manner in speaking to you? A. I would not say he was very polite. He said, in a rough sort of way, it was the conductor's orders." It is not disputed that the porter, during her journey from Columbia to Hamlet, had furnished her with pillows, and pulled out her seat to make her comfortable, as she did not wish, and had not procured, a berth. She, however, only had the right to occupy a seat, and whenever it was necessary to make up berth for some other occupant of the section, there was nothing in reason to do but to request her to move to another seat, and she was in each instance given a comfortable seat. The only other alternatives left to the porter was either to deny the right of the occupant to his berth or pull down the berth over the plaintiff. In her inexperience as a traveler, and in her distressed condition of mind, plaintiff may have supposed that she had been unnecessarily and

impolitely moved, but to impose punitive damages upon defendant upon the undisputed facts would be a travesty of justice. The other circumstance is found in the testimony of plaintiff that, on arrival of the train at Hamlet, the porter picked up her satchel and umbrella, and said to plaintiff that she had to get off there; that she protested, declaring that there was a mistake; that she had been told that she would not have to leave the coach except to step into another coach; that the porter said that it was the conductor's orders, and carried her things off in spite of her protest. A stranger, seeing her distress, offered assistance, and they found the conductor, and explained that she wanted to get on to Norfolk as quick as she could, and the conductor was asked what the lady should do. Plaintiff testified that the conductor, "in a rather gruff kind of way," said, "I suppose she can get back on this train," and she thereupon got back on the car she had left. This is the foundation for the claim that plaintiff was unlawfully ejected from the train. By the plaintiff's own testimony she had paid for a seat in that coach to Hamlet only, and she knew she was to leave that coach at Hamlet for the Portsmouth coach. Her protest against leaving the coach grew out of her belief that she would only have to step from that coach to the Portsmouth coach. But the Portsmouth coach was gone, because her train was belated beyond the ordinary waiting time. Hamlet was her natural and contemplated changing place. Hence there was no alternative but to give her information that she was to get off there, and to assist her by carrying out her baggage. As the coach she had been riding in was to go on north by way of Norlina, her return to it, after conference with the conductor was merely an alternative between staying over at Hamlet until the next Portsmouth train and going on, with a view to connect with Portsmouth train at Norlina. We are unable to discover in this matter a scintilla of evidence suggesting an unlawful ejection from the train, or any willful disregard of plaintiff's rights as a passenger.

5. The appeal requires reference to one other matter. The plaintiff testified that between Hamlet and Norlina, late at night, she supposed about 1 o'clock, she asked the porter to make up her berth, that the porter told she might have it made up for two hours, and that she declined to have it made up for so short a time. The train actually reached Norlina at 6 o'clock, and plaintiff would necessarily have been aroused from the berth some time before arrival at Norlina, so she could disembark there. Whether the porter knew when the belated train would reach Norlina, and whether either the porter or the plaintiff was mistaken as to the lateness of the hour when the making up of the berth was requested, need not be considered. Conceding that the porter was negligent, or even willfully disregarding of plaintiff's request in

this matter, the defendant company is not liable, in the absence of evidence connecting it with the special contract of the Pullman company. The delict, if any, was a breach of duty by the Pullman company, since it appertained peculiarly to the contract of that company to furnish berth accommodations as distinguished from the defendant's contract of safe and comfortable transportation. The jury were, however, correctly instructed as to the law governing in such case, and it may be that the jury disregarded this matter in estimating the liability of the defendant. At any rate, the circumstances afford no basis for punitive damages against defendant.

As a question of punitive damages was improperly submitted to the jury, and as we have no means of accurately determining that the verdict excluded such damages, there must be a new trial.

The judgment of the circuit court is reversed.

# CATLETT v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Sept. 15, 1908.)

## 1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

A finding of fact, having some evidence to support it, is not reviewable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3943.]

## 2. CARRIERS—LIABILITY FOR LOSS OF GOODS.

A railroad company's liability for the destruction of plaintiff's goods in its possession is that of a common carrier, and not of a warehouseman; they having been in its possession as a common carrier when it wrongfully refused to allow him to take them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 341, 609.]

Appeal from Common Pleas Circuit Court of Anderson County; D. E. Hydrick, Judge.

Action by J. P. Catlett against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

E. M. Rucker, for appellant. A. H. Dag-nall, for respondent.

POPE, C. J. Two actions were brought by the plaintiff against the defendant in the magistrate court for the loss of property which occurred on the defendant's line; the property sued for having been destroyed by fire. The penalty of \$50 was claimed under the act 24 St. at Large, p. 81.

The magistrate's court, while giving judgment for \$16, refused the penalty of \$50, claiming that it was as warehouseman the defendant held the goods. From this judgment, the plaintiff appealed to the circuit court, and at the hearing of such appeal the circuit judge held that, not only was the defendant due the plaintiff \$16 the value of the goods, but also the penalty of \$50 under the statute. The second action was

appealed to the circuit court. The circuit judge has decided it to the satisfaction of all parties.

From this judgment of the circuit court, the defendant has appealed to this court upon the following grounds, which we will now consider in their order.

The first, second, and third exceptions will be considered together.

"(1) Because his honor erred in finding as a fact that there had been an overcharge upon this consignment, when there is no evidence upon which this finding can be based.

"(2) Because his honor erred in considering the testimony of the plaintiff that there was an overcharge, when the plaintiff was not an expert, and the only witness introduced by him testified that he could not give the correct rate.

"(3) Because his honor erred in holding that there was an overcharge, when there is no testimony to show that there was an overcharge, and therefore holding the defendant liable as a common carrier attaching the penalty of fifty (\$50) dollars."

There being some evidence tending to show that an overcharge was made upon this consignment, the circuit judge's ascertainment of such fact is not now reviewable by us. These exceptions are overruled.

"(4) Because his honor erred in not holding that this defendant was not liable either as a common carrier or warehouseman, the goods having been in the warehouse for over 30 days subject to the disposal of the plaintiff, the evidence showing that this defendant was not negligent."

The circuit judge when he held that the defendant held the consignment as a common carrier, and not as a warehouseman, was correct, because there is no doubt that, when the defendant refused to allow the plaintiff to take his goods, they were then in the hands of defendant as a common carrier. If the railroad still held the goods and the plaintiff refused to take the same beyond a certain period of time, then the defendant would be allowed to hold the same as warehouseman; but, as before remarked, such is not the case. 5 A. & E. 275; Woodward v. Ill. Cent. R. R. Co., 33 Ill. App. 433. This exception is overruled.

The fifth exception is virtually abandoned by the appellant itself, but under the decision of Charles v. Railroad Co., 78 S. C. 86, 58 S. E. 927, it is clearly untenable.

The judgment of the circuit court is affirmed.

VAUGHN et al. v. LANFORD et al.  
(Supreme Court of South Carolina. Sept. 2, 1908.)

# 1. WILLS — CONSTRUCTION — PROPERTY DEVISED—POSSIBILITY OF REVERTER.

Where a will mentioned each item of the property devised, and stated that the items mentioned constituted all his property, but

made no reference to a possibility of reverter, he did not attempt to devise such possibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 965.]

## 2. REVERSIONS—POSSIBILITY OF REVERTER—NATURE OF INTEREST.

A possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate.

## 3. WILLS—CONSTRUCTION—SHARES—RIGHT OF HEIRS TO RESIDUE.

Though a will showed an intention to exclude devisees from participation in other property than that devised, it will not prevent them from receiving as heirs any property not disposed of by the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 2203.]

## 4. PARTITION—CO-TENANTS—ALLOWANCE FOR IMPROVEMENTS—CHARGES FOR RENTS.

A co-tenant may recover the value of improvements placed upon land only after deducting therefrom the value of the use of the land, and the heirs of such co-tenant cannot claim, in partition proceedings, more than the share to which their ancestor would have been entitled.

## 5. SAME.

Improvements by a co-tenant in possession are regarded as paid for pro tanto by the rents as they accrue, and hence, in partition proceedings between co-tenants, the statute of limitations will not bar rents and profits chargeable against a co-tenant claiming the value of improvements.

## 6. TENANTS IN COMMON—LIABILITIES OF CO-TENANTS—LIEN FOR RENT.

No lien or incumbrance for rents or profits arises in favor of one co-tenant against the share of another in land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, § 81.]

## 7. PARTITION—INCIDENTAL RELIEF—ADJUSTMENT OF EQUITIES BETWEEN PARTIES.

Even though a tenant in common has no lien on the moiety of a co-tenant for the excess of rent over improvements, a court of equity will require an accounting for waste, betterments, and rents, as an incident to partition between tenants in common; and, while the value of improvements will be allowed to a co-tenant in partition, he must account for waste to the common property, and the rents and profits derived therefrom by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 228.]

## 8. DEATH—EVIDENCE OF DEATH—SUFFICIENCY.

The reported death of the children of an heir, together with their complete disappearance for more than 20 years, was sufficient prima facie evidence of their death, in a partition suit between other heirs and the co-tenant of their ancestor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 5.]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. O. Purdy, Judge.

Action for partition by Margaret Vaughn and others against Leannie Lanford and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Simpson & Bomar and S. M. Pilgram, for appellants. Haynsworth & Patterson and Stanyarne Wilson, for respondents.

WOODS, J. The action is for partition. The land described in the complaint was owned by William Jones, who on 21st August,

1868, conveyed it to his daughter, Eliza Jones, "and the lawful heirs of her body." Eliza Jones, on the 21st December, 1882, executed to E. L. Lanford a deed of conveyance containing a full warranty clause, and afterwards, on 28th March, 1895, died without having had heirs of her body. The plaintiffs allege that Eliza Jones held a fee conditional in the land, and that when she died without having had heirs of her body there was a reverter to the heirs of William Jones living at the time of her death. The known heirs of William Jones were the plaintiffs, a daughter Frances, who died 31st July, 1895, unmarried and childless. William Jones had another daughter, Mary, who predeceased her father, leaving four children, Frances, John, Judith A., and William Long, who left the state about 1848. William returned to the state about 20 years ago, and said his brother and sisters had all died childless. A year or two later a report came back that he also had died childless, and nothing has been heard of him since. The plaintiffs admit that the defendants own one-third of the land in fee by reason of the fact that Frances Jones, one of the heirs of William Jones, living at the time of the death of Eliza, who was entitled to one-third of the reversion, had joined Eliza in the conveyance made to E. L. Lanford, with a general warranty of title, thus estopping herself and her heirs from setting up claim to her interest in the land. The plaintiffs claimed an accounting for rents and profits, at the rate of \$150 a year. The defendants alleged: (1) That they were the owners of the land, and that the plaintiffs had no title or interest therein; (2) that the purchase money paid by E. L. Lanford to Eliza Jones had been invested in other lands, which the plaintiffs had taken as her heirs; (3) that they were protected by adverse possession; and (4) that they were entitled, in any event, to betterments to the amount of \$1,500. The second and third defenses are not involved in the appeal.

We do not understand any question to be made that, under the deed from her father, Eliza Jones took a fee conditional. The defendants contend, however, that William Jones, the grantor, by his will made after the conveyance to Eliza, devised to her the reversion as a part of his residuary estate, or if not that, the will shows that he had previously released the reversion to her, or, at least, that he did not intend the plaintiffs should have the reversion or any other interest in his estate. It is clear from the will that the testator meant to dispose of all the property then in his possession, each item of which he mentions; but it is equally clear, from the fact that he makes mention of the several items, and saying they constituted all the property he possessed, and making no reference to the reverter, that he did not have in mind, and did not intend, to attempt to devise the possibility of reverter created

by his deed to Eliza. The possibility of a reverter, after the termination of a fee conditional, being a mere possibility, is not an estate. It is thus described in *Blount v. Walker*, 31 S. C. 27, 9 S. E. 804: "It is neither a present nor a future right, but a mere possibility that a right may arise upon the happening of a contingency, which is not the subject of either devise or inheritance. This is because the grant or devise of a fee conditional passes the whole estate to the tenant in fee, leaving nothing in the grantor or devisor which can be the subject of devise or inheritance; and hence it is settled that, upon the termination of such an estate, it goes to those who can bring themselves into the class of heirs of the person creating the estate at the time when the estate terminates, and not to those who were heirs at the time of the death of such person." *Adams v. Chaplin*, 1 Hill, Eq. 235; *Deas v. Horry*, 2 Hill, Eq. 244; *Pearse v. Killian*, *McMul.* Eq. 231. In the case last cited the court, through Chancellor Harper, holds that he who would be entitled to the estate, if the fee conditional should presently determine, cannot devise or convey it; yet he may release it to the tenant in fee conditional, so as to make his estate an absolute fee simple. We are inclined, however, to the opinion that such a release could not be made effective by will, for the reason that a will could have no legal effect until the death of the testator; and at the moment of death the possibility of reverter passes from the testator, and beyond his control, to his heir. But it is not necessary to decide that point, because the will of William Jones shows on its face that it had no reference whatever to the possibility of reverter. Certain it is that there are no words in the will which could possibly be construed as an attempt to release the possibility of reverter to Eliza; and, though there are words signifying an intention to exclude the plaintiffs from participation in other property than that devised to them, that cannot have the effect of excluding them as heirs from participating in any property, not disposed of. *Blackman v. Gordon*, 2 Rich. Eq. 43, 44 Am. Dec. 241.

With respect to their fourth defense, the defendants complain that the circuit court, in allowing them credit for betterments put upon the land by E. L. Lanford, decreed that the rent of the land for the time that E. L. Lanford had it should be deducted. The objections urged against this method of adjustment are that the defendants should not be charged with the debt of E. L. Lanford for rent, that the rents and profits chargeable against E. L. Lanford are barred by the statute of limitations, and that there is no claim made in the complaint for rents and profits for the time the land was held by E. L. Lanford. None of these objections have any substantial foundation. Assuming that the defendants are entitled to receive compensation for the betterments made by E. L. Lan-

ford, they cannot claim more than Lanford himself would have been entitled to had he remained in possession; and it is obvious he could not have recovered the value of the betterments put upon the land without having credited thereon against him the value of the use of the land. This is the equitable rule by which the case is governed. *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19; *Tribble v. Poore*, 28 S. C. 565, 6 S. E. 577; *McGee v. Hall*, 28 S. C. 562, 6 S. E. 566; *Cain v. Cain*, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863. The statute of limitations has no application; for the reason that, in an accounting between co-tenants, betterments are to be regarded paid for pro tanto by the rents as they accrue. There is no proof here that the rents accrued more than six years before the betterments were made, and therefore in no possible view is the statute of limitations available to the defendants. As to the third point, it is true the plaintiffs do not seek in the complaint to recover judgment against the defendants for the rents which accrued while E. L. Lanford was in possession; but, when the defendants claim the benefit of betterments made by E. L. Lanford, it is manifest they cannot have more than the net amount due for betterments; that is, the difference between the value of the betterments to all the owners of the land and the value of the use of the land to him.

We do not think the circuit decree contemplates making defendants liable for the debt of E. L. Lanford, by charging them with any balance of rents which accrued against E. L. Lanford, beyond the value of betterments. But that is not a practical matter, because, under the evidence, it is not possible that his liability for rents can exceed his betterments which are credited to defendants. The decree provides that any rents, due by defendants over and above the betterments credited to them, shall be paid from the defendants' share of the proceeds of the sale of the land. By their seventh exception the defendants submit this was error, contending that the plaintiffs have no right to any other means of collection of the rents than an ordinary money judgment. The point is important, and there is no express decision of it in this state. We do not think it ought to be held on principle that any lien or incumbrance arises in favor of one co-tenant against the share or interest of another, in the land for rents due. Such liens would be indefinite in amount, and undisclosed by public records, upon which third parties, in dealing with the owners of property, ordinarily have a right to rely. They would greatly injure tenants in common by impairing the market value of their shares and interests, because of the apprehension, on the part of those contemplating purchasing such interests or otherwise dealing with them, that claims for rents might be established as superior liens. There are many authorities holding that no such liens exist. *Burns v. Dreyfus*,

69 Miss. 211, 11 South. 107, 30 Am. St. Rep. 539; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296; *Flack v. Gosnell*, 76 Md. 88, 24 Atl. 414, 16 L. R. A. 547, 35 Am. St. Rep. 413; *Burch v. Burch*, 82 Ky. 622; *Clark v. Hershy*, 52 Ark. 492, 12 S. W. 1077; 17 Am. & Eng. Enc. 697; 2 Jones on Liens, § 1155. In New York and Missouri the contrary is held. *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Beck v. Kallmeyer*, 42 Mo. App. 563. We think reason and weight of authority is against holding rents, due to one co-tenant by another, to constitute an outstanding lien or incumbrance on the latter's moiety.

But the absence of a lien does not render a court of equity powerless to require co-tenants to do full justice to each other, with respect to all their dealings with the common property, when the rights of third parties are not involved. Accounting for waste, for betterments, and for rents among co-tenants is now recognized as an incident to the right of partition, and the universal practice of the court of equity is to adjust all these matters in the suit for partition. Value added to the land by a co-tenant in the form of betterments will be allowed and paid to him from the proceeds of the sale made for partition. *Johnson v. Pelot*, 24 S. C. 265, 58 Am. Rep. 253; *Buck v. Martin*, 21 S. C. 594, 53 Am. Rep. 702; *Sutton v. Sutton*, 26 S. C. 40, 1 S. E. 19. On the same principle, when the rights of third parties are not involved, a co-tenant ought not to be allowed to have his share of the proceeds of sale without first accounting for waste committed by him on the common property, and the rents and profits derived by him therefrom. In *Hancock v. Day*, *McMull. Eq.* 73, 86 Am. Dec. 293, the power and discretion of the court to make such provision in the order of sale is fully recognized, though it was held in that case that the defendant's share of the proceeds of the sale should not be held to await the result of further litigation as to his liability for rent, when there was no showing that the defendant was not able to respond to any claim that might be established against him. The court says, in *Backler v. Farrow*, 2 Hill, *Eq.* 111: "The exception to the commissioner's report seems to have been sustained on the ground that damages for waste cannot be recovered in this court; the remedy being at law. This, no doubt, is in general true; but, having proper jurisdiction of the case, there is hardly any question, in relation to property, which this court may not determine incidentally for the purpose of doing complete justice, and preventing multiplicity of litigation." The rule that the court of equity, in decreeing partition, should adjust and settle the equities of co-tenants with respect to betterments, waste, and rents from the common property while under its control is thus stated by Judge Story: "Cases of a different nature, involving equitable compensation, to which a court of law is utterly inadequate, may easily be put; such, for in-

stance, as cases where one party has laid out large sums in improvements on the estate. For although, under such circumstances, the money so laid out does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and compelling the party applying for partition to make due compensation. So, when a tenant in common has been in the exclusive reception of the rents and profits, on a bill for a partition and account, the latter will also be decreed. So where one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or, if that cannot be done, he will be entitled to a compensation for those improvements." Equity Jurisprudence, § 655. We think the true rule may be thus stated: There is no fixed lien on the common property for rents in favor of one co-tenant against another, and the court will not provide for the payment of such rents from the common property to the prejudice of persons holding conveyances or liens on the interest of the co-tenant owing the rent. But, as among the parties themselves, the court in decreeing partition has the power, in doing full justice in the premises, to adjust all demands for rent, and require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the co-tenant owing the rent. This sale is just, and in accord with the principle that, when all the parties and the property are before the court of equity, it will do full justice to all before releasing its hold. It is not objectionable as creating a secret, indefinite lien to the prejudice of those parties dealing with the owners of the property, and therefore it is not opposed to the authorities above cited, holding that no such lien exists.

We do not see how there can be room for serious contention that the report of the death of all the children of Mary Long, together with their complete disappearance for more than 20 years, was not sufficient prima facie evidence of the death of these persons. There is no ground for the exception on that point.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### CAUTHEN et al. v. CAUTHEN et al.

(Supreme Court of South Carolina. Sept. 11, 1908.)

#### 1. COSTS—TAXATION—EQUITY CASES—CHANCELLOR'S DISCRETION.

Under Code Civ. Proc. 1902, § 323, the ordinary rule that costs must be taxed in favor of the prevailing party is only effective in equity cases, when not otherwise ordered by the chancellor, he having a large discretion in taxing

costs in such cases, the exercise of which will not be disturbed in absence of clear abuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 21.]

#### 2. SAME—DISCRETION NOT ABUSED.

In a suit for partition, and to establish a claim against the common estate, on judgment for plaintiff, the chancellor did not abuse his discretion in taxing the costs against the estate rather than against defendants' interest therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 21.]

#### 3. SAME—COSTS ON APPEAL.

Even in equity cases, costs and disbursements in the Supreme Court are taxed against the losing party on appeal, and the circuit judge or chancellor has no power or discretion to make a contrary direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 840.]

#### 4. PARTITION—COSTS—READVERTISING SALE—TAXATION.

Costs of readvertising a sale in partition were improperly taxed against plaintiff because he failed to pay in his whole bid in cash, he being justified in claiming a credit for the amount of his distributive share in the proceeds of the sale, and the balance due him on his judgment.

#### 5. SAME.

Costs in a partition suit, incurred solely in a contest between plaintiff and attorneys, as to their fees, should be taxed as general costs; the defendants not being interested in the controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partition, § 447.]

#### 6. SAME.

In taxing costs in a partition suit, it was improper to hold in abeyance taxation of costs incurred solely in a contest between plaintiff and attorneys, until the determination of another suit between plaintiff and the attorneys; it being proper to tax such costs against either plaintiff or the attorneys.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partition, § 447.]

#### 7. SAME.

Attorneys having lost in a contest with plaintiff in partition respecting their fees, costs incurred solely in that contest should have been taxed against them, in the absence of a contrary direction by the circuit court, based on equitable grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Partition, § 447.]

Appeal from Common Pleas Circuit Court of Lancaster County; John S. Wilson, Judge.

Action by W. B. Cauthen, administrator, and another against Alexander Cauthen and others. From an order affirming the taxation of costs by the clerk, plaintiff W. B. Cauthen appeals. Modified, affirmed, and remanded. See 79 S. C. 456, 61 S. E. 112.

W. O. Hough and R. B. Allison, for appellant. Ernest Moore, for respondents.

JONES, J. This appeal is from an order of the circuit court affirming the taxation of costs by the clerk. The action was for the sale and partition of the lands of the estate of W. B. Cauthen among plaintiff and defendants, and the establishment against said estate of a claim held by plaintiff W. B. Cauthen. The main litigation arose from the contest of this claim by the defendants. A full history of the litigation in the case



may be obtained by reference to 70 S. C. 167, 49 S. E. 321, and 76 S. C. 226, 56 S. E. 978. In the motion before the clerk for taxation the costs and disbursements were divided into three classes, A, B, and C. Class A, amounting to \$22.15, admittedly represents general costs and disbursements, and no objection is raised to taxation of same against the general fund. Class B, amounting to \$226.70, represents \$134.90 costs and disbursements in circuit court, and \$91.80 costs and disbursements in the Supreme Court (70 S. C. 167, 49 S. E. 321), which were taxed as general costs, but which appellant contends should have been taxed against the defendants Alexander Cauthen and others, represented by Ernest Moore, Esq., as the losing parties, but in any event that the amount of the Supreme Court costs and disbursements should have been so taxed. Class C, represents \$5 witness fees in the contest between Green & Hines and W. B. Cauthen, which the court held was not properly taxable against any parties, and should await the determination of litigation between W. B. Cauthen and Green & Hines, but which appellant contends should have been taxed against Green & Hines. Class C also represents \$12, taxed by the clerk against W. B. Cauthen as expenses of readvertising land for sale on his failure to comply with his bid on former sale, which appellant contends should have been taxed against Green & Hines.

First as to circuit court costs. This being a cause in equity, liability for the costs of the circuit court is generally controlled by the decision of the circuit judge. *Williams v. Jones*, 74 S. C. 281, 54 S. E. 558. The exercise of the court's discretion in such matters will not be interfered with, except for a clear abuse of discretion, or for violation of some principle of law. The ordinary rule that costs must be taxed in favor of the prevailing party against the losing party is not necessarily binding on the chancellor, and is only effective in equity cases when not otherwise ordered by the court. Section 323, Code Civ. Proc. 1902. As this was an action for partition of land between plaintiff and defendants as tenants in common, and for the establishment of a large claim against the common estate in favor of plaintiff W. B. Cauthen, the circuit court may have considered that the other tenants in common contested this claim in good faith for the benefit of all interests therein as tenants in common, and that the estate of W. B. Cauthen, deceased, was interested in the due establishment of its liability for the claim, and therefore that it was not inequitable for such costs to be taxed against the estate or general fund rather than against the share of the defendants therein. We cannot say that there was any abuse of discretion or violation of any rule of law in so doing. It follows from these views that the circuit court costs and disbursements in class B must stand as taxed.

With respect to Supreme Court costs and disbursements as specified in class B, a different rule prevails. It has been settled by a number of decisions that even in equity cases costs and disbursements in the Supreme Court are taxed in favor of the prevailing party against the losing party on said appeal, and that the circuit judge or chancellor has no power or discretion to make a contrary direction. *Hall v. Hall*, 45 S. C. 4, 22 S. E. 881; *Cunningham v. Cauthen*, 47 S. C. 164, 25 S. E. 87; *Jennings v. Parr*, 66 S. C. 388, 44 S. E. 962. Rule 40 of the circuit court prescribes how judgment for such costs shall be entered. The Supreme Court costs specified in class B, amounting to \$91.80, should therefore have been taxed in favor of plaintiff against the defendants, represented by Ernest Moore, Esq., the plaintiff having prevailed on said appeal.

With respect to costs in class C. In taxing of \$12 against W. B. Cauthen as the expenses of readvertising the sale of land because of his failure to pay in his whole bid in cash seems so arbitrary that it should not stand. The result of the litigation vindicated him in his offer to pay said bid after crediting same with his distributive share in the surplus proceeds of sale and the allowance of the balance due him on his judgment. Said expenses of readvertising should therefore have been taxed as general costs, in the absence of some reason for a different disposition. The witness fees of \$5 were incurred solely in the contest between W. B. Cauthen and Green & Hines as to the fee of the latter. These costs should not be taxed as general costs, since the other defendants are not concerned in the controversy, and to this extent the clerk was right. He erred, however, in holding these costs in abeyance until the determination of the pending suit between W. B. Cauthen and Green & Hines. The latter is a separate and independent suit, and the costs in this case should be taxed and paid without regard to the result of that suit. Either W. B. Cauthen or Green & Hines should pay these costs, and, since Green & Hines were the losing parties in this particular controversy, they should pay these costs, in the absence of a contrary direction by the circuit court, based on some equitable consideration.

The judgment of the circuit court is modified in the particulars specified, and affirmed in other respects, and the case remanded for adjustment, in accordance with the views herein announced.

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FOSTER et al. v. FOSTER et al.  
(Supreme Court of South Carolina. Sept. 11, 1908.)

1. TENANCY IN COMMON — RIGHTS OF DECEDENT'S CHILDREN—EFFECT OF WIFE'S CONVEYANCE.

A widow's conveyance of a right of way over her husband's land could not affect the in-

terest of his children as his heirs at law, her relation to the land remaining that of tenant in common with the children, her interest having imposed upon it the easement coextensive with her one-third interest.

**2. PARTITION — RIGHT TO SUE — EFFECT OF FORMER ACTION TO RECOVER LAND.**

Code Civ. Proc. 1902, § 98, subd. 2, requiring a second action to "recover" land to be brought within two years after a discontinuance of the first action, does not preclude a suit by decedent's children to "partition" land over which the widow granted a railway right of way, as to the railway company, because more than two years before bringing the suit they discontinued an action against the railway company brought to "recover" the land.

**3. SAME—EVIDENCE.**

Decedent's children sue the widow and a railway company, to which she conveyed a right of way over decedent's land, to partition the land. The company claims that, in a proceeding to settle the estate brought by the widow, the land was sold to persons other than plaintiffs, leaving plaintiffs without interest therein. Held that, on this issue all evidence tending to establish the sale must be excluded, except that admitted to be true or offered by plaintiffs, or appearing in judicial proceedings to which plaintiffs were parties.

**4. BOUNDARIES — DEEDS — CONSTRUCTION — LAND CONVEYED—RAILWAY RIGHT OF WAY AS BOUNDARY.**

Where land held in common was divided and deeded in tracts partly bounded by a railway right of way, the deed conveyed the fee to the center of the right of way; the company holding a mere easement, and no intention to reserve the fee covered by the right of way appearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 134.]

**5. EVIDENCE — OPINIONS — EFFECT OF DEED—ADMISSIBILITY.**

Opinions of witnesses on an issue whether the interest of plaintiffs in partition had passed under a judicial sale were properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2171, 2174.]

Appeal from Common Pleas Circuit Court of Lancaster County; J. C. Klugh, Judge.

Action by J. Harry Foster and others against Charlotte R. Foster and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded for new trial.

R. B. Allison and Abney & Muller, for appellants. J. Harry Foster and Green & Hines, for respondents.

**WOODS, J.** The land involved in this case was a part of the property of the late Joseph H. Foster. After his death, his widow, Mrs. Charlotte R. Foster, became administratrix of his estate, and on 20th April, 1887, undertook to grant a right of way, over the lands of the estate of the Charleston, Cincinnati & Chicago Railroad Company. That company entered under the grant, and appropriated the land described in the complaint to its use as a part of its right of way. The defendant Southern Railway Company, having acquired the interest of the Charleston, Cincinnati, & Chicago Railroad Company, now holds and uses the property as part of its right of way. The plaintiffs, the children of Joseph H. Foster, allege in their complaint, in this action for partition,

that the railroad company acquired under this grant from Mrs. Foster a one-third interest in the land, and that they are the owners in fee of the remaining two-thirds. Mrs. Foster by her answer admits all allegations of the complaint, except that the railroad company owns one-third interest in the land under the grant from her, and joins in the prayer of the complaint. The Southern Railway Company sets up the following defense: First, that it acquired a good title to the land for its roadbed and right of way by the grant of Mrs. Foster in 1887; second, that the plaintiffs brought an action for the recovery of the identical land in the court of common pleas for Lancaster county in 1899, against the South Carolina & Georgia Extension Railroad Company, the lessee and predecessor in title of the Southern Railway Company, and, after issue joined took an order of discontinuance, more than two years before the commencement of their present action, and therefore is precluded from bringing this action against the Southern Railway Company, under the terms of subdivision 2 of section 98 of Code of Civil Procedure of 1902; third, that in a proceeding to marshal assets and for partition, to which the plaintiffs were parties, all the lands of the estate of Joseph H. Foster, including the fee in the land now in dispute, were sold and duly conveyed to other persons, and the plaintiffs, therefore, have no interest in the land. On the trial of the issue of title thus made, after all the evidence was in, the circuit judge refused to direct a verdict for defendant, and, after a verdict had been rendered for plaintiffs, refused a motion for a new trial. Error is assigned in the refusal of these motions, in the charge to the jury, and in the exclusion of testimony. As the same points are made in several different forms, it will not be necessary to refer in detail to the 30 exceptions appearing in the record.

The first defense may be at once eliminated from the case, for it is obvious the conveyance of Mrs. Foster could not affect the interests of the plaintiffs as heirs at law of their father, Joseph H. Foster. *C. & W. C. Ry. Co. v. Reynolda*, 69 S. C. 481, 48 S. E. 476.

Due consideration of the effect on this action of the former action for the recovery of the land, as well as of that for partition of the lands of Joseph H. Foster, requires a statement of the relation of the several parties to the land after the execution of the deed of Mrs. Foster purporting to convey to the railroad company a right of way. Mrs. Foster did not undertake to convey the fee to the railroad company, but only an easement; and therefore, after the execution of her deed, her relation to the land remained that of tenant in common with her children; her interest having imposed upon it the easement of the railroad right of way, coextensive with her one-third interest. The South Carolina & Georgia Extension Railroad Com-

pany, to whose rights the Southern Railway Company succeeds, held, under Mrs. Foster's deed, an easement in the land occupied as a right of way only to the extent of the one-third interest which Mrs. Foster could convey. Such being the relation of the several parties to the land, the children of Joseph H. Foster brought their action against the South Carolina & Georgia Extension Railroad Company to recover possession of the entire land held by it as a right of way under the deed made by Mrs. Foster. The evidence shows that action was discontinued more than two years before the commencement of this present action. The defendant insists the delay for more than two years was fatal to this action, and the circuit court should have so instructed the jury. The Code of Civil Procedure of 1902, § 98, subd. 2, provides: "The plaintiff in all actions for recovery of real property or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more: Provided, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a nonsuit or discontinuance therein." This statute does not apply, for the former action was for the recovery of real estate, while this is not, but, on the contrary, is an action for partition. On this point the case of *Elmore v. Davis*, 49 S. C. 1, 26 S. E. 898, is conclusive.

We consider next, under the third defense, whether the evidence showed conclusively that the land in dispute was sold in the proceeding instituted by Mrs. Foster against her children, the plaintiffs in this action, for the settlement of Joseph H. Foster's estate. On this issue, all evidence tending to establish the sale of this land must be excluded, except that admitted to be true or offered by the plaintiffs, or appearing in judicial proceedings to which the plaintiffs were parties. In the first place, it is to be observed, the answer and supplemental complaints filed for the settlement of the estate, taken together, show on their face an intention to dispose of all lands and settle the entire estate. One of the tracts of land mentioned and described in the complaint was the "Jones Tract," and the evidence for the plaintiff shows the land in dispute to be a part of the land known as the "Jones Tract." There is no exception or exclusion in the complaint of the land occupied as a right of way from the general designation and description of the Jones tract. On the contrary, the allegation is that the plaintiffs and defendants own no other lands in common in this state, except those described in the complaint. There cannot be the least doubt that the action contemplated a sale of all the interests of the parties as heirs of Joseph H. Foster in the Jones tract, as well as all other lands of the estate of Joseph H.

Foster. Under orders of sale made by the court in that cause, the clerk of the court sold the Jones tract in these parcels: 25 acres, more or less, to Mrs. Charlotte R. Foster, one-tenth acre to W. J. Cunningham, and 8 acres to Dr. R. C. McManus. In the deed to Mrs. Foster the land conveyed is described as "bounded on the north by Charleston, Cincinnati & Chicago Railroad"; and in the separate deed to McManus and Cunningham the parcel conveyed to each of them is described as "bounded on the south by the Charleston, Cincinnati & Chicago Railroad." The other boundaries in all three of the deeds are streets or the lands or lots of other persons.

As already observed, the parties to the action, as heirs of Joseph H. Foster, owned the entire fee in the land occupied by the Charleston, Cincinnati & Chicago Railroad Company as a right of way, and as to the children, defendants in that cause, the railroad company did not have even an easement in the land. If it had been the intention to reserve the land occupied by the railroad, the boundary should, and doubtless would, have been given as the land so occupied. When it was in fact given as the railroad itself, the conveyance covered all the land, including that occupied as a right of way, to the center of the railroad track. The precise point here involved was decided in *Witter v. Harvey*, 1 McCord, 67, 10 Am. Dec. 650, and *Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971. The numerous authorities in other jurisdictions to the same effect will be found collated in 9 Cyc. 906.

The opinions of witnesses as to whether the conveyances made under the order of the court embraced the land in dispute could not affect the question, and the circuit judge properly excluded them when objection was made. The words used in the deeds made by the clerk of the court, giving the boundaries of the lands conveyed, were free from any latent ambiguity; and the circuit judge should have construed and interpreted the deeds, and should have held and instructed the jury that the entire interest of the plaintiffs in the lands in dispute had passed by these deeds to other parties, and hence the plaintiffs had no right of action.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

#### STRICKLAND v. JONES.

(Supreme Court of Georgia. Aug. 19, 1908.)

##### 1. FRAUDULENT CONVEYANCES — HUSBAND AND WIFE—BURDEN OF PROOF.

It was not error to charge: "Whenever a transaction is between husband and wife, and creditors attack it, then the law throws the onus—that is the burden of proof—on the wife, when she claims the property purchased or received

from her husband, to make a fair showing of the whole transaction."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 802.]

## 2. SAME—ACTION TO VACATE—INSTRUCTIONS.

The charge of the court upon the question as to the existence of fraud in the conveyance by the husband to the wife of the lands upon which the plaintiffs' attachment against the husband was subsequently levied, when fairly considered as a whole, did not put the burden upon the wife, as the claimant, of showing that her husband, the defendant in the execution, had no fraudulent intent in conveying the property in question to her; nor was it justly subject to exception upon the ground that it failed to instruct the jury that fraud by the husband in this transaction with his wife, unknown to her, and which she had no reasonable ground to suspect, would not be sufficient to invalidate the deed which he made to her.

## 3. SAME—CLAIMS BARRED BY LIMITATIONS.

It was not error to instruct the jury that, in passing upon the question whether there was fraud in the transaction between the husband and the wife, the question whether the debt, in payment of which the wife claimed that the husband conveyed the property in controversy to her, was barred by the statute of limitations was a circumstance which they might consider.

## 4. ATTACHMENT—LEVY—CLAIM—TITLE OF THIRD PERSON.

A claimant cannot rely upon title acquired from a third person after the levy of the execution and the filing of the claim.

## 5. FRAUDULENT CONVEYANCES—TRIAL—VERDICT—VACATION.

Even if a claimant, who admits possession in the defendant in *fi. fa.* at the time of the levy, and assumes the burden of proof, upon showing some interest in the property, can set up that the defendant in *fi. fa.* had, before the levy, conveyed the property to a third person to secure a debt, taking bond for reconveyance on payment, and that the defendant has not been revested with the title, yet when the only interest which such a claimant sought to assert was by virtue of a deed from the defendant in *fi. fa.*, and this was attacked on the ground that it was a fraudulent conveyance and void against creditors, after verdict finding the property subject to the levy, the verdict will not be set aside on a general ground of a motion for a new trial, alleging that the verdict was contrary to the evidence.

## 6. ATTACHMENT—CLAIM—RIGHTS OF CLAIMANT.

Where an attachment, sued out under the fraudulent debtor's act, is levied upon land as the property of the defendant in execution, and such property is claimed by another person, the question whether the right of the attaching creditor to sue out the attachment had become barred by the statute of limitations at the time he proceeded to do so is not one which can be raised by the claimant upon the trial of the claim case. This is true although it appears from the evidence that the claimant relies for title upon a deed from the defendant in the attachment proceeding, which was alleged in the attachment affidavit to have been executed for the purpose of defeating and defrauding the attaching creditor.

## 7. SAME—EVIDENCE.

The evidence was sufficient to authorize the jury to find the property subject, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by W. T. Jones, as survivor of Jeth-

ro Jones & Son, against T. J. Strickland, in which F. E. Strickland, wife of T. J. Strickland, filed claim to certain attached real estate. A verdict was rendered finding the property subject, and from an order denying claimant's motion for a new trial, she brings error, and plaintiff filed a cross-bill of exceptions. Affirmed on main bill and cross-bill dismissed.

W. F. Brown and W. C. Hodnett, for plaintiff in error. R. D. Jackson and S. Holderness, for defendant in error.

FISH, C. J. Jethro Jones & Son sued out an attachment against T. J. Strickland as a fraudulent debtor, alleging in the petition, verified by a member of the firm on November 30, 1898, that the defendant was indebted to them in a named amount upon certain described promissory notes, upon which suit was then pending in the superior court; that, for the purpose of defeating and defrauding them, he had executed a deed conveying certain land to his wife, which he had previously agreed to convey to them as security for such indebtedness; that he had also executed fraudulent mortgages, transfers, and assignments of other property of his, and was threatening to dispose of all the balance of his property, all for the purpose of defeating and defrauding the plaintiffs. The attachment was issued December 1, 1898; and on December 3, 1898, it was levied upon several tracts of land as the property of the defendant, to which Mrs. F. E. Strickland, his wife, interposed a claim. Plaintiffs filed a declaration in attachment in the superior court. While the common-law and attachment suits were pending, the defendant died, and the administrator upon his estate was made a party defendant in his stead. By an order of court the attachment case and the common-law action were consolidated and tried together, and upon the trial a judgment was rendered in favor of the plaintiffs for the amount found to be due them by an auditor, to whom the suit upon the notes had been referred. Subsequently the claim case came on for trial, and upon such trial the claimant admitted that, at the time of the levy of the attachment, the defendant was in possession of the property levied upon, and assumed the burden of proof. The jury returned a verdict finding the property subject, whereupon claimant made a motion for a new trial, which was overruled, and she excepted.

One of the grounds of the motion for a new trial was that the court erred in charging: "Whenever a transaction is between husband and wife, and creditors attack it, then the law throws the onus—that is, the burden of proof—on the wife, when she claims the property purchased or received from her husband, to make a fair showing of the whole transaction." There is no special assignment of error pointing out wherein this charge is claimed to be erroneous. The

charge is in accordance with what this court, in *Richardson v. Subers*, 82 Ga. 427, 9 S. E. 172, declared to be the law, and with section 2492 of the Civil Code of 1895, wherein it is declared that "when a transaction between husband and wife is attacked for fraud by creditors of either, the onus is on the husband and wife to show that the transaction was fair." It is therefore clear that there is no merit in this ground of the motion.

2. The court charged the jury that, if the claimant had shown by evidence "that she bought this property from her husband in good faith, free from fraud, for the purpose of settling a debt which her husband owed her, and you find she has brought evidence before you that he did owe her at the time the deed is alleged to have been dated, the 8th of March, 1894, a valid, subsisting, outstanding debt, if the husband conveyed property to her in settlement of such debt as that, and upon further consideration that she should assume and pay off a debt he owed Richardson, which was secured by a deed on the land made by her husband, and there was no fraud in the transaction, why then I charge you she would have made out such a case as would entitle her to a verdict finding the issue in her favor, unless the plaintiffs \* \* \* have shown you some legal reason why she should not have such a verdict." This charge is complained of in the motion, the assignments of error thereon being that it put the burden upon claimant of showing "that the defendant, T. J. Strickland, had no fraudulent intent in making the deed referred to," and implied "that if the claimant did not show" this, "the property levied on would be subject," and "because it does not instruct the jury that, if defendant \* \* \* in the execution of said deed to her had a fraudulent intent, unknown to her, or that she had no ground for reasonable suspicion, the property levied on would not be subject." From the brief of counsel for plaintiff in error it appears that the first assignment of error was intended to be based upon the use by the judge of the expression "free from fraud," and the language "and there was no fraud in the transaction." We do not think that the language "if the claimant \* \* \* has shown \* \* \* that she bought this property from her husband in good faith, free from fraud, for the purpose of settling a debt which her husband owed her," is fairly susceptible of the construction placed upon it by counsel for plaintiff in error; that is, that the charge put the burden on the claimant of showing that the husband had no fraudulent intent in making the deed. The more natural construction of this language is that the wife must have bought this property in good faith, and have been herself free from fraud in buying it. The other expression "and there was no fraud in the transaction" is broad enough to include fraud in the transaction on the part of the husband, unknown to the wife, as well as fraud by

both husband and wife; but, in view of the other instructions by the court upon the same subject, which followed in unbroken connection with the instruction here excepted to, we feel sure that the jury could not have so understood it. The instructions which immediately followed those here excepted, to were such as to make it perfectly clear to the jury that fraud in the transaction on the part of the husband alone, unknown to and unsuspected by the wife, would not be sufficient to invalidate the deed which he made to her. This comment upon the charge also disposes of the second assignment of error.

3. One ground of the motion complains generally that the court instructed the jury that, in passing upon the question whether or not there was any fraud in the transaction, the question whether the debt, which Mrs. Strickland claimed her husband owed her, was barred by the statute of limitations was a circumstance which they might consider. It appeared from the claimant's own testimony that the debts which she claimed her husband owed her, and in payment of which he conveyed to her the lands in question, had been created by her having loaned him money at various times, without taking any written evidence of indebtedness thus created, and that at the time he made her the deed, the whole of this indebtedness had long been barred by the statute of limitations, some of it having then been in existence for about a quarter of a century. Certainly the jury could consider this circumstance in passing upon the question of the bona fides of the claimant in this transaction with her husband, as it is well settled, both by the provisions of the Civil Code and numerous decisions of this court, that, fraud being subtle in its nature, slight circumstances tending to show its existence may be considered in determining whether it was or was not present in a given transaction. *Comer v. Allen*, 72 Ga. 1 (4).

4. It was alleged in the motion that the court erred in failing to instruct the jury that the claimant contended that the lands levied on had been conveyed by the defendant to one Richardson, by a deed executed December 31, 1890, to secure a debt of \$685, and that Richardson executed a bond conditioned to reconvey the property to the defendant, or his assigns, upon the payment of this debt, and that, at the time defendant executed the deed of March 8, 1894, to claimant, he also transferred to her, for a valuable consideration, this bond for title, and that on November 9, 1900, Richardson, after she had paid the debt, to secure which defendant had conveyed the lands to him, executed and delivered to her a deed to the premises levied upon. While the court did not charge this contention of the claimant as it is here stated, he presented her contention that she acquired title to the property by reason of its having been conveyed to her by her husband in settlement of a debt which

he owed her, and upon the further consideration of her assuming and paying the debt which he owed Richardson, more favorably to her than if he had done so. His charge in this respect was broad enough for the jury to understand that, if they should find that the deed from the husband to the wife was really executed for the purpose of paying a debt which he owed her, and upon the further consideration that she should assume and pay the debt which he owed Richardson, and with no intent on his part, known to her, to hinder, delay, or defraud the plaintiffs, the property should be found not subject to plaintiffs' execution whether she had actually paid the Richardson debt and received a conveyance from him or not. The attachment was levied December 3, 1898, and the claim interposed March 15, 1899. The deed from Richardson to the claimant was dated November 30, 1900. So the claimant could not rely upon title acquired from Richardson, as she obtained this title after the levy of the attachment, and after she had filed her claim to the property levied on. *McIntyre v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Oatts v. Wilkins*, 110 Ga. 319, 35 S. E. 345. She could only rely upon the title which she claimed to have acquired from her husband prior to the levy and the filing of her claim, and the charge of the court gave her the full benefit of her contention in this respect.

5. It was also alleged in the motion that the verdict was contrary to the law and the evidence, because, at the time of the levy of the attachment, the defendant "had no leviable interest in the property levied upon, for the reason that \* \* \* he had previously \* \* \* conveyed said property, \* \* \* by deed lawfully executed, to Albert L. Richardson to secure a loan of \$685.60," and at the time of the levy this debt had not been paid, nor the property reconveyed by Richardson to the defendant, nor had plaintiffs offered to pay the debt in order to have the property reconveyed to the defendant, so as to have it levied upon. The members of the court are not in entire agreement as to whether a claimant, who admits a *prima facie* title in the defendant, so as to make out a *prima facie* case for the plaintiffs in *fi. fa.*, can set up that the defendant in execution had conveyed the property to a third person as security for a debt, had taken bond for reconveyance upon payment, and the title had not been reconveyed to the defendant, and therefore the defendant did not have a leviable interest in the property; such contention being for the purpose of having the property found not subject under the claim. Some of the members of the court are of the opinion that, after the claimant admitted that the defendant in *fi. fa.* was in possession at the time of the levy, and assumed the burden of proof, she could not set up an outstanding title in a third person and thereupon secure a judgment sustaining

her claim and finding the property not subject. Other members of the court are of the opinion that, if the claimant showed a deed to her from the defendant in *fi. fa.*, which would convey to her all his interest in the property, she could set up the existence of the security deed previously made by him, and that the defendant in execution had no leviable interest for the purpose of preventing the property from being subject to the levy. All of the members of the court concur in the view that a title, acquired by the claimant after the interposition of the claim, could not be set up in the claim case, as has been already stated, and that the claimant occupied no better position by reason of any conveyance taken by her from the holder of the security deed while the claim was pending. All also concur in the view that, even if, upon showing an interest in the property, the claimant could set up the outstanding security deed, for the purpose of showing that the defendant in *fi. fa.* had no leviable interest, nevertheless, where the only interest sought to be proved by the claimant, acquired before the interposition of the claim, was under a deed from the defendant in execution, and this was attacked as being fraudulent and void as against the plaintiffs in *fi. fa.*, and the finding of the jury involved a determination of this issue against the claimant, thus in effect finding that, as between the parties to the litigation, the deed to the claimant was void and she had no interest in the land, the verdict will not be set aside, or a new trial granted, on the ground that it was not supported by the evidence, because the defendant in execution had no leviable interest. To do this would be to hold that the deed which the jury have found void was not so, and the claimant had an interest, in spite of the verdict, which found in effect that she had none, which finding was supported by sufficient evidence.

6. In the last ground of the motion it is contended that the evidence showed that plaintiffs' right, if any they had, to sue out the attachment under the fraudulent debtor's act was barred at the time they proceeded to do so, on November 30, 1898, as more than four years had then elapsed from the commission of the alleged fraudulent act by the defendant, *viz.*, the execution of the deed to his wife to the lands in controversy, on March 8, 1894, which deed was recorded March 9, 1894. In our opinion the claimant could not make this contention. The plea of the statute of limitations was not one which was available to her. If the statute was involved in the attachment case, the right to plead it was a personal privilege of the defendant, which he, or his legal representative in case of his death, might exercise or waive, but of which a third party could not take advantage. If the right of the plaintiffs, if such they had, to sue out the attachment had become barred when they undertook to exercise it, this fact did not render

the attachment void, but only voidable at the instance of the party against whom the attachment was issued. While the affidavit upon which the attachment was based alleged that the defendant had fraudulently conveyed certain land to his wife, which appears from the evidence is the land upon which the attachment was levied, and which was claimed by her, this did not give her the right to rely upon the statute of limitations in aid of her claim; for the attachment was not issued against her or her property, was but a proceeding against her husband, who alone had the right to plead the statute.

7. Under the evidence the jury were authorized to find the property subject, and there was no error in refusing to grant a new trial. Judgment affirmed on the main bill of exceptions; cross-bill dismissed. All the Justices concur.

#### HARROLD et al. v. SEABOARD AIR LINE RY. et al.

(Supreme Court of Georgia. Aug. 18, 1908.)

#### RAILROADS — REAL ESTATE — FORFEITURE — DEED—HABENDUM CLAUSE.

Uriah B. Harrold, the heirs at law of Thomas Harrold, and the administratrix of one Johnson, brought their equitable petition to recover from the defendants certain land which had been conveyed by Uriah B. Harrold, Thomas Harrold, and H. R. Johnson to the predecessors in title of the defendants. The deed of conveyance contains the following stipulation: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." The petition alleges that only a portion of said land is occupied by the railroad company for railroad purposes, having its track and certain railroad buildings thereon, and that the other and remaining portion of said land is occupied by permission of the defendant by private parties who have erected "monumental works and woodshed thereon." The petition also seeks a recovery of mesne profits against the defendant railroad company and one Clark; the latter being one of the private parties referred to who is in possession of a portion of the land conveyed by said deed. *Held:*

(1) The petition does not state a good cause of action for recovery of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 215.]

#### 2. EJECTMENT—PETITION.

Said petition does not state a case as against the individual defendant, especially as it does not show what portion of the land is occupied for private purposes by permission of the company, nor for how long a time such portion of the land has been so occupied.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by W. B. Harrold and others against the Seaboard Air Line Railway and another to recover certain real estate. From a judgment for defendants on sustaining a demurrer to the petition, plaintiffs bring error. Affirmed.

Uriah B. Harrold, Mrs. Mary E. Boone, Louisa E. Davenport, Mariah Harrold, and

Mrs. Josephine Johnson, administratrix of H. R. Johnson, deceased, brought an action against the Seaboard Air Line Railway and C. J. Clark to recover certain real estate in the city of Americus, alleging the following facts: On October 27, 1886, H. R. Johnson, lately deceased, Uriah B. Harrold, and Thomas Harrold, lately deceased, conveyed to the Americus, Preston & Lumpkin Railroad Company certain real estate in the city of Americus, "said property having been deeded to said railway company for railroad purposes only, the fee being reserved in and now is in said grantors and their legal representatives according to the tenor of the deed." The defendant railway company is the successor of the Americus, Preston & Lumpkin Railroad Company. The deed is attached to the petition, and the material parts of it are as follows: "We [the above-named grantors] do hereby sell and convey unto the Americus, Preston & Lumpkin Railroad Company and its successors, for right of way, yards, depots, side tracks, and other railroad purposes the following described real estate," and then follows a description of the property, after which is the following: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." The defendant railway company has never used the land for railroad purposes, "except a small portion thereof, on which the track of said defendant is located, and also the passenger station house and the agent's office." On another part of the land C. J. Clark "has, within the last seven years, without authority of plaintiffs, but under the direction and permission of said Seaboard Air Line Railway, erected a building to be occupied as a monumental workshop and storehouse, and also a woodyard for the sale of wood, all for his own private gain, without accounting to plaintiffs in any wise whatever." The prayer is that it be decreed that whatever rights the defendant railway company may have had to the property wrongfully occupied be forfeited, and that the title to said tracts be decreed to be in petitioners, free from all incumbrances; that possession be delivered to petitioners; that they have judgment against both the defendants for mesne profits for four years at \$80 per month; and that process issue. The defendants demurred to the petition, on the grounds that there was no cause of action, and that the plaintiffs were barred by the statute of limitation. The demurrer was sustained, and the plaintiffs excepted. Since the date of the certificate to the bill of exceptions Uriah B. Harrold, one of the plaintiffs, has died, and, on motion in this court, his heirs were made parties plaintiff in his stead.

Shipp & Sheppard, for plaintiffs in error. E. A. Hawkins, for defendants in error.

BECK, J. (after stating the facts as above). The court below did not err in sustaining the

demurrer to the petition in this case. The conveyance to the predecessor in title of the defendant railroad company contained the following stipulation: "To have said several lots under the same tenor as if the same had been regularly condemned for right of way, depot, yards, side tracks, and other railroad purposes." If we give to the stipulation in the conveyance the construction given to it by counsel for plaintiff in error—that is, that the grantees in the conveyance took only an easement in the land such as they would have acquired by condemnation proceeding—the conclusion that we have reached would not be affected thereby. The exact shape of the lot of land described in the deed and in the petition is not set forth so that the court can determine the shape of the entire tract, nor the relative position of the several lots which constitute the tract; and there is no map or plat contained in the record by which the shape of the tract could be determined with any degree of accuracy. But it is stated in the petition that the defendant company occupies "a small portion" of the land whereon "the track of said defendant is located, and also the passenger station house and the agent's office." We are not even informed in the petition as to whether that "small portion" of the land is segregated and inclosed so as to cut it off from the other parts of the land conveyed or not. The mere fact that the defendant company has not occupied and put into use all of the land conveyed, which is of the width of a little over 200 feet, as nearly as we can ascertain from the allegations in the petition, would not operate to work a forfeiture of the lands not used.

In the case of *Moss v. Chappell*, 126 Ga. 193, 54 S. E. 968, 11 L. R. A. (N. S.) 398, it appears that the deed to the railroad company, conveying the land in controversy, contained this provision: "Provided that should said strips of land cease to be used for railroad purposes, it shall revert to the grantors." And it was held that the words created a condition subsequent, a breach of which would work a forfeiture. The deed under consideration in the present case contains no such stipulation as that which we have pointed out in the deed under construction in the *Moss Case*. In the case of *Mayor, etc., of Macon v. E. Tenn. Va. & Ga. Ry. Co.*, 82 Ga. 501, 9 S. E. 1127, and *Ga. Railroad Co. v. Macon*, 86 Ga. 585, 13 S. E. 21, it was held that if the railroad companies, which were parties to those cases, "had any right to the lands mentioned, it was by reason of accepting the grant on the terms fixed by the city council of Macon, and this must have been with the limitation that the estate acquired was to exist only so long as the property was used for the purposes specified," and that "such a limitation is distinguished from an

ordinary condition subsequent, inasmuch as it marks the limits or boundaries beyond which the estate conveyed could not continue to exist." But in the deed which we have under consideration in this case there are no words of limitation nor words importing a condition subsequent, but the grantees in the deed acquired such an interest in the property, according to the plaintiffs' own construction of the deed, as would have been acquired by it under condemnation proceedings; and the mere failure upon the part of the railroad to use every part of the land thus acquired does not work a forfeiture, and the plaintiff would not be entitled to recover against the railroad company upon the grounds that it had forfeited its right and title to the lands conveyed.

As against the defendant Clark, the plaintiff did not show a good cause of action, as the petition does not show what portion of the land was in the possession and occupation by Clark, nor that he had been in such occupation for any length of time. We do not now pass upon the question as to whether or not, if a part of the land described in the deed had been segregated and actually divided from those portions used and occupied by the defendant company for railroad purposes, and the part so segregated and divided off had been entirely diverted from the purposes in contemplation of the makers of the deed, a right of action would have arisen in favor of the grantor in the deed or his privies in estate as against the parties occupying the land so segregated from that used for railroad purposes.

In addition to what we have said above in upholding the judgment of the court, sustaining the demurrer to the plaintiff's petition, it may be observed that the petition in this case is brought to recover the entire body of land conveyed, including that portion which is in actual use and occupancy by the railroad company for railroad purposes; for it appears from the petition that the track of the railroad company is actually laid over a portion of the land. Certainly it cannot be contended that so much of the land as is actually occupied by the railroad company with its track and railroad buildings could be recovered on the ground that there was a forfeiture of that portion of the land so occupied and used by the defendant. And it would seem, even if they had a right to recover a portion of the land which had been diverted from the purposes and uses intended by the maker of the deed, that part of it which was recoverable should have been described in the petition, so that it would be capable of identification and segregation from that part which could not be recovered.

Judgment affirmed. All the Justices concur.



**TOWN OF WYTHEVILLE v. JOHNSON'S  
EX'R et al.**

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

**1. TAXATION—UNAUTHORIZED TAX—ENJOINING ENFORCEMENT.**

Equity has jurisdiction to enjoin enforcement of an unauthorized tax, notwithstanding the remedy at law furnished by Code 1904, § 571.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1238, 1239.]

**2. MUNICIPAL CORPORATIONS — COLLATERAL INHERITANCE TAX—POWER TO LEVY—STATUTES.**

Under Code 1904, § 1043, authorizing a town or city to annually levy a tax on the adult male persons therein, and on any property therein, and on such other subject as may at that time be assessed with state taxes against persons therein, and under the charter of a town providing that its council may raise taxes annually by assessment on all subjects taxable by the state, the town has no power to impose a collateral inheritance tax; such power being conferrable on it only by express grant.

Appeal from Circuit Court, Wythe County.

Suit by Johnson's executor and others against the town of Wytheville. From an adverse decree, defendant appeals. Affirmed.

B. F. Buchanan, for appellant. J. J. A. Powell, for appellees.

**WHITTLE, J.** This appeal is from a decree of the circuit court of Wythe county, enjoining the treasurer of the town of Wytheville from levying and collecting a collateral inheritance tax on property real and personal, devised and bequeathed to the appellee, Nannie L. Wadley, by the will of her deceased aunt, Emily L. Johnson.

The jurisdiction of a court of equity to enjoin the enforcement of an unauthorized tax is too firmly established in this jurisdiction to admit of serious question. *Goddin v. Crump*, 8 Leigh, 120; *Bull v. Read*, 13 Grat. 78; *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 367; *Miller v. City of Lynchburg*, 20 Grat. 330; *Johnson v. Drummond*, 20 Grat. 419; *Lewellen v. Lockharts*, 21 Grat. 570; *City of Richmond v. R. & D. R. Co.*, 21 Grat. 604; *Redd v. Supervisors*, 31 Grat. 697; *Schoolfield v. City of Lynchburg*, 78 Va. 366. There is no merit, therefore, in the first assignment of error, which questions the jurisdiction of the court on the ground that section 571, Code Va. 1904, affords a complete and adequate remedy at law.

The essential facts are these: The testatrix, Mrs. Johnson, a resident of the town of Wytheville, died June 21, 1907, and shortly thereafter her will was admitted to probate. The collateral inheritance tax imposed on behalf of the state was paid by the executor. On August 2, 1907, more than a month after the death of the testatrix, the town council passed an ordinance laying a collateral inheritance tax for the use of the town of 5 per centum on every \$100 in value of the estate of any decedent in the town,

and declared that the ordinance should take effect from January 1, 1907.

On the merits the only question material to be considered is whether the power to impose a collateral inheritance tax has been delegated to the town of Wytheville either by general statute or charter.

The enactment found in section 1043, Code Va. 1904, is as follows: "The council of every city and town shall cause to be made up and entered upon their journal an account of all sums lawfully chargeable on the city or town, which ought to be paid within one year, and order a city or town levy of so much as in their opinion is necessary to be raised in that way, in addition to what may be received for licenses and from other sources. The levy so ordered may be upon the male persons in the said city or town above the age of twenty-one years, and upon any property therein, and upon such other subject as may at that time be assessed with State taxes against persons residing therein."

Section 42 of the town charter provides that, "for the execution of its powers and duties, the council may raise taxes annually by assessments in said town on all subjects taxable by the State, such sums of money as they may deem necessary to defray the expenses of same, and in such manner as they may deem expedient (in accordance with the laws of the state, and the United States \* \* \*)."

A statute substantially similar to section 1043 (section 33, c. 54, Code 1873) in connection with the charter of the city of Lynchburg and an ordinance imposing a collateral inheritance tax came under review by this court in *Peters v. City of Lynchburg*, 76 Va. 932, and *Schoolfield v. City of Lynchburg*, 78 Va. 366. Though the charter powers of the city in the matter of taxation were exceedingly broad, it conferred no express authority upon the common council to levy a collateral inheritance tax. In the first-named case, the validity of the ordinance was upheld by a divided court. Two of the judges, Burks and Christian, were of opinion that the power to impose such tax was conferred by the general law. Judge Anderson maintained the view that the Legislature, if it had the right, did not intend to confer power upon cities and towns to levy a collateral inheritance tax; and Judge Staples, while not doubting the authority of the Legislature to tax collateral inheritances, and to delegate that power to municipal corporations, was nevertheless of opinion that the power had not been conferred upon the city of Lynchburg, either by general law or charter.

Two years later the precise question again arose in the case of *Schoolfield v. City of Lynchburg*, supra, when the court unanimously denied the power of the city to impose such tax, either by charter delegation or otherwise. The court in that case observes:

"Upon an inspection of the charter, \* \* \* we find the subjects upon which the city of Lynchburg is authorized to levy a tax enumerated at great length, until they seem to cover every conceivable subject which might find place in a tax list, and yet we find no authority for the levying of this tax. Under the authorities cited, and a plain rule of construction, we cannot conclude otherwise than that, for reasons deemed wise, the Legislature intended to withhold this power. And we are of opinion that the decision of the learned judge who decided that this power was to be found in section 33 of chapter 54 is not sustained by the terms of that section. The words, 'upon any property in said town,' cannot be held to confer the power, because, as we have seen, this is not a property tax. \* \* \* In the light of the authorities cited, and upon reason, the concluding sentence cannot be construed to apply to other subjects than such as are assessed annually with State taxes. The provision is general, and was intended to apply to the general subjects of taxation, such as are provided for taxing generally, and ought not to be extended to include a special power to levy this special tax, unless the authority be expressly given by law."

We concur in the construction placed by the court both on the general statute and city charter.

The doctrine is well settled that "in construction of the grant of any power to tax, made by the state to one of its municipalities, the rule accepted by all the authorities is that it should be with strictness. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all that it has intended to grant, and whatever authority the municipal officers assume to exercise they must be able to show a warrant for it in the words of the grant." *Cooley on Taxation*, 209, 468. *City of Lynchburg v. N. & W. Ry. Co.*, 80 Va. 237, 56 Am. Rep. 592; *Green v. Ward*, 82 Va. 324.

In *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 367, the court held that a collateral inheritance tax was not in any proper sense a tax on property, but merely on the transitus of property—a privilege granted by the state of acquiring property by inheritance. Judge Lee in that connection says: "The intention of the Legislature was plainly to tax the transmission of property by devise or descent to collateral kindred, to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment." See, also, authorities cited in footnote to the principal case in Va. Rep. Ann.

It is apparent that section 1043 and the charter of the town of Wytheville apply only to the ordinary annually recurring tax on property and other subjects of taxation, and not to sporadic subjects, which, though connected with the transmission and enjoyment of property, are casual in their nature, and

not recurrent. It was to the former subjects of taxation that the court had reference in *Ould & Carrington v. City of Richmond*, 23 Grat. 404, 14 Am. Rep. 139, and *City of Norfolk v. Landmark Co.*, 95 Va. 564, 28 S. E. 959, and cases of that type, and not to a special exaction imposed by the state upon the recipient of a collateral inheritance. It would seem clear from the authorities that the power of a municipality to attach such burden to the devolution of property can only be conferred by express grant.

This view of the case renders it unnecessary to consider the remaining contention, namely, that the ordinance in question is retroactive and void, because it affects vested rights.

The decree appealed from is without error, and must be affirmed.

Affirmed.

BUCHANAN, J. absent.

## CLINCHFIELD COAL CO. v. CLINTWOOD COAL & TIMBER CO. et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

### 1. SPECIFIC PERFORMANCE—LACHES—APPLICABILITY OF DOCTRINE.

In a suit for specific performance of a compromise agreement executed in 1883 to convey mineral rights in land, the contention that the doctrine of laches had no application to bar the suit, because defendants have remained in possession of the land since that date, is untenable, where such possession was not under the compromise agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 328-331.]

### 2. SAME — GOOD FAITH — PERFORMANCE BY PLAINTIFF—ALLEGATIONS.

In a suit for specific performance of an agreement to convey land, an allegation that complainant and its predecessors in interest were at all times ready, able, and willing to carry out their part of the contract is not sufficient, where the admitted facts on the face of the bill contradict such allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 368.]

### 3. PLEADING—CONSTRUCTION AGAINST PLEADER.

In a suit for specific performance of a compromise agreement by which complainant's predecessors agreed to release all claims to the surface of a tract to defendant's predecessors, in consideration of a conveyance of all the mineral rights in the land, the bill herein having alleged that complainant's predecessors thereafter brought ejectment against defendant's predecessors to recover the land, but not setting out the record in the ejectment suit, under the rule that pleadings are construed more strongly against the pleader, it will be presumed that the ejectment suit was for both the land and minerals, thereby abandoning and repudiating the compromise agreement for the conveyance of the minerals alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 66.]

### 4. SPECIFIC PERFORMANCE—LACHES — BURDEN OF PROOF.

In a suit brought after 1905 to enforce specific performance of an agreement to convey mineral rights in land, executed in 1883, the

burden was upon complainant to give sufficient reasons why the suit was not brought sooner, and to state specifically the impediments to an earlier prosecution thereof.

#### 5. SAME — PLEADING — NATURE OF ALLEGATIONS.

To obtain specific performance of an agreement to convey land, complainant must aver the facts and circumstances entitling him to such relief by full, clear, positive, and distinct statements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 356-370.]

#### 6. SAME—BILL—SUFFICIENCY.

Bill for specific performance of a compromise agreement entered into in 1883, by which complainant's predecessors in interest were to release all claim to the surface of certain land in consideration of receiving a conveyance of the mineral rights therein, *held* not to show any good excuse for the unreasonable delay in seeking specific performance of the agreement, and to state facts and circumstances which showed on their face that the court would be liable to do great injustice by specifically enforcing the agreement, and hence the relief would be denied.

Appeal from Circuit Court, Dickenson County.

Bill by the Clinchfield Coal Company against the Clintwood Coal & Timber Company and others to specifically enforce an agreement to convey land. From a judgment on demurrer dismissing the bill, complainant appeals. Affirmed.

J. N. Powell, Bullitt & Kelly, and W. H. Rouse, for appellant. Ayers & Fulton, Vicars & Peery, A. A. Skeen, and S. H. Sutherland, for appellees.

CARDWELL, J. The bill filed by appellant and twice amended seeks specific enforcement of a certain written agreement, known as the "Imboden Compromise," bearing date February 19, 1883, and entered into by F. M. Imboden, agent of Dale Carter's heirs, and Mrs. Mary Campbell, of the one part, and William Sutherland and others, of the other part; and, by specific enforcement of said compromise agreement, to extract from appellees and vest in appellant the title to the coal and other minerals in, under, and upon a certain tract of land situated in Dickenson county, Va., spoken of in the record as the "Sutherland Tract."

It appears from the averments of the original and amended bills that there was in 1876, and several years prior, an ejectment suit brought in the name of Dale Carter against William Sutherland and others pending in the circuit court of Buchanan county, the object of which was to dispossess the defendants of certain portions of a large body of land, spoken of as the "French Land," including within its area the said "Sutherland Tract"; that in 1876 Dale Carter departed this life intestate, and said ejectment suit was thereafter revived in the names of his children as his heirs at law, but several years later the papers in said suit were burned when the courthouse of Buchanan county was destroyed by fire, and were never supplied by the Carter heirs; that, learning

that the defendants were anxious to compromise and settle said suit, the Carter heirs and Mrs. Mary Campbell, who was the widow of James Campbell, deceased, and had by his will acquired an interest in said French lands, employed F. M. Imboden as their agent, and gave him full power to compromise and settle the said litigation; that thereupon Imboden, after personal interviews with said defendants separately, called a meeting of all of them, and the aforesaid "Imboden Compromise" was entered into, the same reduced to writing, and signed by Imboden as agent for the Dale Carter heirs, William H. Burns, attorney for Mary Campbell, Joseph Kelly, and 12 others, including William Sutherland.

The intent and import of that compromise, so far as pertinent to the issues here, was to bind the Dale Carter heirs and Mrs. Mary Campbell not to supply the destroyed papers in the ejectment suit, to pay all costs of that suit, and to release to the said defendants any and all claim of the Carter heirs and Mrs. Campbell to the surface of the land claimed and occupied by the defendants, respectively, the surface of said lands to be conveyed by the Carter heirs, their respective wives and husbands, and Mrs. Campbell, by deeds with covenants of special warranty, etc., to the defendants, and these defendants, together with their wives, were "to convey or cause to be conveyed by deeds with covenants of special warranty, in fee simple, all the minerals on their respective tracts of land owned by them at the institution of said action \* \* \* to the heirs of the said Dale Carter, deceased, their assigns or vendees, except there is a clause to be inserted in each of the said deeds, reserving to the grantors, their assigns or vendees, the right to use and consume all the stone and cannel coal necessary for home consumption, and that there is also to be inserted a clause in each of the said deeds making said heirs of the said Dale Carter, deceased, their assignees or vendees, responsible to the said grantors in said deed, or their assignees, for any damage actually done to the said lands by reason of the mining of the said minerals."

It further appears from the original and amended bills that nothing was done pursuant to the Imboden compromise, except the payment of the costs of the ejectment suit by the heirs of Dale Carter, deceased, and Mrs. Campbell, between the date of the so-called compromise and the year 1888, when a number of the parties thereto, including William Sutherland, instituted a suit in equity against the Dale Carter heirs, the devisees of Mrs. Mary Campbell, who had in the meantime died testate, and the Virginia, Tennessee & Carolina Steel & Iron Company, who claimed an interest in the said lands under a contract of sale from the Campbell devisees and the Dale Carter heirs. The object of which suit was to have the Imboden

compromise declared null and void, and to have the same set aside and canceled.

To this suit the defendants appeared and filed answer, controverting the allegations of the bill. Depositions were taken and other proceedings had. While these proceedings were being taken, the cause was transferred to the circuit court of Wise county and to several other counties, and finally to the circuit court of Washington county, where it was pending in 1896.

Some time prior to 1896, to wit, in 1894, the complainants in that suit, including William Sutherland, made a compromise with the defendants thereto, by the terms of which the suit was to be dismissed at the costs of the defendants. The complainants were, respectively, to convey to the Virginia, Tennessee & Carolina Steel & Iron Company, the minerals in, on, and under their respective tracts of land involved in the suit, and the Virginia, Tennessee & Carolina Steel & Iron Company was to convey the land, excepting the minerals underlying it, to the complainants, respectively; and thereafter (some time in 1896) this suit was dismissed, and the defendants paid the costs thereof.

By deed of July 5, 1894, William Sutherland, pursuant to the agreement entered into some time in 1894 it is claimed, conveyed to the Virginia, Tennessee & Carolina Steel & Iron Company all the coal and other minerals in, on, and under the Sutherland tract of land, reserving and excepting to himself, his heirs, etc., certain stone and so much cannel coal on the land as might be necessary for home consumption; and the Virginia, Tennessee & Carolina Steel & Iron Company likewise executed and delivered to a number of the defendants in the last-named suit deeds by which it conveyed to them the lands they claimed, respectively, except the coal and other minerals thereon, which these defendants were, respectively, to convey to the Virginia, Tennessee & Carolina Steel & Iron Company, these minerals to be conveyed to the said company, instead of to the heirs of Dale Carter and devisees of Mrs. Mary Campbell; it being claimed by the steel and iron company that it had obtained deeds from the Campbell devisees for their interest in the lands, and to have purchased from the Carter heirs their interest therein, but there was then existing a dispute between the company and the Carter heirs with reference to this alleged purchase, and for that reason no deeds had been made by the Carter heirs to the company, although the Carter heirs made no objection to the minerals in, on, and under the lands being conveyed by William Sutherland and others to the company.

The original bill in the cause before us states that at the time the Virginia, Tennessee & Carolina Steel & Iron Company accepted the deed from William Sutherland it knew that he had in 1887 conveyed the land to Jasper Sutherland, and that the interest of Jasper Sutherland in the land had, in a certain

suit brought in the circuit court of Dickenson county to subject Jasper's interest to the claim of certain of his creditors, been sold to William B. Sutherland. Therefore it had endeavored to get a release deed from Jasper and William B. Sutherland, but they, Jasper and William B. Sutherland, claimed that, as they had not signed the Imboden compromise, there was no need for them to sign such a deed, and refused to do so. But, say the complainants, the company understood, and such was the fact, that Jasper and William B. Sutherland recognized the validity of the Imboden compromise and the right of their father, William Sutherland, to make the same, and likewise the compromise of the suit pending in 1894, and further understood that Jasper and William B. Sutherland were not then claiming and had never claimed the minerals on the land (Sutherland tract); therefore the signing of said release deed by Jasper and William B. Sutherland was not insisted on, etc., that it was never known by the Virginia, Tennessee & Carolina Steel & Iron Company or its assigns that Jasper and William B. Sutherland were setting up claims to the minerals on the lands until the year 1902, at which time, viz., on May 16, 1902, William B. Sutherland granted and conveyed the coal and other minerals in, on, and under the lands in question to the Clintwood Coal & Timber Company.

It is further stated in the original bill that the Virginia, Tennessee & Carolina Steel & Iron Company became insolvent, and suit was instituted against it in the Circuit Court of the United States for the Western District of Virginia by the Central Trust Company of New York, in which suit the French lands, including the Sutherland tract, were sold and conveyed to the Interstate Coal & Iron Company; that on the 23d day of May, 1905, the Interstate, etc., Company sold and conveyed these lands to the complainant (appellant here), and that complainant has also recently purchased and obtained from the Carter heirs and others deeds for all the right, title, and interest of the Carter heirs in and to the said lands, including the Sutherland tract.

It is further stated that at the date of the Imboden compromise William Sutherland was claiming the Sutherland tract, and it was not known to F. M. Imboden, or Mary Campbell, or the heirs of Dale Carter, that any of his (William Sutherland's) children claimed an interest therein; that after the Interstate Coal & Iron Co. discovered on record the deed from Wm. B. Sutherland to the minerals in question, and then, or shortly thereafter, for the first time learned that it was claimed by Jasper Sutherland that William Sutherland (Jasper's father) had prior to the year 1883 given or agreed to give the Sutherland tract to him (Jasper) and his brother, E. T. Sutherland, and that E. T. Sutherland had sold his interest in the land to him (Jasper), and that William Sutherland had executed to Jasper a deed for the land in 1887,

and that they were then claiming that that deed passed to Jasper the minerals in, on, and under the lands it conveyed, as well as the surface thereof. The bill then asserts that the claim of the Sutherlands and the Clintwood Coal & Timber Company is unfounded in fact or law, and calls in question the facts upon which the claim is rested, alleging bad faith on the part of the Sutherlands in not intimating to Imboden, or to the parties whom he was representing, that they, or either of them, objected to the Imboden compromise, or denied the right of William Sutherland to make the same; that E. T. Sutherland understood the contrary to be the facts, admitting the right of his father to make the Imboden compromise, and that when he (E. T. Sutherland) made sale of his interest in the Sutherland land to his brother, Jasper, between the years 1883 and 1887, he did not sell to Jasper the coal and other minerals in, on, and under the land, but only the surface, etc.; that in making the deed to Jasper, his son, in 1887, and likewise in 1888 when making another deed to correct errors in the first-named deed, William Sutherland did not intend to convey the coal and other minerals in, on, and under the lands, but only the surface and timber thereon.

It is then charged in the original bill that if it were true that William Sutherland did prior to the Imboden compromise give or agree to give to his sons, Jasper and E. T. Sutherland, the Sutherland tract of land, then in making the Imboden compromise William Sutherland acted for and was the agent of Jasper and E. T. Sutherland, and they were bound by what their father and agent did, etc.

Referring again to the suit instituted in 1888, the bill charges that when Jasper Sutherland signed the power of attorney to one Stratton, authorizing the institution of that suit to annul the Imboden compromise, assisted in its prosecution, and agreed to its dismissal pursuant to an agreement between the parties interested therein, the final decree therein precludes, in effect, the right of Jasper to call in question the validity and binding effect upon him of the Imboden compromise; that William B. Sutherland's purchase of the Sutherland tract of land, in the suit instituted by the creditors of Jasper Sutherland, was but a sham, as the purchase was really for the benefit of Jasper, who got the full benefit thereof; that, therefore, William B. Sutherland and also the Clintwood Coal & Timber Company had both actual and constructive notice of the Imboden compromise, and were as much bound by that compromise and the proceedings in the suit to annul it as Jasper Sutherland.

The bill further alleges that the Clintwood Coal & Timber Company, or its predecessors in title, or Jasper Sutherland, were never in the possession of the minerals in, on, and under the Sutherland tract of land, as the

Imboden compromise worked a severance of the minerals in, on, and under the land from its surface; that as the complainant has a complete title of the heirs of Dale Carter and also of Mary Campbell's devisees in and to the Sutherland tract of land, and offers to convey the land—i. e., the surface thereof—to William Sutherland or his assigns or vendees, as their rights may appear, reserving unto itself the coal and other minerals in, on, and under the land, as provided in the Imboden compromise, it, the complainant, has the right to specific enforcement of that compromise, whereby the complainant may obtain from appellee, the Clintwood Coal & Timber Company, a conveyance of the coal and other minerals in, on, and under the land, reserving in favor of Wm. B. Sutherland, his assignees and vendees, the rights reserved to him and them under said compromise, and inserting also, in the conveyance a clause to the effect that complainant, its assignees and vendees, shall be responsible to William Sutherland and his assigns for any damage actually done to the land by reason of the mining of said minerals, for costs, etc.

We have set out, perhaps at greater length than was necessary, the facts and circumstances under which the complainant acquired the right it asserts to a specific performance of the Imboden compromise, made and entered into nearly a quarter of a century before the institution of this suit, and also that the grounds of the demurrer to the original bill and as amended, relied on by the defendants, may be the better understood.

As mentioned, the bill was twice amended. In each of the amended bills the allegations of the original bill are repeated, and the effort made to overcome the force and effect of some of the 14 grounds of demurrer to the original bill; but the circuit court on the demurrer to the original bill, and as it stood after each amendment thereto, sustained the demurrer, and dismissed the bill, with costs to the defendants, and this ruling of the circuit court is assigned as error in the petition to this court for an appeal.

We do not deem it at all necessary to discuss seriatim the grounds of demurrer to the bill as it originally stood or as amended. It will be observed that the appellant is claiming as the successor in title to the rights of the heirs of Dale Carter, deceased, and the devisees of Mary Campbell, deceased, the right to a specific performance on the part of William Sutherland, his assigns and vendees, of that part of the Imboden compromise which provided that certain parties signing the compromise agreement, including William Sutherland, were, together with their wives, to convey to the heirs of Dale Carter, deceased, their assigns or vendees, all the minerals on their respective tracts of land, reserving certain rights as to stone, coal, etc., for home consumption, the Dale Carter heirs, their wives and husbands, and the devisees

of Mary Campbell to convey, in turn, to the grantors in the first-named deed, their assignees or vendees, the surface of the lands and appurtenances, except the minerals in, on and under the lands other than enough for the grantors' home consumption, etc. Nothing whatever is alleged to have been done under the Imboden compromise by the Carters and Campbells, except the payment of some costs, until the year 1894, when they paid another small bill of costs, and from 1883 to 1888 no excuse existed, so far as is alleged, for the failure to tender the conveyances of the Carters and the Campbells, as stipulated for in the Imboden compromise. On the other hand, it is admitted that William Sutherland in 1887 made and delivered to his son, Jasper, a deed conveying to him the Sutherland tract of land, without any exception or reservation whatsoever, and that not only was this deed duly recorded, whereby the Carters, the Campbells, and all others concerned had constructive notice of its making and import, but that they and the Virginia, Tennessee & Carolina Steel & Iron Company had actual notice when they made an ineffectual effort to get Jasper Sutherland and William B. Sutherland to execute to them a release of the underlying minerals.

The bill states that from 1888 to 1896 a suit to rescind the Imboden compromise was pending; but, as the record in that suit is not exhibited, we are left to conjecture the grounds on which the rescission was asked, since the bill here merely states that the allegations of the bill in the rescission suit were controverted, and gives no reason why the defendants did not then insist upon a specific enforcement of the contract sought to be rescinded. It was not until the amended bills were filed in this cause that appellant alleged that Dale Carter and Mrs. Campbell and their respective heirs and devisees were ready, able, and willing to carry out the Imboden compromise; and this allegation is made in the face of an admission in the original bill that in 1894 there existed a dispute between the Carter heirs and the steel and iron company as to the terms of the purchase claimed to have been made by the latter of the former's interests in the Sutherland tract of land, whereby the Carter heirs were in no condition, even if they were willing, to carry out the Imboden compromise. As already stated, the Virginia, Tennessee & Carolina Steel & Iron Company became insolvent, and the Sutherland land was sold under decree of the United States District Court, and conveyed to the Interstate Coal & Iron Company, and by conveyance of date May 23, 1905, appellant acquired from the Interstate Coal & Iron Company the title it had to this land; and, according to the bill, the interest of the Carter heirs and others in these lands were acquired by appellant but a short while before the institution of this suit without any reservation of surface or anything else in favor of William Sutherland,

or any one else, provided for in the Imboden compromise.

True, the amended bills allege that appellant and its predecessors in title took these conveyances subject to that compromise, and agreed to carry it out; but no such stipulations are alleged to have been inserted in the conveyances, and no binding written agreements to that effect are exhibited; and, had this been the case, that appellant acquired title to the minerals in and under the Sutherland land (which is here asserted) subject to the condition that appellant would carry out the Imboden compromise, is flatly contradicted, so far as the Interstate Coal & Iron Company, under whom appellant claims, is concerned, by the admission that it brought an ejectment suit in 1902 against appellee, Clintwood Coal & Timber Company, and others, to recover the land, thereby claiming the surface and the underlying minerals therein, as well as the growing timber thereon.

The ejectment suit referred to was finally determined in this court (105 Va. 574, 54 S. E. 593), and it was there held that the circuit court did not err in refusing to admit in evidence the Imboden compromise, for the reason that this compromise agreement was never carried into execution, but was disregarded and ignored by the parties in interest in their dealings with the Sutherland tract of land. No clearer justification of that view can be found than in the dealings of appellant and those under whom it claims, with respect to the Sutherland land, the subject of controversy here as in the ejectment suit.

These parties seem to have played the role of "fast and loose" with respect to the Imboden compromise, invoking its aid when deemed needful, and ignoring it when not adapted to their purposes. As fairly and well argued for appellees, after nearly a quarter of a century's delay, appellant comes into a court of equity to have enforced the Imboden compromise that it (appellant) may acquire the minerals underlying the Sutherland land, relying mainly upon an agreement alleged to have been entered into by William Sutherland in 1894, with full knowledge on the part of appellant's predecessor in title that he had no sort of interest in the land, having years before conveyed the same to his son, Jasper, the bill asking such relief should show a right thereto clearly and unmistakably. Not only this long delay, but the effort to enforce for any purpose the stale and often ignored, if not repudiated, Imboden compromise by the parties in interest, comes not until an unsuccessful attempt is made to recover the whole land of appellees, and then with a bill, though several times amended, full of bare allegations unsupported by any written documents exhibited therewith. A mere assertion by a complainant in such a case that he and those under whom he claims

the right to have the contract specifically enforced were at all times ready, able, and willing to carry out the contract on their part will not suffice when the admitted facts on the face of the bill, as in this case, refute the assertion.

The contention of appellant that the doctrine of laches has no application to the case, because appellees have remained in possession of the Sutherland land since 1883, is without force, since the possession was not pursuant to the Imboden compromise. That contract was at most but a purely executory agreement of compromise, which, if not carried out, left the parties as before. In the ejectment suit (105 Va. 574, 54 S. E. 593), it was determined that the possession of Jasper Sutherland of the land in question was not under the alleged Imboden compromise, but in hostility to it.

In 1 Barton's Ch. Pr. (2d Ed.) p. 123, referring to the class of cases to which the one in judgment plainly belongs, it is said: "Owing to the general rule that the specific performance of a contract will not be enforced in equity, unless the party seeking it has not been in default, but, on the other hand, has shown himself to have been ready, eager, prompt, and desirous of maintaining his right, the rule of laches is more strictly applied in cases of this character than in other suits for accounts, etc.; and hence, although in some instances a long delay has been insufficient to bar the complainant's rights, yet in others a very short time has sufficed for that purpose."

The same learned author says: "Cases of this character, except in special instances, are governed by the general rule applicable to laches; but, where the suit is to enforce specific performance of a contract to convey lands, courts of equity often allow and adopt the statute fixing a limit of real actions."

"As the application for a specific performance is addressed to the sound discretion of the court, he who asks it must have shown himself prompt and willing to comply with the obligations of the contract on his part; and the prayer will not be granted if it would be inequitable towards the party against whom the prayer is made." *Bowles v. Woodson*, 6 Grat. 78; 2 Minor's Inst. 895.

The same doctrine enunciated in the authorities just cited is reaffirmed in *Powell v. Berry*, 91 Va. 568, 22 S. E. 365, where it is emphasized that, if a party seeking specific performance or rescission of a contract has been in default, a court of equity will leave him to such remedy as he may have in a court of law.

*Fry on Spec. Perf.* (3d Am. Ed.) in note on page 453, citing an extensive list of cases, says: "It is well settled that, where a party asks the specific performance of a contract, he must show, either that he has performed, or has offered and is willing to perform, all that his contract can at any time call for," etc.

The original and the first amended bill in this cause put the appellant on inconsistent grounds, in that it first attempts to show that it is entitled to specific performance of the Imboden compromise by alleging that Dale Carter's heirs were always able, anxious, and willing to convey the surface of the land in question to William Sutherland, his assigns or vendees, and that the Interstate Coal & Iron Company, as well as appellant, took title to the land subject to the Imboden compromise, and agreed to carry it out; but, when it comes to make excuses for the long delay in seeking enforcement of that agreement, appellant accounts for four years of the delay by reference to the ejectment suit brought in 1902 and determined adversely to the plaintiff and in favor of Jasper Sutherland on his defense of adverse possession of the land for the statutory period of limitation in 1906, and, in the absence from this record of the record in the ejectment case (under the rule that pleadings are to be construed most strongly against the pleader), it is to be presumed that the declaration in that case asserted a right to the whole land, and not for the underlying minerals alone, thereby abandoning the Imboden compromise, if not absolutely repudiating it.

The bill as first amended was bad on demurrer, and the second amended bill does not help the appellant out of the difficulties confronting it by reason of the admissions in the original and first amended bill, for this second amended bill, not only repeats the admissions of the first two bills and refers to the four years' effort to eject the appellees from the whole land, but concedes that there never was at any time any deed tendered to William Sutherland, or to any one claiming under him, for the surface of the Sutherland land, in execution of the Imboden compromise. In fact, the bill, as twice amended, not only fails to allege that appellant or any of its predecessors in title ever at any time offered to carry out the Imboden compromise by a conveyance of the surface of the land to William Sutherland or his assigns, pursuant to that agreement, but fails to state facts and circumstances sufficient to constitute a good excuse for the unreasonable delay in seeking the relief here asked. It was incumbent upon appellant to give sufficient reasons why this suit was not brought at an earlier period, stating specifically what were the impediments, if any, to an earlier prosecution of it; but, instead, it relies mainly, as it would seem, upon the bare statement that appellant and its predecessors in title did not know until the termination of the ejectment suit, instituted in 1902 and terminated in 1906, just before the institution of this suit, that the proper forum in which to assert and maintain their claim was in a court of equity. The allegation in the second amended bill, that the Virginia, Tennessee & Carolina Steel & Iron Company was able, ready, and willing to carry out the terms

of the Imboden compromise concerning the surface of the Sutherland tract of land, is directly refuted by the admission in the original bill that that company was insolvent and for some time tied up in the United States court, with its affairs in the hands of a receiver. Not only does the bill, with its amendments, make the admissions to which we have adverted and others, but states facts and circumstances which show upon their face that a court of equity would encounter great risk of doing gross injustice to the parties against whom relief is asked by the enforcement of the Imboden compromise, and doubtless to others.

Facts and circumstances entitling appellant to the relief prayed for are not averred by full, clear, positive, and distinct statements, as the rule in such cases requires. Therefore it would be plainly inequitable to grant the relief. *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908; *Bowles v. Woodson*, supra; *Powell v. Berry*, supra; *Waterman on Spec. Perf.* § 438; *Fry on Spec. Perf.* (3d Am. Ed.) §§ 1070-1072; 12 Am. & Eng. Enc. Pl. & Pr. 834, 835; 20 Id. 449.

We are of opinion that there is no error in the rulings of the circuit court sustaining the demurrers to the original and amended bills, and dismissing the cause. Therefore the decree appealed from is affirmed.

**Affirmed.**

#### \* NORTON COAL CO. v. HANKS' ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

##### 1. MASTER AND SERVANT—RISKS ASSUMED—RELIANCE ON MASTER'S CARE — SERVANT'S KNOWLEDGE OF DANGER.

An employé may not assume that his employer has performed his duty in furnishing a reasonably safe place in which to work where the employé has knowledge of facts or circumstances which would indicate to a reasonable man that the assumption was not justified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

##### 2. TRIAL—INSTRUCTIONS—INCONSISTENCY.

Generally, where inconsistent instructions are given, the verdict should be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 564-568.]

##### 3. MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANT—SUPERINTENDENCE.

While it was the duty of a decedent, a track layer in defendant's mine, to keep a look-out for his own safety, and to inspect the mine roof where he was working if he had reason to believe that it was unsafe, he would not thereby become a fellow servant of a mine boss, upon whom defendant had imposed the duty of inspecting generally the mine roof, and seeing that it was reasonably safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 429, 463, 491.]

##### 4. SAME—DUTY OF SUPERINTENDENT.

It being the duty of defendant's mine foreman to inspect the mine and see that it was in a reasonably safe condition, he should have informed decedent of the dangerous condition of the mine roof where he assigned the latter to work, of which he knew, even if he thought the

roof would stand for awhile longer without falling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 297.]

##### 5. SAME — ACTIONS—EVIDENCE — ADMISSIBILITY.

In an action for the death of decedent by slate falling on him in a place where he had been assigned to work by the mine foreman, plaintiff could prove that under defendant's rules it was the foreman's duty to warn employes of the dangerous condition of the roof, of which he knew, when he ordered them to work in that place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 924-926.]

##### 6. SAME.

In an action for decedent's death while repairing tracks in a mine where he was ordered to work by defendant's mine boss, a question to a witness whether it was the duty of the mine boss to warn men of any danger which exists in the working places to which he assigns them should have been limited to the dangerous conditions of the roof known to the mine boss, or which he should have known by the exercise of ordinary care.

Error to Circuit Court, Wise County.

Action by Hanks' administrator against the Norton Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Ayers & Fulton, Bullitt & Kelly, and J. W. Chalkley, for plaintiff in error. Vicars & Peery, for defendant in error.

BUCHANAN, J. James Hanks, whilst working as a track repairer in the coal mine of the Norton Coal Company, was killed by the falling of a large piece of slate from the roof of the haulway in which he was employed. His administrator, the defendant in error, instituted this action to recover damages from the coal company, upon the ground that his intestate lost his life by reason of its negligence. There was a verdict and judgment against the defendant, and to that judgment this writ of error was awarded.

The evidence tended to prove that Hanks, the decedent, was directed by the defendant's mine foreman to assist another employé named Murphy in repairing the track in mine No. 4 of the defendant. They had repaired the track in one of the entries of the mine, and were returning from their work, when they met the mine foreman in another entry, who was told by Murphy that there had been a wreck in that entry in which there was some bad track. The mine foreman thereupon ordered them to take up the track in that entry or haulway, and relay it that evening, so that the mining machine could be taken over it that night to the face of the coal. This was about 4 o'clock in the evening. Murphy and Hanks immediately commenced to tear up the track, as directed. While so engaged, Murphy heard a small piece of slate or coal fall. He was unable to state whether it fell from the roof or the side of the entry or haulway in which they were working. When he first heard it, he thought



it was caused by a rat running "around the gob." He tapped upon the roof immediately above him, and, finding it safe, continued his work. The substance which Murphy heard fall fell about 10 feet from him and within 5 feet of Hanks. Murphy could not say whether or not Hanks heard it. Nothing was said by either to the other about it.

The evidence further tended to prove that the falling of slate from the roof, which is called "dripping," is an indication or warning to miners that the mine roof is, or may be, in a dangerous condition.

About two hours after this slate or coal was heard to fall, and when Murphy and Hanks were at work 40 or 50 feet nearer the face of the coal, a large piece of slate, about 9 feet long, 5 feet wide, and 17 inches thick in the middle, but thinner towards the sides, fell upon them, causing the death of Hanks and injuring Murphy.

There was also evidence tending to prove that the mine foreman some days before (though this is denied by him) had been informed by another employé of the company that the roof at the place where the slate fell was in a dangerous condition, and, unless the slate was timbered or taken down, some one would get killed, and the foreman's reply was that it might stand for some time.

One of the errors assigned is to the action of the court in giving and in refusing to give certain instructions.

By instruction No. 1, given at the request of the plaintiff, the jury were told "that it was the duty of the defendant company to use all reasonable care to provide and maintain a reasonably safe and suitable place in which its employé were at work, and not to expose its employé to risks beyond those incident to the employment, and not to expose them to risks beyond those risks in contemplation at the time of the contract of service and its employé had the right to presume that these duties had been performed, and for injuries to its employé, resulting from a breach of this duty, the defendant is responsible in damages. And, if the jury believe from the evidence in this case that the defendant company did not perform this duty, and that the breach of this duty of the defendant company was the proximate cause of the injury that resulted in the death of James Hanks while in the employment of the said defendant company, then the said defendant company is liable in damages in this case."

The objection made to that instruction is that it told the jury that the defendant's employé had the right to presume that it had performed its duty in providing a reasonably safe place in which to work, "notwithstanding the fact that two hours before the slate fell the witness Murphy had heard the dripping of the slate, and knew that it meant a bad roof, and the practically necessary inference that Hanks must have heard and knew the same thing."

If, as is conceded by the defendant's counsel, there had been no evidence tending to show that the employé had notice of the dangerous condition of the roof of the haulway, the instruction would have been correct; but, there being evidence which tended to prove that the roof of the mine was "dripping," which indicated that the roof was, or might be, in an unsafe condition, and that the decedent Hanks had knowledge thereof, the instruction did not correctly propound the law.

The employé's right to act upon the presumption that his employer has done his duty in furnishing him a reasonably safe place in which to work does not exist where the employé is affected with notice of facts or circumstances which would indicate to any reasonably intelligent man that the presumption was unjustifiable. See *Labatt on Master & Servant*, §§ 356, 413a; 1 *Bailey's Per. Inj. etc.*, § 800; 1 *Shear. & Red. on Neg.* §§ 211, 217.

Instruction numbered 5, given upon the request of the plaintiff, properly instructed the jury upon this point. The effect of it, however, was not to cure the error in instruction No. 1. That instruction was complete in itself; and, if the jury believed the facts hypothetically stated therein, they were told that the defendant was liable, even though they might have believed that the plaintiff's intestate had knowledge which should have warned him that it was unsafe to act upon the assumption that the defendant had performed its duty. Generally, where inconsistent instructions are given, the verdict should be set aside. This case clearly comes within the general rule. See *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *N. & W. Ry. Co. v. Mann*, 99 Va. 180, 187, 37 S. E. 849; *Bowles v. Commonwealth*, 103 Va. 816, 831, 832, 43 S. E. 527; *C. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 93, 94, 51 S. E. 182.

The giving of instruction No. 6, offered by the plaintiff, is assigned as error. Two objections are made to it—one that there was no evidence upon which to base it; and the other, as we understand it, that the dangerous condition of the mine being equally known to the employer and employé, it does not correctly state the law.

Both objections are based upon a mistake of fact, as we understand the record. There was evidence upon which to base the instruction, and also tending to show that the employer had knowledge of the dangerous condition of the mine, not known to the employé.

Instruction No. 7 given at the request of the plaintiff, is erroneous; but, as the error is apparent and one which will not be made upon another trial, it is unnecessary to discuss it.

The refusal of the court to give instructions numbered 1 and 2, asked for by the defendant, is assigned as error.

The objection urged to instruction No. 1 is that it assumes "that a horseback or kettle bottom is a piece of slate the nature of which makes it impossible to ascertain whether or not it is loose by the usual, reasonable, and ordinary methods used in determining loose slate."

It is not altogether clear that the instruction does make this assumption; but upon the next trial this defect can be removed by leaving that question clearly to the jury.

Instruction No. 2 is as follows: "The court further instructs the jury that if they believe from the evidence that the duty of inspecting the roof of the mine for the purpose of discovering defects therein, and of remedying such defects when discovered, was under the rules of the defendant company devolved on the mine boss, and, also, in part upon the trackmen, and that James Hanks at the time he was killed was a trackman, then said mine boss and said Hanks were fellow-servants as to the inspection of the said roof and the repairing thereof, and neither can recover for the neglect of such duties by the other."

While it was the duty of the deceased to keep a lookout for his own safety, and also to inspect the roof at the place he was working, if he had any reason to believe that it was in an unsafe or dangerous condition, he was not the fellow servant of the mine boss, upon whom the defendant had imposed the duty of inspecting generally the mine roof, and of seeing that it was in a reasonably safe condition. The instruction was properly refused.

The assignment of error based upon bill of exceptions numbered 4 was abandoned in oral argument.

The remaining assignment of error is to the action of the court in permitting the following question to be asked and answered:

"Q. State whether or not it is the duty of the bank foreman to warn men of any danger which exists in the working places he assigns them?"

"A. It is his duty."

The witness had testified that he was an employé of the defendant, and was working in the mine at the time of the accident; and that he had informed the mine foreman of the dangerous condition of the roof where the deceased lost his life several days before the accident. It also appeared that it was the duty of the mine foreman to inspect the mine, and to see that it was in a reasonably safe condition. Having knowledge, as the evidence tended to show, of the dangerous condition of the roof before he sent Murphy and the deceased to work in that entry, he ought to have informed them at least of its condition, even if he thought it might stand a while longer. It was clearly admissible to prove that, under the rules of the defendant company, it was his duty to warn them of this known danger when he ordered them to repair the track in that

entry. Under the facts of this case, we do not think that the defendant could have been prejudiced by the question and answer; but, as the case will have to be reversed upon other grounds, upon the next trial the question should be limited to the dangerous condition of the roof known to the mine foreman, or which ought to have been known to him by the exercise of ordinary care.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

## NORFOLK & W. RY. CO. v. DAVIS' ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

### 1. RAILROADS—CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE—COMPLAINT—SUFFICIENCY.

In an action against a railroad for the death of a driver of a vehicle at a grade crossing, a complaint alleging that the train, being in a cut and by reason of a house, was invisible until within 693 feet of the crossing, and that defendant failed to give the warning required by law, showed contributory negligence on deceased's part; it not appearing but that if he had been looking, as it was his duty to do, he could have seen the train approaching 693 feet from the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1112.]

### 2. SAME.

While, in an action against a railroad for death of the driver of a vehicle at a crossing, it is not necessary for plaintiff to aver that deceased was exercising due care in going on the track, yet, if the facts averred show contributory negligence on decedent's part, there can be no recovery in the absence of averments showing that, notwithstanding such contributory negligence, defendant, by the exercise of ordinary care after it discerned or ought to have discerned decedent's danger, might have avoided the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1112.]

### 3. SAME.

In an action against a railroad for death of the driver of a vehicle at a crossing, counts of the declaration, each averring, in substance, that decedent reached a position of danger from the train when he arrived at and drove on the crossing, one count averring that, when in this position, decedent could have been seen and his death avoided if defendant had kept a proper lookout and had exercised ordinary care, both of which it failed to do, and the other count averring that defendant discovered decedent's peril and could have avoided the collision had it exercised ordinary care but that it failed to exercise such care, each stated a good cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1112.]

### 4. SAME.

Plaintiff's intestate, when seen by defendant railroad's trainmen, was driving very slowly along the highway. The train was running at a speed of 20 miles or more an hour, and the engine bell was ringing. There was nothing in the conduct of the decedent to indicate that he was not in full possession of his faculties; that he did not know that the train was rapidly ap-

proaching, that his team was not entirely under his control, or anything to indicate that he intended to attempt to cross the track in front of the train, which was in full view. *Held* that, under these circumstances, the trainmen had a right to presume that decedent would stop, and not go on the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1016.]

#### 5. SAME.

In an action against a railroad for the death of the driver of a vehicle at a crossing, the fact that decedent's wagon had almost gotten over the crossing when it was struck, and that, if the train had been checked a little earlier, there would have been no collision, could not render defendant liable, in the absence of evidence that the trainmen failed to exercise ordinary care to avoid the accident after decedent left a place of safety and started on the crossing.

**Error to Circuit Court, Wythe County.**

**Action by Davis' administrator against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.**

W. B. Kegley and R. M. Page, for plaintiff in error. A. A. Campbell and S. W. Williams, for defendant in error.

BUCHANAN, J. The declaration in this case contained four counts, to each of which and to the whole declaration there was a demurrer. The court overruled the demurrer, except as to the fourth count, and its action in not sustaining the demurrer to the other three counts is assigned as error.

The first count, omitting the formal parts, after stating that the plaintiff's intestate and the freight train which caused his death were going in the same direction towards Max Meadows, a station on the defendant company's line of road, avers that:

"At a point on said railroad in said county between Wytheville depot and Max Meadows depot, and about two miles east of Wytheville depot, a public road or highway crosses said railroad, said highway being commonly known as the 'McAdam Road,' and runs through Wythe county. Said public highway at said crossing crosses the said railroad track at grade or upon the same level and at an oblique angle to the railroad. Immediately west of said crossing and about — yards distant therefrom, there is a deep cut through which said railroad runs, and this cut, together with a house, cut off the view of the crossing from the train until the train got within 693 feet of the crossing.

"And the plaintiff avers that at the time aforesaid his intestate, J. A. Davis, was traveling along said public highway towards said crossing in his wagon, driving his team of horses and intending to cross said railroad at said crossing on said highway, and was then and there within 200 feet of said crossing, and at the same time the defendant was running its said locomotive engine by steam and hauling said train of cars towards said crossing, and was then and there at a cer-

tain distance from said crossing, to wit, 600 to 300 yards therefrom.

"And plaintiff alleges that the defendant then and there owed to his intestate the duty to sharply sound a steam whistle twice at a distance of not less than 300 nor more than 600 yards from said crossing towards which both said freight train and plaintiff's intestate were traveling, and it was also the duty of defendant company to ring a bell of ordinary size upon said locomotive steam engine, or sound said whistle continuously or alternately with said bell after said whistle had been sounded twice as above, until said engine had reached said crossing. But this duty the defendant carelessly and negligently and wrongfully neglected to perform, and at said time and place, and by reason of said negligence, plaintiff's intestate was not warned by said signals or otherwise of the approach of said train, and was then and there ignorant of his danger. And plaintiff further avers that said freight train was then and there invisible to plaintiff's intestate as it came on towards said crossing, in time for plaintiff to save himself, by reason of said train being in the cut above described, and also by reason of a house which also impeded plaintiff's intestate's view of said train.

"And by reason of the negligence above set forth in failing to give said signals as above set forth, and being then and there ignorant of his danger, plaintiff's intestate then and there continued to travel on said highway to said crossing, and then and there in said wagon drove upon said crossing and the said freight train or engine thereof then and there ran against said wagon, and hurled said intestate from said wagon and against a fence, and thereby so hurt and wounded plaintiff's intestate that he then and there died instantly."

The objection made to that count is that, while it states a case of negligence on the part of the defendant company in failing to give the warning required by law as its locomotive approached the crossing, the facts averred show that the plaintiff's intestate was guilty of contributory negligence.

This, as we understand the count, is true. It states that the highway crossed the railway at grade, and that, by reason of a cut and house west of the crossing, the view of the train was cut off until it reached a point within 693 feet of the crossing. The plaintiff then undertakes to state why his decedent, whose duty it was to look out for the train, did not see it in time to avoid the collision, and in doing so avers that the train was "invisible to plaintiff's intestate as it came on towards the crossing, in time for plaintiff to save himself, by reason of said train being in the cut above described, and also by reason of a house which also impeded plaintiff's intestate's view of said train." There is nothing in that averment to show that if the deceased had been looking, as it was his duty to do, he could not have seen

the train approaching 693 feet west of the crossing. On the contrary, the necessary inference from the facts averred is that he could have done so. It was not necessary for the plaintiff to aver that his decedent was exercising due care in going upon the railway track; yet, if the facts averred in the count show contributory negligence on the part of the plaintiff's decedent, there can be no recovery under such count, in the absence of averments which show that, notwithstanding such contributory negligence, the defendant, by the exercise of ordinary care after it discerned or ought to have discerned the decedent's danger, might have avoided the injury.

The second and third counts each state a good cause of action, as we construe them. They each aver, in substance, that the plaintiff's decedent reached a position of danger from the moving train when he arrived at and drove upon the crossing. The second count avers that, when in this position of danger, the decedent could have been seen and his death avoided if the defendant had been keeping a proper lookout, and had exercised ordinary care to prevent the collision, but that it was not keeping such lookout, nor did it exercise such care. The third count avers that, when in this position of danger, the defendant did see the decedent's peril, and could have avoided the collision if it had exercised ordinary care, but that it failed to exercise such care.

However negligent the decedent may have been in driving upon the crossing in front of a moving train, he was still entitled to recover if, after the defendant saw or ought to have seen that he was in peril, it failed to exercise ordinary care to avoid injuring him.

The next assignment of error is to the action of the court in refusing to give certain instructions asked for by the defendant, and in giving certain other instructions. It is unnecessary to consider whether or not the instructions, or any of them, asked for by the defendant, were correct and applicable to the case, as we are of opinion that the instructions given by the court properly submitted the case to the jury, and that upon those instructions there ought to have been a verdict for the defendant.

It is conceded in the brief of counsel for the plaintiff, and if it were not it is clear, that there could be no recovery in the case unless the evidence showed that the defendant could, by the exercise of ordinary care, have prevented the accident after the plaintiff's intestate was discovered in a situation of peril, or by the exercise of ordinary care ought to have discovered it.

The engineman on the defendant's train saw the deceased as he was driving along the highway toward the crossing, some 70 or 80 feet from it. The fireman saw him when he was some 50 feet from it. The plaintiff's intestate, when seen by the trainmen, was sitting on the running gears of his wagon, driv-

ing very slowly along the highway. The train, which consisted of an engine and 11 loaded freight cars, was running at a speed of 20 miles or more an hour, and the bell on the engine was ringing. There was nothing in the conduct of the plaintiff's intestate to indicate that he was not in the full possession of his faculties; that he did not know that the train was rapidly approaching; that his team was not entirely under his control, or anything to indicate that he intended to cross, or attempt to cross, the railroad track in front of the train which was in full view. Under these circumstances, the trainmen had the right to presume that he would stop, and not go upon the track.

In the case of *Southern Ry. Co. v. Daves*, etc. (Va.) 61 S. E. 748, decided at the last term of the court, it was held that a railroad company could not be held liable for the failure of its engineer to anticipate that a person, whether infant or adult, approaching a crossing is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety until the train has passed.

When the plaintiff's intestate left a place of safety and started upon the crossing, the fireman at once informed the engineman, who could not then see the wagon from his side of the engine, that the plaintiff's intestate was driving upon the crossing. The engineman immediately applied the air brakes, sounded the alarm, and did all that could be done to avoid a collision. There is nothing in the evidence to satisfactorily show, or to show at all, that after the trainmen knew, or ought to have known, of the peril of the plaintiff's intestate, they did not do all that they could to avoid the accident. It is quite true that the wagon had almost gotten over the crossing when it was struck, and that, if the train had been checked a little earlier, there would have been no collision; but that fact, in the absence of evidence that the trainmen failed to exercise ordinary care to avoid the accident after the plaintiff's intestate left a place of safety and started upon the crossing, cannot render the defendant liable.

The judgment must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

DURBIN v. ROANOKE BLDG. CO. et al.  
(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

1. EQUITY—BILL OF REVIEW—CUMULATIVE EVIDENCE.

Where, on the first hearing of a suit, it was held on appeal that there was no evidence at all on a certain issue, a bill of review founded on after-discovered evidence on that issue should

not be refused on the ground that the evidence is cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1092.]

## 2. SAME — NEWLY DISCOVERED EVIDENCE — REQUISITES.

A bill of review founded on newly discovered evidence, showing the discovery of evidence after the final decree was rendered and affirmed, which could not have been discovered before by the exercise of reasonable diligence, and which is not merely cumulative and is material and such as, if true, ought to produce on another hearing a different result on the merits, entitles complainant to a rehearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091-1094.]

Appeal from Corporation Court of City of Roanoke.

Bill by one Durbin against the Roanoke Building Company and others to review a decree on the ground of newly discovered evidence. From a decree refusing leave to file the bill, complainant appeals. Reversed and remanded.

See 107 Va. 753, 60 S. E. 86.

Scott, Altizer & Watts and Dupey & Whittle, for appellant. L. H. Cocke and Hart & Hart, for appellees.

HARRISON, J. This is the second appearance of this case upon our docket. At the January term, 1908, an opinion was handed down affirming a final decree of the corporation court of the city of Roanoke which was rendered at its April term, 1907. After that decision, and within one year of the date of the final decree thereby affirmed, the complainant in the court below, who was the appellant here, filed his bill in the corporation court, praying that the final decree, which was affirmed by this court, be reviewed and reversed.

The record of the original suit, as presented here, together with the opinion and decree of this court, are filed with the bill as a part thereof. The record shows that the object of the suit was to subject to the lien of appellant's judgment against the Roanoke Building Company and others a narrow strip of land forming a portion of the northern half of Walnut street, lying immediately east of Jefferson street, as shown on a map of the Roanoke Land & Improvement Company, which is filed as an exhibit with the original bill. It further shows that the location of Walnut street was afterwards, and before dedication, changed so as to run in a more southerly direction, thus leaving the strip of land in controversy not occupied for street purposes.

The rights of the parties, as shown by the former decision of this court, turned upon the question whether or not the change in the location of Walnut street was accomplished before February 3, 1891, the date of the deed from the Roanoke Building Company,

the judgment debtor, to Joseph Ellis. This court held that there was no evidence establishing that fact, and that, in the absence of evidence to the contrary, the street must be assumed to remain in its original location.

The bill of review was sworn to by the complainant; and, on being tendered, the corporation court refused leave to file it, upon the ground that the newly discovered evidence was cumulative.

The bill alleges that, since the final decree and its affirmance, the complainant has discovered relevant and material evidence which shows that Walnut street was changed to its present location prior to the 3d day of February, 1891, the date of the deed from the Roanoke Building Company to Joseph Ellis. This allegation is clearly supported by the affidavit of a witness, filed with the bill as a part thereof, and, if true, it establishes the fact, the failure to establish which was made the sole ground for affirming the final decree which was adverse to the appellant. The newly discovered evidence, if true, ought therefore on a rehearing to produce a different result on the merits.

The bill further alleges that the evidence now adduced could not have been discovered before by the exercise of reasonable diligence. This allegation is fully sustained by the affidavits of counsel, which show that the evidence was not discovered until the 18th of March, 1908, and could not have been discovered earlier by any degree of diligence; that extraordinary efforts were made, without success, to discover the same prior to the former hearing of the cause.

It was clearly error to refuse leave to file the bill of review upon the ground that the new evidence was cumulative. The former opinion of this court holds that there was no evidence tending to show that the change in the location of Walnut street had been made prior to February 3, 1901. When, upon the first hearing, there is no evidence at all, newly discovered evidence can hardly be said to be cumulative.

All of the requisites of a bill of review are found in the bill of the appellant: (1) The evidence was discovered after the final decree was rendered and affirmed; (2) it could not have been discovered before by the exercise of reasonable diligence; (3) it is material, and such as, if true, ought to produce, on another hearing, a different result on the merits; and (4) it is not merely cumulative. A bill founded on after-discovered evidence, with the requisites stated, entitles the complainant to a rehearing. *Connolly v. Connolly*, etc., 32 Grat. 657.

The decree appealed from is erroneous, and must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

**JOHNSTON & GROMMETT BROS. v.  
BUNN & MONTEIRO.**

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

**1. MECHANICS' LIENS—NATURE OF PROCEEDING—RIGHT TO GRANT LEGAL RELIEF.**

A suit to enforce a mechanic's lien being in equity, where the court has once acquired jurisdiction, it may, under its general power to go on to a complete adjudication, render a personal decree for the indebtedness sought to be secured by the mechanic's lien, though the right to that lien is not then established, and may appoint a commissioner to take the evidence, and report whether complainants are entitled to a lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, *Mechanics' Liens*, §§ 628-631.]

**2. CONTRACTS — CONSTRUCTION CONTRACTS — FINAL ESTIMATE OF ENGINEER—CONDITION PRECEDENT.**

A construction contract provided that, whenever in the opinion of the chief engineer the contract had been completely performed, he should make and return a final estimate of the work done by contractors, and certify it in writing that the procuring of such certificate and final estimate should constitute a condition precedent to any right of action by contractors against the company. *Held*, that a contractor had no right, in the absence of any unnecessary or unreasonable delay by the engineer in making estimates, or of any mistake or fraud on his part, without the consent of the other party to the contract, to employ an engineer who was a stranger to the contract to make a final estimate of the work, and then bring an action on the contract based upon the stranger's estimate.

Appeal from Circuit Court, Wise County. Bill by Bunn & Monteiro against Johnston & Grommett Bros. to enforce a mechanic's lien. Decree for complainants and defendants appeal. Reversed and remanded.

Flannigan & Burnett and Irvine & Morrison, for appellants. W. S. Mathews, for appellees.

**HARRISON, J.** The bill in this case was filed by the appellees to enforce payment of a mechanic's lien, alleged to be due them as subcontractors for work done in constructing a section of the Black Mountain Railroad.

It appears that the Keokee Coal & Coke Company, as general contractors, entered into a contract with the Black Mountain Railroad Company to build for the latter a railroad, several miles in length, between Imboden, in Wise county, and Keokee, in Lee county. The Keokee Coal & Coke Company sublet its entire undertaking, by contract in writing, to the firm of Johnston & Grommett Bros., the appellants, who, in turn, by parol contract, sublet a part of the work to the appellees, Bunn & Monteiro. The evidence shows that under this parol contract the appellees were to be governed by the written contract which had been entered into by the appellants with the Keokee Coal & Coke Company.

The Black Mountain Railroad Company, the Keokee Coal & Coke Company, and Johnston & Grommett Bros. were made parties defendant to the bill, which alleged that complainants had completed their contract and

taken out a mechanic's lien for the balance due them on that portion of the roadbed which they had constructed, and prayed that the Black Mountain Railroad Company and the Keokee Coal & Coke Company be required to answer as to the amount they were due, or would become due, to Johnston & Grommett Bros., by reason of the latter's completion of their contract for the construction of the railroad mentioned. The prayer, further, is that complainants, who are the appellees here, be decreed a lien on that part of the Black Mountain roadbed which was constructed by them between stations 834 and 856, described in their mechanic's lien, which was made a part of the bill, and that they be decreed a sale of the same for the payment of their debt, and be given a personal judgment against the Black Mountain Railroad Company and the Keokee Coal & Coke Company for such sums as they may appear to have owed Johnston & Grommett Bros. on the date they, respectively, received notice of the complainants' mechanic's lien, and for general relief.

Upon the bill, the answers, which deny its allegations, and the evidence in the cause, the decree appealed from was rendered, giving a personal judgment for \$2,203.21, subject to a credit of \$522.15 and costs of suit, against the appellants, Johnston & Grommett Bros., with the right to issue execution thereon. The decree then refers the cause to a commissioner to ascertain whether the Black Mountain Railroad Company and the Keokee Coal & Coke Company are liable to the complainants by reason of the filing of their mechanic's lien, and, if so, in what amount.

We are of opinion that the position taken by appellants, that the court was without jurisdiction to enter the judgment complained of, is not tenable. The appellants contend that the only ground for equitable jurisdiction in this case is that the complainants have a mechanic's lien to be enforced, and that the record fails to show that there is any such indebtedness on the part of the owner of the railroad in question to any of the contractors as would give the complainants the right to a mechanic's lien; that the decree which gives judgment in favor of the appellees does not hold that a lien exists, but appoints a commissioner to take evidence and report whether the Black Mountain Railroad Company owes the Keokee Coal & Coke Company anything, or whether the latter company owes the appellants anything; and that the court is without jurisdiction to enter a personal decree until it has gone far enough to ascertain and decree that a lien exists.

The right of Bunn & Monteiro, the appellees, to recover from the appellants, with whom they contracted, does not depend upon the right of the former to a mechanic's lien. If the fact was properly established by the record that the appellants were indebted to the appellees, a personal decree against the

appellants for such indebtedness could be rendered, although the right to a mechanic's lien had not then been established. This was a bona fide proceeding in equity to enforce the mechanic's lien alleged in favor of the appellees. It may turn out when the evidence is taken that the complainants in the bill are not entitled to a lien upon the section of the railroad bed in question; but, if it appears that the complainants are entitled to recover from the appellants, the court can proceed to give judgment in their favor for the amount due, although they may have failed to establish their right to a lien; it being well settled that, when a court of equity has once acquired jurisdiction of a cause upon equitable grounds, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies which would otherwise be beyond the scope of its authority. *Walters v. Bank*, 76 Va. 12; *Penn v. Ingles*, 82 Va. 65; *Beecher v. Lewis*, 84 Va. 632, 6 S. E. 367; *Grubb v. Starkey*, 90 Va. 834, 20 S. E. 784.

We are, however, further of opinion that it was, as contended, premature to enter the personal decree complained of, in favor of the appellees against the appellants.

The evidence satisfactorily shows that, except in two or three particulars, not material in this connection, the contract between the appellants and the appellees was that the appellees were to be bound by the written contract entered into between the appellants and the Keokee Coal & Coke Company. That contract sets forth in detail all the terms and conditions of the undertaking by the parties. During the progress of the work which was to be done between December 20, 1906, the date of the contract, and May 1, 1907, the chief engineer of the railway company, therein agreed upon, was to make monthly estimates of the work done as the basis for payment of the amount due. Clause 21 of the contract provides that whenever in the opinion of the chief engineer the contract shall have been completely performed, he shall make and return a final estimate of the work done by contractors, and shall certify the same in writing. It further provides that the procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by contractors against the Keokee Coal & Coke Company.

The evidence shows that during the progress of the work the monthly estimates were made and the appellees paid in accordance therewith; but it clearly appears that no final estimate upon the work done by the appellees has ever been made by the chief engineer; indeed, it is insisted that the work undertaken by the appellees has not been completed. Nor does it appear that appellees have ever mentioned to the chief engineer their claim that the work was completed, or requested of him a certificate in writing showing a final estimate and the balance, if any, due to them. The basis of the personal decree against the appellants is admitted to be

a final estimate upon the work done by appellees, made by engineers who were strangers to the transaction, and employed for the purpose by appellees without the knowledge or consent of the appellants. The evidence shows that in the nature of things these outside engineers could not make an accurate or reliable estimate showing the balance due upon an undertaking they had previously had no connection with, and that in some particulars their estimates would be necessarily the result of mere conjecture.

A sufficient answer, however, to this proceeding by appellees is that it violates the express terms of the contract by which they agreed to abide. That contract provides that the engineer in charge of the work shall certify in writing its final completion, together with a final estimate showing the balance due. It was error to ignore, without cause, this final arbiter agreed upon in the contract and adopt the uncertain and arbitrary standard of measurements and estimates furnished by strangers employed by one of the parties to the contract without the consent of the other. There is not shown to have been in this case any unnecessary or unreasonable delay by the engineer in charge in making estimates nor does there appear to have been any other ground for the course pursued by appellees in employing other engineers to perform the duties they had agreed should be discharged by the chief engineer of the Black Mountain Railroad Company. If the conduct of the engineer designated by the contract was fraudulent, or he was guilty of a mistake so gross as to amount to a fraud on the rights of the opposing party, the latter would not be bound by such estimates, but could maintain their action on the contract to recover the amount due them. *N. & W. Ry. Co. v. Mills & Fairfax*, 91 Va. 613, 22 S. E. 556. No such condition, however, appears in this record. On the contrary, the appellees have obtained a decree based upon final estimates made, without apparent cause therefor, by strangers to their contract, and in violation of its express terms.

We are of opinion that the order of reference made in the cause should be enlarged, so as to require the commissioner, in addition to the other inquiries directed, to ascertain and report whether the appellees had completed their work in accordance with the terms of their contract, and, if so, what balance, if any, was due them from the appellants.

The decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

WILLIAMS' ADM'R v. NORTON COAL CO.  
(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

1. MASTER AND SERVANT — DEFECTIVE MACHINERY—PROXIMATE CAUSE.

Recovery cannot be had against an employer for injury to an employé on account of de-

fective machinery, unless the defect was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 162.]

## 2. SAME—MINES—MOTORMEN—CONTRIBUTORY NEGLIGENCE.

A motorman in a mine was guilty of contributory negligence barring recovery for his death, which was caused, while he was backing the motor with the trolley pole in front, by the pole leaving the wire, resulting in roof supports being knocked down and slate falling upon him, regardless of the company's rule prohibiting "back poling" and of its knowledge of customary violations of the rule, and though the pole left the wire because the trolley wheel was defective; "back poling" in mines being extremely and obviously dangerous, and the usual and proper method merely involving turning the pole so that it will trail behind the motor, thus avoiding all risk of danger on the pole leaving the wire.

Error to Circuit Court, Wise County.

Action by Joseph Williams' administrator against the Norton Coal Company for wrongful death. From a judgment for defendant, plaintiff brings error. Affirmed.

Vicars & Peery, for plaintiff in error. Bullitt & Kelly and Ayers & Fulton, for defendant in error.

HARRISON, J. This action was brought by the administrator of Joseph Williams, deceased, to recover of the Norton Coal Company damages for having, as alleged, negligently caused the death of the plaintiff's intestate.

At the time of the accident the deceased was employed by the defendant company as motorman, operating electric cars which were used in its mines at Norton for hauling coal.

A demurrer to the evidence, filed by the defendant company, was sustained, and thereupon this writ of error was awarded.

The deceased was hauling cars of coal from the fifth right entry of the mine to B entry; the latter being the main entry leading to the mouth of the mine. The operation consisted in hauling three or four cars at a time from the minor entry out to and upon the main entry, and, when a sufficient number had been thus placed, to haul the whole number over the main entry out of the mine. The deceased had taken three or four cars out of the fifth right entry and placed them on B entry. He then cut loose from these cars, pulled up beyond the junction point of the two entries, and undertook to back into the fifth right entry to get more cars. This operation of backing put the pole, which carried the electricity from the wire to the wheels of the motor, in front. While the motor was being thus moved backwards with the pole in front, the wheel came off of the wire on B entry, and ran up over one of the cross-timbers supporting the roof of the mine. This knocked the cross-timber down, derailed the motor, and caused it to strike and knock down several other props, together with considerable slate which they

supported, which fell upon the motor and killed Williams.

It was contended in the circuit court that the timbers supporting the roof of the mine at the point of the accident were rotten, which caused them to fall when struck by the pole, and that this condition was due to the negligence of the defendant.

The record does not sustain this charge of negligence on the part of the defendant company. The evidence fails to show that the timbers were rotten; while there is affirmative evidence establishing the contrary.

It is further contended that the company was guilty of negligence, in that the motor pole was unsafe and defective, and that this was the cause of the accident. The defects complained of in the motor pole were, first, that the spring was too weak to keep the pole up against the wire; and, second, that the wheel on the pole which ran along the wire was so worn that it would not stay on the wire.

There was evidence tending to show that the spring mentioned was weak, and that the wheel was somewhat worn; but the evidence fails to show that these alleged defects in any manner contributed to the accident. On the contrary, it is manifest from the record that the defective condition of the pole was not the proximate cause of the death of the plaintiff's intestate.

It is unnecessary to cite authorities to sustain the proposition that a plaintiff cannot recover on account of defective machinery, unless it affirmatively appears that the defect was the proximate cause of the accident of which he complains. The evidence satisfactorily shows that the accident in which the deceased lost his life resulted from the unusual and reckless manner in which he was "back poling" the motor into the fifth right entry. The proper and usual method was to turn the pole, so that it would trail behind when entering the fifth right entry. If this had been done, the accident could not have happened, because in that case, if the wheel had come off the wire and the pole had reached the roof at all, it would have merely dragged lightly over the timbers without probable or even possible harm to any one; whereas, backing the motor in, with the pole pointing in the direction the motor was going, was almost certain to throw the wheel off of the wire, making the accident which resulted well nigh inevitable.

The evidence shows that the established and well-known rule of the company was against "back poling." It is however, contended that, notwithstanding this general rule, "back poling" was done with the knowledge of the company.

The evidence does not satisfactorily show that the company knew that its employees were violating this rule. Very recently, before this accident happened, the general manager of the company reiterated the strictest orders against "back poling" at any point in



the mines. The extent to which the rule is shown to have been violated was in cases where the motor was only to be backed very slowly from three to five feet and then stopped; whereas, in this case, it appears that the deceased was moving the motor backward with considerable speed, and with the purpose of running the whole distance (some 300 feet) into the fifth right entry without stopping.

If, however, there had been no rule of the company on this subject, the plaintiff could not recover, because the evidence shows that "back polling" in the mines is an extremely dangerous operation; that its danger was open and obvious, and well known to the employees; and that any man of common sense would know, and in this case was bound to know, that it was perilous to "back pole" in the way deceased was doing when the accident occurred. There was no occasion for the deceased to incur the open and obvious danger which resulted in his death. The usual and proper method involved the small trouble of turning the pole, so that it would trail behind the motor, thus avoiding all risk to himself and all danger of injury to his employers' property.

It satisfactorily appears that the useless and reckless method of entering the fifth right entry of the mine adopted by the plaintiff's intestate was the sole proximate cause of the accident which resulted in his death, and therefore, upon well-settled principles, his administrator cannot recover.

There was no error in the judgment complained of, sustaining the demurrer to the evidence, and it must be affirmed.

**Affirmed.**

#### EPPERSON v. EPPERSON et al.†

(Supreme Court of Appeals of Virginia. Sept. 10, 1903.)

#### 1. EQUITY—JURISDICTION—NATURE OF PROCEEDING.

A proceeding by original bill, by the assignee of an obligor in a contract for support, which contract provided for the conveyance of land to obligor and his brother on condition that they support their parents, for a construction of the contract and a determination of the relative rights in the land of the assignee and the obligee in the contract who was in possession of the land, with an amended bill seeking to enjoin the obligee's cutting of timber thereon, comes within the jurisdiction of a court of equity; the original bill partaking of the nature of a suit for specific performance, and the amended bill seeking injunctive relief against irreparable damages to the freehold.

#### 2. SAME—NECESSARY PARTIES—ADMISSION ON OWN INITIATIVE.

The brother of the assignor of the contract and his co-obligor, being a party to the original transaction, was a necessary party to the litigation, and he, being omitted as a party to the original and amended bills, was properly admitted as a party defendant on his own initiative without formal amendment, and permitted to file an answer; no injustice being occasioned thereby.

† Rehearing denied.

#### 3. DEEDS—"DEFEASANCE"—STIPULATION FOR AVOIDANCE OF AGREEMENT IN SEPARATE INSTRUMENT.

Where a deed of land conveyed in consideration of a contract for support, and a stipulation for the avoidance of the agreement in case of failure to perform the contract embraced in a separate instrument form parts of one transaction, the stipulation for avoidance constitutes a defeasance.

#### 4. WORDS AND PHRASES—"DEFEASANCE"—"CONDITION."

An instrument which defeats the force or operation of some other deed or of an estate is a defeasance; but, if the provision is in the same deed, it is a condition.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400, 1930-1931.]

#### 5. CONTRACTS—ENTIRE CONTRACTS—CONTRACTS FOR SUPPORT.

Where two persons obligated themselves to support their parents in consideration of the conveyance of land to the obligors, their contract was entire, and not severable, and, when breached by one of the obligors, avoided the agreement in its entirety.

#### 6. DEEDS—DEFEASANCES—INTENTION OF PARTIES.

While courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles, they will not hesitate to give effect to the intention of the parties when the condition or defeasance is clear and explicit.

#### 7. ASSIGNMENTS—CONTRACTS—EXECUTORY CONTRACTS FOR PERSONAL SERVICES.

An executory contract for personal service, founded on personal trust or confidence, is not assignable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 28-31.]

#### 8. EQUITY—TRYING ISSUES BETWEEN CODEFENDANTS.

The rule that, if plaintiff in an equitable proceeding cannot get at his right without trying and deciding a case between codefendants, the court will try and decide that case and the codefendants will be bound, but that, if the relief given plaintiff does not require or involve a decision of any case between codefendants, the codefendants will not be bound by any proceedings which may be necessary only to the decree the plaintiff obtains, is not applicable where the rights and equities between codefendants necessarily arise upon the pleadings and evidence between plaintiffs and defendants, and hence does not apply where the principal question involved in the pleadings and decided by the court was the construction of a contract for support executed by codefendants, and the necessary result of the decision of that issue between plaintiff and defendants was to affect the rights of defendants among themselves and in such a case a decree might be rendered between the codefendants without cross-pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1000.]

Appeal from Circuit Court, Scott County.

Bill by S. F. Epperson against W. H. Epperson and others to construe a contract for support, and to determine the respective rights of plaintiff, an assignee of one of the obligors, and the obligee, in land charged with the performance of the contract, to which J. H. C. Epperson was on his own initiative admitted as a party defendant. There was a decree declaring the contract not assignable and declaring W. H. Epperson the owner of

the land, from which plaintiff and defendant J. H. C. Epperson appeal. Affirmed.

Richmond & Bond and W. S. Cox, for appellant. Irvine & Morrison, for appellees.

WHITTLE, J. The following are the material facts in this case: By agreement between the appellees, W. H. Epperson and James S. Haynes, the latter bought the land in controversy for Epperson (who, with his father, were former owners) at a judicial sale; the understanding between the parties being that Epperson was to continue in possession of the property, and on repayment of the purchase money Haynes was to convey him the legal title. Agreeably to that compact, by direction of Epperson, Haynes on May 3, 1897, in consideration of \$178.25, the balance of purchase money then due, conveyed the land to Epperson's two sons, I. S. L. Epperson and J. H. C. Epperson. The conveyance was part of a family arrangement between father and sons, which was reduced to writing May 15th following. By that contract, in consideration of the conveyance of the farm to the sons—W. H. Epperson and wife reserving the right to the dwelling house occupied by them, with the curtilage, for life—I. S. L. Epperson and J. H. C. Epperson agreed "to furnish them whatever support they may need while they live, and to see that they are well cared for in sickness, and, if said parties of the second part fail to furnish such support, then said parties of the first part may take charge of the above farm and rent it to whomsoever they please to secure their support. The parties of the second part agree to pay James S. Haynes the full amount due him; \* \* \* and each further agrees to build a house on said farm and to occupy the same. It is mutually agreed that if said parties of the second part fail to comply with any one of the provisions of this agreement which is binding on them, then the whole of it, together with said deed from James S. Haynes, are null and void."

I. S. L. Epperson wholly failed to perform his part of the contract, and moved to Kentucky. He subsequently, on May 18, 1904, undertook to convey an undivided moiety of the land to the appellant S. F. Epperson, who thereupon filed an original bill (and afterward an amended bill) in the circuit court of Scott county against W. H. Epperson and wife, I. S. L. Epperson, and Haynes; the object of the suit being to have the court construe the agreement of May 15th, and determine the rights of W. H. Epperson and the plaintiff as assignee of I. S. L. Epperson, respectively, in the land, and also what support, if any, he was to furnish W. H. Epperson and wife, and, in the event he was not entitled to possession of the farm, he then asked that Haynes be decreed to refund the amount paid in discharge of the balance due thereon. The amended bill charged that W. H. Epperson was cutting the merchantable

timber, especially tan-bark timber, from the land, and, unless enjoined, that the injury to the plaintiff would be irreparable.

The court, responding to the issues raised by the pleadings and evidence, decreed that the contract for support was not voluntary, but founded on good and valuable consideration; that the duties imposed by it could only be performed by the obligors thereto, and that the contract was consequently not assignable; that the agreement was avoided by the failure of the obligors to carry out its stipulations, which circumstance likewise avoided the deed from Haynes to J. H. C. Epperson and plaintiff's grantor; that W. H. Epperson was therefore the true and lawful owner of the land; that the contract was breached, and all rights thereunder ceased and determined before the attempted assignment; and that neither the plaintiff nor his grantor was entitled to recover anything on account of it, either from W. H. Epperson or James S. Haynes. The decree, moreover, dissolved the injunction granted on the amended bill, and dismissed the suit at the costs of the plaintiff. From that decree, S. F. Epperson and J. H. C. Epperson appealed.

We have no difficulty in disposing of the objection raised by J. H. C. Epperson to the jurisdiction of a court of equity in this case. The original bill partakes of the nature of a suit for specific performance; and, besides, the amended bill seeks injunctive relief against irreparable damage to the freehold, which in itself affords undoubted ground for equitable jurisdiction.

Nor is there merit in the contention that J. H. C. Epperson was not properly before the court, and ought not to be bound by the decree. It is true that his name does not appear as a party to either bill, but he was a party to the original transaction and is a necessary party to the litigation; and, on his own initiative, was admitted as a party defendant by being permitted to file an answer and litigate his rights. It is common practice for omitted parties to be thus convened without formal amendment, and it is not perceived that any injustice has been occasioned by that mode of procedure in the present instance.

On the merits of the case: As remarked, it plainly appears that the deed of May 3d and the contract of May 15th formed parts of one transaction. If the stipulation for the avoidance of the agreement had been included in the deed, it would have been a condition subsequent; but, being embraced in a separate instrument, it constitutes a defeasance.

Bouvier defines a defeasance to be "an instrument which defeats the force or operation of some other deed, or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance." 1 Bouv. L. Dict. 527; Lippincott v. Tilton, 14 N. J. Law, 361.

It is not denied that there has been a

total failure of performance of the contract by I. S. L. Epperson. Indeed, he has expressly repudiated it and rendered performance impossible by moving beyond the limits of the state.

It is said by a learned author that "a contract may be broken in any one of three ways: (a) A party may renounce his liability under it. (b) He may by his own act make it impossible to fulfill his liability under it. (c) He may totally or partially fail to perform what he has promised." Clark on Contracts, § 328.

All of these elements are present, and characterize the conduct of I. S. L. Epperson with respect to the agreement in question.

We furthermore concur in the interpretation of the learned circuit court that the agreement is entire, and not severable, and, when breached and abandoned by one of the obligors, a condition arose, which by the express terms of the instrument rendered "the whole of it, together with the deed from James S. Haynes, null and void."

We are not unmindful of the principle that courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles. Nevertheless, when the condition or defeasance is clear and explicit, they do not hesitate to give effect to the intention of the parties.

"When the intent of such an instrument is clear, it will be given full weight and effect, notwithstanding the fact that such instruments are regarded unfavorably by the courts." 1 Devlin on Deeds, § 9; Modern Law, Theory and Practice (Tiffany) § 511.

Here, then, we have a plain and positive contract, distinctly stated, between a father and his two sons, that, in consideration of the conveyance of a farm to them (proved to be worth \$3,000), each would build and settle upon the land, and jointly support and care for their parents while they lived, followed by a defeasance clause that, if the parties fail to comply with any one of the provisions of the agreement, the whole shall be null and void. The noncompliance, therefore, by either obligor fulfills the condition upon which the defeasance attaches, and avoids the instrument in its entirety.

It is also an elementary principle that an executory contract for personal service, founded on personal trust or confidence, is not assignable. Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.

There is one other assignment of error which demands attention; that is to say: That it was not competent to decree between codefendants without cross-pleadings.

In point of fact, the principal question involved in the pleadings and decided by the court was the construction of the contract of May 15th, and the necessary result of the decision of that issue between plaintiff and

defendants was to affect the rights of defendants among themselves.

The rule of practice invoked is not inflexible, but is a rule of convenience, founded largely on the principle that the tendency of such decrees is to delay the plaintiff in order that defendants may litigate rights foreign to his claim and not material to the matter in issue; and for the additional reason that one defendant has no opportunity by answer properly to state his own case against a codefendant. Glenn v. Clark, 21 Gratt. 39.

But the general rule is not applicable where the rights and equities between codefendants necessarily arise upon the pleadings and evidence between plaintiffs and defendants. Templeton v. Fauntleroy, 3 Rand. 442; Blair v. Thompson, 11 Gratt. 441.

The rule is thus stated by Vice Chancellor Wigram, in Cottingham v. Earl of Shrewsbury, 3 Hare, 627: "If the plaintiff cannot get at his right without trying and deciding a case between codefendants, the court will try and decide that case, and the codefendants will be bound. But, if the relief given to the plaintiff does not require or involve a decision of any case between codefendants, the codefendants will not be bound by any proceedings which may be necessary only to the decree the plaintiff obtains." Cited in Ould and Carrington v. Myers, 23 Gratt. 383-406.

Upon the whole case, the decree of the circuit court is plainly right, and must be affirmed.

Affirmed.

BUCHANAN, J., absent.

THOMAS et al. v. BOYD et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

# 1. JUDGMENT—EQUITABLE RELIEF—GROUNDS OF RELIEF.

To entitle a party to equitable relief against a default judgment, it must be shown that defense was not made because of fraud, accident, surprise, or some adventitious circumstance beyond defendant's control.

## 2. SAME.

Application was made for the establishment of a road with gates, and viewers appointed, and damages were waived by eight of the nine landowners affected by the road. No further steps were taken until a year thereafter, when a second application was made by the same persons to open a road upon the same location and viewers appointed, and an order was entered showing that no defense was made to the road, and directing the case to be certified to the board of supervisors on the question of damages, only one person claiming damages. When the road was opened, gates were erected and maintained for some time by complainant and others, when they learned that the road had been established without gates. Complainants believed the road was a gate road, and some of the applicants represented to them that the second road applied for was the same as the first, a second application being rendered necessary

because the papers in the first proceeding were lost, and that complainants waived their right to damages under this understanding, that two of the viewers thought it was a gate road, which was also the general understanding in the community. An open road would cause considerable damages to most of the landowners who had waived damages, and the road was of slight benefit to one of the owners to whom damages would be very heavy. *Held* that, while complainants might have ascertained from the record that the second application was for an open road, they were not guilty of negligence or want of diligence in failing to ascertain that fact and make defense to the application, so as to prevent equity from granting relief from the judgment in that proceeding.

**3. APPEAL AND ERROR — PROCEEDINGS ON LOWER COURT — OBJECTIONS — FAILURE TO OBJECT—EFFECT.**

Where objections made to testimony when the depositions were taken were not called to the attention of the court below, they will be treated as waived on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1258-1280.]

Appeal from Circuit Court, Russell County.

Suit by Thomas and others against Boyd and others to enjoin the removal of gates on a public road. From a decree dissolving the injunction except as to one tract of land, complainants appeal. Decree reversed in so far as it dissolved the injunction.

W. W. Bird, for appellants. R. S. Meade and E. S. Finney, for appellees.

BUCHANAN, J. The object of this suit was to enjoin the removal of gates on a public road running through the lands of the complainants and others from one public road to another in the county of Russell.

The orders of the circuit court and the board of supervisors of that county, establishing the road upon which the gates are located, are for a road without gates, though gates were erected upon it when it was opened, and have been kept upon it since that time.

Upon a hearing of the cause, the court dissolved the injunction which had theretofore been granted, except as to one of the tracts of land, thus leaving the road an open road about three-fourths of its length and a gate road as to the residue. From that decree this appeal was allowed.

The first question to be considered is whether or not the appellants have shown that the reason why they did not make the defense to the establishment of the road without gates in the proceeding at law is such that a court of chancery can grant the relief prayed for.

The grounds upon which a court of equity will entertain a party seeking relief against a judgment rendered in a court of law, in consequence of his default in making a defense which should have been made in that forum, are well defined and firmly established. It must be shown that the reason why such defense was not made at law was founded in fraud, accident, surprise, or some adventitious circumstances beyond the con-

trol of the party. *Holland v. Trotter*, 22 Grat. 186, and cases cited; *Thomas v. Jones*, 98 Va. 323, 36 S. E. 382, and cases cited.

The record shows that in April in the year 1903 an application was made for the establishment of a road with gates upon substantially the same location as the road in controversy. The viewers appointed by the county court upon that application made their report, and process was directed at the May term following against such of the landowners as had not agreed in writing to waive their claim for damages.

The evidence shows that damages were waived by eight of the nine landowners through whose land the road was located. For some reason, which the record does not satisfactorily disclose, no further steps were taken in that proceeding.

In March, 1904, an application was made in the circuit court by the same persons, with one or two exceptions, for the establishment of the road in controversy, and viewers appointed. At the May term, 1904, of the court, the viewers having made report, an order was entered directing process to be issued against the landowners to show cause why the road as reported should not be established. During that same term an order was entered, in which, after stating that no defense was being made and that all the landowners had been duly served with notice, it was directed that the case should be certified to the board of supervisors on the question of damages. Only one person, C. H. Purcell, claimed damages. His claim was allowed, and the road ordered to be opened by the supervisors at their meeting in June, 1904.

When the road was opened, gates were erected by the appellants and the other landowners, and their right to do so was not questioned until some time during the year 1907, when, at the suggestion of some of the applicants for the road, the landowners were summoned before the supervisors to show cause why the gates should not be removed. Then, or very soon afterwards, the appellants learned that the road had been established without gates.

It is impossible to read the record in this case without being convinced that when the road in question was applied for and established, the appellants believed that it was a gate road, that upon that belief they waived their right to damages, and but for such belief, caused in part at least by some of the applicants for the road, they would have objected to an open road, claimed damages, and made defense. The first application was for a gate road. When the second application was made and the appellants were asked to waive their right to damages, it was represented to them by some of the active applicants for the road that it was for the same kind of a road as was first applied for, and that the reason why a second application was necessary was because the papers

In the former proceeding had been lost. One of the three viewers, Mr. Gibson, who located the road, testified that he thought the view was for a gate road; that this impression was made upon his mind by all the parties along the line—by those through whose lands it passed and by the applicants; and that his associate viewer, Mr. Candler, who was dead when the witness was testifying, also believed that it was a gate road. This evidence of Mr. Gibson was objected to when his deposition was taken; but, as neither that objection nor any other made when the depositions were taken was called to the attention of the court below, they must be treated as waived in the appellate court. *Fant v. Miller, etc.*, 17 Grat. 187; *Martin v. South Salem Land Co.*, 94 Va. 23, 42, 26 S. E. 591; *McVeigh v. Chamberlain*, 94 Va. 73, 26 S. E. 395.

The evidence further shows that it was generally understood in the community that it was a gate road. That this was the understanding is strengthened by the fact that gates were erected all along the line when the road was opened, without question or objection, which could scarcely have been the case upon a road nearly four miles in length if the landowners and those using the road had not thought that it was a gate road.

The uncontradicted evidence shows that the damages for an open road for fencing and cutting off land from water would be very serious to many of the landowners, amounting in some cases to hundreds of dollars, and in the case of the land then owned by the Stuart Land & Cattle Company to from \$1,000 to \$2,000. To that tract of land it appears that the road is of little or no benefit, as another public highway passes through it. Yet, notwithstanding the great difference in the damages resulting from an open and a gate road, eight of the nine landowners make the same waiver of damages in the one case as in the other.

It is true that the appellants might have ascertained, by the examination of the record in the proceeding at law, that the application was for an open road; but we do not think that under the facts and circumstances disclosed by the record they were guilty of negligence or want of diligence in failing to ascertain that fact and make defense in that proceeding.

We are of opinion, therefore, to reverse the decree appealed from, in so far as it dissolves the injunction as to the appellants, and enter such decree as the circuit court ought to have entered.

Reversed in part.

#### STEINMAN v. HAGAN et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### SPECIFIC PERFORMANCE—NECESSARY PARTIES—SUBPURCHASERS.

Only the purchaser is a necessary party defendant to a suit by the vendor for specific per-

formance of the contract of sale; so that one to whom the purchaser had sold, though not made a party, was bound by the decree for sale of the property for payment of the purchase money due the original vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 343.]

Appeal from Circuit Court, Wise County.

Suit by Steinman against Hagan and others. Decree for defendants. Complainant appeals. Affirmed.

Irvine & Morrison, Geo. A. Smith, and A. C. Anderson, for appellant. Bond & Bruce and C. T. Duncan, for appellees.

WHITTLE, J. The essential facts of this case are these: On June 2, 1870, the appellee Patrick Hagan conveyed 264 acres of land situated in Wise county, Va., which included the 80 acres involved in this litigation, to Felix Campbell, by deed recorded September 5, 1870. On June 3, 1870, Campbell, for the same consideration, reconveyed the identical land to Hagan, who withheld the deed from record until June 29, 1881. In the meantime, namely, on August 22, 1870, the attorney in fact for Campbell executed a title bond for the 80 acres to Anderson Wells, the bond reciting that it was in ratification of a previous contract between Hagan and Wells, and on December 15, 1874, Wells conveyed the coal and minerals underlying the tract to the appellant, Steinman, and Price. On the day following Price conveyed his half interest to Steinman, who put both deeds to record.

In 1876 Campbell instituted for Hagan's benefit a suit in equity against Wells to enforce specific performance of the contract of sale, whereupon the land, having been decreed to be sold, was bought by Hagan for the amount of purchase money due, with interest and costs. The sale was confirmed and title conveyed to Hagan by a special commissioner of the court; and the deed recorded December 10, 1877. In 1894 Hagan leased the coal under a large boundary of land, including the Wells tract, to the Ayers Coal Company, who, in turn, assigned their lease to the Norton Coal Company.

On December 19, 1906, this suit in equity was brought by Steinman against the appellees, alleging the foregoing facts (and others not material to be stated), for the purpose of setting aside the commissioner's deed to Hagan, and the mining lease to the Norton Coal Company, so far as they affected the coal and minerals in dispute. The prayer of the bill is that the land may be sold (the surface primarily); or, at Hagan's election, that his deed be permitted to stand, and that he be required to convey the coal and minerals to Steinman, and, also, that the mining lease to the Ayers Coal Company, and certain supplemental leases to the Norton Coal Company, to the extent to which they affect the coal and minerals in question, be set aside and cancelled.

From a decree dismissing on demurrer the

original and amended bills, this appeal was allowed.

Though the alleged laches of Steinman are relied on by Hagan as constituting a complete bar to his recovery, we deem it only necessary to consider the question of the conclusiveness of the decrees in the case of Campbell for Hagan against Wells upon Steinman's right to the relief sought in this suit.

In its last analysis that proposition depends upon whether or not Steinman was a necessary party to the former litigation. The general rule is well settled that a person is not a necessary party when there is no proper privity or common interest between him and the plaintiff, such as would warrant the court in decreeing between them.

Here we have no allegation that Hagan knew of the conveyance from Wells to Steinman at the time he brought suit to enforce his vendor's lien; and the law devolved no duty upon him to search the records in quest of derivative purchasers from Wells. On the other hand, Steinman had constructive notice that Wells was not the holder of the legal title; and he was, therefore, informed that any interest which he might acquire from that source would be taken in subordination to the superior rights of the owner of the legal title. With respect to such owner, he was a mere intruder, and as against the paramount title the deed from his vendor invested him with no estate, either legal or equitable. Upon this principle is founded the general doctrine that in suits of this character the only necessary parties are parties to the contract.

The rule is thus stated in Story's Eq. Pleading (10th Ed.) §§ 226, 226b: "In the first place (as we have seen), the rule as to necessary parties does not extend to all persons who may be consequentially interested or affected by the suit. \* \* \* So, in the case of a common bill for the specific performance of a contract of sale of real estate, the only proper parties in general are the parties to the contract itself. Special cases may indeed exist in which the rule may be otherwise; but they stand upon their own peculiar grounds."

Waterman on Specific Performance, at section 59, states the rule as follows: "Sub-purchaser Not To Be Made A Party:—A purchaser from the vendee is not as a rule a proper party to a bill filed by the vendor; nor the original purchaser, when his vendee has been accepted in his place by the vendor. Where a suit was brought by the vendor against both the purchaser and the sub-purchaser, it was dismissed by the vice chancellor as against the latter, though specific performance was decreed against the original contractor, and the case was affirmed on appeal."

To the same effect is Frye on Specific Performance, § 140: "The general rule with regard to suits to enforce contracts was that

the parties to the contract, or their representatives, were the necessary and sufficient parties to the suit—that all the parties to the contract should be parties to the suit, and no one else. The contract is what constitutes the rights and regulates the liabilities of the parties. In a stranger there is no liability; and against him, therefore, there was no more right to enforce specific performance in equity than to recover damages at law." See, also, 20 Am. & Eng. Enc. Pl. & Pr. 414; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

The effect of the outstanding legal title was to admonish Steinman that what was actually done in the suit against his vendor might lawfully be done, and that he, although not a party, would be concluded by the proceeding. He dealt with the property with open eyes, and must abide the consequences of his own imprudence. Devlin on Deeds, § 711.

We find no error in the decree of the circuit court, and it is affirmed.

Affirmed.

## LONG POLE LUMBER CO. v. SAXON LIME & LUMBER CO.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

### 1. TRIAL—MODIFICATION OF REQUESTS.

Refusal to charge requests as offered is not error, where the court gives an instruction embracing all the questions covered by the requests, and states the law on those questions as favorably to the party asking them as it asked or was entitled to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

### 2. SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES—FAILURE TO FURNISH ARTICLES.

Where a seller fails to furnish the articles he has contracted to sell, the measure of damages is the difference between the contract price and the market price at the time and place for delivery, with interest; and, where the delivery is to be by installments, the value is to be estimated as of the time the several installments ought to have been delivered, but, if there is no market at the place for delivery, the basis for damages to the buyer is the value of the article in the nearest available market to which he may resort to supply himself, with any additional cost of transportation added, and any reasonable and necessary expenses attending repurchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174-1182.]

### 3. TRIAL — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE TO SUPPORT.

In an action to recover for defendant's failure to deliver lumber sold, where the evidence tended to show that plaintiff made efforts to purchase lumber of like kind, and the expense incurred in such efforts, but did not show what repurchases were made nor the expense thereof with reasonable certainty, it was error to instruct that the expense of repurchases might be taken into consideration in ascertaining his damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Error to Circuit Court, Russell County.

Action by the Saxon Lime & Lumber Com-

pany against the Long Pole Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Sexton & Roberts and H. A. Ritz, for plaintiff in error. Finney & Gilmer and Routh & Routh, for defendant in error.

BUCHANAN, J. This is an action of assumpsit, instituted by the Saxon Lime & Lumber Company against the Long Pole Lumber Company, to recover damages for the failure of the latter to keep and perform a contract entered into between the parties on March 10, 1906, by which the latter company agreed to deliver to the former on board the cars at Honaker, Russell county, Va., one car load of 4 by 4 poplar lumber per week, during the remainder of that year, at the price of \$13 per 1,000 feet.

Upon the trial of the cause there was a verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

Three grounds of error are relied on in the petition for a reversal of the judgment. The first is to the action of the court in refusing to give the three instructions asked for by the defendant, and the third to the giving of an instruction by the court in lieu of them. These two assignments of error will be considered together.

By the instructions asked for by the defendant, the court was asked to tell the jury that the burden of proof in making out its case was on the plaintiff; that, as the contract between the parties did not fix the time when the purchase price of the lumber was to be paid, it was payable on demand; that, if the plaintiff failed or refused to pay for the lumber delivered on demand, the defendant had the right to rescind the contract and refuse to make further deliveries; and that, if they believed the defendant had rescinded the contract for failure to pay on demand, there could be no recovery, unless they further believed that it had agreed that the time for making the payments might be deferred.

The instruction given covers all the questions embraced in the instructions asked for by the defendant, and states the law upon those questions as favorably to the defendant as it asked or was entitled to. There was therefore no error in the court's refusing to give the defendant's instructions and in giving its own in lieu thereof upon the questions involved in them.

The instruction given by the court was also in lieu of the plaintiff's instructions, and told the jury that the measure of the plaintiff's damages, if they believed it was entitled to recover, was "the difference between the contract price and market price of the same kind and quality of lumber as that purchased, at the place and at the times provided for delivery under said contract, and, if other lumber of the same kind and quality could not have been purchased at that place and at

such times, then the market price of said lumber in the same locality or section of the country, *plus the expense necessary to purchase the amount of lumber of the same kind and quality which was purchased from said defendant, but was not delivered under said contract.*"

So much of the instruction quoted as is italicized is objected to, upon the ground that there was no evidence upon which to base it.

There is evidence tending to prove that the plaintiff made efforts to purchase lumber of like kind with that which the defendant failed to deliver, and the expense incurred in such efforts which included the cost of sending its agents along the Clinch Valley, the Columbus, and the Bristol Divisions of the Norfolk & Western Railway, was from \$600 to \$800, and that the cost of purchasing and loading the lumber so purchased was about \$2 per 1,000 feet. But the evidence wholly fails to show the amount of lumber which it actually purchased to supply the place of that which the defendant failed to deliver, and the reasonable and necessary expense of making such purchases.

The general rule is that, where a vendor fails to furnish the articles he has contracted to sell, the measure of damages is the difference between the contract price and the market price at the time and place of delivery, with interest from the time of delivery; and where the delivery is to be by installments, the value is to be estimated as of the time the several installments ought to have been delivered. *Enders v. Board, etc.*, 1 Grat. 364; *Perry, etc., Co. v. Reynolds*, 100 Va. 264, 270, 40 S. E. 919; *Mechem on Sales*, § 1746. But, if for any reason there is no market at the place of delivery, the basis for estimating the damages of the vendee is the value of the article in the nearest available market to which the buyer may resort in order to supply himself, with the additional cost of transportation added, if any; and, in the event the vendee does repurchase, and to the extent that he repurchases, the reasonable and necessary expense attending such repurchase is to be added. See *Sutherland on Damages*, § 651; *Mechem on Sales*, § 642; *Nottingham Ice Co. v. Pears*, 102 Va. 820, 822, 823, 47 S. E. 823.

The evidence in this case, as before stated, does not show what repurchases were made, nor the expense attending the same. Where a vendee determines to purchase the goods which his vendor has failed to deliver, and to charge him with the expense of such repurchases, he ought to show with reasonable certainty the repurchases made, and the necessary and reasonable expense attending the same, as well as the price paid.

The evidence being insufficient to show with any reasonable certainty what repurchases had been made by the plaintiff, or what expense it had reasonably incurred in making them, the instruction given by the court erred in telling the jury that they might

take that matter into consideration in ascertaining the plaintiff's damages.

The other objection to the instruction given by the court is, we think, without merit.

The court is of opinion that the judgment complained of should be reversed, the verdict set aside, and the cause remanded for a new trial, not to be had in conflict with the views expressed in this opinion.

Reversed.

## STEVENSON v. W. M. RITTER LUMBER CO.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

### 1. DEATH—ACTION FOR CAUSING DEATH AT COMMON LAW.

At common law no action could be maintained for the death of a person by wrongful act, either by a husband or father suing for loss of services of wife or children, a master for the loss of his servant, or a personal representative suing in the right of his decedent; the action abating for technical reasons at the time of death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 10.]

### 2. SAME—PERSONS ENTITLED TO SUE—PARENTS.

At common law the parent's right to recover for the services of his child is predicated upon the relation of master and servant, and he cannot recover for the loss of his son's services after the latter's death because in legal contemplation at the servant's death the master's right to his services ceases, and hence, in an action for his son's death by defendant's negligence, plaintiff may not recover for loss of his son's services between the time of his death and the time when he would have become of age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 115.]

### 3. SAME—STATUTE—EFFECT.

Code 1904, § 2902, giving a right of action for the death of any person by the wrongful act or neglect of another in cases where, if death had not ensued, the party himself would have had a right of action, does not give a right of action to a parent for the loss of services of his minor son from the time of the latter's death until he would have reached his majority; the only effect of the statute being to give a right of action to decedent's personal representative for his wrongful death where none existed at common law.

[Ed. Note.—For case in point, see Cent. Dig. vol. 15, Death, § 115.]

### 4. PARENT AND CHILD—LOSS OF SERVICES.

Code 1904, § 2902, giving a right of action for the death of any person by the wrongful act of another in cases where, if death had not ensued, the person injured would have had a right of action, does not affect the right existing at common law of a personal representative or parent to recover for loss between the time of the injury and death, nor the personal representative's right to recover in an action for breach of contractual duty resulting in death the damages to decedent's personal estate arising in his lifetime for medical expenses and losses caused by his inability to work, nor a parent's right in a proper case to recover for the loss of services of a minor child to the time of the child's death.

### 5. DEATH—ACTIONS FOR CAUSING—PLEADING—DECLARATION—SUFFICIENCY—CAUSE OF ACTION STATED.

In an action for the death of plaintiff's minor son, the declaration alleged that defendant

unlawfully and wrongfully employed him and required him to engage in dangerous work for one of his age and experience, and shortly thereafter, as was to be expected, he received injuries from which he died, whereby plaintiff was deprived of the services of his son and servant, which he otherwise would have had for the next five years. It was not alleged that the hiring was against plaintiff's will, or that he did not acquiesce in it, or that defendant did not pay plaintiff for the services rendered by his son. *Held*, pleadings being construed against the pleader, that the cause of action alleged was for the loss of services from the son's death until he reached his majority, and not for the wrongful hiring of the son against plaintiff's will; the allegations of wrongful hiring being mere matter of inducement, or for loss of service between the time of the injury and majority, and hence the declaration did not state a cause of action.

Error to Circuit Court, Tazewell County.

Action by R. S. Stevenson against the W. M. Ritter Lumber Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Wm. H. Werth, for plaintiff in error. Greever & Gillespie and M. O. Litz, for defendant in error.

CARDWELL, J. This action is to recover damages resulting from the death of the plaintiff's minor son, alleging that he was a minor at the time, and that that fact was known to the defendant corporation; that the son was employed by the defendant without the plaintiff's consent; that contrary to its duty the defendant required or permitted the son to engage in a business "dangerous for his years and experience," viz., "to engage in hauling heavy logs from the woods to the defendant's mill, which logs were hoisted upon a tramroad by means of hoisting machines, derricks, etc., from a steep incline, that shortly after the defendant put the plaintiff's son to work at the business aforesaid, as was to be expected," the said son was caught by a log and was so crushed and mangled that he died of his injuries, whereupon the plaintiff says "that, by reason of the premises, he hath been permanently deprived of the services of his said son and servant, which he otherwise would have had and enjoyed for the next five years, and damaged thereby," etc.

To the declaration the defendant demurred, stating its grounds of demurrer relied on to be as follows: "The declaration seeks to recover damages for loss of services of plaintiff's son from the time of the injury of the said son up to the time he would have attained his majority, while the plaintiff is only entitled, if he is entitled to anything at all, to recover for loss of services from the date of the said injury up to the time of the death of the said son, and the length of this time is a material allegation in order to recover therefor, and the declaration does not make such allegation."

The demurrer was sustained and the cause dismissed; and to that judgment this writ of error was awarded.



The petition for the writ of error states that "the real bone of contention" in this case is "the father's right to recover, by reason of the wrongful death of his son, for loss of his services between the time of his death and the time when he would have attained his majority."

At common law no action could be maintained for the death of a human being—whether it be the husband or the father suing for loss of the services of wife or child, a master suing for loss of his servant, or a personal representative suing in the right of the decedent; the death for technical reasons being regarded as cutting off the right of action, according to the maxim, "*Actio personalis moritur cum persona*." 1 Lile's Notes to Minor's Inst. p. 246; Shear. & Red. on Neg. § 124; Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616, and note where the authorities are collated.

The opinion of the court in Insurance Co. v. Brame, 95 U. S. 756, 24 L. Ed. 580, says: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and many of the state courts, and no deliberate, well-considered decision to the contrary is to be found. In Hilliard on Torts, p. 87, § 10, the rule is thus laid down: 'Upon a similar ground it has been held that in common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages.' The most of the common cases upon the subject are there referred to."

At common law the parent's right to recover for loss of the services of his child is, by legal fiction, predicated upon the relation of master and servant; but, as said in the opinion of the court in Edgar v. Castello, 14 S. C. 20, 37 Am. Rep. 719, in discussing the reasons for the doctrine that there can be no recovery for loss of services after the death of the servant, "not so much because the civil remedy is merged in the felony, as because by the death of the servant the master's right to his services is instantly abrogated, and in the eye of the law no damage is sustained by him because no right is infringed. The justice of this rule may not be apparent, but the law will not deal with mere speculations and uncertainties. It will not determine, nor attempt to determine, the measure of human life, except for the happening of an event which has destroyed it, nor presume that the capacity to serve would have continued if the injury had not been inflicted. It stops at the outer limit of the master's rights under his contract, and as, when the servant's death intervenes, the master's right to his services are ended, so, in like manner, are all his remedies for injuries arising under the con-

tract, except such as accrued prior to his death."

In a note to Carey v. Berkshire R. Co., 48 Am. Dec. 632, it is said: "It is settled, as laid down in the principal case, notwithstanding the vigorous dissent of some eminent judges, that at the common law no action will lie for damages caused by the death of a human being by the wrongful or negligent act of another, however close may be the relation between the deceased and the plaintiff, and however grievous the loss." And at page 633 of 48 Am. Dec., it is said: "Not only is there, without the aid of a statute, no civil remedy for the death itself, but no action will lie for loss of services, etc., caused by the death, as is abundantly shown in the cases above cited. Where a child is disabled for a few days by the wrongful act or negligence of the defendant, the father may recover for the loss of services; but, if the child is killed by the injury, and the father is forever deprived of his services, he has no remedy. Various reasons have been suggested for this utterly unreasonable rule. \* \* \* The preponderance of authority, however, is too strong to be overborne by reason, and the rule laid down in the principal case must be admitted to be firmly established in the common-law courts, except so far as it has been abrogated by legislation."

Very many more authorities in point might, if deemed necessary, be cited to show that it is too well settled to admit of further discussion that plaintiff in error cannot maintain this action to recover for the loss of the services of his son between the time of his death and the time when he would have attained his majority. In fact, it is conceded in the argument of the case that the great weight of authority is against the contention that plaintiff in error can maintain this action, and the effort being made is to show that the authorities are wrong or do not apply; and section 2902 of the Code of 1904 is cited in support of this latter view.

That statute, modeled after the English statute known as "Lord Campbell's Act," creates a right of action where none existed before, and cannot be construed as giving the parent any right he did not have before; since this new right of action is given solely to the personal representative of the deceased person whose death was caused by the wrongful act, neglect, or default of any person or corporation, etc. The argument that "the terms of the statute limiting the administrator's right of recovery to what his intestate could have recovered had death not ensued necessarily declare and protect the parent's right to his deceased minor's services until majority, notwithstanding his death and the right given to his administrator to recover for his death," is more ingenious than sound. The statute does not change the parent's right in any manner whatsoever, and

that he could not at common law recover for the loss of the services of his child after the death of the child we have already determined.

"An action for loss of services of a son from the date of his death by wrongful act until he would have attained his majority is in effect one to recover for the death of the son, and cannot be maintained by the father, since the right of the father to a son's services ceases at the latter's death." *Harris v. Kentucky L. Co.*, 45 S. W. 94, 19 Ky. Law Rep. 1731; Cent. Dig. 1902A, "Death," 1365, § 20.

It is further contended for plaintiff in error that if a minor be hired to leave his father without the latter's consent (perhaps against his will), and is killed by such negligence as will make the employer liable to his administrator, the minor being 16 years old, it is clear that such administrator could not recover for five years of that minor's time, for the reason that, not only is it settled by the authorities that the administrator of the minor cannot recover for the loss of services between the death of the minor and the date at which he would have attained his majority, but by the language of the statute (section 2902 of the Code of 1904, *supra*) the administrator is given such right of recovery "as would (if death had not ensued) have entitled the party injured to maintain an action \* \* \* and to recover damages in respect thereof." Therefore the statute leaves the right to recover for loss of services of the minor where it had always been, in the parent.

Concede that the statute admits of this construction, still, as we have already shown, the great weight of authority is that the parent could not at common law maintain an action for loss of services of the minor after the death of the latter, and this established rule was not abrogated or even modified by the enactment of the statute. The only effect of the statute is to change the rule of the common law that, in pursuance of the maxim, "*Actio personalis moritur cum persona*," no right of action existed in favor of the heirs, distributees, or personal representatives of a deceased person for damages for his wrongful death. The right of action which the injured person had abated with his death and did not survive; and no right of action existed in favor of those surviving him, because the civil act merged in the criminal act; the single change in the common-law rule wrought by the statute being that the right of action is given by it solely to the personal representative of the deceased for the benefit of the wife, husband, parent, or child of the deceased. 8 Am. & Eng. Enc. L. pp. 854, 857, 858.

The statute, however, does not affect the right of action for damages existing at common law in favor of a personal representative or a parent to recover for losses between the time of an injury and the resulting death

of the person injured; nor, as it would seem clear from the authorities, the right of the personal representative of a person dying as a result of an injury caused by a breach of a contractual duty on the part of the person or corporation inflicting the injury to recover in an action for breach of contract the damages to the deceased's personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business, nor the right of a parent to recover in a proper case made for loss of the services of his minor child to the date of the child's death by wrongful act. The remaining question, therefore, in this case is: Does the declaration state a cause of action at all?

Clearly, unless the declaration is good as an action to recover for the loss of the services of plaintiff in error's minor son, resulting from the wrongful hiring, between the time of the hiring and the injury, or for loss of services for the time between the injury and death, or both, there was no error in the ruling of the circuit court sustaining the demurrer of defendant in error and dismissing the case.

The declaration contains practically but one count, and does not allege that the hiring of the son was against the will of the father in wrongful violation of his prohibition, but simply says it was "unlawful and without consent" of the father; nor does it say that the father did not acquiesce in the employment after the act of hiring, which is a necessary allegation, since every hiring of a minor is not a wrongful act. 1 Min. Inst. p. 430; *Toledo, St. L. & K. C. R. Co. v. Trimble*, 8 Ind. App. 333, 35 N. E. 716. Nor does the declaration state that the defendant in error did not pay the plaintiff in error for the services rendered his son, and no recovery is asked on that account.

Under the familiar rule that all pleadings are to be most strongly construed against the pleader, the declaration here cannot escape the construction that the intention of the pleader was to seek to recover only for the loss of services from the time of his son's death to the time the son would have become twenty-one years of age; the language of the declaration being: "And the said plaintiff says that shortly after the said defendant put the said George Everett [the son] to work at the business aforesaid, as was to be expected, the said George Everett was caught by a log, and was so crushed and mangled that he died of his injuries. And the said plaintiff says that, by reason of the premises, he hath been permanently deprived of the services of his said son and servant, which he otherwise would have had and enjoyed for the next five years, and damaged thereby in the sum of \$2,500."

Plainly the five years meant are the five years following the death of the son, and the inference and the only inference to be drawn

from the language of the declaration is that the death occurred immediately after the injury; and, while it is conceded that the father had a right to recover for the loss of the services of the son between the injury and death, no appreciable time between the two events is stated; the declaration proceeding throughout upon the theory that the father is entitled to recover for loss of services up to the time when the son would have become 21 years of age because of some act on the part of the defendant in error, viz., the wrongful death alleged. The language of the declaration with respect to the alleged "wrongful hiring" of the son and putting him at a dangerous employment, thus causing the father the loss of his services, is to be construed as by way of inducement, or merely matter of aggravation, and not as the gravamen or gist of the action.

We are of opinion that the declaration fails to state a cause of action upon which plaintiff in error is entitled to recover, and that there is no error in the judgment of the circuit court complained of. Therefore it is affirmed.

**Affirmed.**

**BUCHANAN, J., absent.**

**SOUTH & W. RY. CO. v. MANN et al.†**  
(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

**1. DEEDS — CONSTRUCTION — CONSTRUCTION AGAINST GRANTOR.**

An ambiguous deed will be construed most strongly against the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 235.]

**2. EVIDENCE—PAROL EVIDENCE — CONSTRUCTION OF DEED.**

Parol evidence is admissible when it is necessary to identify, explain, or define the subject-matter of a grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2116-2120.]

**3. SAME—OPINION OF EXPERTS — SUBJECT OF EXPERT TESTIMONY — LOCATION OF RAILROAD.**

Where a deed conveyed to a railroad a "strip of ground extending for such a width on each side of the center line of said railroad, with such additional width at cuttings and embankments as may be required for the construction and maintenance of a double track railroad," expert testimony is admissible to establish the center line of the double-track road, and to determine what width of ground on each side of the line was necessary to construct and maintain such road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2311.]

**4. DEEDS — CONSTRUCTION — INSTRUCTIONS AGAINST GRANTOR.**

Where a deed to a railroad of land for a right of way provided that company was to remove any of grantor's houses, and buildings at its own expense, the evidence being conflicting as to whether the provision included dwelling houses, under the rule that a deed will be construed more strongly against the grantor in

doubtful cases, the question will be resolved in favor of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 235.]

**5. SAME.**

A grant of land for a right of way conveyed a strip through complainant's farm extending for such width on each side of the center line of the railroad with such additional widths at cuts as might be required to construct and maintain a double-track railroad on the M. survey. Defendant's predecessor had located and partly constructed the roadbed for a single-track road under the M. survey. It appeared by expert testimony that a right of way at least 86 feet wide would be required for the construction of such road, and that the center line of a double-track road meant a center line between the two tracks forming the double track, and that the usual distance between the centers of the two tracks is 13 feet. *Held*, that construing the deed most strongly against the grantor, and in view of the expert testimony it conveyed a strip through complainant's farm 33 feet in width on each side of an initial line parallel with and  $6\frac{1}{2}$  feet west of the M. center line of location of the single track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 316.]

Appeal from Circuit Court, Scott County. Suit by W. D. Mann and others against the South & Western Railway Company. From a decree defining the rights of the parties, defendant appeals. Reversed and remanded for further proceedings.

Phlegar & Powell, and Irvine & Morrison, for appellant. W. S. Cox, for appellees.

**WHITTLE, J.** The primary purpose of this suit was to enjoin the appellant from locating and constructing a railroad over the land of the appellees on Clinch river, in Scott county, Va., not included within the metes and bounds of a strip of 2.91 acres conveyed by them to the appellant by deed of February 13, 1907, for a right of way for a railroad and other railroad purposes.

The appeal is from a decree which undertakes to define and establish the rights of the parties with respect to the matters in controversy.

A number of questions are raised by the pleadings, but the paramount issue involves the exact quantity and precise location of an approximately parallel strip of ground to the 2.91 acres, which was conveyed by the appellees to the Charleston, Cincinnati & Chicago Railroad Company (commonly known as the "3-C Company"), predecessor in title of the appellant, by deed of April 22, 1889, for the construction and maintenance of a double-track railroad. The appellant contends that the two parcels of ground are, for the most part at least, coterminous; and the fundamental objection to the ruling of the circuit court is that, while it holds that the appellant is entitled to a right of way over the appellees' farm under the last-mentioned deed, it fails to define the extent of that right. Nevertheless the decree declares that should the appellant transcend its authority—though an injunction will not lie to prevent the encroachment (Code Va. 1904,

† Rehearing denied.

§ 1105f [11]; *J. R. & K. Co. v. Anderson*, 12 Leigh, 278)—the appellees may resort to actions at law to recover damages for any trespasses that may be committed by the appellant outside of the right of way. In other words, the decision relegates the appellant to another forum to answer in damages for exceeding rights which are left undetermined.

The testimony satisfactorily explains the causes for delay in construction of the railroad by appellant's predecessors, and fully repels any intention on their part to surrender or abandon their rights under the deed of 1889, which eliminates that issue from the case, and leaves for our consideration the sole question: What land was acquired by the appellant by virtue of that conveyance?

The deed conveys to the "3-C Company" "a strip of ground extending for such a width on each side of the center line of said railroad, with such additional width at cuttings and embankments as may be required for the construction and maintenance of a double track railroad through and over said grantors' tract of land, situated on Clinch river on the late survey of F. E. Montague. \* \* \* Said strip of ground to be laid out in accordance with the survey of said company's engineers, with the right to the company to make such variations in the line of said survey as may be deemed needful to secure the best location for the road. For any of said grantors' houses, barns or buildings of any kind to be moved, said grantors are to move at their own expense."

Brief reference to some of the elementary principles of law touching the construction of deeds generally may be helpful in the interpretation of this instrument. For instance, it is a familiar rule of interpretation that in case of ambiguity the deed will be construed most strongly against the grantor and most favorably to the grantee. Moreover, extrinsic evidence is always admissible in aid of construction when the words of the deed can only be applied to facts ascertainable by such evidence. This is obviously a rule of necessity, for by no other means can the language employed be made to speak the minds of the parties.

The rule is thus formulated in 17 Cyc. 724: "Parol evidence is always admissible when it is necessary in order to identify, explain, or define the subject-matter of a grant, \* \* \* for without such evidence it would be impossible to give effect to the intentions of the parties." *Carrington v. Goddin*, 13 Grat. 587; *Reusens v. Lawson*, 91 Va. 226, 235, 21 S. E. 347; *Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

Applying these well-known principles to the writing in question, with the aid of extrinsic testimony, we cannot fail to identify with reasonable certainty the ground intended to be included in the deed. As we have seen, it conveys a strip of land through the farm, extending for such width on each side of the

center line of the railroad, with such additional width at cuttings and embankments as may be required for the construction and maintenance of a double-track railroad on the Montague survey. We must, therefore, invoke the testimony of experts to assist us in establishing the center line of the double-track railroad; and also to determine what width of ground on each side of that line would be required for the construction and maintenance of such a road.

The "3-C Company" located and partly constructed the roadbed for a single-track railroad under its purchase, and the expert testimony informs us that the center line of a double-track railroad, according to the location and plans of construction adopted by the "3-C Company" (which admittedly must control in this controversy), means a center line between the two tracks forming the double track; that the usual distance between centers of the two main tracks is 13 feet, and the center line of the double track would, therefore, be  $6\frac{1}{2}$  feet from the center of each track. It likewise appears that, owing to the proximity of the river on the easterly side of the first track (which would expose the embankments of an additional track on that side to high water), the proper location for the second track would be on the westerly or uphill side of the original track.

The testimony also shows that, although the needful space is variable, a right of way at least 66 feet wide would be required, and is essential, for the proper construction and maintenance of such a railroad through the appellees' farm as is contemplated by the deed, and called for by the plans of the "3-C Company," and that a less quantity of ground would be wholly inadequate for those purposes.

It is insisted, however, that such width could not have been intended by the appellees, because it would have taken part of their yard and necessitated the removal of the dwelling house.

At the date of the deed, the statute forbade the condemnation of land for right of way of a railroad company within 60 feet of a dwelling; and that circumstance is shown to have induced the company to acquire this particular property by purchase, and at a higher price than was usually paid for similar rights of way in that locality. The evidence is conflicting as to whether the stipulation for the removal of buildings at the expense of the grantors was, or was not, intended to include the dwelling house; yet recourse to the foregoing rule of interpretation, that, when language is doubtful, the deed will be construed most strongly against the grantor, must have resolved that issue in favor of the appellant. But the question at last is only material in its bearing upon the interpretation of the deed of 1889, since the dwelling was unquestionably embraced by the deed of February 13, 1907, and by subsequent agreement be-

tween the parties the appellees have been permitted to remove the building to another location.

The conclusion of the whole matter is that by fair construction of the deed of April 22, 1889, aided by extrinsic testimony with regard to the subject-matter, it conveyed to the "B-C Company" (whose rights the appellant has acquired) a strip of ground through the farm of the appellees 33 feet in width on each side of an initial line parallel with and 6½ feet west of the Montague center line of location of the single track.

For these reasons, the decree must be reversed, and the case remanded to enable the circuit court to ascertain by survey, or otherwise, the exact quantity of land, if any, between the two rights of way, in order that the appellant, if so advised, may take the necessary steps to acquire the intervening ground for its purposes.

#### McGEHEE v. TIDEWATER RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

##### 1. WATERS AND WATER COURSES—SURFACE WATERS—RIGHT TO DIVERT.

Under the common-law rule, contrary to the civil-law rule, as expressed in the Code Napoleon, surface water is regarded as a common enemy, and a landowner may protect his property from it, even if in so doing he throws the water back upon adjoining land; but in Virginia the rule is subject to the qualification that it must not be diverted wantonly, unnecessarily, or carelessly, but must be done in good faith in a reasonable use of the land for its improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 128.]

##### 2. SAME—NATURAL WATER COURSES—OBSTRUCTION.

A riparian owner cannot obstruct a natural stream in the improvement of his premises so as to injure adjoining land, however careful he may be in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 43.]

##### 3. SAME—SURFACE WATERS—ACTIONS—INSTRUCTIONS.

Defendant railroad filled in a depression along which surface water from the surrounding land habitually flowed, the bottom of which was covered with sod without a defined channel, and the surface water was thereby diverted upon plaintiff's land adjoining the fill. *Held*, in an action for damages, error to hold as a matter of law that defendant was not bound to supply reasonably adequate means of escape for surface water through its property.

##### 4. SAME—QUESTION FOR JURY—CARE EXERCISED BY DEFENDANT.

In an action for diverting surface waters upon plaintiff's land by filling a depression in constructing defendant's station grounds, the question of whether defendant was reasonably prudent and careful to avoid injury to plaintiff's property should have been submitted to the jury under proper instructions.

Error to Corporation Court of City of Roanoke.

Action by McGehee against the Tidewater Railway Company. Judgment for defendant,

and plaintiff brings error. Reversed and remanded for new trial.

Moomaw & Moomaw and Robertson & Wingfield, for plaintiff in error. Robertson, Hall, Woods & Jackson, for defendant in error.

WHITTLE, J. The facts in this case are undisputed. At the time of the commission of the grievance complained of, the plaintiff in error (the plaintiff below) was carrying on the business of a florist in the city of Roanoke. On the rear side of the lot on which the business was conducted there is a depression along which the surface water, which gathers from the surrounding watershed, was accustomed to flow into another depression running from west to east, and emptying into Roanoke river. Although storm water habitually flowed along this swale, the bottom was covered with sod and was not abraded. The defendant in error acquired a strip of ground adjoining the plaintiff's lot on the south for its right of way and passenger station and approaches; and in the construction of its roadbed, and in elevating its property to a uniform grade by filling in the land up to the plaintiff's line, it built across the depression, which likewise passed over the company's land, without making provision for the escape of surface water through its premises by culvert, drain, or otherwise. The result of that method of construction was to retain and cast back the waters upon the plaintiff's lot. Consequently, in the fall of 1906, after a heavy and protracted rainfall, the plaintiff's premises were flooded, and his greenhouse, boiler house, and a portion of his garden were overflowed by the pent-up waters. A great part of his plants and flowers were entirely destroyed, and the remainder damaged, either by the water or from the cold caused by his inability to heat them; the boiler having also been overflowed.

The plaintiff thereupon brought this action of trespass on the case against the railway company to recover damages for the loss sustained; and to an adverse judgment this writ of error was allowed him.

Two general rules prevail in the United States with respect to surface water—the civil-law rule and the common-law rule. The former is thus expressed in Code Napoleon, § 640:

"Inferior lands are subjected, as regards those which lie higher, to receive the waters which flow naturally therefrom to which the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall prevent such flowing. The superior proprietor of the higher lands cannot do anything to increase the servitude of the lower."

On the other hand, by what is known as the "common-law rule" (though it is said the subject has never received the consideration of the English courts, but that the doctrine originated in Massachusetts in 1857, in the case of *Parks v. Newburyport*, 10 Gray

[Mass.] 28. See 30 Am. & Eng. Ency. L. 331, note), "surface water is regarded as a common enemy, and every landed proprietor has the right, as a general proposition, to take any measures necessary to the protection of his property from its ravages, even if in doing so he prevents its entrance upon his land and throws it back upon a coterminous proprietor." 30 Am. & Eng. Ency. L. 330, note, where the authorities are assembled.

While it is true that this so-called common-law doctrine prevails in Virginia, it is nevertheless subject to the important qualification that the privileges conferred by it "may not be exercised wantonly, unnecessarily, or carelessly; but is modified by that golden maxim of the law that one must so use his own property as not to injure the rights of another. It must be a reasonable use of the land for its improvement or better enjoyment, and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary. When the exercise of the right is thus guarded, although injury may result to the land of another, he is without remedy." Riely, J., in *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587, 592, 593, 22 S. E. 517.

The general rule fairly deducible from the authorities is that with respect to natural streams of water—that is to say, such streams as usually flow along fixed channels having beds and banks—one riparian owner has no right, in the improvement or protection of his own premises, no matter how careful he may be, to interfere with or obstruct the flow of the water in such manner as to occasion injury to the land of another riparian proprietor. And the qualified rule of the common law in this state, with regard to surface water (in a case such as we are considering), imposes upon the lower landowner in the betterment or protection of his own property the duty of exercising his rights, not wantonly, unnecessarily, or carelessly, but in good faith, and with such care as not to needlessly injure the upper owner.

The declaration charges that the defendant "wrongfully, unjustly, and negligently constructed said railroad near the property of said plaintiff by making a fill thereon \* \* \* without providing a drain thereunder to convey the storm water which gathered at that place off of the property of the plaintiff." The court, it is true, in response to that allegation, charged the jury "that if they believed from the evidence that the defendant, by the construction of its roadbed, dammed water on the plaintiff's premises in a negligent and careless manner," the defendant would be liable in damages; yet, at the same time, it withdrew the case from the jury by declaring in another instruction that unless there was a well-defined channel worn or cut into the soil on the plain-

tiff's premises, through which the water was accustomed to flow (a condition which admittedly did not exist), the defendant was not liable.

In the leading case in this state of *Norfolk, etc., R. Co. v. Carter*, supra, the court approved an instruction which told the jury "that any interference with the drainage of the plaintiff's lands or the flow of surface water which could not be prevented by the proper and skillful construction of defendant company's road with proper and skillfully constructed culverts was proper to be taken into consideration by the plaintiff when the defendant company purchased its right of way from the plaintiff; and, if the jury believe from the evidence that the railroad through plaintiff's land was properly and skillfully constructed, with properly and skillfully constructed culverts, in proper numbers, and the same have been kept in proper order, then they cannot assess any damages against the said defendant company on account of ponds or of accumulations of water, though caused by the building and construction of said road." In that instruction the principle is recognized that proper and skillful railroad construction calls for the building of necessary culverts to take care of the flow of surface water.

So, also, in *Railway Company v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, cited with approval in the above case, it is held: "A railway company may not be allowed, by building its roadway across a natural drainage of surface water, to obstruct the customary flow, to the detriment of upper proprietors, but must supply reasonable means of passing it through the roadbed, so as to save the upper proprietors harmless to the same extent as before." The court furthermore observes at pages 288-289 of 43 Am. Rep.: "Its only property was its right of way. It was not necessary to the enjoyment of that that the bed should be solid throughout. The damage, of course, was unnecessary, and was not the result of a fair and proper exercise of its franchise. It was not reasonable that it should render so much property useless when it might so easily have prevented it without detriment to its operations. It ought not to be allowed to protect itself in an obvious wrong by any technical distinction between running and surface water."

It is strongly argued that the case also comes within the influence of section 58 of the Constitution of 1902 (Code 1904, p. ccxxli), which declares that the General Assembly "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation." *Swift, etc., v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404; *Tidewater Ry. Co. v. Shartzler*, 107 Va. 562, 59 S. E. 407. We do not deem it necessary, however, in this instance to consider the scope of that provision.

The case was clearly tried upon a false

theory of the respective rights and duties of the parties. The trial court erred in holding, as a matter of law, that no duty rested upon the defendant to supply reasonably adequate means of escape for surface water under its roadbed and through its property. The question whether or not the company, in the construction of its road and improvement of the grounds and approaches to its station, was reasonably prudent and careful to avoid injury to the plaintiff from the flooding of surface water, ought to have been submitted to the jury under correct instructions.

For these reasons, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

# **YELLOW POPLAR LUMBER CO. et al. v. THOMPSON'S HEIRS et al.**

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

## **1. APPEAL AND ERROR—PROCEEDINGS NOT IN RECORD—IMPEACHING RECORD—AFFIDAVITS.**

To show that a bill of exceptions included in the record certified April 30th as being a true transcript of the record was not made a part of the record on appeal, defendant in error offered affidavits by the clerk of the lower court to the effect that the evidence and instructions, as well as the clerk's certificate thereto, were written up and forwarded to counsel for plaintiff in error before the bills of exceptions, signed by the judge, dated May 11th, were filed in the clerk's office, which was on May 1st by plaintiff in error, and were never before in his office. Supreme Court of Appeals Rule 1 (37 S. E. p. xiv) provides that the court will not read any affidavit in support of, or opposition to, any motion, unless reasonable notice in writing be given to the opposing party of the time and place of taking same. No notice of taking such affidavits was given to plaintiff in error; the motion to dismiss the appeal which they were offered to support being made in a printed brief, filed only several days before the hearing on appeal. *Held*, that the certificate to the record brought up was a verity as to the clerk, and the affidavits could not be considered to impeach or change it.

## **2. TAXATION—ASSESSMENT—MISDIRECTION OF OWNER—EFFECT.**

If the assessment of land belonging to "James T." under the name of "Jane T." and a note on the land book opposite the assessment, "not James T." did not in fact mislead James T., he may not avoid the sale of the land for taxation on the ground of the erroneous description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 701.]

## **3. SAME—ACTIONS TO TRY TITLE—QUESTION FOR JURY—EFFECT OF MISDESCRIPTION.**

In ejectment to recover land sold for taxes, whether the erroneous description of the owner on the land book, as "Jane T.," instead of "James T.," and a note on the book opposite the assessment that it was "not James T.," was sufficient to mislead the latter and prejudice his right, was for the jury; and it was error to instruct that such mistake was immaterial.

## **4. ADVERSE POSSESSION—COLOR OF TITLE—SUFFICIENCY OF INSTRUMENT TO CONSTITUTE COLOR.**

An instrument is sufficient to constitute color of title in adverse possession if it is regular on its face, and the grantee is ordinarily not required to go beyond the writing to determine whether it actually passes title or is void; a rightful title not being essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 395.]

## **5. SAME—COLOR OF TITLE—VOID TAX DEED—SUFFICIENCY.**

A tax deed gives color of title, though informal or defective, or even if absolutely void, unless the land in controversy is so insufficiently described as to render the identification impossible; and hence it was error to refuse an instruction that a void tax deed sufficiently describing the property was sufficient color of title to support adverse possession if the other elements of adverse holding existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 462.]

## **6. SAME—DURATION OF POSSESSION—BEGINNING OF ADVERSE POSSESSION—RUNNING OF LIMITATIONS.**

Limitations begin to run in adverse possession under a tax deed only from the date of the possession under the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 207.]

## **7. TAXATION—TAX DEEDS—TIME OF ISSUING.**

The power to issue a tax deed does not arise until after the expiration of the period allowed for redemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1493.]

## **8. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—AFFECTING PARTY NOT ENTITLED TO SUCCEED.**

Error in holding that a void tax deed was not sufficient color of title to support adverse possession was harmless where the evidence showed that the one claiming under it had not held possession for the entire statutory period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036.]

## **9. ADVERSE POSSESSION—CONTINUITY OF POSSESSION—TACKLING SUCCESSIVE POSSESSIONS.**

Defendant's grantors entered into adverse possession of land in May, 1893, and in May, 1902, conveyed the land to O., and conveyed a number of trees standing thereon by separate deed to defendant, the latter deed providing that defendant might remove the trees when it chose, and the grantor would protect the timber as long as it remained on the premises. *Held*, that the separate conveyance of the trees to defendant was a severance of them from the estate in the surface of the land, and the grantor's agreement to protect the trees did not constitute defendant and the grantee of the land privies in estate, so as to tack the latter's possession to defendant's possession of the trees to complete the 10 years' adverse possession required by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 217.]

## **10. SAME—NECESSITY—PRIVITY.**

Privity must be shown before possession can be tacked, so as to complete the statutory period for adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 216.]

## **11. SAME—ELEMENTS OF "ADVERSE POSSESSION."**

Adversary possession must be actual, exclusive, open, and notorious and continued for the statutory period, accompanied by bona fide claim of title against all others, and mere naked possession without claim of right, however long

continued, cannot ripen into a good title, but is regarded as for the benefit of the true owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

**12. LOGS AND LOGGING—SALE OF STANDING TIMBER—EFFECT OF SALE.**

Though trees, unlike minerals, draw their support from the soil until removed, and so long as they are standing are real estate, they may be created a separate and distinct estate from the estate in the land; and, where they are separated by conveyances or reservation from the ownership of the surface, there is no presumption that they belong to the owner of the surface, and hence, where standing trees were conveyed to defendant, and the land conveyed to another by separate conveyance, the latter's possession was only of the land.

**13. MINES AND MINERALS—TITLE—CONVEYANCES—SEVERANCE FROM OWNERSHIP OF SURFACE.**

It is a general presumption that the possessor of the surface also has possession of the subsoil; but, when minerals have been severed from the owner of the surface by conveyance or reservation, the surface owner can acquire no right in the minerals by his exclusive possession of the surface, nor does the owner of the minerals lose his right or possession by any length of nonusage, except by a disseisin, which actually takes the minerals out of his possession.

Error to Circuit Court, Buchanan County.

Ejectment by James Thompson's Heirs and others against the Yellow Poplar Lumber Company and another. Judgment for plaintiffs, and the defendant named brings error. Affirmed.

Vicars & Peery, Finney & Stinson, C. C. Burns, and A. A. Skeen, for plaintiff in error. Geo. W. St. Clair and Wm. H. Werth, for defendants in error.

**CARDWELL, J.** This action of ejectment was brought by the heirs of James Thompson, deceased, and another, against the Yellow Poplar Lumber Company and one Levi Osborn to recover the possession of 150 acres of land, situated in Buchanan county, Va.; the defendant the Yellow Poplar Company being the claimant of 279 marked and branded poplar, ash, and cucumber trees standing and growing on said land, and Levi Osborn claiming the ownership and possession of the surface of the land.

At the trial there was a verdict for the plaintiffs against the Yellow Poplar Company for the standing trees in question, and in favor of the other defendant Levi Osborn for the land, which verdict in favor of Osborn was set aside, but judgment entered thereon against the Yellow Poplar Company; and to that judgment this writ of error was awarded.

During the progress of the trial, plaintiff in error excepted to various rulings and opinions of the court, and was, with the consent of all parties, allowed 30 days from the rising of the court to present proper bills of exceptions. The bills of exceptions were within the time fixed signed and sealed by the judge, and appear in the record certified by the clerk as "a true transcript of the

record and proceedings" in the cause; but counsel for defendants in error point out that this certificate of the clerk bears date the "30th day of April, 1907," while the bills of exceptions appear to have been signed by the judge May 11, 1907, and for this reason we are asked to dismiss the writ of error as improvidently awarded.

Section 3385 of the Code of 1904 provides that any bill of exceptions may be tendered to the judge, and signed by him, either during the term at which the opinion of the court to which exception is taken is rendered, or in vacation within 30 days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exception so tendered and signed by the judge as aforesaid, either in term time or vacation, shall be a part of the record of the case; and the order of the court in this case refusing to set aside the verdict against plaintiff in error says: "And it is ordered by the court, with the consent of the parties, that the defendants be and they are hereby allowed 30 days from the rising of this court to present proper bills of exceptions, which when done and the same are signed and sealed are hereby made a part of the record in this case."

It is suggested in the brief of counsel for defendants in error that the record certified by the clerk "does not as a matter of fact contain all the evidence introduced before the court below"; but it not only appears from the printed record that the requirements of section 3385, supra, were literally complied with, but an inspection of the original file of the court papers in the case, brought up for our inspection, discloses that the record was made up and copied by the clerk for certification to this court pursuant to an agreement between counsel for the respective litigants, and there is nothing contained therein or omitted therefrom that was not so agreed on.

True, counsel for defendants in error produce in their printed brief what purports to be two affidavits made by the clerk of the court below, the one to the effect that the evidence and instructions in the case, as well as the clerk's certificate thereto, appearing in the printed record, were all written up and forwarded to counsel for plaintiff in error "before any bills of exceptions were ever signed by the judge, or at least no such bills had then (or have since) come to my office," etc.; and the other to the effect that the bills of exceptions signed by the judge, of date May 11, 1907, were on May 1, 1907, presented and filed in the office of the clerk by counsel for plaintiff in error, and that the same were never before in his office, etc.; but this same affiant gives to counsel for plaintiff in error a copy of which is also produced here, an affidavit to the effect that the record in the case was made up, copied, and certified in accordance with the practice in the circuit court of Buchanan county; that



the evidence in the case to be certified by the clerk was agreed to by the attorneys of record, and "the record with the agreed evidence was copied as was directed and certified to by me; the attorneys having agreed to same and notice being waived."

We have here a demonstration of the wisdom of the rule adhered to by this court, that the certificate of the clerk of the trial court to the record brought to this court, made up and signed by him, is a verity as to the clerk, and cannot be impeached, modified, or changed in the manner attempted in this case. Rule 1 of this court (57 S. E. xiv) provides that "the court will not read any affidavit in support of, or opposition to, any motion hereafter made to the court, unless reasonable notice in writing be given to the opposing party of the time and place of taking the same. \* \* \*" In this case the notice required by that rule was not given, but the motion to dismiss is made in a printed brief, filed but a few days before the case is called for hearing in this court, and as a part of that brief the *ex parte* affidavit of the clerk, who himself, as he admits, certified the record, is alone relied on to support the motion. Therefore we are of opinion that the contention that this writ of error should be dismissed is wholly without merit.

James Thompson, a nonresident of Virginia, who died intestate in 1876, was the owner of the 150 acres of land, which, with the 279 standing trees thereon, form the subject of controversy in this suit, and descended at his death to his heirs at law. They conveyed one moiety thereof to Martha Graham, who with said heirs instituted the suit.

It is too plain to admit of discussion, if plaintiff in error does not in fact intend to admit as much, that the defendants in error established at the trial a good legal title to the land, and, of course, to the standing trees thereon, and had the right to recover the land, including the standing trees upon it, unless this right was lost by reason of a tax deed under which plaintiff in error claims, made by the clerk of the county court of Buchanan county to one S. M. B. Coulling, bearing date July 18, 1893, the sale of the land for the payment of the taxes due thereon for the year 1886 having been made February 21, 1888, and the plat of the land and certificate of survey ordered by the court recorded as required by law April 1, 1892.

It appears on the land books of Buchanan county that this land was assessed for taxes in the name of "James T. Thompson" for 1884 and 1885, in the name of "Jane Thompson" for 1886 to 1890, inclusive; in the name of "Jane" or "James" Thompson for 1891, and in the name of S. M. B. Coulling and those claiming under him for the years 1892 to 1906, inclusive. It further appears in the certificate of the evidence that in the column of the land books of 1886 and 1887, headed "Remarks," the following note appears: "not

James T."—that the parties agreed, and their counsel admitted, that the land assessed to the above-named parties was the identical land in controversy, and the same land assessed to "James Thompson" for 1884 and 1885. It is not claimed that the taxes were paid on the land for 1886, the year for which it was sold for taxes and bought by Coulling, nor that the land was ever assessed against James Thompson or those claiming under him other than as shown by the certificate made from the land books above referred to.

It will be readily observed, therefore, that the defense set up by plaintiff in error at the trial was adversary possession, under color of title, for the statutory period of 10 years; the contention being that the tax deed to Coulling afforded him and those claiming under him color of title which by lapse of time ripened into a perfect title before this suit was brought, and that, so far as plaintiff in error was concerned, if recovery by the plaintiffs (defendants in error here) of the land itself was barred, they were also barred of a recovery of the 279 standing trees thereon claimed by plaintiff in error; but the learned judge below instructed the jury that the tax deed in question passed no title for the land in the declaration described, and this ruling is made the basis of plaintiff in error's first assignment of error.

The case of *Stevenson v. Henkle*, 100 Va. 595, 42 S. E. 672, involved a mistake in the name of the landowner whose lands were sold for delinquent taxes, similar to the case in judgment, and the opinion of the court says: "The underlying principle in such cases is that a person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burdens by any errors, omissions, or irregularities that do not prejudice his rights."

The contention that only such right or title as was vested in Jane Thompson at the beginning of the year 1886 passed under the tax deed cannot avail defendants in error, if the mistake of the commissioner in writing "Jane" for "James," and the note he made, "not James T.," under the head of "Remarks," did not mislead James Thompson; but, whether or not the assessment of the land by the commissioner, as listed on his books for the year 1886, was sufficient to mislead James Thompson and to the prejudice of his rights, was a question for the jury, and not for the court.

It is said by Freeman in a note to *Schooler v. Asherst*, 13 Am. Dec. 233: "The doctrine of *idem sonans* has been much enlarded by modern decisions to conform to the growing rule that a variance to be material must be such a one as misled the opposite party, to his prejudice."

It has been held by this court in several criminal cases that whether the name in the indictment is *idem sonans* with the true name of the person upon whom the offense

was committed is a question for the jury, and not for the court. Taylor's Case, 20 Grat. 825; Pitsnogle's Case, 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867.

In the first-named case Moncure, P., says: "But the question is one for the jury, and not for the court, which cannot instruct the jury as matter of law that any two names are or are not of the same sound."

And in the second-named case the opinion by Keith, P., says: " \* \* \* The modern and approved practice is to submit the question to a jury whenever there is opportunity to do so, and where the correct sound appears at all doubtful or dependent upon particular circumstances."

In this case the court, in effect instructed the jury that as a matter of law the names of "Jane" and "James" Thompson were not *idem sonans*, and therefore took from the jury the determination of whether or not the mistake of the commissioner in assessing the land in the name of Jane Thompson, and noting under the head of "Remarks," "not James T.," was immaterial. This, for the reasons stated, was error; and it was also error to refuse plaintiff in error's instruction No. 11, which sought to submit to the jury for determination, whether or not the mistake in the assessment was immaterial.

We are further of opinion that the trial court erred in refusing instruction No. 1, asked for plaintiff in error, which in effect told the jury that a deed for land sold for delinquent taxes was sufficient to carry to the grantee color of title to the land conveyed, and, if the required conditions as to adverse possession were shown to have existed and continued for the period of the statutory bar, the defendants in error were not entitled to recover.

While there is considerable conflict as well as a marked confusion in the authorities as to what are the requisites of an instrument, in order that it may have the effect of conferring color of title, it appears to be a generally accepted rule that, if the instrument under which the claimant enters upon the land is regular upon its face, this will suffice to give color of title, and he is not ordinarily required to go beyond the writing to see whether it actually passes title or is in fact void; and in *Nowlin v. Reynolds*, 25 Grat. 137, the opinion of this court says that it is not necessary to constitute an adverse possession that there should be a rightful title.

With respect to a tax deed the rule is stated in 1 Cyc. 1095, citing decisions of the appellate courts in a number of states to be that it may give color of title although informal and defective, or even when absolutely void, unless the land in controversy is not described therein, or is so insufficiently described as to render identification impossible. "Whatever may be the source of the invalidity of the deed, if it purports to convey land and in form passes what purports to be the title, it gives color of title."

The weight of authority is that "a tax deed based on a void tax sale is color." *Osceola L. Co. v. Chicago M. & L. Co.*, 84 Ark. 1, 103 S. W. 609; *Gilbert v. So. L. & T. Co.*, 53 Fla. 319, 43 South. 754; *Perkins Land & Lumber Co. v. Irvin*, 200 Mo. 485, 98 S. W. 580; *Hoyle v. Mann*, 144 Ala. 516, 41 South. 835; *Sharp v. S. F. Co.*, 100 Va. 27, 40 S. E. 103; 6 Current Law, 1654.

In this case the tax deed to Coulling is formal, and the land it purports to convey is sufficiently described, at least, to render identification possible. 1 Cyc. 1082, 1085-1086.

But, while possession by the holder of the tax title for the period prescribed in the statutes may give title, and bar an action of recovery by the owner, the statutes begin to run only from the date of the possession under the deed, and the power to issue the deed does not arise until after the expiration of the period allowed for redemption. Current Law, *supra*, and note to *Griffin v. Jackson*, 9 Am. & Eng. Anno. Cas. 74-76; 1 Am. & Eng. Enc. L. 850-852.

In the view we take of this case, however, while the court below erred in the respects above discussed, the errors are to be considered as harmless, for the reason that they could not have prejudiced the rights of plaintiff in error. In other words, notwithstanding the erroneous instructions given to the jury or refused, upon the facts proved there could not have been rightly a verdict different from that rendered by the jury in favor of the defendants in error for the 279 trees involved.

Although the tax deed to Coulling was sufficient to confer color of title upon him and those claiming under him, it conferred color of title only from the date of its execution July 18, 1893, and, as to adverse possession under this color of title the evidence is that the land was and remained wild, uncleared, uninclosed, and unoccupied by any one until February, 1896, when a log cabin was put on the land, which was occupied by a tenant for one or two years, and about three acres of the land cleared; that this tenant then moved out and the cabin was unoccupied for several years. Then it was occupied by another tenant for about one year. Then he moved out and the cabin was burned down. It was about this time that Levi Osborn took a deed for the land from Geo. W. Osborn, who had theretofore obtained a conveyance therefor from Waldron, a grantee of Coulling. While the house on the land was down, Levi Osborn sold his adjoining land and moved to another county, and, when he moved away, there had been no one living on the land for two years, and it was two years later when the house was rebuilt and occupied by a tenant, and after the property had been vacant for about four years. According to the testimony of Levi Osborn himself, and another witness introduced by plaintiff in error, there were never but three per-

sons who lived on the land, the first going thereon in 1896, and there were intervals of from two to four years between their respective occupancies. True, there is evidence as to a parol contract with Coulling, under which Waldron gave Levi Osborn in 1892 or 1893 a 10-year lease, making the latter, who lived on the adjoining land, somewhat of a caretaker to watch over the land, and Osborn ranged cattle on and cut some wood from the land, as did others; but independently of these facts, if the acts of ownership done by Levi Osborn or those under whom he claimed the land in question were sufficient to constitute in him and them adversary possession under color of title, which might have ripened into a good title by being continued for the statutory period of limitation, such adversary possession could not avail plaintiff in error, unless it could tack on its adversary possession of the trees in question to that of Levi Osborn of the land itself. The adversary possession of the land by Coulling or those claiming under him, if such there were, could not have begun before the date of the tax deed, May 19, 1893, and on May 27, 1902, Waldron, Coulling's grantee, by separate deeds conveyed the land to Geo. W. Osborn, and the 279 standing trees here in question to plaintiff in error, which conveyances were before adversary possession of the land under Coulling's tax deed could possibly have ripened into a good title. Geo. W. Osborn, by deed of January 4, 1904, conveyed, with covenants of general warranty, the land to Levi Osborn; and the ruling of the trial court that the conveyance of the 279 standing trees to plaintiff in error was a severance of estate in the trees from that of the estate in the surface of the land, and that any possession that Levi Osborn and those under whom he claims had after that time was not possession of the said trees, is assigned as error.

In this ruling there is no error. The provisions in the conveyance of the trees to plaintiff in error by which the grantor, Waldron, agreed that the grantee might remove the trees within such time as it might choose, and that he, Waldron, would "protect and take care of said timber as long as it may remain upon said premises," could not constitute plaintiff in error and Geo. W. Osborn, who took from Waldron on the same day a separate conveyance of the land, privies in estate, for the one acquired independently of the other, though from the same grantor, an entirely different and separate estate with no privity in holding. The agreement or covenant to take care of the trees until they were removed was but a personal covenant binding alone on the grantor, Waldron.

"Privity must be shown before possession can be tacked." 9 C. L. 39, and cases cited in note.

The possession of Geo. W. Osborn and Levi Osborn claiming under him of the land was not and could not have been possession of

the 279 trees conveyed to plaintiff in error under color or claim of title to the trees.

"Adversary possession must be actual, exclusive, open, and notorious, accompanied by a bona fide claim of title against that of all other persons, and it must be continued for the period of the statutory bar. A mere naked possession, without claim of right, no matter how long, never ripens into a good title, but is regarded as being held for the benefit of the true owner." *Creekmur v. Creekmur*, 75 Va. 430.

Whether marking these 279 trees with the brand or figure "A," as stated in the deed to plaintiff in error, or what would be "actual, visible, exclusive, hostile, and continuous" possession under a bona fide claim of title to standing trees which have been severed in title from the land itself, we are not called upon to determine in this case. True, the trees, unlike the minerals underlying the surface of the land, draw their support, life, and health from the soil until removed, and so long as they stand upon the land they are real estate (*Stuart v. Pennis*, 91 Va. 688, 22 S. E. 507); but it is inconceivable that they may not by deed be created, as may minerals in or under the surface of the land, a separate and distinct estate from the estate in the land (*Va. C. & I. Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020; *Interstate Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593).

"It is a general presumption that one who has the possession of the surface of the land has the possession of the subsoil also. But when, by conveyance or reservation, a separation has been made of the ownership of the surface of the land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or possession by any length of nonusage. He must be disseised to lose his right, and there can be no disseisin by an act which does not actually take the minerals out of his possession." 1 Cyc. 994, 995.

"Adverse possession of the surface of the land does not necessarily include possession of the minerals below it, where the title to the latter has been severed by deed from that of the surface." 1 Am. & Eng. Enc. L. 875, and cases cited in note 1.

We find nowhere discussed in the authorities the question whether or not there is a general presumption that one who has the possession of the surface of the land has possession of the standing timber thereon also, where by a conveyance or reservation a separation has been made of the ownership of the surface of the land from that of the standing timber; but by analogy of the authorities with respect to underlying minerals, which by conveyance or reservation carries the ownership of the surface of the land from that of the underground minerals, the

possession of standing timber, where by conveyance or reservation a separation has been made of the ownership of the surface of the land from that of the timber standing thereon, is not presumably in the owner or claimant in possession of the surface.

In the case here, conceding that plaintiff in error had, from and after its deed from Waldron of May 27, 1902, an adversary possession of the 279 trees in question, which might have ripened into a perfect title if continued for the period of the statutory bar, that adversary possession of the trees could not be tacked on to the possession of Levi Osborn, and those under whom he claims, of the land, so as to complete the period of the statutory bar to a recovery of the trees by the true owners before this action was brought, the possession of the land, including the standing trees thereon, ceased from and after May 27, 1902, when the surface of the land was conveyed to George W. Osborn, and the ownership of the standing trees thereon here in question to plaintiff in error, and Osborn's possession after taking his deed from Waldron was that of the surface of the land only.

The contention of plaintiff in error that Levi Osborn, under his tenure of the land from Waldron, held possession of the timber until 1904, the date of his deed from George Osborn, and after plaintiff in error's adverse possession had ripened into perfect title, is wholly without force. As already pointed out, the deed of May 27, 1902, was a severance of the title to the timber trees and created a separate and distinct freehold in the timber from the surface of the land, and the owner of the surface was not in possession of the timber for plaintiff in error, but only of the surface of the land; and there is no evidence in the record going to prove that there were any provisions in the said lease held by Levi Osborn from Waldron which deprived the latter of the right to create, as he did by deed of May 27, 1902, in plaintiff in error, a separate and distinct estate in the 279 trees. Therefore any subsequent possession of Osborn, if any he had, of the surface of the land, could not inure to the benefit of plaintiff in error as to the trees it is claiming.

We are of opinion, upon the whole case, that the judgment of the circuit court in favor of the defendant in error for the 279 trees involved is right, and therefore it is affirmed.

Affirmed.

CHESAPEAKE & O. RY. CO. v. ROWSEY'S ADM'R.†

(Supreme Court of Appeals of Virginia. Sept. 15, 1908.)

1. APPEAL AND ERROR—HARMLESS ERROR—ERROR CURED—OVERRULING DEMURREK.

Any error in overruling a demurrer to particular counts of a declaration is cured by

† Rehearing denied.

an instruction to the jury not to consider such counts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4008-4106.]

2. MASTER AND SERVANT—ACTION FOR DEATH OF EMPLOYE—PLEADING—SUFFICIENCY.

Allegations in an action against a railway company for the death of a brakeman, struck by an overhead bridge, that the company negligently failed to use proper care to provide a reasonably safe place for decedent to discharge his duties, and in the construction and maintenance of its railway and the structures connected therewith, and carelessly caused and permitted the space between the tender and cars of decedent's train and the bottom of the bridge to be unreasonably dangerous and low, so that the bridge was in dangerous proximity to the top of the cars and engine tender, to wit, — feet therefrom, so as to unreasonably imperil decedent's life, sufficiently show the nature of negligence relied upon by plaintiff.

3. PLEADING—DEMURRE—SUFFICIENCY.

A demurrer to a declaration based on the declaration's failure to comply with a particular section of the Code, but not referring to that section, is insufficient under Code 1904, § 3271, providing that the trial court may require the grounds of demurrer to be stated specifically, and that no grounds shall be considered other than those so stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 476.]

4. MASTER AND SERVANT—RAILROADS—OVERHEAD BRIDGES—EFFECT OF STATUTE.

Code 1904, § 1294-d, cl. 36, provides that where any railroad track passes under a bridge, etc., not sufficiently high to permit safe passage of cars with the employes standing at their posts of duty on such cars, the company shall maintain warning signals to warn the employes of the approach to such bridge, and that failure to maintain such signals shall make the company liable for the death or injury of any employe resulting from the insufficient height of the bridge, etc. Held, that the section was not intended to diminish the liability of railroads, but to increase it, and that the maintenance of the signals does not release the company from liability for its negligence in having the bridge, etc., not sufficiently high to permit safe passage of its cars with its employes thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 225.]

5. TRIAL—CONDUCT—DISCRETION.

Matters arising in the conduct of a trial are largely in the discretion of, and to be controlled by, the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 37.]

6. SAME—ARGUMENT—READING FROM LAW BOOKS.

Though, it being the duty of a trial judge to give all proper instructions, he may refuse to permit counsel to read law books to the jury, it was not error, in an action against a railway company for the death of a brakeman struck by an overhead bridge, to allow plaintiff's counsel to state that, before the new Constitution, there could be no recovery in such cases, that knowledge by an employe of the unsafe character of an overhead bridge had been held to be one of the assumed risks of the employment, that it took the constitutional convention to change the rule, and to permit him to read the constitutional provision that "knowledge by any such railroad employe injured of the defective or unsafe character or condition of any appliances or structures shall be no defense to an action for injury caused

thereby"; such provision having been embodied in an instruction given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 290, 291.]

**7. MASTER AND SERVANT — RAILROADS — BRAKEMAN KILLED BY OVERHEAD BRIDGE — INSTRUCTIONS.**

In an action against a railway company for the death of a brakeman struck by an overhead bridge, an instruction embodying Code 1904, § 1294-k, which provides that knowledge by an employé of the defective condition of any machinery, etc., shall not of itself bar recovery for any injury caused thereby, and stating that if the bridge was situated dangerously near the top of the engine tender and cars, and was thereby rendered unreasonably unsafe to decedent in the performance of his duties, the jury must find for plaintiff, if they believed he was attending to his duties with ordinary care, though they might also believe that decedent knew of the unsafe condition of the bridge. *Held*, that the instruction was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1175.]

**8. SAME—NEGLIGENCE.**

It is negligence for a railway company to maintain a road under a bridge which is so low that its employés cannot perform their duties with reasonable safety while exercising ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 225.]

**9. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In an action against a railway company for the death of a brakeman struck by an overhead bridge, the burden was on the company to show that decedent was guilty of contributory negligence, unless such negligence appeared from plaintiff's evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 908.]

**10. SAME.**

Though a freight brakeman, who was killed by being struck by an overhead bridge, knew that the bridge was dangerous, in an action to recover for his death, the defense of contributory negligence could not rest alone upon such knowledge, but such knowledge was subject to consideration by the jury with the other evidence in determining whether he used proper care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706, 707.]

**11. TRIAL—INSTRUCTIONS.**

In an action against a railway company for the death of a brakeman struck by an overhead bridge, it was proper to refuse to instruct that the company was not negligent in having a bridge over its railway too low to permit the safe passage of a person standing upon the top of one of its cars, since the instruction took from the consideration of the jury the only fact of negligence upon which plaintiff relied; there being evidence tending to support his case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

**12. MASTER AND SERVANT—ASSUMPTION OF RISK.**

In an action against a railway company for the death of a brakeman struck by an overhead bridge, instructions that if, though decedent knew, or ought to have known, that he could not pass in safety under the overhead bridge standing upon a box car or engine tender, he subjected himself to the danger, he was guilty of such contributory negligence as would bar recovery, and that, though the engineer gave a signal for the application of

brakes, that fact did not relieve decedent from the duty to exercise ordinary care for his own safety, and that if decedent knew, or ought to have known, of the proximity of the bridge and its dangerous character, and went on top of the train just as he was approaching the bridge, he was guilty of contributory negligence, were properly refused, since under Code 1904, § 1294-k, knowledge by an employé of the defective character of structures, etc., does not of itself bar recovery for any injury caused thereby.

**13. SAME—EVIDENCE—SUFFICIENCY.**

Evidence in an action against a railway company for the death of a brakeman struck by an overhead bridge *held* to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 950-996.]

**14. SAME—RES IPSA LOQUITUR.**

The res ipsa loquitur doctrine cannot be applied in favor of a railway company in an action for the death of a brakeman, where he started back over the train from the engine as the train approached an overhead bridge, and when next seen there was a contused wound upon the back of his head, and upon the sill of the bridge there appeared a stain or smear, such as might have been made by the violent impact of decedent's head.

**Error to Circuit Court, Albemarle County.**

Action by G. W. Rowsey's administrator against the Chesapeake & Ohio Railway Company for negligent death. From a judgment, for plaintiff, defendant brings error. Affirmed.

The trial court gave the following instructions:

"(A) The court instructs the jury that knowledge by any railroad employé injured of any defective or unsafe character or condition of any appliances or structures shall be no defense to an action for injury caused thereby; and, if the jury believe from the evidence that G. W. Rowsey was killed by reason of the fact that the condition or character of the defendant company's appliances or structures was not reasonably safe, viz., that the bridge in question was situated dangerously near the top of the tender and cars, and was thereby rendered unreasonably unsafe to the said Rowsey in the performance of his duties as brakeman, and if they believe that the deceased Rowsey was attending to his accustomed duties using such care as a man of ordinary prudence would use under the circumstances therein at the time he received the injury which caused his death, they must find for the plaintiff, notwithstanding they may believe from the evidence that he had knowledge of said unsafe condition or character of the bridge.

"(B) The court instructs the jury that the law presumed that G. W. Rowsey exercised due and proper care at the time he was injured, and the burden of proving his contributory negligence is upon the defendant, unless such contributory negligence appears from the plaintiff's evidence; and, if the jury believe from the evidence that the bridge was dangerous and unsafe as stated in instruction A, and that the said G. W. Row-

sey knew this fact, the defense of contributory negligence cannot rest alone upon such knowledge, but such knowledge, if it existed, is rightly to be considered by the jury along with all the evidence in the case in determining whether the said Rowsey used due and proper care required in the situation in which he was placed when the injury occurred."

Instruction No. 2. "The court instructs the jury that the burden of proof is upon the plaintiff to show by a preponderance of the evidence the negligence of the defendant company; and, if it appears from the evidence that the injury complained of may as well have happened from the negligence of G. W. Rowsey himself as from that of the company, they must find for the defendant."

Instruction No. 3. "The court instructs the jury that if they believe from the evidence the negligence of G. W. Rowsey himself contributed in any degree to the proximate cause of the injury complained of, they must find for the defendant, even though they should also believe the defendant company was negligent."

Instruction No. 5. "The court instructs the jury that there can be no recovery in this case upon the allegations contained in the second and third counts of the declaration."

Instruction No. 6. "The court instructs the jury that there can be no recovery in this case if it is not proven to the satisfaction of the jury by a preponderance of the evidence that the said G. W. Rowsey went upon the top of the train in the performance of his duty; and, in the absence of affirmative preponderating proof of that fact, they must find for the defendant."

Instruction No. 7. "The court instructs the jury that unless they believe from the evidence that the defendant company's engineer gave such a signal for the application of brakes upon the train upon which said G. W. Rowsey was a brakeman, as would necessitate the said G. W. Rowsey going upon the top of the cars in the performance of his duty, then there can be no recovery in this action; and, if the jury shall further believe from the evidence that a signal for the application of brakes is one sharp blast of the whistle, and that the engineer in this instance sounded several sharp blasts of the whistle in succession, and that a succession of sharp blasts of the whistle is not a signal for the application of brakes, then the said G. W. Rowsey was not required thereby, and it was not his duty, to go upon the top of the box cars for the purpose of applying brakes in the performance of his duty."

D. H. & Walter Leake, for plaintiff in error.  
F. W. King, W. E. Fowler, and Dan. Harmon, for defendant in error.

KEITH, P. This is an action brought by Rowsey's administrator against the Chesapeake & Ohio Railway Company to recover damages for the death of his intestate, al-

leged to have been caused by the negligent act of the defendant company.

Plaintiff's intestate was a brakeman upon the Chesapeake & Ohio Railway, and at a point upon its line some distance west of Charlottesville, near Ivy station, the public highway crosses the railroad upon a bridge. Plaintiff's intestate was struck on the head by this bridge, and died in a short time thereafter; and the negligence alleged is that the bridge, which it was the duty of the defendant company to keep in a reasonably safe condition, was so low as to be dangerous.

The plaintiff recovered a judgment against the defendant, to which a writ of error was awarded, and the first error assigned is to the action of the court in overruling the demurrer to the declaration and the four counts thereof.

It is unnecessary to pass upon the second and third counts, as the jury were directed not to consider them. The demurrer to the first and fourth counts is because they do not state with sufficient precision wherein the negligence of the defendant company with reference to the construction and maintenance of this overhead bridge consisted.

The averment of the declaration upon this point is that the defendant, "not regarding its duty in this behalf, so carelessly and negligently conducted itself that it failed and omitted to use proper care to provide a reasonably safe place for the said G. W. Rowsey to discharge his duties as aforesaid, and failed and omitted to use due and proper care in the construction and maintenance of its railway and the structures connected therewith, and carelessly and negligently procured, caused, and permitted the space between and tender and cars of said train and the bottom of the said overhead bridge to be and remain unreasonably dangerous and low, so that the said bridge was in dangerous proximity to the tops of the said cars and tender, to wit, ——— feet therefrom, so as to unreasonably imperil the life of the said G. W. Rowsey. \* \* \*

We are of opinion that this was sufficient to give the defendant notice of the cause of action which it was required to meet. Merely to have said that the overhead bridge was dangerous might have been amenable to the objection insisted upon by counsel for plaintiff in error; but to say that it was dangerous because it was too low points out the particular in which the defendant company had been negligent—that it had constructed and maintained the bridge so low as to be dangerous, and thereby imperil the lives of those of its employes who were required to pass under it.

Another objection urged here to the declaration is that it does not comply with section 1294-d, cl. 36, Code 1904, which provides as follows: "Where any railroad track passes under any bridge, tunnel or structure, not sufficiently high to admit of the safe

passage of cars upon such railroad tracks, with the servants and employes standing at their posts of duty on said cars, the person or persons, firm or corporation, operating said railroad and running its trains thereon, shall erect and maintain, at proper distances on each side of such bridge, tunnel or structure, warning signals of approved design, and in general use, to warn the servants or employes, or those operating such railroads, of the approach of said bridge, and the failure to erect and maintain such danger signals shall make those operating such railroads liable in damages for the death or injury of any employe or servant resulting from the insufficient height of such bridge, and no contract, expressed or implied, and no plea of, or defense based upon, the contributory negligence of the servant or employe shall relieve those operating such railroad of the liability imposed thereby."

We might dispose of this ground of demurrer by a reference to section 8271, which provides that "in civil cases the court on motion of any party thereto shall, or on its own motion may, require the grounds of demurrer to be stated specifically in the demurrer, and no grounds shall be considered other than those so stated." There is no reference to section 1294-d, cl. 38, in the grounds of demurrer assigned; but we will consider the question now as it arises in another aspect of the case.

The section mentioned was not intended to diminish the liability of railroads, but to increase it. If the railroad whose tracks pass under any bridge, tunnel, or structure not sufficiently high to admit of the safe passage of cars upon the tracks with the servants and employes at their posts of duty on said cars fails to maintain at proper distances on each side of said tunnel or structure warning signals of approved design and in general use, those operating such railroads are made liable in damages for the death or injury of any employe or servant resulting from the insufficient height of such bridge, and no contract, expressed or implied, and no plea of, or defense based upon, the contributory negligence of such servant, shall relieve such railroad from liability. Railroads having the structures denounced by this statute who do not erect the danger signals for which it provides are deprived of all defense, and made liable for whatever injury may have resulted from their conduct. But, where the warning signals are placed, we do not understand that the railroad company is thereby made immune from damages resulting from its negligent act in having a bridge or other structure not sufficiently high to admit of the safe passage of its cars with its servants and employes standing at their posts of duty on said cars.

We find no error in the ruling of the court upon the demurrer to the declaration.

The next assignment of error was taken to the ruling of the court upon the motion

of the defendant company to quash the subpoena duces tecum sued out by the plaintiff, requiring the defendant to produce certain books and papers. This assignment was waived in open court, and need not be considered.

The third assignment of error is that the trial court overruled the motion of plaintiff in error to restrain counsel for defendant in error from making certain statements to the jury highly prejudicial to the railroad company.

It appears that counsel for defendant in error, while making the closing argument before the jury, said in substance as follows: "That before the adoption of the new Constitution in this state there could be no recovery in cases of this character; that knowledge by an employe of the unsafe character of an overhead bridge had been held to be one of the assumed risks of the employment; that this rule of law had, however, been changed by the new Constitution; that it took the constitutional convention of this state to make a change in the law which prevented a recovery in this class of cases; and that constitutional provision was as follows: [Here counsel read the following constitutional provision, as embodied in instruction 'A' given by the court.] 'Knowledge by any such railroad employe injured, of the defective or unsafe character or condition of any appliances or structures, shall be no defense to an action for injury caused thereby.'"

We have held that matters arising in the conduct of a trial are largely in the discretion of and to be controlled by the trial judge. We have held, also, that it is the duty of the trial court to give all proper instructions to the jury for their guidance, and that the trial judge is justified in refusing to permit counsel to read law books to the jury, as it tends rather to confuse than to inform them. This line of decisions we approve; but we are of opinion that what occurred in this case does not run contrary to the rule which they establish. What counsel read to the jury, as appears from the exception which brings this matter before us, was embodied in an instruction given by the court. It was certainly proper for counsel to read the instruction to the jury, and urge them by all proper arguments to obey the instruction. It does not appear that counsel read from any book, but that he referred arguendo to the constitutional convention and the changes which it had made in the law. In this we do not find reversible error.

The next assignment of error is to the giving of two instructions asked for by the plaintiff, marked "A" and "B," and declining to give instructions 1, 4, and 8, asked for by the defendant in the court below.

Section 1294-k of the Code of 1904 provides that "knowledge by any employe injured of the defective or unsafe character or condi-

tion of any machinery, ways, appliances, or structures of such corporation shall not of itself be a bar to recovery for any injury or death caused thereby."

Instruction A, in its first clause, is copied from the statute. It announces the rule which is to control the jury when they come to consider the case before them, and they are told that if the bridge in question was situated dangerously near the top of the tender and cars, and was thereby rendered unreasonably unsafe to the said Rowsey in the performance of his duties as brakeman, if they believe that Rowsey was attending to his accustomed duties with ordinary care and prudence, they must find for the plaintiff, notwithstanding they might believe from the evidence that he had knowledge of the unsafe character or condition of the bridge.

Now, it is negligence for a railroad company to construct, maintain, and operate a road under a bridge which is so low that its employes cannot perform their duties with reasonable safety while in the exercise of ordinary care. This proposition was stated by this court in *Haffner v. C. & O. Ry. Co.*, 96 Va. 523, 81 S. E. 899, where a brakeman was killed by striking a bridge 28½ inches above the cars; and the court said: "It is negligence for a railroad company to operate its road with such a bridge; but, while dangerous in character, its danger could be avoided." And, under the circumstances of that case, we held that the plaintiff could not recover.

In *N. & W. Ry. Co. v. Marpole*, 97 Va. 597, 34 S. E. 462, the court said: "The court's instruction No. 2 from its beginning down to and including the word 'recover' is substantially the same as defendant's instruction No. 1, refused, and propounded the settled law that, although it is negligence for a railway company to operate its road with an overhead bridge too low for its employes, whose duties are upon the tops of the cars, to pass when standing on the cars in the discharge of their duties, yet if an employe knows or ought to know the dangerous condition of the bridge, and fails to use ordinary care to protect himself in consequence of which he is injured, he is guilty of contributory negligence, and cannot recover for the injury."

It will be observed that the instruction under consideration has reference only to knowledge by an employe of the unsafe character of the bridge. It excludes the idea that there was any other circumstance which might tend to convict the plaintiff of contributory negligence, and thereby defeat his recovery, because the instruction is predicated upon the theory, and so states, that the employe was in the exercise of such care as a man of ordinary prudence would use at the time he sustained the injury which caused his death. The object, and the sole object, of the instruction, was to exclude from the consideration of the jury the doctrine of assumed risks. It is true, as this court

has held, that knowledge of the unsafe character of a structure, while alone not sufficient to establish contributory negligence, is a circumstance to be considered by the jury along with other facts tending to establish that defense. Thus in *N. & W. Ry. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489, the court, discussing the effect of the change in the law which is embodied in section 1294-k, above referred to, passed in conformity with the constitutional provision upon the subject, that, "while the right to make the defense of contributory negligence is not abrogated by the constitutional provision and the statute under consideration, the defense cannot rest alone upon the knowledge of an injured employe of the defective or unsafe character or condition of any machinery, ways, appliances, or structures which may have been instrumental in causing the injury for which he sues, but such knowledge is rightly to be considered by the jury along with all the evidence in the case in determining whether the employe injured used that caution required in the situation he was placed in when the injury was received. Before the adoption of the constitutional provision and the statute, knowledge by an employe of the defective or unsafe character or condition of any machinery, ways, or appliances or structures which were instrumental in causing the injury sued for, upon the doctrine of assumed risk based upon knowledge, actual or imputed, arising from the contract between the parties, the law implied that the servant assumed the risk of all danger of which he had knowledge, or by the use of proper diligence would have had knowledge, and therefore did not permit a recovery for an injury arising from defective machinery, etc., where the defect was known to him."

Instruction B deals with contributory negligence, and tells the jury that the law presumes that Rowsey was in the exercise of due care at the time he was injured, and that the burden of proving his contributory negligence was upon the defendant, unless such contributory negligence appears from the plaintiff's evidence; and if the jury believe that the bridge was dangerous and unsafe, as stated in instruction A, and that Rowsey knew this fact, the defense of contributory negligence cannot rest alone upon such knowledge, but such knowledge, if it existed, is rightly to be considered by the jury along with all the evidence in the case in determining whether Rowsey used due and proper care in the situation in which he was placed when the injury occurred.

Much of what we have said with reference to instruction A applies with equal force to instruction B, and the citation of the opinion of the court in *Cheatwood's Case* seems to be conclusive.

We are of opinion that there was no error in granting the two instructions asked for by defendant in error.

Plaintiff in error asked for eight instruc-



tions. The court gave all except Nos. 1, 4, and 8.

Instruction No. 1 tells the jury that "in this case the defendant company was not negligent in having a bridge over its railway too low to permit the safe passage of a person standing upon the top of one of its cars."

Even in those jurisdictions where the practice is for the court to direct a verdict we apprehend that, as applied to the facts of this case, such an instruction could not be approved. It takes from the consideration of the jury the only fact of negligence upon which the defendant in error relied, and that there was evidence tending to support the case stated in the declaration will appear when we come to consider the motion to set aside the verdict as being contrary to the evidence.

Instruction 4 seems to be in the teeth of the constitutional provision and of the statute, and of the cases considered in connection with instruction A, asked for by defendant in error. It tells the jury that if Rowsey knew, or ought to have known, that he could not pass in safety under the overhead bridge standing upon the box car or tender, but that, notwithstanding such knowledge, he subjected himself to the danger, he was guilty of such contributory negligence as will bar a recovery. The statute says that knowledge by an employé of the defective or unsafe character or condition of any appliance or structure shall not of itself be a bar to recovery for any injury or death caused thereby.

Instruction No. 8 presents, in substance, the same proposition. It states that, although the engineer gave a signal for the application of brakes before reaching Ivy station, that fact did not relieve Rowsey from the duty incumbent upon him to exercise ordinary care and prudence for his own safety; and if they further believe from the evidence that he knew, or ought to have known, of the proximity of the bridge and its dangerous character, and notwithstanding such knowledge went on top of the train just as he was approaching the bridge, he was guilty of contributory negligence.

We are of opinion that there was no error in the ruling of the court upon the instructions.

The remaining assignment of error is that the court overruled the motion of the defendant to set aside the verdict of the jury on the ground of misdirection, and because it was contrary to the law and the evidence.

G. W. Rowsey was a brakeman in the service of plaintiff in error. When he made application for employment with the railroad company, he signed a paper in which the following question, among others, was asked and answered:

"Do you know that bridges, including highway bridges and tunnels, on this line are too low to clear a man standing on a box car? A. Yes."

He went over the road with Turner, a freight conductor, in order that he might ac-

quaint himself with the road, and be instructed as to his duties as brakeman. A witness for the company says that he made at least three trips. "They have always made three or four, or as many as the conductor thought necessary. It was left with the conductor to say whether he was competent to fill the position of brakeman." In this case it seems that Rowsey made three trips back and forth—that is to say, six trips in all—and he was then considered competent to discharge the duties of brakeman and was employed as such. His application for employment is dated August 25, 1905, and his employment was from that date. The injury from which he died was received on the 24th of September, 1905. On that day he was acting as brakeman upon a freight train, moving in an easterly direction and approaching Ivy, a station upon the road some miles west of Charlottesville. As the train approached Ivy, Rowsey was seated upon the "fireman's seat box." The engineer, as they approached the bridge over the railroad, blew two or three short blasts of his whistle. One short blast is a signal for applying brakes, a succession of short blasts is the signal of danger, and indicates that there is some obstruction upon the track; but the signal for down brakes may be repeated, and often is repeated, the interval between the signals being so spaced, however, as to distinguish the repetition of the call for down brakes from the quick succession of short blasts above referred to. When the signal was given by the engineer, Rowsey got up and started back over the tender to apply brakes. When next seen after passing Ivy, there was blood upon his face. He was taken to Charlottesville, turned over to the hospital, and died in a short time. The cause of his death was a contused wound upon the back of his head, which seems to have fractured the skull, as appears from an examination of his body after death. Upon the sill of the bridge, to the west, there appeared a stain or smear, such as might have been made by the violent impact of the brakeman's head upon it.

The habit is to fill the tender with coal at Staunton, and upon an ordinary run the coal will have been so far removed from the tender by the time the train reaches Ivy as that it will slope from almost nothing at the front of the tender to the top of the tender at the rear.

The bridge over the railroad is something like 30 inches above the top of a freight car, and at the usual and proper distance from the bridge, as it is approached from the west, is an appliance consisting of cords attached to a beam across the track, intended to warn employés of the approach to a bridge. There is no evidence of any negligent act upon the part of defendant in error, except his knowledge of the condition of the road, as appears from his statement in his application for employment and such information as he may have acquired in passing over the road

while being instructed as to his duties as brakeman. This could not amount to more than bare knowledge of the existence of the overhead bridge.

From these facts we are of opinion that the jury were justified in concluding that the injury from which Rowsey died was caused by his head striking the overhead bridge. There is no other rational way of accounting for the injury. It is not a case in which we should apply the doctrine known as that of *res ipsa loquitur*, but one in which, taking into consideration all of the circumstances surrounding the occurrence, we find that the conclusion reached by the jury is supported by the evidence.

As was said in *Haffner v. C. & O. Ry. Co.* and in *N. & W. Ry. Co. v. Marpole*, already cited, it is negligence for a railroad company to operate its road with an overhead bridge too low for its employés to pass when standing on the cars in the discharge of their duties. Its negligence, as we have seen, was the proximate cause of the injury, and as knowledge by an employé of the unsafe character or condition of this structure no longer bars his recovery for an injury sustained by reason thereof, and as there is no evidence of any act of negligence on the part of the employé which can be considered along with his knowledge of the defect in order to impute to him contributory negligence, the judgment complained of must be affirmed.

Affirmed.

## LOUISVILLE & N. R. CO. v. INTERSTATE R. CO.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

### 1. CONSTITUTIONAL LAW — STATUTES — CONSTRUCTION IN FAVOR OF VALIDITY.

Where two constructions may be given a statute, one making it within the Legislature's power, and another not, it will be presumed that the Legislature intended to do that which it had the right to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

### 2. EMINENT DOMAIN—RAILROADS — CONNECTIONS—RIGHT TO COMPENSATION—"PRIVATE PROPERTY."

Code 1904, § 1294d, cl. 37, authorizes one railroad company to connect with another, and provides that the company making the connection must bear all expenses of operating the connection, etc., but does not require compensation to the company with which connection is made for the use of its property. Const. 1902, § 58 (Code 1904, p. cccxii), prohibits a law whereby private property is taken or damaged for public uses without just compensation. *Held*, that since a railway right of way is private property even to the public, except as to an interest and benefit in its uses, the land of a company with which connection is sought cannot be taken upon which to construct the connecting track for joint use against its consent without compensation; the Code provision being subordinate, and not repugnant, to the constitutional provision.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5577-5578; vol. 8, p. 7764.]

### 3. SAME.

Code 1887, § 1087 (Code 1904, § 1294b, cl. 4), reserving to the General Assembly the right to provide for connecting any work of internal improvement with any other such work, does not deprive a railway company, with which another company seeks to connect, of the right to compensation if its property is taken in making the connection.

### 4. SAME—EMINENT DOMAIN—COMPENSATION—CHARACTER.

No person or corporation can be compelled to take, as compensation for property taken, rights or interests, however valuable, in the taker's property or works, and no benefit, however great, resulting to the owner from the taking, can diminish the amount of compensation in money to which he is entitled; and hence a railway company, being entitled to compensation for property taken by another company in connection with it, is entitled to payment in money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 438.]

### 5. SAME—"TAKING."

To take from a railroad company the exclusive right to the use of its property, or any part thereof, and limit its use therein to a particular purpose, and give another railroad company an equal or joint right in the use of it for that purpose, is a "taking" within the meaning of Const. 1902, §§ 58, 159 (Code 1904, pp. cccxii, clviii).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6852-6860, 7813.]

Appeal from Circuit Court, Wise County.

Bill by the Louisville & Nashville Railroad Company against the Interstate Railroad Company. From a decree dismissing the bill, plaintiff appeals. Reversed, demurrer overruled, and cause remanded.

See 107 Va. 225, 57 S. E. 654.

C. T. Duncan and H. L. Stone, for appellant. Bullitt & Kelly, for appellee.

BUCHANAN, J. The Interstate Railroad Company, the appellee, in extending its line of road, desired to cross the track of the Louisville & Nashville Railroad Company, the appellant, and make connection with it at Appalachia. The two companies being unable to agree upon the place and method of crossing or of making the connection, the controversy was taken before the State Corporation Commission for settlement, under the provisions of clause 3, § 1294b, and clause 37, § 1294d, Code Va. 1904. That commission entered an order authorizing the appellee to make both the crossing and the connection and the places and manner in which they should be made.

The connecting track, as provided for by the order of the commission, will have to be constructed through the yard of the appellant, and will, as is alleged in its bill, take a strip of its land 321 feet in length, 35 feet wide at one end and 45 feet wide at the other. For the land thus authorized to be taken or used for the connecting track and for damages to the residue of its property the appellant claimed that it was entitled to compensation. This claim was denied by the appellee, and it was preparing to enter upon the lands of the appellant to construct

the connecting track when the appellant filed its bill to enjoin its construction until compensation had been made. Upon demurrer to the bill, the injunction was refused and the bill dismissed, upon the ground that the connection proposed, being for the joint use of both roads, was not a taking of private property for public use, and the appellant was therefore not entitled to compensation for the use of its land for that purpose. From that decree this appeal was granted.

Clause 37, § 1294d, Code Va. 1904, provides that where one railroad company wishes to connect with another, and they are unable to agree upon the point of connection, the State Corporation Commission may decide the question in dispute, and enter the proper order. It further provides that "such connection, if made, and all costs and expenses of the operation and maintenance of such connection, including signals and other things deemed necessary by the company with which said connection is made, for the proper operation and protection thereof, shall be borne and paid by the company making such connection"; but it contains no provision in terms as to the payment of compensation to the company with which the connection is made for land taken or damaged, if any, in making the connection. The absence of such a provision in the statute, it is argued, shows that the Legislature did not intend that such company should have compensation, especially in the light of the requirement of clause 3, § 1294b, Code Va. 1904, that, when one railroad company crosses the line of another, it shall make compensation for the damages done, if any, to that other by the crossing, to be ascertained according to the laws regulating the right of eminent domain.

If these were the only provisions of law upon the subject, that contention would clearly be correct. But if, as insisted by the appellant, such a construction would be in conflict with the Constitution, it ought not to be given, if the clause will bear any other reasonable construction not in conflict with the Constitution; for, where two constructions may be given a statute, one which is clearly within the legislative power, and the other not, the Legislature will be held to have intended to do that which it had the right to do, and not that which was beyond its powers. *Martin v. South Salem Land Co.*, 94 Va. 28, 36, 37, 26 S. E. 591. See, also, *Sutherland on Stat. Const.* §§ 287-291; 15 Cyc. 641, 642, and cases cited in notes 62 and 63.

Section 159 of the Constitution of 1902 (Code 1904, p. cclviii) declares that the "exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the General Assembly from taking the property and franchises of corporations and subjecting them to public use the same as the property of individuals. \* \* \*

Section 58 of the same instrument prohibits the enactment of "any law whereby

private property shall be taken or damaged for public uses without just compensation."

The order of the State Corporation Commission provides that the connecting track which it authorizes the appellee to construct shall be for the joint use of both roads. The effect of this is to give the appellee the same right in the use of the strip of land upon which the connecting track is constructed as the appellant itself has during the period of such joint user.

It is clear that to take from a railroad company the exclusive right to the use of its property, or any part thereof, and limit its use therein to a particular purpose and give another railroad company an equal or joint right in the use of it for that purpose, is a taking within the meaning of the Constitution.

Lewis in his work on Eminent Domain, § 267d, in discussing the joint use of tracks, says that questions as to such use "have arisen mainly with reference to street railways. A power to provide for such joint use is undoubtedly essential to the public good. It has been intimated that it may be done under the police power. But property cannot be taken from the owner and devoted to a public use under the police power. Some cases seem to refer the powers to provide for the joint use of tracks to the reserved power to repeal, alter, or amend charters of railroad companies. But power to alter, amend, or repeal a charter does not confer authority to deprive a corporation of its property or destroy vested rights. It is clear that the tracks and franchises of a street railroad company, as well as of any other railroad company, are property within the meaning of the Constitution. It follows that one company cannot be authorized to take the joint use of another's tracks, except by the exercise of the power of eminent domain. All the cases practically concede this by holding that compensation must be made."

A railroad company's right of way, as was by the Supreme Court of the United States in *Western Union Tel. Co. v. Penn. Railroad Co.*, 195 U. S. 540, 570, 25 Sup. Ct. 183, 49 L. Ed. 812, "is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without the guilt of trespass. It cannot be appropriated, in whole or in part, except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which that protection is given. It can only be taken by the exercise of the powers of eminent domain. \* \* \*

Section 1097 of the Code of 1887 (clause 4, § 1294b, Code Va. 1904) enacted prior to the incorporation of the appellant, reserving the right to the General Assembly to provide for connecting any work of internal improvement with any other such work at such point as it may see proper, does not, as is argued, deprive appellant of the right to compensa-

tion if its property is taken in making the connection.

"It is frequently provided," says Lewis on Em. Dom. § 268b, "in Constitutions and statutes that railroads shall have the right to intersect or connect with, to join or unite with, any other railroad. These provisions do not confer any right upon one railroad to use the tracks of another longitudinally, or to acquire the right of joint use."

If the right to form a connection does not confer upon the road seeking it any right to the use of the tracks of the road with which it connects, a fortiori, it would not confer the right to construct a connecting track upon the lands of the other for their joint use, without compensation. See R. & D. R. Co. v. D. & N., etc., R. Co., 104 N. C. 658, 10 S. E. 659; East St. L., etc., Ry. Co. v. Bellville, etc., Ry. Co., 159 Ill. 544, 42 N. E. 974.

We are of opinion, therefore, that under the Constitution the lands of the appellant cannot be taken upon which to construct the connecting track for joint use against its consent without compensation. And we are further of opinion that while clause 37, § 1294d, Code Va. 1904, does not provide for the payment of compensation, there is nothing in it which is repugnant to the Constitution, which requires compensation to be made when private property is taken for public uses, and that the statute should be construed in subordination to that constitutional requirement. See 15 Cyc. 641, 642, and cases cited in notes 62 and 63.

Being entitled to compensation for its lands taken or used in constructing the connecting track, the appellant was entitled to payment thereof in the manner prescribed by law; that is, in money. We know of no authority or power by which a person, whether individual or corporation, can be deprived of his property for a public use and be compelled to take as compensation therefor rights or interests, however valuable they may be, in the property or works of the person who caused his property to be so taken. No benefit, however great, which may result to the landowner from the taking, can diminish the amount of compensation in money to which he is entitled for the land taken. *Mitchell v. Thornton*, 21 Grat. 164, 178, 179.

The decree appealed from must be reversed and set aside, the demurrer to the bill overruled, and the cause remanded to the circuit court for further proceedings to be had not in conflict with the views expressed in this opinion.

Reversed.

HARVEY et al. v. HOFFMAN et al.  
(Supreme Court of Appeals of Virginia. Sept. 15, 1908.)

1. EJECTMENT—JUDGMENT FOR PLAINTIFF—RECOVERY OF POSSESSION.

Code 1904, § 662, as amended by Act Dec. 12, 1903 (Acts 1902-4, p. 693, c. 452), provides

that one may sue to recover possession of land, etc., though it be delinquent for taxes, sold to the commonwealth, and not redeemed, etc., except that no execution, etc., shall issue upon any judgment in such suit until the successful party shall have paid all delinquent taxes, etc. *Held*, the provision is designed to give the former owner or claimants under him the same right to sue to recover the land, etc., as if the land had not been sold to the commonwealth and to protect the state, etc., by not permitting plaintiffs in such actions to obtain the benefit of any judgment without paying delinquent taxes, but that it was not intended to apply to a plaintiff who was not the person in whose name land had been returned delinquent and sold or who did not claim under him, and hence successful plaintiffs in ejectment, who did not claim under the party in whose name the land was returned delinquent and sold to the commonwealth, were entitled to writs of possession and fieri facias, regardless of the statute.

2. STATUTES—RULE OF CONSTRUCTION.

Where a statute is fairly open to two constructions, it should be given that construction which will prevent absurdity, hardship, or injustice, and should be so construed as to bring it, if possible, within the authority of the Legislature.

3. TAXATION—PERSONS LIABLE.

An act requiring one claiming land returned delinquent and sold to the state for taxes in another's name to pay the taxes before being entitled to sue to recover possession of, or protect the land from injury by suit, would be beyond the Legislature's power.

Error to Circuit Court, Botetourt County.

Ejectment by Flora Hoffman and others against Mary E. Harvey and others. From a judgment refusing to quash writs of possession and fieri facias, defendants bring error. Affirmed.

C. M. Lunsford and Wm. R. Allen, for plaintiffs in error. Benj. Haden, for defendants in error.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court for Botetourt county overruling a motion to quash writs of possession and fieri facias issued upon a judgment rendered in an action of ejectment, in which the defendants in the motion to quash were plaintiffs and the plaintiffs were defendants.

The ground upon which the motion to quash was based was that the land recovered in the action of ejectment had at the time of the institution of that action been returned delinquent for the nonpayment of taxes and levies due thereon, sold therefor, and purchased in the name of the Auditor of Public Accounts for the benefit of the commonwealth and the county of Botetourt, and had since the institution of that action been repeatedly returned delinquent for taxes and levies, and again sold and purchased in the name of the said auditor for the benefit of the commonwealth and the said county; and as the said taxes and levies had never been paid or the land redeemed, no execution or other process could issue on said judgment under the provisions of section 662 of the Code as amended by act approved December 12, 1903. Acts 1902-3-4, p. 693, c. 452; Code Va. 1904, § 662.

Where land had been purchased in the name of the Auditor of Public Accounts, under the authority of section 662 of the Code of 1887 (Code 1904, p. 324), it was decided by this court that the only right which the "former owner"—that is the owner in whose name the land had been returned delinquent—(Dooley v. Christian, 96 Va. 534, 32 S. E. 54) and those claiming under him had in the land was the right of redemption (Parsons v. Newman, 99 Va. 298, 38 S. E. 186; Glenn v. Brown, 99 Va. 322, 38 S. E. 189; Baker v. Buckner, 99 Va. 368, 38 S. E. 280).

Section 662, as amended, among other things contains this provision: "Provided, however, that any person claiming to be entitled to such real estate, if the same had not been delinquent for taxes, or sold therefor, may bring any action or actions, or suit or suits, either at law or in equity, to recover the possession thereof, try the title thereto, or to recover damages for any injury to the same, or to prevent injury to the same, although such real estate may have heretofore been, or may hereafter be, delinquent for taxes, or purchased by the treasurer in the name of the Auditor of Public Accounts, for the nonpayment of taxes, and not redeemed, and the judgment or decree in any such action or suit shall only affect the rights and title of the parties thereto, and shall in no wise affect the rights of the commonwealth or of any city or county therein or thereto; provided, however, that no execution, or other process or order, shall issue upon any judgment or decree rendered in any such action or suit, until the party in whose favor such judgment or decree is rendered shall have paid all delinquent and other taxes and levies, with the interest and other charges due upon said real estate, to the state, and to the city, town, or county, or district, wherein the same is located."

The object of that amendment was to clothe the former owner and those claiming under him with the same right to bring actions at law or suits in equity to recover the possession of the land, try the title thereto, or to recover damages for its injury, or to prevent injury to the same, as such persons would have had if the land had not been sold and purchased by the state for the nonpayment of the taxes and levies thereon, and to that extent to change the law as declared in the case of Parsons v. Newman and the other cases cited above, but at the same time to protect the commonwealth and the subordinate divisions thereof by not permitting the plaintiffs in such actions or suits to obtain the benefit of any judgment or decree which might be rendered therein in their favor until they had complied with the terms of the statute by making the payments it required.

It could not have been intended by the General Assembly that the provisions of the statute, as amended, should apply to a plaintiff in an action at law or a suit in equity,

who was not the person in whose name the land had been returned delinquent and sold, or who did not claim under him. The language of the act does not authorize, much less require, such a construction, for it applies in terms to "persons claiming to be entitled to such real estate, if the same had not been delinquent for taxes, or sold therefor." Persons other than he in whose name it was returned delinquent and sold, and those claiming under him, were under no obligation to pay the taxes and levies for the nonpayment of which it was sold, and had no right to redeem it. Code Va. 1904, § 664; Dooley v. Christian, 96 Va. 536, 537, 32 S. E. 54. Such persons could receive no benefit from the provisions under consideration, and ought not, in asserting their right to or interest in the land, to be construed to be within its provisions, even if the language would justify such a construction, unless no other reasonable construction could be placed upon it; for, where a statute is fairly open to two constructions, it should be given that construction which will prevent absurdity, hardship, or injustice, and should be so construed as to bring it, if possible, within the authority of the Legislature. Sutherland on Stat. Constr. § 324; *Im. Soc. v. Commonwealth*, 103 Va. 46, 48 S. E. 509, and authorities cited; *L. & N. R. Co. v. Interstate R. Co.*, 107 Va. 225, 57 S. E. 654, 62 S. E. 369.

To hold that the Legislature intended that that section should apply to persons other than the claimant of the land in whose name it had been returned delinquent and sold, and those claiming under him, would not only result in great hardship and injustice, but would give it an effect not within the power of the Legislature.

It is well known that under the loose system prevailing in this state for a long time, by which public lands were disposed of, two grants were frequently issued, sometimes more, for the same land. If the junior grantee or those claiming under him had permitted the land to be returned delinquent for the nonpayment of the taxes thereon, sold therefor and purchased in the name of the auditor for the benefit of the state, neither the senior grantee nor those claiming under him, under the construction contended for by the plaintiffs in error, could recover possession of the land by action from the junior grantee or those claiming under him, unless they first paid all the taxes and levies assessed against it, and for which it had been returned delinquent and sold, although the senior grantee or those claiming under him may have had the land properly assessed for taxation and regularly paid the taxes and levies thereon. Neither could the claimants of land, who had a perfect title to it, recover possession of it from a squatter or other trespasser, or recover damages for injuries done it, or protect it from injury, by action or suit, if another asserting title to it had caused the land to be assessed in his name for taxation

and afterwards permitted it to be returned delinquent and sold for the nonpayment of the taxes and levies thereon, until the former claimant had paid such taxes and levies.

To impose such a burden upon a litigant as a condition precedent to his right to recover possession of or protect his land from injury by action or suit would not only be absurd and unjust, but beyond the power of the Legislature. See *Cooley on Taxation* (3d Ed.) pp. 1056-1063.

We are of opinion that section 662 of the Code, as amended, applies to and embraces only the person in whose name the land so sold and purchased by the commonwealth was assessed, returned delinquent and sold, and those who claim under him. As the plaintiffs in the action of ejectment in which the judgment was rendered upon which the writs sought to be quashed were issued do not claim under the party in whose name the land was returned delinquent, sold, and purchased by the commonwealth, they were entitled to their writs of possession and fieri facias, and the circuit court did not err in overruling the motion to quash and dismissing the same.

The judgment complained of must be affirmed.

Affirmed.

#### O'DONNELL v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 15, 1908.)

##### 1. CRIMINAL LAW — PRESUMPTION OF INNOCENCE.

One charged with crime is presumed to be innocent until his guilt is established by the evidence beyond every reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 731.]

##### 2. INTOXICATING LIQUORS — SALES TO PERSONS "INTOXICATED."

The word "intoxicated" in an indictment charging a violation of Acts 1908, p. 284, c. 189, § 19, providing that no person shall knowingly sell intoxicating liquor to any intoxicated person, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 177.

For other definitions, see Words and Phrases, vol. 4, pp. 3734-3736.]

##### 3. SAME—ILLEGAL SALES—PERSONS LIABLE—"KNOWINGLY SELL."

Under Acts 1908, p. 284, c. 189, § 19, providing that "no person \* \* \* shall knowingly sell [ardent spirits] to any intoxicated person," and section 27, p. 286 declaring that any person violating any of the provisions of the act shall be guilty of a misdemeanor, a licensed barkeeper is criminally liable for a sale of liquor to an intoxicated person made in the conduct of the business by the keeper's son employed in the barroom and intrusted with the conduct of the same in the absence of the barkeeper, though the barkeeper was at the time of the sale absent from the place of business; the term "knowingly sell" being referable to the condition of the per-

son to whom the liquor is sold, and not to the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 192.]

##### 4. SAME.

The rule that a principal is bound for the acts of his agent done not only without his authority, but in violation of his instructions, in the sale of ardent spirits, is based on the postulate that a man engaging in this business as a licensee of the state engages in it at his peril, and must see to it that the requirements of the law are complied with; and is an exception to the general rule that the doctrine of respondeat superior does not apply to criminal cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 189-192.]

##### 5. SAME—INTENTION — ELEMENT OF OFFENSE.

Intention is not necessary to the offense of an illegal sale of intoxicating liquors, and such a sale, whether made by the principal, or by his clerk, is all that is necessary to be proved to make out the offense, provided that the sale made by the clerk is made in the conduct of the business with which he is charged by the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 189-192.]

Error to Circuit Court, Rockingham County.

Daniel O'Donnell was convicted of selling liquor to an intoxicated person, and he brings error. Affirmed.

The following are the instructions of the court:

"(1) The jury are instructed that the defendant is presumed to be innocent until and unless his guilt is established by the evidence beyond every reasonable doubt.

"(2) The court instructs the jury that the word 'intoxicated,' as used in the indictment, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct.

"(3) The jury are instructed that even though they may believe from the evidence that the defendant, O'Donnell, did on the 26th day of May, 1908, sell intoxicating liquor to J. N. Sherrard, and that the said Sherrard was at the time of such sale in an intoxicated condition, that yet they must find the defendant not guilty, unless they further believe from the evidence that at the time of such sale the defendant, or his salesman who sold the liquor, knew that said Sherrard was intoxicated.

"(4) The court instructs the jury that if they believe from the evidence that J. L. Sherrard purchased half a pint of whisky at the barroom of Daniel O'Donnell on the 26th day of May, 1908, whether said purchase was made from said O'Donnell or some person employed by him in his said barroom, and that at the time of the said sale the said Sherrard was intoxicated and that said intoxication of said Sherrard at that time was perfectly apparent, so that the seller must have observed the fact that he was intoxicated, they shall find the accused guilty, and shall ascertain his punishment,

which shall be a fine of not less than \$50 nor more than \$100."

D. O. Dechert, for plaintiff in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

CARDWELL, J. Section 19 of the act of Assembly approved March 12, 1908 (Acts 1908, p. 284, c. 189), commonly known as the "Byrd Liquor Law," provides, inter alia, that "no person \* \* \* shall knowingly sell (ardent spirits) to any intoxicated person." And in section 27 of the act it is provided that "any person violating any of the provisions of \* \* \* this act shall be deemed guilty of a misdemeanor \* \* \* and shall be fined not less than fifty dollars nor more than one hundred dollars \* \* \* and shall be required to give bond for twelve months with approved security in the penalty of five hundred dollars, and conditioned that he will not violate the provisions of this act."

Plaintiff in error, Daniel O'Donnell, having a license to sell liquor by retail at his barroom in the town of Harrisonburg, in the county of Rockingham, was indicted in the circuit court of that county for a violation of the above statute, in that he did on the 26th day of May, 1908, sell to one J. L. Sherrard one-half pint of whisky, knowing the said Sherrard to be intoxicated. The case was tried on the plea of not guilty, the defendant found guilty; and his punishment ascertained by the jury to be a fine of \$50, and the court gave judgment against him for the said fine and costs of the prosecution, and further required the defendant to execute bond with security in the penalty of \$500, conditioned for his observance of the provisions of the act above mentioned.

We are asked to review and reverse this judgment on the ground that the verdict of the jury was contrary to the law and the evidence, and because the trial court erred in giving and refusing instructions.

That the sale of liquor was made as charged in the indictment is proved by the evidence beyond all question. In fact, the defendant, when testifying in his own behalf, practically admitted that fact; and we pass over the question whether or not Sherrard at the time of the sale to him was intoxicated, and the fact apparent to any one having occasion to observe his condition, with the remark only that the evidence not only tended to prove that such was his condition, but proved it beyond all reasonable doubt. The sole question, therefore, for our consideration is whether or not the jury were misled or misled by the instructions of the court.

Four instructions were given on behalf of the commonwealth, which will be set out with the official report of this opinion. Practically the only objection made to these instructions is that the court told the jury that if they believed from the evidence that J. L. Sherrard purchased half a pint of whisky at

the bar of Daniel O'Donnell on the 26th day of May, 1908, whether said purchase was made from said O'Donnell or some person employed by him in his said barroom, and at the time of said sale the said Sherrard was intoxicated, and that said intoxication of said Sherrard at the time was perfectly apparent so that the seller must have observed the fact that he was intoxicated, they shall find the accused guilty, etc. The instructions asked for by the defendant, which the court refused, sought to have the jury told that the statute in a case of sale of ardent spirits such as is charged in the indictment contemplates actual knowledge on the part of the accused of the purchaser's condition. In other words, it was the purpose of the defendant to have the jury instructed that if they believed from the evidence that the sale of liquor was made to Sherrard, not by the defendant in person, but by his agent in the absence of the defendant, and without his knowledge, they could not find a verdict of guilty against him.

The sale in question was made, as the evidence shows, by the son of the defendant, who was employed by the latter in his barroom and intrusted with the conduct of the same in the absence of the defendant; and the evidence also shows that the defendant at the time of the sale to Sherrard was, in fact, absent from his place of business.

Much stress is laid by counsel for the defendant in the argument of the case here upon the fact that the language of the statute is that no person shall knowingly sell to an intoxicated person, and he argues that, if the defendant did not know himself that Sherrard was intoxicated when the sale of the whisky was made by his clerk, there could be no conviction in this case.

Clearly, as it appears to us, the term "knowingly sell" is referable to the condition of the person to whom the liquor is sold, and not to the sale; for manifestly, if that interpretation of the language were adopted, the whole purpose of the statute would be defeated, as the penalty for making the prohibited sale could be easily avoided. It would be necessary only, under that interpretation of the statute, for a person engaged in the business of selling ardent spirits to absent himself from his place of business and leave his clerks free to make sales to any and all persons, regardless of their condition or age. It is true that the person who actually makes the sale is liable to prosecution under the statute, as well as the proprietor of the place of business where the prohibited sale is made; but this does not relieve the proprietor of responsibility for the illegal sale.

There is unquestionably a decided conflict in the cases with reference to the criminal and penal liability of a principal or master for violation of liquor laws by an agent or servant; but this conflict in a large measure grows out of the differences to be found in the

various statutes of the states in which the cases on this subject were adjudicated.

To the case of *Williams v. Hendricks*, 115 Ala. 277, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32, there is a note citing a large number of these cases, some of which are entirely irreconcilable in principle with others of them; but, as stated, this conflict is due to the phraseology of the various statutes of the character of the one which we have under consideration.

In *Carroll v. State*, 63 Md. 551, 3 Atl. 29, it was held that the principal is bound by the act of his agent in selling liquor to a minor in violation of the law, if the agent is pursuing the ordinary business entrusted to him by such principal, on the ground that intention is not an essential element of the offense, but that the offense is constituted by the act of selling, whether done by the principal or by his agent, and that this is true, even though the agent had violated the instructions of his principal in making such sale.

In *State v. Kittelle*, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, it was held that "the proprietor of a barroom is criminally liable for the unlawful sale of intoxicating liquor to a minor by his clerk, although it is made in his absence, without his knowledge, and in violation of his instructions." Under the statute involved in that case, knowledge of the infancy of the person to whom the liquor was sold was an essential element of the crime, and the court held necessarily that the agent's knowledge should be imputed to the principal; the opinion saying that the doctrine that the agent's knowledge is the knowledge of the principal applies on a sale of intoxicating liquors to a minor by a clerk, to the statutory presumption of knowledge as to the age of the purchaser. True, the language of that statute was that the dealer in intoxicating liquors should not sell directly or indirectly to any unmarried minor; but, upon reading the opinion of the court, it is clear that the court considered that the principles controlling in such a case would make the principal liable irrespective of these words.

The same view was taken in *Zeigler v. Commonwealth* (Pa.) 14 Atl. 237, cited in the note to *Williams v. Hendricks*, supra, which was a prosecution for willfully furnishing liquor to persons of known intemperate habits, in which it was alleged that the liquor was furnished by a clerk without authority. The decision in that case was based upon the principle that in misdemeanors there are no accessories, but all are implicated as principals, and that the question of agency had nothing to do with the case.

In *State v. Denoon*, 81 W. Va. 122, 5 S. E. 315, a druggist was held to be liable and was fined for a sale by his clerk, without his knowledge, and contrary to his instructions; the prosecution in that case being under a statute providing that "no person without a state license therefor shall \* \* \* sell, offer

or expose for sale spirituous liquors, wines, porter, ale or beer, or any drink of like nature"; and there, as in the case before us, it was contended that, as the sale was shown to have been made, not by the accused, but by his clerk, without his knowledge and contrary to his directions, he was wholly innocent of any wrong intent or purpose to violate the law, and therefore innocent of any offense. The court in an opinion by Snyder, J., carefully considered the question, and reached the conclusion above mentioned. In the opinion it is said: "The authorities are numerous to the effect that, when statutes prohibit or command an act to be done without qualification, in such cases ignorance or mistake of fact will not excuse their violation. This is peculiarly the case in regard to statutes respecting revenue and police matters, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his peril. Many of the cases sustaining this view will be found annotated in a note to *Farrell v. State*, 32 Ohio St. 453, 30 Am. Rep. 617, and the result there deduced from the cases is stated thus: 'First. When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense. Second. When a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defense.' \* \* \* I deem it unnecessary to express any opinion as to the weight of authority on this subject in other states, because I consider the law of the case at bar plain under our statutes and the former rulings of this court." Further on the opinion, quoting from *State v. Cain*, 9 W. Va. 569, says: "'As to whether the seller intended to violate the law or not at the time of selling to the minor is, under the authorities cited, immaterial, except in mitigation of the punishment.' \* \* \* And in reference to offenses of a different character and the decisions of other states this further quotation is made: "'It is true that with us in felonies, and most cases of misdemeanor under the common law, intent is regarded as being one of the chief elements necessary to constitute the crime or offense, but under this statute the commission of the act prohibited constitutes the offense. This is manifest, I think, from the legislation to which I have referred. I am aware that the highest courts of several of the states have differed in the construction of similar legislation. Some of them have taken the view I have presented, and others a different view. But I apprehend, if the courts of the states adopting a different view from that I have taken had considered their legislation such as required them to construe the legislation as remedial and not penal, they would have arrived at the same conclusion I have felt myself bound to adopt in this case.'"



In the case from which we have just made quotations, as in the case at bar, it was not questioned that the liquor sold was the property of the defendant, that the clerk who sold it was the agent of the defendant, and as such authorized to sell the liquor according to law; nor is it pretended that the defendant did not get the money paid for the liquor. It is true that the statute under consideration in *State v. Denoon*, supra, contained the language "by one person for another," but nevertheless the opinion says that "by the positive command of the statute both the clerk and the defendant are guilty of the offense, and they may be indicted and punished either jointly or separately. It is wholly immaterial, under the positive prohibition and policy of the statute, what the instructions were from the defendant to his clerk, or that the sale was in violation of his instructions. Neither the motives nor the intent of the defendant, nor his purpose to obey the law, can relieve him, when it is shown that a sale in violation of the statute was actually and purposely made either by himself or by another for him. The clerk knew he was selling the liquor, and the proof shows that he was selling it as the agent of and for the defendant. If the purpose had been to sell a wholly different thing from that which was in fact sold, an article the sale of which was not prohibited, then the motive and intent might be material. \* \* \*

A number of authorities are cited in that case for the view taken by the court, among which are 1 *Whart. Crim. Law*, § 247; *Commonwealth v. Kelly*, 140 Mass. 441, 5 N. E. 834; *Dudley v. Sautbine*, 49 Iowa, 630, 31 Am. Rep. 165; *People v. Blake*, 52 Mich. 566, 18 N. W. 560. See, also, *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; *Noecker v. People*, 91 Ill. 494.

We quite agree with the view taken by the learned Attorney General in his argument of this case, that the cases which hold that a principal is bound for the acts of his agent, done not only without his authority, but in violation of his instructions in the making of the sale of ardent spirits, constitute an exception to the general rule that the doctrine of respondeat superior does not apply to criminal cases, and that the doctrine is based upon the postulate that a man who engages in this business as a licensee of the state engages in it at his peril, must see to it that the requirements of the law are rigidly complied with, and is responsible for any failure of any agent of his to comply with those requirements.

If this be not the correct doctrine, then the statute we have now under review would prove a dead letter, and the evil—namely, the sale of ardent spirits to persons already intoxicated—would not, and could not, be removed. Any other view of this remedial statute would leave the way open for the vendors of ardent spirits to make the sale prohibited without fear of punishment.

Moreover, if a barkeeper could shield himself behind the claim that he was ignorant of the illegal acts of his clerk or agent in the sale of ardent spirits, violations of the prohibited acts by his tacit connivance would, without doubt, be increased rather than diminished, and thus render farcical all efforts to suppress the evil at which the statute is aimed.

We fully concur in the view taken in the cases and by the text-writers cited above that intention is not a necessary element in the offense of an illegal sale of intoxicating liquors, and that such a sale, whether made by the principal or by his clerk or agent, is all that is necessary to be proved in order to make out the offense, provided only that the sale be made by the clerk or agent in the conduct of the business with which he was charged by the principal, as proved in this case.

The statute is clearly broad enough to hold the master responsible for all acts of his employé, whether authorized or permitted by him or not, under the exception to the general rule as stated in 23 Cyc. 207, relied on by the defendant.

We are of opinion, therefore, that the judgment of the circuit court is right; and it is affirmed.

Affirmed.

#### BURTON et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 15, 1908.)

#### 1. HOMICIDE—MOTIVE—EVIDENCE — ADMISSIBILITY.

Motive may be shown by circumstances, in the absence of an express declaration showing it. [Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 320-331.]

#### 2. SAME—SUFFICIENCY.

In a murder prosecution, where the shots were fired in the nighttime at a cab shortly after it had passed defendant's store, evidence that defendants had quarreled with a constable who levied execution on the property of one of them to satisfy a debt of the cab owner's was inadequate by itself to show motive, on the theory that defendants laid in wait for the cab to fire into it, thinking the owner was driving it, because of their grudge against him for levying on their property, where there was no evidence that defendants fired the shots, except that one of them secured a gun earlier in the evening, but which the evidence showed might have been secured for a different purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 481.]

#### 3. CRIMINAL LAW — EVIDENCE — PRESUMPTIONS.

While a motion to set aside a criminal verdict as being contrary to the evidence is heard as upon a demurrer to the evidence, the rule does not permit the jury to guess at the verdict, and, where a fact is susceptible of an interpretation consistent with the innocence of accused they cannot arbitrarily adopt that interpretation which incriminates him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 731.]

#### 4. HOMICIDE — EVIDENCE — SUFFICIENCY — VOLUNTARY MANSLAUGHTER.

Evidence held insufficient to sustain a verdict of voluntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 540.]

#### 5. SAME—TRIAL—QUESTION FOR JURY—GRADE OF OFFENSE.

Under Code 1904, § 4040, providing that, if a person indicted for a felony be acquitted of a part and convicted of a part of the offense, he shall be sentenced for the part of which he is convicted, and section 4041, providing, if a person indicted for murder be found guilty, the jury shall fix in their verdict whether he is guilty of murder in the first or second degree, a certain discretion is allowed in applying the statutes, which should be construed together, and the indictment may be for murder in the first degree and the evidence prove the offense charged and no other, and yet the jury may find accused guilty of a less offense.

#### 6. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES—CONSTRUCTION OF STATUTES.

In determining whether a conviction for murder in the second degree acquitted accused of murder in the first degree, which crime, if any, the evidence tended to show, Code 1904, § 4040, providing if a person indicted for felony be convicted of a part, and acquitted of a part, of the offense, he shall be sentenced for that part of which he was convicted, section 4041, permitting the jury to fix in their verdict whether accused is guilty of murder in the first or second degree, and section 3862, making murder by lying in wait first degree murder, and the Code provisions in pari materia, should be construed together.

#### 7. SAME—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In a murder prosecution, where the evidence did not show that defendants fired the fatal shots, or advised and assisted in so doing, an instruction that, though defendants did not actually fire the shots if they aided in so doing, they were guilty, was properly refused.

Error to Corporation Court of City of Norfolk.

Samuel L. Burton and Sylvanus Conquest were jointly convicted of voluntary manslaughter, and bring error. Judgment reversed, verdict set aside, and cause remanded.

See 60 S. E. 55.

Thos. H. Willcox and Jeffries, Wolcott & Wolcott, for plaintiffs in error. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

KEITH, P. Burton and Conquest were jointly indicted in the circuit court of Accomac county for the murder of John Topping. They were found guilty and sentenced to confinement in the penitentiary for 10 years. To that judgment a writ of error was awarded by this court. The judgment was reversed, and the case was removed to the corporation court of the city of Norfolk, where they were again tried, and a verdict was rendered against them of voluntary manslaughter, and fixing their punishment at one year in the penitentiary. To the judgment upon this verdict a writ of error was awarded by this court.

The first error assigned is set forth in bills of exceptions Nos. 1 and 2, and is to the ad-

mission of the evidence of John M. Fosque and Tank Kellam by the trial court.

Fosque, it appears, had secured a judgment against Sylvanus Conquest for a small amount of money. Tank Kellam, in whose hands execution upon the judgment had been placed, levied the same upon a horse owned by Conquest. The horse was found in the possession of Burton. A controversy arose between the constable, Kellam, and Conquest, and Burton, it is claimed, behaved himself in an offensive manner towards the constable in the discharge of his duty. Burton subsequently paid the debt, and later in the day a warrant charging Conquest with resisting the constable was tried and a fine imposed upon him of \$50. During the progress of this trial Burton, who was a witness, was directed to leave the witness chair, but did not do so as quickly as in the opinion of the constable he should have done, and the constable thereupon jerked the chair from under him.

This evidence was introduced by the commonwealth, in order to show that the prisoners had a grudge against Fosque and Kellam, and as constituting a motive for their subsequent conduct, which it is claimed resulted in the death of John Topping.

The circumstances attending the shooting of Topping are as follows: A hack containing three or four persons left the hotel in the town of Onancock, in the county of Accomac, about a quarter before 9 o'clock on the evening of the 10th of August, 1907. The hack was driven by one Braden Short. On his left was Dr. M. J. Hunt, and upon the rear seat were a salesman (whose name is not given) and a Mr. Nelson. When the hack had passed Burton's store, which was on the left of the road, looking in the direction in which the hack was going, the witness Hunt says that he saw an object which he at first thought was a hog, but it at once stood up and showed that it was a man, who called out, "Blaze away!" and thereupon a shot was fired which he believes was fired from a gun, and a second shot, which he also thought came from a gun, and then a number of shots, perhaps as many as 20 or 25, which he took to be pistol shots, were fired in very rapid succession, and several of these bullets struck different parts of the hack; that upon the firing of the first shot the man who had given the order to fire cried out. The hackman, Braden Short, crouched down so as to avoid the fusillade, and the horses moved slowly. This witness was upon the left side of the driver. The curtains upon that side were open, so that he could see quite distinctly all that occurred. He says that there was a dim light in Burton's store, and that the firing took place after they had passed Burton's store about 25 or 30 feet.

It turned out that John Topping received a gunshot wound in the shoulder, from which he died on the 22d day of August.

The hack belonged to John M. Fosque, to

whom Conquest owed the debt, and whose testimony with reference to the sale of a horse for the payment of that debt was the subject of the first bill of exceptions. It appears that Fosque sometimes drove that hack. Sometimes it was driven by others. On the night in question it was driven by Braden Short.

The theory of the prosecution is that, having a grudge against Fosque on account of what took place between them and Fosque and the constable, Kellam, the petitioners armed themselves, formed an ambushade along with other confederates, and fired the shots at the hack, that Topping had been stationed by them as a lookout to warn them of the approach of the hack, and in that way received the wound from which he died.

Burton was a merchant in the town of Onancock. Conquest had been employed in his store. There were in Burton's store upon the night in question and just before the shooting two other colored men in the employment of Burton. A witness for the commonwealth, Frank Johnson, says that a short time before 9 o'clock he was at Burton's store, and that Burton sent him to the house of Spencer Bailey to get a gun belonging to Jim Warren, and that he got the gun and gave it to Burton.

This evidence constitutes the case made by the commonwealth.

On behalf of the prisoners, it was shown that Burton some time before the shooting received a message from a respectable young gentleman, Mr. J. C. Westcott, that he had better leave town, owing to some trouble that had arisen between the white and colored people earlier in the evening, which had resulted in the killing of a citizen of Onancock by a negro named Uzzle, and as a result of which a very strong feeling had been aroused among the people of Onancock. Conquest received a like message. In consequence of this Burton directed his store to be closed, and according to their testimony, he and Conquest and the other two men who were employed in the store went off, having first closed the store and turned down the lights. Burton first went to the house at which he was in the habit of taking his meals, kept by a colored woman named Vene Ames, and stayed there a short time, but finally went across the street to a piece of woods in the rear of Spencer Bailey's restaurant, where he and Conquest concealed themselves.

Motive, in the absence of an express declaration, may be shown by circumstances; and the occurrences which took place in connection with the effort on the part of the constable to collect a debt due to Fosque, and the conduct of Conquest and Burton on that occasion may have been a circumstance which, in connection with other circumstances, would have been sufficient to establish motive; but taken by itself (and it stands alone upon that subject in this record) it was wholly inadequate to warrant a jury in inferring that

plaintiffs in error harbored a grudge against Fosque which would lead them to endeavor to take his life. Of course, if the evidence had been plain that the plaintiffs in error were guilty of the offense charged, very slight proof of motive would be sufficient; but we are not here looking for a motive as actuating the commission of a crime, the perpetrator of which is known, but we are here considering motive as tending to disclose the active agent in a crime whose perpetrator is unknown, and as shedding light upon circumstances otherwise obscure.

There is but one fact of an incriminating nature shown in the evidence against Burton and Conquest, and that is the evidence of the witness Johnson that Burton a short time before the shooting sent him to the house of Spencer Bailey to procure a gun, and that a short time before the shooting Burton and Conquest were near the spot where it occurred. It is difficult to understand how the jury could have attached the slightest credit to the testimony of Johnson. He was shown to have made the most contradictory statements, to have been utterly regardless of the sanction of an oath, and to have been ignorant of any moral distinction between truth and falsehood. But, if it be conceded that his credibility was a matter for the jury, and that its verdict had given credit to this witness, it is wholly insufficient to sustain the verdict.

Suppose Burton did send him for a gun. Is that evidence that he meant to lie in wait and make an unprovoked attack upon the stage upon the chance of killing Fosque? Is it not more rational to suppose that, if he sent for the gun, he did it because of the message which he had received that he himself was to be the object of an attack, and that he armed himself for self-protection? Is it possible that a man, acting upon a previous grudge, having gathered his confederates about him, and intending to form an ambushade to kill his enemy, should wait until the very moment of action before providing himself with any weapon of offense?

The evidence is that Fosque owned this hack. It carried passengers from the hotel and other parts of the town to the railroad station. It was driven sometimes by Fosque and sometimes by colored men. On the night in question it was driven by Braden Short. Burton and Conquest and their confederates must have known that it was a matter of chance whether the hack on that occasion would be driven by Fosque, whom they wished to kill according to the theory of the prosecution, or by Braden Short, one of their own race, against whom they entertained no grudge. Surely they would have made inquiry upon that subject, and informed themselves as to whether or not a friend or an enemy would be the victim.

The theory that Topping was one of the confederates, and that his part in the per-

formance was to give warning of the approach of the hack, is equally improbable, not to say preposterous. The hack, be it remembered, was coming from the direction of the hotel, and passed Burton's store on its way to the depot. The firing took place about 25 or 30 feet after the hack had passed Burton's store, and the man who gave the order to fire, according to the witness Hunt, stood about 15 feet further on in the direction of the depot; so that the order to fire was given by a man at a point where the hack had passed Burton's store 35 or 40 feet. Hunt says that this man who gave the order to fire was the man who was shot. Now, one would suppose that a lookout would have been stationed in the direction from which the person or thing expected was to come; that the lookout would have been placed at a point upon the street before the hack reached Burton's store where the ambuscade was placed, and not at a point beyond it, where those who were to be informed would be advised of its approach before the lookout became aware of it. If Topping was placed upon the street as a lookout, then he, of course, was advised as to the point at which Burton, Conquest, and their confederates were concealed; and yet it is gravely argued that he would place himself between the ambush and the object of the attack, and himself give the order to fire, the result of which was a volley in which he received a mortal wound.

In order to justify a conviction, juries are told that every fact necessary to a verdict of guilty must be proved beyond a reasonable doubt; and that, if there be a reasonable doubt as to any fact, they shall acquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused.

Now, it is true that, after the jury have rendered their verdict and a court is called upon to set it aside as being contrary to the evidence, the motion is heard, under our statute, as upon a demurrer to evidence, and it becomes the duty of the court to consider whether or not the evidence is sufficient to sustain the verdict. But the rule does not leave the jury at liberty to guess, and, where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him.

The evidence in this case, considered in the light of these plain and unquestioned principles of criminal law, is wholly insufficient in our judgment to sustain the verdict.

Upon behalf of the plaintiffs in error, it is claimed that the prisoners ought to be discharged; that it appears by all of the evidence that, if they were guilty of any offense, it was that of murder by lying in wait; and that the verdict of murder in the second degree rendered by the jury upon the trial in

the county of Accomac acquitted them of murder in the first degree, the only offense of which they could with any propriety have been found guilty under the evidence.

The indictment in this case was in the usual form of an indictment for murder, and by section 4040 of the Code of 1904 it is provided that, "if a person indicted of a felony be by the jury acquitted of a part and convicted of a part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same shall be substantially charged in the indictment, whether it be felony or misdemeanor"; and by section 4041 of the Code of 1904 it is provided that, "if a person indicted for murder be found guilty by the jury, they shall in their verdict fix whether he is guilty of murder in the first or second degree."

The various sections of the Code applicable to this subject, and which are, as the phrase is, *in pari materia*, are to be read together. It is true that our statute (section 3862, Code Va. 1904) which defines murder says, among other things, that "murder by lying in wait" shall be murder in the first degree. But this is to be read along with the power conferred upon the jury by the sections just quoted. Our jurisprudence in this and in other respects may be amenable to criticism of schoolmen and logicians, but, subjected to the test of actual experience, it has appeared in practice to be well that the law, after framing definitions and formulating rules of conduct, should allow to courts and juries, in their application and enforcement, a certain latitude and discretion. And so it comes to pass that a man may be indicted for murder of the first degree by the various means embraced in the statute, the evidence adduced may tend to the proof of the offense named in the indictment and none other, and yet the jury, acting under this discretion with which they have been clothed by the law, may find the offender guilty of a less offense. And it is well in practice that it should be so, else, owing to the tenderness of juries and their reluctance to impose the highest penalty, many crimes would go wholly unpunished, and thus the rigor of the law would tend rather to the promotion than to the prevention of crime.

At the request of the commonwealth, the court gave, among others, the instruction marked in the record "E," which is as follows: "The court instructs the jury that though they believe that neither Samuel L. Burton nor Sylvanus Conquest actually fired at or upon the hack in which several people were riding as aforesaid, but that some other person or persons maliciously actually fired upon said hack in which the said people were riding, with guns and pistols, charged with deadly loads, and killed John Topping, who was passing by or standing near the scene of shooting, yet if they further believe the said Samuel L. Burton and

Sylvanus Conquest were present, and lending countenance, encouraging, aiding, abetting, counselling, advising, or consenting to the firing upon said hack, as aforesaid, then they are guilty of murder."

We have seen that the evidence is insufficient to show that the shots which killed Topping were fired by either Burton or Conquest; while, as to the second branch of the instruction, there is nothing whatever in the record to support it. There is not a scintilla of evidence that either Burton or Conquest countenanced, encouraged, counselled, aided, abetted, advised, or consented to the firing upon the hack. This instruction, therefore, while it embodies a correct proposition of law, ought not to have been given in this case.

We see no other error in the ruling of the court upon the instructions.

We are of opinion, therefore, that the judgment should be reversed, the verdict of the jury set aside, and the case remanded to the corporation court of the city of Norfolk.

Reversed.

#### SELDEN et ux. v. WILLIAMS et al.†

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### 1. JUDGMENTS—ASSIGNMENT—RIGHTS OF ASSIGNEE.

The recovery by the payee of judgment on a note against the maker destroys its further negotiability, and the judgment is but a nonnegotiable chose in action, the assignee taking it subject to all the equities of the debtor against the assignors existing at the date of the assignment or which arise after the assignment and before the debtor has notice thereof, even though the assignee takes the assignment for value, bona fide, and without notice of the equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1556-1558.]

#### 2. ASSIGNMENTS—RIGHTS OF ASSIGNEE.

The assignee of a nonnegotiable obligation can take no rights which his assignor did not possess, and can generally make no defense he could not make.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 162-165.]

#### 3. JUDGMENT — ASSIGNMENT — DEFENSES AGAINST ASSIGNEE—ESTOPPEL.

Where the payee of a note deposited it with a bank as collateral security for a loan less than the amount of the note, and thereafter the bank recovered judgment against the makers for the face value, the makers, after paying the debt for which the note was deposited as collateral, were not estopped by their failure to defend a chancery suit by the bank to subject certain property of the makers to the lien of the judgment from setting up any equities they had against the judgment in a suit thereon by the assignee thereof.

#### 4. SAME.

Code 1904, § 3299, provides that, in an action on a contract, defendant may file a plea alleging any such failure in the consideration of the contract, etc., or any other matter as would entitle him to relief in equity, etc. Section 3300 provides that, if defendant shall not tender such plea, he shall not be precluded from such

relief in equity as he would have been entitled to if the preceding section had not been enacted. *Held*, that the failure of the makers of a past-due negotiable note, the consideration for which had failed and which was held as collateral for a debt of the pledgor for a less amount than the face of the note, to defend an action at law on the note by the pledgee wherein a judgment against them was obtained, or to defend scire facias proceedings to revive the judgment, did not preclude them from setting up equities against the enforcement of the judgment in proceedings by the assignee thereof.

#### 5. ASSIGNMENTS — DEFENSES AGAINST ASSIGNEE—EQUITIES BETWEEN ORIGINAL PARTIES.

The rule that where the original debtor in a nonnegotiable chose in action is sued by an assignee thereof, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, applies to all forms of contract not negotiable, and to all defenses which would have been valid between the debtor and the original creditor.

#### 6. EVIDENCE—PRESUMPTION.

In the absence of proof, it will not be presumed that a bank, after disclaiming any interest in or right to a judgment on a note which had been assigned to it only as collateral for a debt which was later paid, would attempt to assign the judgment.

Buchanan and Whittle, JJ., dissenting.

Error to Circuit Court, Gloucester County.

H. A. Williams filed his petition in two certain chancery cases, to which Charles Selden and his wife were parties. From the decree said Selden and wife bring error. Reversed and annulled.

Jones & Woodward and John W. Friend, for plaintiffs in error. G. Carlton Jackson, for defendants in error.

CARDWELL, J. On or about the 27th day of July, 1890, Charles Selden and wife executed their joint note to the Baldwin Avalon Fertilizer Company in the sum of \$1,914, payable three months after date to the order of the fertilizer company, without offset, negotiable and payable at the Citizens' Bank of Richmond, Va.; the note being executed under the following circumstances:

One of the makers' sons was employed by the fertilizer company, and wished to purchase 500 shares of the stock of the company, and the note was executed upon the promise on the part of the fertilizer company that it would issue the shares of stock to the son of the makers of the note; but this the fertilizer company never did, nor have the makers of the note, or either of them, or their sons, received one cent of consideration for the note.

The fertilizer company owed to the Citizens' Bank the sum of \$890 at that time, and put the said note in that bank as collateral security for this debt; and afterwards the fertilizer company failed and went into the hands of a receiver. The Citizens' Bank instituted suit in the circuit court of Elizabeth City county against the makers of the note, and recovered judgment thereon at the September term, 1892, for the face value thereof, with interest and costs, but on

† Rehearing denied.

the margin of the judgment docket of the court the following indorsement is made: "Judgment released. Thomas Tabb, p. q. As this judgment was confirmed contrary to an understanding between counsel, and as a court of equity would give relief, the same is released. Thomas Tabb, p. q."

At the March term, 1898, of the same court, the bank again recovered a judgment against the makers of said note for the sum of \$1,914, with interest and costs, but to be credited by the sum of \$981.22 as of the 24th day of December, 1892. No execution ever issued on either of said judgments at any time.

In 1894 the bank instituted a chancery suit for the benefit of W. S. Forbes, receiver of the fertilizer company, to recover of Selden and wife the amount due on the last-named judgment, and under the proceedings in that suit the land of Selden and wife, or an interest in lands, was sold, and the proceeds of the sale, after the payment of an antecedent lien and costs, were paid to Forbes, receiver; the amount realized being sixty odd dollars, Selden and wife making no defense to the suit.

In March, 1902, the bank, notwithstanding it had stated in its bill in the above-mentioned chancery suit that the judgment belonged to the fertilizer company, instituted a scire facias proceeding for the revival of the judgment, and in that proceeding the following order was entered by the circuit court of the county of Elizabeth City on May 17, 1902:

"This day came the plaintiff (the Citizens' Bank) by its attorney, as well as the defendants, by their attorney, and on motion of the plaintiff, by its attorney, it is considered by the court that the plaintiff may have execution against the defendants for \$1,914, with interest thereon from the 30th day of October, 1890, and \$8.61 costs in the writ aforesaid specified; and also that the plaintiff recover against the said defendants its costs by it expended in suing forth and prosecuting this writ."

In the execution book in the clerk's office of Elizabeth City county is found this entry: "Citizens' Bank of Richmond v. Charles Selden and Wife.

"Judgment on the 17th day of May, 1902, for the plaintiff against the defendants, and to have execution on scire facias for the sum of nineteen hundred and fourteen dollars, with interest thereon from October 30, 1890, and \$8.61 costs in the writ (costs of old suit) and its costs in (scire facias) proceeding \$10.70."

On May 21, 1902, the clerk of the circuit court issued an execution on this judgment or order as though it was a judgment quod recuperet, returnable to first July rules, 1902, no credit as in the original judgment being mentioned, and the execution was received by the sheriff of Elizabeth City county on June 17, 1902, but there was never any re-

turn of it. The clerk of Elizabeth City county, who went into office under the present Constitution on January 1, 1904, issued on May 17, 1904, returnable to first July rules, 1904, what he called an "alias *fi. fa.*" upon the above-mentioned order in the scire facias proceeding for \$1,914, with interest from October 30, 1890, till paid, and \$19.31 costs, no mention being made of the credit on the original judgment upon which the scire facias proceeding was had; and this execution was returned indorsed by the sheriff, "No effects to satisfy this execution."

On the 6th day of January, 1904, the Citizens' Exchange Bank of Richmond assigned, or attempted to assign, one of the above-mentioned judgments to H. A. Williams, reciting that the Citizens' Bank of Richmond, by an agreement made January 14, 1898, conveyed all of its assets of every kind to the Citizens' Exchange Bank; and on the 26th of June, 1906, H. A. Williams filed his petition in two certain chancery causes pending in the circuit court of Gloucester county, to which Selden and wife were parties, and in which it was sought to subject their interest in certain property to the payment of the liens thereon; the object of Williams' petition being to enforce the lien of the judgment assigned, or attempted to be assigned, to him by the Citizens' Exchange Bank.

To this petition of Williams, Charles Selden filed his answer and amended answer, which were treated as a cross-bill, to which Williams filed his demurrer and answer; and the cause was referred to a special commissioner of the court to inquire and report (among other things) "whether or not there are any liens against any of the interests of the legatees under the will of R. C. Selden, and, if so, their amounts, character, and priority." In response to this decree of reference, Commissioner C. A. Ashby on January 3, 1907, filed an elaborate report, in which the ground was taken that the judgment set up in the petition of H. A. Williams was a good and valid judgment against the defendant Charles Selden for \$1,914, with interest at the rate of 8 per cent. per annum from the 30th day of October, 1890, and \$8.61, costs of the original judgment, and \$10.70, costs of the scire facias proceeding, subject to a credit of \$981.22 as of December 24, 1892, and a lien upon the property of Selden under the control of the court in the chancery cause. To sustain this finding the commissioner submitted an argument in support of the view that the executions issued upon the order in the scire facias proceeding, treated by the clerks as a judgment quod recuperet, served to revive and to keep alive the original judgment, so as to render the pleas of the statute of limitations unavailing, giving but little consideration to the important question whether or not Selden and wife were entitled to the benefit of the equitable defenses they sought to interpose against the judgment.

Selden and wife excepted to the commissioner's report on the following grounds:

(1) Because the plea of the statute of limitations, filed by the exceptants, was not sustained, in so far as the judgment in the petition of Williams mentioned, obtained by the Citizens' Bank of Richmond against the exceptants, was concerned, and because the commissioner reported that the exceptants were precluded from making their defense by reason of laches.

(2) Because the proceedings mentioned in the report, on the scire facias sued out by the Citizens' Bank against exceptants, stopped the running of the statute of limitations, and because the commissioner did not report that these proceedings on the scire facias were void, or at least voidable, and could be attacked collaterally.

(3) Because the commissioner did not hold that the assignee of the bank took the judgment in question subject to all the equities between the makers and the payee of the note upon which the judgment was originally obtained existing at the date of the assignment of the judgment to Williams, and which arose after the assignment and before the debtor had notice thereof, and because the commissioner reported that no such equities existed.

(4) Because the commissioner reported that the judgment in question was a subsisting lien on the property of exceptants.

(5) Because the commissioner also held that Williams was entitled to have the judgment in question paid to him.

All of these exceptions were overruled by the circuit court, and the report of Commissioner Ashby confirmed; and, from the decree of the circuit court so ruling, this appeal was allowed.

To this decree two errors are assigned, which present the two questions: First. Was the judgment asserted by appellee Williams barred by the statute of limitations when he filed his petition in said chancery causes? Second. Can a nonnegotiable chose in action (a judgment) be assigned, and, if so, does the assignee thereof take it subject to all the equities of the debtor against the assignor existing at the time of the assignment?

If the answer to the first question should have to be in the negative, but to the second in the affirmative, the appellants would prevail in this appeal, and therefore we shall take up for consideration the second question only, since, in the view we take of the case, the decree appealed from is erroneous in holding that the appellants are not entitled to the relief they set up against the judgment lien asserted against them.

"The recovery by the payee of judgment on a note against the maker destroys its further negotiability" (7 Cyc. 524; 3 Min. Inst. 43), and therefore the judgment here in question was but a nonnegotiable chose in action, which, though assignable, the assignee took

subject to all the equities of the debtor against the assignors existing at the date of the assignment, or which arose after the assignment and before the debtor had notice of it; and this is the rule of law, though the assignee has taken the assignment for value, bona fide, and without notice of the equity. *Picket v. Norris*, 2 Wash. 255; *Feazle v. Dillard*, 5 Leigh, 30; *Ragsdale v. Hagy*, 9 Grat. 409; *Stebbins v. Bruce*, 80 Va. 389; *Stoner v. Harris*, 81 Va. 451; *Etheridge v. Parker*, 76 Va. 247. See, also, Code Va. 1904, § 2860.

It is also equally as well settled that the assignee of nonnegotiable obligation can take no rights which his assignor did not possess, and generally make no defense he could not make. *Stockton v. Cook*, 3 Munf. 69, 5 Am. Dec. 504; *Meredith v. Salmon*, 21 Grat. 762, 9 Grat. 409, supra; *Prim v. McIntosh*, 43 W. Va. 790, 28 S. E. 742.

As suggested by counsel for appellants, "the stream cannot rise higher than its source"; and, if the Citizens' Bank had no interest in the judgment after appellants had paid the debt for which their note had been deposited as collateral, which it could enforce against appellants, it certainly could not, either indirectly or directly, assign the judgment to appellee, with the right to the latter to enforce its payment by appellants. When appellee acquired, if in fact he ever acquired, title to the judgment, he acquired nothing but the actual right and title of the Citizens' Bank, and took that subject to all the equities to which it was subject in the hands of the bank. *Authorities*, supra, and *Cussen v. Brandt*, 97 Va. 1-9, 32 S. E. 791, 75 Am. St. Rep. 762.

It is well to bear in mind in this connection that the Citizens' Exchange Bank, and not the judgment creditor, the Citizens' Bank, made the assignment to appellee; and there is no proof that the Citizens' Exchange Bank ever owned the judgment or any interest therein, other than the recitals in its attempted assignment to appellee. Every cent that the original judgment creditor, the Citizens' Bank, could demand of appellants, had been paid, and it had disclaimed, as above mentioned, in 1894 any further interest in the original note or judgment, declaring that thereafter the judgment belonged to the fertilizer company, and neither that company nor its receiver has ever asserted any right to or interest in the judgment since the filing of the bill in the chancery suit by the Citizens' Bank in 1894, in which the bank disclaimed any interest in the judgment. True, appellants made no defense to that chancery suit, but this fact cannot be invoked to estop them from making the defense they set up against the recovery sought in this suit. Non constat, but they considered there were prior liens on the land sought to be subjected in the former suit which would nearly, if not altogether, consume the proceeds from the sale of the land, and the expense of employing

counsel would be greater than the possible loss from not defending the suit at all. The sequel justified the course they pursued, as there was, so far as this record discloses, no decree over against them for the balance of the face value of the judgment after crediting the sixty odd dollars thereon above mentioned.

Nor does their failure to make defense to the action at law, in which the judgment in the name of the Citizens' Bank was obtained against them in 1893, *supra*, or their failure to defend against the *scire facias* proceeding in 1902, preclude them from making the equitable defenses relied on in this suit. They could have made these defenses at law under section 3299 of the Code of 1904 only; and that section and section 3300 left it optional in appellants whether they would or would not then make these equitable defenses, provided nothing occurred in the law actions which the statute declares precludes them from relief in equity; and it is not pretended that by the terms of the statute, as applied to what took place in either of said law actions, appellants should be considered as precluded from setting up their equitable defenses in this suit. It will be observed that the original law action was upon a past due negotiable note held as collateral for a debt of the pledgor for a much less amount than the face of the note, and the proof shows that appellants thought their equitable defense was being made by their attorneys. But, be this as it may, appellants were not prejudiced by their defense not being then made. Code Va. 1904, § 3300, *supra*; *Wayland v. Tucker*, 4 Grat. 269, 50 Am. Dec. 76.

"Where a chose in action is assigned as collateral security, the pledgee may bring an action upon it, and recover the whole amount, even though such amount exceeds the debt secured; the rule being that the pledgee, if he realizes more than the amount of the debt secured, shall hold the surplus as trustee for the pledgor." But, in an action by the pledgee of a promissory note which has been pledged to secure a sum less than the amount for which the note was given, the pledgee cannot deprive the maker of all equitable defenses against the pledgor, who is still a part owner of the note. 22 A. & E. Ency. L. pp. 898, 899.

The statements of the law just quoted are supported by authorities cited in the footnote, and in the case in judgment it is to be noted that the pledgor of the note, the fertilizer company, never had at any time the right to enforce its payment, as the consideration for which the note was given had wholly failed; so that the equities set up by appellants were inherent in the note itself. When the judgment was recovered against appellants, the plaintiff bank being a nominal plaintiff, and the amount for which the note had been held as collateral having then been paid, and the fertilizer company, the pledgor,

having no beneficial or equitable interest in it, appellants were entitled to equitable relief against the balance due on the note, and therefore the pledgee, the Citizens' Bank, had no beneficial or equitable interest in it to transfer to the Citizens' Exchange Bank, under whose assignment appellee claims the right to enforce payment of the judgment in this suit.

That there was an absolute failure of the consideration for which the note, upon which this judgment was obtained, was executed, is not questioned; and the rule that where the original debtor in a nonnegotiable chose in action is sued by an assignee of such chose in action, the defenses, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail him against the substituted creditor, applies, and this rule applies to all forms of contract not negotiable, and to all defenses which would have been valid between the debtor and the original creditor. They may arise out of and be inherent in the very terms or nature of the obligation itself, as that it was conditional and the condition has not been performed by the assignor, failure or illegality of the consideration, and the like, or they may exist outside of the contract, as set-off, payment, release, the condition of accounts between the parties, and the like. It is essential, however, that the equity in favor of the debtor should exist at the time of the assignment or before notice thereof. 2 Pom. Eq. Jur. (2d Ed.) § 704.

The equities of appellant are manifest from what has been stated, and the essential to appellants' right to set them up here, pointed out by the learned author to whom we have just referred, is fully met, as plainly appears from the record.

Appellee in answer to interrogatories propounded to him by appellant, Charles Selden, states that he acquired, as an investment, the judgment in question on or about January 6, 1904; that the amount, \$750, paid the Citizens' Exchange Bank therefor "was his own money and nobody else's"; but the fact remains that there is no proof in the record of any right in the Citizens' Exchange Bank to the judgment other than the mere recital in a copy of the assignment above mentioned that this bank "had acquired from the Citizens' Bank its assets," etc. It will be observed that the Citizens' Bank had declared in 1894 that it had no interest in the judgment, that the same belonged to the fertilizer company, and that the judgment was assigned to the bank as collateral only for a debt of \$890 due from the fertilizer company, which had been paid, and not for collection. If after these declarations and admissions, and before the Citizens' Exchange Bank is said to have acquired the assets of the Citizens' Bank, the last-named bank had regained the title to the judgment or any interest therein which could pass by assign-



ment, there is not the slightest proof in this record of that fact. The master commissioner says in his report that it was agreed that Forbes, the receiver of the fertilizer company, would testify that he did not know where the books and papers of the company were, but believed they were lost in two fires which partially destroyed the business house of the company in Richmond; and the report further states that "in 1898, or thereabouts, the Citizens' Exchange Bank of Richmond acquired the uncollected assets of the Citizens' Bank of Richmond. The National Bank of Richmond then acquired the assets of the Citizens' Exchange Bank and also certain assets, and the books of the Citizens' Bank of Richmond. The books of the Citizens' Bank of Richmond, which would show the circumstances surrounding this transaction, are not now accessible to the cashier of said National Bank, and he does not know where they are."

It cannot be that the Citizens' Bank, after disclaiming any interest in or right to the judgment in question, for the reason that it had been assigned to it as a collateral only for a debt of \$890, which had been paid, could have assigned or attempted to assign the judgment to appellee's assignor, the Citizens' Exchange Bank, and, in the absence of proof of that fact, it would not be presumed.

This being the case in judgment, a repetition of what was so well said by Carrington, J., in *Picket v. Morris*, *supra*, is justified, viz.: "It would perhaps seem strange that a court of equity should not possess the power of relieving against a judgment at law obviously unjust and against the right of the cause."

The further contention of appellee, that the appellants are estopped to make defense in this suit by reason of their "gross laches," is wholly without merit, for there is not the faintest proof in the record that he was misled to his injury, by any omission on the part of appellants to keep and perform any obligation to him, of whom they perhaps

never heard until his petition was filed in this cause, June 28, 1906. On the other hand, appellee might easily have obtained information that neither the bank which attempted to assign the judgment in question nor the bank under which it claimed had any right to or interest in the judgment to assign; but, instead of inquiry, he pays but \$750 for the judgment, upon which there was then due, including interest, about \$2,000, and takes the assignment "without recourse," which itself suggests doubtful right in the assignor.

We are of opinion, upon the whole case, that the decree appealed from is erroneous, and that the appellants are entitled to the relief they seek. Therefore, the decree will be reversed and annulled, and this court will enter the decree the circuit court should have entered, dismissing appellee's petition in the cause, with costs to appellants.

Reversed.

BUCHANAN and WHITTLE, JJ. (dissenting). We are unable to concur in the conclusion reached by a majority of the court in this case.

We concede the correctness of the general proposition upon which the opinion is based, that the assignee of a judgment takes it subject to all equities of the debtor against the assignor. But in this instance the appellants are estopped from invoking that doctrine by the consent decree of September 22, 1894, pronounced by the circuit court of Elizabeth City county in the case of the Citizens' Bank of Richmond, Va., v. Appellants et al., which confirmed a commissioner's report establishing the validity of the judgment in question. The decree, moreover, directed the sale of real estate belonging to Mrs. Selden to satisfy liens, and this judgment received its ratable share of the proceeds. A more forcible illustration of the principle of estoppel by decree could hardly be presented; and we cannot assent to the overthrow of that doctrine to relieve the hardship of the particular case.

## ROANOKE RY. &amp; ELECTRIC CO. v. STERRETT.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

## 1. CARRIERS—ACCIDENT TO TRAIN—COLLAPSE OF BRIDGE—HIDDEN DEFECT—EVIDENCE.

Evidence held to sustain the theory that the collapse of a street railway company's bridge was caused by a hidden and internal defect in the weld of a cord which supported the entire structure, and which broke at the place where welded, which defect could not have been detected by the utmost scrutiny.

## 2. SAME—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—HIDDEN DEFECTS.

Where an accident arises from a hidden and internal defect, which a thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, the carrier is not liable for an injury to a passenger resulting therefrom.

## 3. NEGLIGENCE—ACTS CONSTITUTING NEGLIGENCE—"INEVITABLE ACCIDENT."

An accident is inevitable if the person in connection with whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another; and in such a case, the essential element of legal duty being wanting, the person cannot be held negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 80.]

For other definitions, see Words and Phrases, vol. 4, pp. 3571-3573.]

## 4. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—NEGLIGENCE.

The slightest neglect against which human prudence and foresight might have guarded, and by reason of which an injury may have been occasioned, renders a carrier liable for an injury to a passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1087.]

## 5. SAME—TRIAL—INSTRUCTIONS.

In an action by a passenger against a carrier for injuries resulting from the collapse of a bridge, a requested charge that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, and cannot recover if it is just as probable that the accident resulted from one of two causes, for one of which defendant was not responsible, was properly modified to state that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, but that, when plaintiff had shown that she was injured by the breaking down of the bridge and overturning of the car, it was sufficient proof of defendant's negligence, and that the burden of proof was then on defendant to establish by a preponderance of evidence that it has been guilty of no negligence whatsoever which caused the accident, and that the damage has been caused by inevitable casualty or by some cause which human care and foresight could not prevent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1334.]

## 6. SAME—PRESUMPTION OF CARRIER'S NEGLIGENCE.

The presumption of a carrier's negligence does not arise from the abstract fact of an accident to a passenger, but whether it exists depends upon the nature of the accident, which must be such as does not in the usual course of things happen to passengers when due care is exercised by the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283-1294.]

Error to Circuit Court, Roanoke County.

Action by Mary E. Sterrett against the

Roanoke Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Robertson, Hall, Woods & Jackson and Dupuy & Whittle, for plaintiff in error. N. H. Hairston & Son, and Hoge & Penn, for defendant in error.

HARRISON, J. This action was brought by Mary E. Sterrett against the Roanoke Railway & Electric Company to recover damages for injuries alleged to have been sustained by her in consequence of the negligent failure of the defendant company to maintain one of its street railway bridges in a safe condition. The trial resulted in a verdict and judgment in favor of the plaintiff, the propriety of which is called in question by this writ of error.

In the view we take of the case, it will conduce to clearness and brevity to consider first the assignment of error, which involves the action of the circuit court in refusing to set aside the verdict of the jury, upon the ground that it was contrary to the law and the evidence.

The record shows that one branch of the defendant's street car system ran from Roanoke City for a distance of some 2½ miles to the suburban town of Vinton. Before reaching the corporate limits of Vinton, this line crossed Tinker creek on an iron truss bridge, which was about 75 feet long, made into one span composed of six sections of 12½ feet each. Upon each section of the span was placed wooden stringers, running the length of each section. These stringers were 12 by 10 inches in size, and were supported at either end of the 12½-foot section by resting about 2 or 2½ inches on metal plates, called "floor beams," about 5 inches in width. These wooden stringers were fastened together with straps, so as to hold them together and prevent lateral movement. Upon these stringers were placed the cross-ties, which were securely fastened, and to the ties were spiked the rails. The record further shows that this bridge is what is known as a "pin connected Pratt truss bridge"; that the truss is supported by long iron cords, known as top and bottom cords, made of wrought iron. These cords come together at a point just under the track, and are connected by a pin or post, made of wrought iron, which pin runs through loops at the ends of these cords. It is shown that the entire weight of the bridge is held up by these cords, and the bridge so constructed that if the connecting pin is broken, or any one of the cords is broken, the bridge will collapse. It appears that the iron bridge in question was made to order for the defendant company by the Virginia Bridge & Iron Company, of Roanoke, Va., which is shown to have been, and still to be, a thoroughly reputable, competent, and reliable manufacturer. It further appears that at the time of the accident the bridge had

been continuously in use for six years, and was believed by the defendant railway company to be perfectly safe and suitable for the use to which it was put. It further appears that some eight or ten months prior to the accident this bridge was thoroughly overhauled, new stringers were put in, and the entire structure examined and inspected. It is also shown that about two months prior to the accident new 60-pound rails were substituted for old rails, and the entire bridge at that time again examined and inspected. It further appears that a competent inspector of bridges was kept in the employ of the defendant company, who examined this bridge every few weeks, and that no defect was discovered, except those which were repaired in the manner already mentioned. The capacity of the bridge is shown to have been very much greater than was actually necessary for the purposes and uses to which the bridge was put.

On the morning of the accident several cars, heavily loaded with passengers, had passed over the bridge safely, with nothing occurring to suggest or indicate any defect therein. Finally the car involved in the accident under consideration, containing about 85 or 90 passengers, came upon the bridge on its way from Vinton to Roanoke. It had passed over about three-fourths of the bridge, when suddenly and without warning the structure collapsed, and the bridge, with the exception of a portion of its western section, fell into the stream. The car, with its passengers, was for a while held up by the rails, but these rails gradually bent until one of them broke, precipitating the rear end of the car into the stream. Mary E. Sterrett, the defendant in error, was a passenger on this car, and received the injuries of which she complains.

Totally different theories are advanced by the parties, respectively, as to the cause of this accident. The defendant in error contends that some of the stringers, the ends of which rested upon the floor beams, had slipped until the lap or catch was reduced from 2 or 2½ inches to only one inch and a half, and that the defendant company had, or ought to have had, notice of this alleged defect. The contention of the defendant in error is, further, that the weight of the car upon these stringers caused them, at the time of the accident, to slip entirely off of the floor beams, thus leaving nothing to support the car.

The contention of the plaintiff in error is that one of the iron cords which was found broken had a defective weld just where the loop was made in the cord, and that the break was in this weld; that the defect in the weld was latent, and could not be discovered by any external examination, and only appeared after the weld was broken; and that the hidden defect in the weld caused the cord to break and the bridge, which was supported by the cord, to collapse.

We are of opinion that the evidence fails to sustain the contention of the defendant in error that the accident was caused by the stringers slipping off of the floor beams, and establishes the theory of the plaintiff in error, that the accident resulted from the defective weld which caused the cord supporting the entire structure to break, thereby effecting the inevitable collapse which followed.

The witnesses introduced by the defendant in error for the purpose of showing that the bridge was not in a safe condition were without knowledge or experience in the construction of bridges or in bridge engineering. They do not profess to know that the stringers were in an unsafe condition, or whether they had been built into the bridge as situated when seen by them. They do not say that the slipping of the stringers, which they supposed had taken place, caused or contributed to the accident. They merely state, without having made any measurement, that the stringers only rested upon the floor beams 1½ inches; the statement that they had slipped being mere assumption. Further, these witnesses made their observations of the stringers in most instances some time before the accident, and locate most, if not all, of the stringers observed by them at a point other than the section of the bridge where the collapse occurred. This theory of the defendant in error, that the stringers had slipped and thereby caused the accident, is, however, shown to be fallacious and without foundation by the testimony of competent experts, whose evidence is not in conflict with the plaintiff's witnesses, who admit their inability to say whether the conditions they describe did, or did not, cause or contribute to the collapse of the bridge.

Two experts were introduced by the plaintiff in error—one a bridge builder and the other a bridge engineer—both competent, with long experience in their line and familiar with the character and construction of the bridge in question. They show that the conditions described by the plaintiff's witnesses, if true, could not have caused the accident, and did not in any way contribute thereto. The undisputed testimony of these experts is that, if the stringers had slipped and fallen, it would not have caused the bridge to fall, for the reason that the stringers get their support, in part, from the bridge, while the latter gets no part of its support from the stringers.

These experts explain the mechanism of the bridge, and show that, while it is built in 6 sections of 12½ feet each, yet these sections are all connected into one entire span which makes the whole bridge. The iron cords which unite these several sections and bind them into one span are what holds up the bridge; the stringers performing no function of that sort. If one of these cords breaks, the bridge falls. It is further shown that, if one or more of the stringers had

slipped from the beams and fallen into the creek, neither the bridge nor the car would have fallen from that cause.

These experts inspected the bridge after it had fallen, and found no unsound or broken timbers therein, and found no faulty condition of anything about the bridge, except the defect in the loop of the bottom cord, where there had been an imperfect weld. The broken cord was produced in court, and the unqualified testimony of these experienced bridgemen is that the breaking of that cord was the sole cause of the accident, and that the defect in the cord was the imperfect weld, which could not have been detected by the utmost scrutiny.

"Where an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary compensation." 2 Hutchinson on Carriers (3d Ed.) §§ 903, 904. The liability of a carrier of passengers as thus defined is now almost universally adopted.

As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it; and, if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, therefore, be a case of negligence. 1 Shearman & Red. on Neg. §§ 15, 16.

Applying these well-settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against, and that no liability attaches to the plaintiff in error on account thereof.

Notwithstanding the conclusion reached on the merits, the case must, under our practice, be remanded for another trial, if the plaintiff be so advised. It is therefore necessary that objections taken to two of the instructions given by the circuit court should be considered.

The first of these is instruction No. 4, given on behalf of the plaintiff, which is as follows: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, renders the Roanoke Railway Company liable in damages for such injury."

The objection made to this instruction is that the jury are told that negligence that may have occasioned the plaintiff's injury will justify a recovery; it being insisted that the negligence must have caused the injury in order to justify a recovery.

This instruction, in the same language that is here employed, has been more than once approved by this court in cases of a like nature. *Balt. & O. R. Co. v. Wightman's Adm'r*, 29 Grat. 431, 26 Am. Rep. 384; *Balt. & O. R. Co. v. Noel's Adm'r*, 32 Grat. 394. In both of these cases the accident resulted to a passenger from the falling of a railroad bridge. An examination of the records and the briefs filed in both cases shows that the same objection and the same argument in support thereof was there made to this instruction that is now made.

In the first case cited Judge Staples, speaking for a unanimous court, in referring to this instruction in common with four others, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country."

The case of *Noel's Adm'r*, supra, is to the same effect.

In the light of these authorities, the objection to the instruction under consideration was properly overruled.

The second objection taken by the plaintiff in error is to the modification made by the circuit court of its instruction No. 2. The instruction as asked for, was as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds. They are further instructed that the evidence must show more than a probability of a negligent act, and the plaintiff cannot recover if it is just as probable that the accident in which the plaintiff was injured resulted from one of two causes, for one of which the defendant is not responsible."

This instruction was modified by the court, and made to read as follows: "The jury are instructed that the plaintiff, in order to recover in this case, must establish the negligence of the defendant by evidence sufficient to satisfy reasonable and well-balanced minds, and the evidence must show more than a probability of a negligent act; but, when the plaintiff has shown that she was injured by the breaking down of the bridge and overturning the car, then this is sufficient proof of negligence on the part of the defendant company to meet the requirements above stated, and then the burden of proof is on the company to establish, by a preponderance of evidence, that it has been guilty of no negligence whatsoever which caused the accident, and the damage has been occasioned by inevitable

casualty or by some cause which human care and foresight could not prevent."

There was no error in this action of the circuit court. Under the instruction, as asked for, the defendant company would merely have to raise a doubt as to the cause of the accident, and thereby shift to the plaintiff a greater burden than the law imposes in such cases. In the case of a passenger, when the plaintiff shows that his injury resulted from an accident which was caused by the breaking down of one of the carrier's bridges, it is sufficient proof of negligence on the part of the defendant company to put the burden upon it of establishing, by a preponderance of evidence, that the accident and the resulting damage was occasioned by inevitable casualty, or by some cause which human care and foresight could not have prevented. The presumption of negligence suggested does not arise from the abstract fact of an accident to a passenger, but arises from a consideration of the nature and quality of the accident; and it must appear that it was such an accident as does not, in the usual course of things, happen to passengers when due care is exercised on the part of the carrier. 3 Thompson on Neg. § 3484; Richmond Ry. & Elec. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736.

Because of the error of the circuit court in not setting aside the verdict as contrary to the law and the evidence, its judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

#### COLEMAN et al. v. WOOD et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### 1. WILLS—TESTAMENTARY CAPACITY—MARRIED WOMEN—STATUTES.

Independent of Acts 1876-77, p. 333, c. 329, removing certain of the disabilities of married women, a married woman had no power to dispose of her real property by will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 58, 59.]

#### 2. SAME—CONSTRUCTION.

Acts 1876-77, p. 333, c. 329, § 1, provided that property which a woman, thereafter marrying, owned at the time of her marriage, and the rents and profits thereof, should not be subject to the disposal of her husband, but should be her separate property, and that any such married woman might contract in relation thereto or by the disposal thereof, and might sue and be sued as if she were sole, provided that her husband should join in all contracts with reference to her property. Section 2, p. 334, declared that all property thereafter acquired by any woman should be her separate estate subject to the limitations of the first section, though the marriage was solemnized before the passage of the act, and that she might devise and bequeath such property as if she were sole. *Held* that, where a woman acquired certain real estate in 1868 and married in 1878, such act did not confer on her power to dispose of such property by will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 58, 59.]

Error to Circuit Court, Washington County. Ejectment by D. C. Wood, assignee, and others, against John F. Coleman and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

J. J. Stuart, for plaintiffs in error. L. P. Summers and White & Penn, for defendants in error.

BUCHANAN, J. The only question involved in this case is whether or not Jane Coleman, under whom both the plaintiffs and defendants claim (the former as her devisees and the latter as her heirs), had the power to dispose of the land in controversy by will.

The land in litigation was conveyed to Jane Wood (afterwards Mrs. Coleman) in the year 1868. She was married in February, in the year 1878, and died in the year 1899 (her husband surviving her), leaving a will dated in the year 1899.

Unless the effect of the act of April 4, 1877 (Acts 1876-77, p. 333, c. 329), known as the "Smith Act," was to give Mrs. Coleman the power to dispose of the property in question by will, she had no such power.

That act made radical changes in the law, but it did not do away with all the common-law disabilities of married women as to their property.

The first section of the act provided, among other things, that the property, real and personal, which a woman thereafter marrying owned at the time of her marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor liable for his debts, but shall be and continue her separate and sole property, that any such married woman shall have the power to contract in relation thereto, or for the disposal thereof, and may sue and be sued as if she were a feme sole, provided her husband shall join with her in any contract with reference to such real and personal property.

The second section declares that all property, real and personal, thereafter acquired by any woman, by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her sole and separate estate, subject to the provisions and limitations of the first section, although the marriage may have been solemnized previous to the passage of the act. It then expressly provides that she may devise and bequeath the property declared by that section to be her separate estate as if she were an unmarried woman. There is no provision in the first section of the act authorizing her to devise or bequeath the property declared by that section to be her separate estate.

The fact that a married woman is expressly given the power to dispose of property by will declared by the second section of the act to be her separate estate, and no such power is given in the first section as to the property therein declared to be her separate estate, would seem to indicate conclusively that the Legislature intended that she should

have the power in the one case, and should not have it in the other. If her right of disposition by will in both cases was intended to be the same, no reasonable explanation has or can be given why the Legislature expressly conferred the power as to the property declared to be her separate estate in the second section and failed to expressly confer the same power in the first section, or as to the property declared by that section to be her separate estate.

It may be that, if the Smith act had been silent as to the power of a married woman to devise or bequeath the property declared by that act to be her separate estate, it could be held by a liberal construction that the legal or statutory separate estate created by that act was separate estate within the meaning of section 2513 of the Code, and subject to her power of disposition by will. But the Smith act not being silent, and expressly giving the power of disposition by will as to the property embraced in one section, and failing to give it as to the property embraced in the other, it must be held that Mrs. Coleman's power to make a will as to the property in controversy was governed by that act, and that she did not have the capacity to devise the property in controversy.

We are therefore of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

#### GARRETT et al. v. RUTHERFORD et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

#### 1. EVIDENCE—ADMISSIONS—PROBATIVE FORCE OF EVIDENCE OF VERBAL ADMISSIONS.

Evidence of verbal admissions, consisting as it does of the mere repetition of oral statements, ought to be received with great caution, especially when made to and proved by persons having no interest in the subject of the conversation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1029.]

#### 2. TRUSTS—EXPRESS TRUSTS AFFECTING REAL ESTATE, NOT IN WRITING.

The question is an open one in Virginia whether an express trust affecting real estate is valid unless in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 15-24.]

#### 3. SAME—CREATION—SUFFICIENCY OF EVIDENCE.

Testimony of witnesses as to conversations they had with a husband and wife more than 30 years before, in which the couple stated that the wife had money with which to buy a farm, that they had selected a certain farm which they afterwards bought, and that it was agreed by them while in Kentucky that they should come to Virginia and buy a farm with her money and for her benefit, is insufficient, after the death of the wife and the incompetency of the husband, to impress upon the land purchased an express trust in favor of the wife's heirs at law, especially where the man and wife were married prior to the married woman's act of April 4, 1877 (Laws 1876-77, p. 333, c. 329), when, in the absence of a stipulation to the contrary, the money of the

wife when received by the husband became his absolute property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66-68.]

#### Appeal from Circuit Court, Lee County.

Suit by one Rutherford and others against one Garrett and others, in which defendants by cross-bill sought to impress land in controversy with an express parol trust. From a decree dismissing the cross-bill, plaintiffs therein appeal. Affirmed.

Duncan & Criddle and B. H. Sewell, for appellants. M. G. Ely and Pennington Bros., for appellees.

WHITTLE, J. We need only concern ourselves to consider the question raised by appellants in their cross-bill, in which, as children and heirs at law of Susan C. Rutherford, deceased, they seek to impress the land in controversy, known as the "Baylor Farm," with an express parol trust for their benefit.

They rest their claim upon the allegations that in 1871 their parents were married in the state of Kentucky, and shortly thereafter removed to Lee county, Va.; that in 1872 their father, George C. Rutherford, purchased the Baylor farm with money derived from his wife, and that, in pursuance of a distinct and positive agreement between them, it was to be her property and the legal title taken in her name; that they occupied the farm jointly as a home, and in 1887 the wife died in the belief that it had been conveyed to her in accordance with their previous understanding.

At the time of the filing of the cross-bill, George R. Rutherford had been convicted of a felony, and was confined in the state penitentiary; but his committee, by answer, denied the existence of the trust, or that the plaintiffs had any interest whatever in the property.

In point of fact the purchase was made by George R. Rutherford in his own name, and the deed to him was promptly admitted to record; and after the death of his first wife, he from time to time incumbered the property by deeds of trust to secure his individual indebtedness, and these deeds still remain unsatisfied.

The plaintiffs undertook to prove the agreement upon which their contention is founded by a single witness, A. E. Rutherford, who deposed on that point as follows: "I had a conversation with George R. Rutherford and his wife shortly after they came to Virginia. \* \* \* In that conversation Mrs. Rutherford said that she had the money to buy a farm with. George was present, and had the same talk that she did. In said conversation they said they had selected the Baylor farm, and they afterwards bought. They told me it was the agreement between them before they left Kentucky to come here and buy a farm with her money and for her benefit."

Other witnesses were also examined "pro et con," giving with more or less circumstantiality their recollections of casual conversations had with the parties, or in their presence, subsequent to the purchase and conveyance, touching the ownership of the farm; and, from a decree dismissing the cross-bill, this appeal was allowed.

In *Greenleaf on Evidence* (14th Ed.) § 200, the author, in discussing the probative value of such evidence, says: "With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party actually did say."

The significance of these observations is accentuated in this instance by the circumstance that more than 30 years had elapsed since the alleged conversation took place, when the impairment of memory by lapse of time rendered it practically impossible for witnesses to bear in mind and repeat, with any degree of accuracy, the exact language of loose conferences in relation to a transaction in which they had no personal interest.

Of that species of testimony, *Snider, J.*, in *Vangilder v. Hoffman*, 22 W. Va. 1, 11, 12, affirms: "The whole claim of the plaintiff rests upon the mere verbal statement of the appellant gathered by witnesses from casual conversations. Evidence consisting of the mere repetition of oral statements—and especially when made to and proved by persons having no interest in the subject of the conversation—is of the weakest and most unreliable character, and should be received with the greatest caution. And unless corroborated by other proof, or aided by surrounding circumstances, it must be held insufficient to establish any material fact"—citing *Horner v. Speed*, 2 Pat. & H. 616. See, also, *Phelps v. Seely*, 22 Grat. 573, and authorities in footnote to that case.

In *Lench v. Lench*, 10 Vesey Jr.'s R. 511, Sir William Grant, the Master of the Rolls, at page 517, commenting upon the insufficiency of the evidence to establish a parol declaration of trust on behalf of the wife, upon the theory that the property was purchased by the husband with trust funds belonging to the wife, and in pursuance of an engagement between them to that effect, observes: "Then how is the fact made out? There is no material evidence but that of the trustee, who is made a competent witness by a release. She swears to no fact or circumstance capable of being investigated or contradicted; but merely to a naked dec-

laration supposed to be made by the husband himself, admitting that the purchase was made with the trust money. That in all cases is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration. There are no corroborating circumstances by any writing under his hand."

The danger of relying upon that class of evidence is further enhanced where, as in this case, the testimony of the principal actors in the occurrence is lost—that of the wife by death, and of the husband by incompetency. Common observation teaches us that the character of desultory talk attributed to these people is of common occurrence in the unrestrained intercourse between man and wife, or other members of the same family; and it would be a most unsafe doctrine to rest the title to real estate upon any such shadowy foundation. Moreover, the fact must not be lost sight of that *Rutherford* and wife were married prior to the married woman's act of April 4, 1877 (*Laws 1876-77*, p. 333, c. 329), and at that time, in the absence of stipulation to the contrary, the money of the wife when received by the husband became his absolute property.

The question is an open one in this state whether an express trust affecting real estate is valid unless in writing. *Sprinkle v. Hayworth*, 26 Grat. 384; *Borst v. Nalle*, 28 Grat. 423; *Jesser v. Armentrout*, 100 Va. 666, 42 S. E. 681.

On that subject Mr. Minor remarks: "Whether contracts touching trusts in lands are within our statute has not been adjudged; but it would seem that little doubt can exist that they are. In England all doubt is obviated by section 7 of the statute of frauds (29 Car. II, c. 3), which requires all creations and declarations of trusts to be in writing, signed by the party, or by last will; whilst section 8 excepts resulting, implied, and constructive trusts (2 Washb. R. Prop. 191-2; 2 Min. Inst. [4th Ed.] 847).

In *Jesser v. Armentrout*, supra, *Keltn, P.*, in delivering the opinion of the court, says: "It is not necessary, we think, to discuss the controverted question as to whether a trust in lands may be created by a parol declaration. We prefer to leave that question where it was placed by Judge Moncre in *Sprinkle v. Hayworth*, 26 Grat. 384, and by *Burks, J.*, in *Borst v. Nalle*, 28 Grat. 423. If a trust could be created by parol, the declaration should be unequivocal and explicit, and established by clear and convincing testimony." The learned judge proceeds to show the total insufficiency of evidence such as we are considering to prove the existence of a trust, and concludes: "Granting that a trust may be created by parol, to establish such a trust upon such declarations would be productive of great mischief."

In this aspect of the case, we are of opinion that the decree of the circuit court is without error and ought to be affirmed.

**Affirmed.**

**WAGNER v. BRISTOL BELT LINE RY. CO.**  
et al.

(Supreme Court of Appeals of Virginia. Sept. 10, 1908.)

**1. STREET RAILROADS—LOCATION—POWER OF CITY COUNCIL.**

The power conferred by Bristol city charter on the city council to permit street car lines to be built, and to designate the route and grade thereof, is not limited by the present Const. 1902, art. 4, § 58 (Code 1904, p. ccxxii), providing that the Legislature shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation, nor by Code 1904, § 12941, authorizing the construction of street railroads, and providing that the tracks shall not unnecessarily interfere with the use of the street or public travel over the same, or damage property without compensation, so as to deprive the city council of the right to determine the location of such railroad within a street.

**2. MUNICIPAL CORPORATIONS—DISCRETION OF CITY COUNCIL—STREET RAILWAY—LOCATION—REVIEW.**

The city council of a city having charter authority to permit street railway lines to be built and to designate the route and grade thereof, the exercise of judgment by the council in directing that a street railway line should be laid east of the center of a street could not be interfered with by the courts, in the absence of a showing of a fraudulent or manifest abuse or oppressive exercise of power.

**3. EMINENT DOMAIN—STREET RAILROADS—LOCATION IN STREET—ADDITIONAL SERVITUDE.**

The rule that the location of a street railway line does not impose an additional servitude on the land occupied by the street so as to constitute an invasion of the property rights of abutting owners is not changed by Const. 1902, art. 4, § 58 (Code 1904, p. ccxxii), prohibiting the passage of any law whereby private property shall be taken or damaged for public uses without just compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 305-309.]

**4. MUNICIPAL CORPORATIONS — STREETS — ABUTTING OWNERS.**

Where a city acquires title to the fee of a street by conveyance or condemnation, the abutting owner is presumed to have been compensated for all the servitudes to which the street was liable when the city acquired the land.

**5. STREET RAILROADS—LOCATION IN STREET—RIGHTS OF ABUTTING PROPERTY OWNER.**

A city council, pursuant to charter authority, directed that a street railway company should lay its tracks east of the center of a certain street, on the east side of which complainant owned certain property. The track was to be located six feet from the east curb flush with the surface of the street, and maintained so as not to unreasonably impede travel or the passage of vehicles. *Held*, that such location did not impair any of complainant's rights in the street; and this, though a vehicle could not stand between the track and the curb while a car was passing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 87.]

**6. SAME.**

Where by reason of the location of street railway tracks, east of the center of a street, there was not sufficient room for a vehicle to

stand opposite the complainant's property between the track and the curb while a car was passing, complainant was entitled to occupy the street in front of his property for a reasonable time to take away or deliver persons or goods, as against the rights of the street railway company to use the street for passage.

**7. EMINENT DOMAIN—DAMAGE TO ABUTTING PROPERTY.**

An abutting property owner is not entitled to damages because the proposed location of a street railway track in the street in front of his property as authorized nearer to his property than the center of the street would make such property less desirable and less comfortable as a residence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 259.]

Appeal from Circuit Court, Washington County.

Suit by R. F. Wagner against the Bristol Belt Line Railway Company and others. From a decree for defendants, complainant appeals. **Affirmed.**

Roberts & Roberts, for appellant. A. A. Phlegar, Bullitt & Kelly, J. C. Byars, and Paul Dulaney, for appellees.

CARDWELL, J. The council of the city of Bristol, Va., pursuant to authority conferred by its charter (Acts 1899-1900, p. 635, c. 611, § 49), granted on June 19, 1907, to the Bristol Belt Line Railway Company a franchise to build, equip, and operate a street railway, using electricity, over and along the streets of the city, including Moore street, this franchise providing that the streets occupied by the railway shall be put in as good condition after construction of the tracks as before; that the railway company shall keep in good repair the streets occupied by its track for 3½ feet on each side of the center line thereof, and shall keep the same flush with the street; and that, if the city should thereafter pave or macadamize any of the streets so occupied, the railway company shall in like manner pave and macadamize that portion occupied by its tracks, measuring 3½ feet from the center line thereof on either side. The line of railway was to be constructed under the supervision of the street committee chosen by the council, and the street committee directed the railway company to locate its track in Moore street, on the east side thereof, flush with the surface of the street, and that it be "maintained so as not to unreasonably impede travel or the passage of vehicles." The railway company was proceeding to so construct its track in Moore street as authorized, when R. F. Wagner, who owns three lots abutting on the east line of Moore street, gave a notice to the railway company and the city, requesting and notifying them to place the track of the car line in the middle of Moore street, and stating that the building of the track on the east side of the street would impede his, Wagner's, right of ingress and egress, and would damage his property considerably, further stating that,



if his request was not granted, he would apply for an injunction to protect his rights.

On the 9th of August, 1907, at a meeting of the council of the city, after a number of the members of the council had viewed that portion of Moore street upon which the railway track was proposed to be laid, a resolution was adopted reciting that it appeared to the satisfaction of the council that the construction of the railway track on the east side of Moore street would be less inconvenient and dangerous to public travel than the construction thereof in the center of the street, approving and ratifying the action of the street committee, and directing the railway company to locate its track accordingly, the east rail thereof to be placed 6 feet from the curb of the sidewalk, and the street between the rails and 1½ feet on each side thereof to be continuously kept in good repair by the railway company so as to permit easy passage thereover. Whereupon Wagner filed his bill in the circuit court of Washington county, and obtained a temporary injunction restraining the railway company from placing its track line on the east side of Moore street, which injunction after a hearing was by decree entered August 16, 1907, dissolved, and from that decree Wagner obtained this appeal.

The section of the charter of the city of Bristol, *supra*, gives to the council of the city the power "to permit street car lines to be built, and to determine and designate the route and grade thereof."

In the petition for this appeal it is conceded that the city, before the enactment of section 12941, c. 3, Code 1904, had the power to regulate and control its streets, and that this power was subject to only one limitation—that the city must act in good faith, and that the regulation must be reasonable and not imposed arbitrarily or capriciously. But the contention is made that as the city itself is not building the electric car line in Moore street, but the railway company proposes to do so, the latter derives its power to build and operate the proposed line from the statute just mentioned, and, as that statute provides that "such \* \* \* tracks, etc., \* \* \* shall not, in any wise, unnecessarily obstruct or interfere with the use of the same (street) or public travel over the same, or damage property, without compensation," therefore the prior rule of law has been modified, and, although the railway company had obtained the required franchise from the city and proposed to build its track line under the supervision of the city authorities, and the city authorities had located the track at the point complained of, under a proper interpretation of the statute, if this car line unnecessarily obstructs or interferes with appellant's use of the street, he has the right to have the same located so as not to do so, since the words in the statute, "shall not in any wise unnecessarily obstruct or interfere with the use of the same," refer to

the use of the street by the abutting owners, and the words, "or public travel over the same," refer to the use of the street by the public. No allegation of bad faith or arbitrary or capricious conduct appears in the bill of appellant; the allegation he relies on being that the location of the railway is unreasonable and will unnecessarily and unreasonably interfere with his right of ingress and egress. In other words, as said by the learned judge below in his written opinion, made a part of the record, the contention of appellant is that the judgment of the city council was bad in locating the railway line on the side of Moore street.

The power conferred by the charter of the city to permit street car lines to be built and to determine and designate the route and grade thereof is not dissimilar to that conferred by the general law, and we are unable to appreciate the force of the contention that this power in the city to control and manage its streets is limited by the new Constitution; nor do we assent to the view that the law conferring the power, in so far as street car lines are concerned, has been modified by section 12941 of the Code of 1904.

Have the courts the power to interfere with the judgment of the council of a city in a case such as is made by appellant's bill and proof? is the first question for our determination.

It has been repeatedly decided by this court, and well recognized by text-writers and in the decided cases in other jurisdictions as the settled law, that courts can interfere only to prevent a fraudulent or manifestly abusive or oppressive exercise of the powers conferred upon the council of a city by its charter or the general law, since the discretion of municipal corporations, within the sphere of their powers, is as wide as that possessed by the government of a state. "This discretion is to be exercised according to the judgment of the corporation as to the necessity or expediency of any given measure. The General Assembly is a co-ordinate branch of the government, and so is the lawmaking power of a municipal corporation, within the prescribed limits, and it is no more competent for the judiciary to interfere with the legislative acts of the one than the other." *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 812-813, 14 S. E. 665; *Newport News Elec. Co. v. Hampton*, etc., 102 Va. 802, 47 S. E. 839; 1 Dillon on Mun. Cor. §§ 94, 308, and notes to last-named section. See, also, 7 *Rapalje & Mack's Dig. of Ry. Law*, 420; *Cooley on Con. Lim.* (6th Ed.) 252.

Coming, then, to the remaining question in the case, *viz.*: If appellant is damaged within the contemplation of the present constitutional provision (Const. 1902, § 58, art. 4 [Code 1904, p. ccxxii]), is the city of Bristol or the railway company liable to pay appellant such damages before the proposed line of railway is constructed?

The allegations of the bill of injury to or

invasion of the property rights of appellant are (1) that an additional servitude is imposed upon the land occupied by the street; (2) that ingress and egress are unreasonably interfered with; and (3) that appellant's property will be made less desirable and less comfortable as a residence.

That the first allegation has been decided adversely to the contention of appellant we need only refer to the cases of *Reid Bros. v. Norfolk City R. Co.*, 94 Va. 117-125, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708; *Bass v. Norfolk, etc., Ry. Co.*, 100 Va. 1, 40 S. E. 100; *Richmond Traction Co. v. Murphy*, 98 Va. 106, 34 S. E. 982; *Western Ry. of Ala. v. A. G. T. R. Co.*, 96 Ala. 272, 11 South. 483, 17 L. R. A. 477, and note; *Dillon on Mun. Corp.* (4th Ed.) § 725; *Joyce on Elec. L.* (2d Ed.) § 335; 27 A. & E. Ency. L. p. 27.

It is conceded by counsel for appellant that such was the law and may yet be as a general rule; but it is contended that the new Constitution has altered the rule by inserting the clause (section 58, art. 4, of the present Constitution) that the General Assembly "shall not make any law whereby private property shall be taken or damaged for public uses, without just compensation," the change wrought being by adding to the provision of the old Constitution the words, "or damaged."

The theory of the established rule that an electric railway operated on a public street adds no additional burden to the street, entitling the abutting lot owners to damages, is predicated of the reasoning that the streets are acquired for the purpose of free passage or travel, not merely by the means in vogue at the time of the dedication or taking, but by such new means as the necessities of the age and the community may require. *Joyce on Elec. L.* § 341; *Reid Bros. v. Norfolk, etc., supra*; *Bass v. Norfolk, etc., supra*.

In this case appellant does not deny the right of the city to the use of Moore street for all the purposes for which a street may be lawfully used as the necessities of the age and the community may require, but rests his claim of right to damages as an abutting owner, and to enjoin the city and the railway company from locating the proposed car line in Moore street until the damages he claims are paid, solely upon the ground that the railway track is proposed to be on the side of the street next to the property of appellant, instead of in the middle of the street. He, as seems also to be conceded, conveyed to the city the fee-simple title to the land in Moore street from its center to the east line of the street abutting on his property; but, whether he made such a conveyance or the city acquired this space for street purposes by condemnation, appellant is presumed to have been compensated therefor, and for all the servitudes to which the street was liable, when the city acquired

the land, and having been paid for the same once, he could not claim damages again for having parted with the control of the land. This is the reasoning for the rule sanctioned in the Virginia cases cited above, and in innumerable cases decided by the courts of other states, as well as the federal courts. In Pennsylvania, California, Missouri, Texas, Kentucky, Indiana, Illinois, Arkansas, Georgia, Maine, Maryland, and Mississippi, each having a constitutional provision similar to section 58 of article 4 of our new Constitution, the courts adhere to the rule that a street car line is no additional servitude, and that one who abuts is entitled to no damages by reason of its location in the street. Among the cases referred to are *Rafferty v. Cln. Trac. Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *Finch v. Riverside, etc., R. Co.*, 87 Cal. 597, 25 Pac. 765; *Montgomery v. Santa, etc., R. Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89; *Nagel, etc., v. Lindell R. Co.*, 187 Mo. 89, 66 S. W. 1090; *Gaus v. St. Louis, etc., R. Co.*, 113 Mo. 308, 20 S. W. 658, 18 L. R. A. 339, 35 Am. St. Rep. 706; *San Antonio, etc., v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 708; *Georgetown, etc., v. Mulholland* (Ky. 1903) 76 S. W. 148; *Doane v. Lake, etc., R. Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; *So. Ry. Co. v. Atlanta, etc., Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; *Rosenbaum, etc., v. Meridian, etc., Co.* (Miss. 1905), 38 South. 321; *St. Paul, M. & M. R. Co. v. Western Union Tel. Co.* (C. C.) 106 Fed. 243, and note.

In *Gaus, etc., v. St. Louis, etc., R. Co.*, supra, the tracks were laid so close to an abutting owner's property as not to permit wagons to stand between the tracks and the property, yet it was expressly held not to come under the damage clause of the Constitution.

"The convenience and advantage of all the inhabitants of the city, and of the public at large, must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interest of the community and the public to the inferior and subordinate claims of the local lot owner. Such a construction of the law governing the dedication of public streets and the reserved rights of the original landowner and his assigns in the street by unreasonably increasing the cost of rights of way or use would obstruct all progress and deprive the local community of the benefit to be derived from the advancements of science, invention, and discovery." *Mordhurst v. Ft. Wayne, etc., Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222, and note by Freeman, page 243 of 106 Am. St. Rep.

In *Richmond Traction Co. v. Murphy*, supra, the opinion says: "It was not neces-

sary that the abutting lot owners should be consulted in regard to changing the street railway tracks, any more than their consent was necessary to those rails being originally laid in the streets."

True, this court in *Reld Bros. v. Norfolk City Ry. Co.*, supra, declared that it did not mean to say that a street railway might not be so constructed and operated as to create a new servitude upon the street or burden upon the land, or cause injury to property rights, which would entitle the abutting owners to compensation, or to damages for the injury; but no such case is made by appellant here. Whether an additional servitude has been added to the street, or whether an abutting owner is entitled to compensation or to damages for an injury, cannot be determined from the mere fact that the track of an electric car line is proposed to be laid on the side of the street, instead of in the center thereof.

Here every precaution has been taken by the council of the city that the railway company in laying its track in Moore street shall not unreasonably impede or interfere with the passage of vehicles, and shall keep the same in good repair so as to permit easy passage thereover. The allegations with respect to obstruction to access to appellant's property are but conclusions based upon no facts stated, and how a street railway track, six feet from the curb, flush with the surface of the street, and "maintained so as not to unreasonably impede travel or the passage of vehicles," can unlawfully, or unreasonably, or at all, interfere with access to lots abutting on the street with four feet of granolithic pavement between the track and the abutting lots, is not made to appear, and is not easily to be conjectured. The entire width of the street is acquired for street purposes for all time (*Halsey v. Rapid, etc., Co.*, 47 N. J. Eq. 380, 20 Atl. 859), and, if the abutting lot owner is not damaged by the construction and operation of an electric car line in the middle of the street, surely the rule cannot be affected by the mere matter of inches or feet.

The suggestion that, because a vehicle could not stand between the track and the curb while a car is passing, the appellant's rights will be violated, is without merit. While appellant has unquestionably the right to occupy the street in front of his property to take away or deliver persons or goods, he may occupy the street for such purposes a reasonable length of time, and that right the street railway company must accord to him, and both must recognize that streets are established for the purpose of facilitating the passage of persons from one part of the city to another, and not for the standing of vehicles or storage of goods thereon. See authorities above cited, and *Elliott on Roads & Streets*, §§ 716-717, 848.

In a note to *Ashland, etc., Ry. Co. v. Faulkner*, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806,

43 L. R. A. 557, it is said: "So, while the abutting owners have an easement in a street, in common with the whole people, to pass and repass, and also to have free access to their premises, the mere inconvenience of such, occasioned by placing a street car track so near the sidewalk as not to leave sufficient space for a vehicle to stand, is not the subject of an action.

"So a street railway, one of the tracks of which was in such close proximity to the sidewalk in front of the premises of an abutting owner as to interfere with, impede, and prevent his complete enjoyment of the use and occupation thereof, leaving insufficient space between the sidewalk and the track to admit of every kind of vehicle to be driven or to remain in front of his premises, is not for that reason a public nuisance where the title to the street is vested in the city, but the injuries are referable to that class of disadvantages to which one is subjected resulting from the lawful exercise of the absolute power of control vested in the state in connection with the title to the fee of the land."

In *Rafferty v. Cen. Trac. Co.*, supra, it was held that the right of an abutting owner to the use of the street is the same after the tracks are laid thereon and the cars running as it was before. If at any time he has occasion for the presence of vehicles on the street in front of his property to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and, if in such exercise of the right the passage of street cars is impeded, they must wait. See, also, *Kellinger v. Forty-Second St. & G. St. Ferry R. Co.*, 50 N. Y. 206.

Where there is shown to be a physical invasion of an abutting landowner's premises by dirt and dust, which injure the walls and furniture of his house and the health of himself and family, and other acts which amount to a public nuisance, as was the complaint dealt with on demurrer in *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320, 9 S. E. 1078, so much relied on for appellant, the landowner would have a right of action against the wrongdoer for the damages so done him; but the reasoning of that case does not apply here, and in fact, is authority for the proposition that the landowner could not recover damages if the acts complained of amounted simply to an inconvenience or discomfort of the occupants of the property. In that case the street car track was 18 inches from the curb, yet the opinion of the court, at page 1080 of 9 S. E., page 328 of 82 Ga., says that, "if the railroad company had permission from the Legislature and the city council, it could lay its track in the street anywhere in its opinion it was for the best interest of the company to lay it."

Nor is the case of *Swift v. Newport News*, 105 Va. 106, 52 S. E. 821, 8 L. R. A. (N. S.)

404, also invoked for appellant, at all in point. There, and in all similar cases growing out of a change in the grade of a street, the city had established a grade which was contemplated when the land was acquired, and which the lot owner had a right to believe was what it intended to maintain, and to which he had accommodated his premises in the location of his house, fences, pavements, etc. The wide distinction between the using of a public street as a passageway for the public and the changing of the physical condition of the street itself is always to be observed; and also the equally wide distinction between the occupation and use of a street by steam railroads, as in the case of Tidewater, etc., Co. v. Shartzler, 107 Va. 562, 59 S. E. 407, and its use by a street railway; for the obvious reason that, when the land for the street was acquired by the municipality, its occupation and use by a steam railroad was not in contemplation, while in the other case it is to be presumed that, when the land was acquired by condemnation, dedication, or grant for street purposes, it was contemplated that the street at grade would be used by all classes of vehicles, including the street car, to facilitate the passage of persons from one part of the city to another.

The question raised by appellant, as to whether or not he is entitled to damages because, by reason of the proposed location of the railway track in Moore street as authorized, his property will be made less desirable and less comfortable as a residence, has been decided adversely to appellant in the cases of Tidewater, etc., Ry. Co. v. Shartzler, supra, and Campbell v. Met. Ry. Co., supra, cited for him. Both dealt with the question of an original taking. The first involved the right of an abutting lot owner to damages resulting from the occupation and use of the street by a steam railroad, and the latter the question of damages incident to an original taking. Neither affect the question of the public's right to use in a legitimate manner that which it has acquired the right to use, and for which the abutting landowner is conclusively presumed to have been already fully compensated.

With respect to the last-named case, we consider it only necessary to say, in addition to what has already been said, that, if the proposition of law there laid down is as broad as counsel for appellant contends (to which we do not agree), it is unsupported by the great weight of authority, and therefore out of accord with the well-established principles governing such cases.

In Tidewater Ry. Co. v. Shartzler, supra, the opinion by Keith, P., sets out in full section 236 of Lewis' work on Eminent Domain, where that learned author quotes with approval the following from the opinion by the Supreme Court of California in *Eachus v. Los Angeles Consol. El. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149: "The

Constitution does not, however, authorize a remedy for every diminution of the value of property caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But, whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed in any case unless there was some physical injury to the plaintiff's property, or by noise, smoke, gases, vibrations, or otherwise an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere depreciation, caused by the proximity of a public improvement, afforded no ground for redress." Lewis on Em. Dom. § 236.

The gravamen of appellant's complaint is that by the location merely of the railway track on the side of Moore street, instead of in the center thereof, his ingress and egress will be unreasonably interfered with, and his property made less desirable and less comfortable as a residence.

The railway track being laid flush with the ground at grade, and constructed so that vehicles can cross the same and far enough from the sidewalk to preclude any claim that the latter is damaged, or that the right of ingress or egress by foot passengers is interfered with, or carriages or other vehicles prevented by the presence of the railway track from driving up to the curb of the street in front of appellant's property, he has the same ingress and egress he had before; the right of the railway company, as a matter of law, being limited to the use of the street at grade in common with other vehicles. The latter has no greater or less right to the use of Moore street than has appellant or the public generally.

"A street railway has no property interest in the street. It has the mere right to use it in common with the public generally. It has no right to use it for other or different

purposes than those for which it was dedicated or condemned, and because its use by the street cars is not a new and independent one, but merely in aid of the identical use for which the street was laid out, the owners of street cars are not required to pay compensation to abutting owners for its use." *Bass v. Norfolk, etc., Co., supra*; *Watson v. Fairmount, etc., 49 W. Va. 528, 39 S. E. 193.*

It is true appellant produced in support of his bill several pro forma affidavits of certain persons, to the effect that in their opinion the reasonable location of the car line would be in the middle of the street, and that appellant's property is damaged by reason of the laying of the car track on the side of the street next to his property; but, as said by the court in *Rafferty v. Central Tr. Co., supra*, "such statements are matters of opinion only, fortified by no actual facts."

A number of other cases are cited by the learned counsel in support of appellant's contentions, but as they, in our view, are out of harmony with the great weight of authority controlling the issues involved here, or deal only with the right of steam railways to use streets, and therefore not in point, it is deemed unnecessary to review them.

We are of opinion that there is no error in the decree of the circuit court complained of, and it is affirmed.

Affirmed.

#### THOMPSON v. SEABOARD AIR LINE RY. (Supreme Court of South Carolina. Sept. 17, 1908.)

##### 1. APPEAL AND ERROR—QUESTIONS OF FACT—EVIDENCE—SUFFICIENCY.

In an action for intestate's death by being struck by defendant's train, in deciding whether the evidence is sufficient to show negligence in failing to use proper efforts to stop the train, testimony of the engineer that he was on the watch, saw intestate, and used every effort to stop the train will not be considered on defendant's appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

##### 2. RAILROADS — INJURIES — SUFFICIENCY OF EVIDENCE.

In an action for intestate's death by being struck by defendant's train, the evidence held insufficient to show negligence by defendant's engineer in failing to stop the train in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1138-1143.]

##### 3. SAME—PROXIMATE CAUSE OF INJURY.

Where intestate's team was stalled on defendant's track by reason of defects in a bridge which it was defendant's duty to properly maintain, and intestate heard the approaching train and ran down the track to stop it before striking the wagon, and was himself struck and killed by the train, the defective bridge was the proximate cause of his death, though defendant was not negligent in failing to stop its train in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1091.]

##### 4. SAME—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE PER SE—GOING ON TRACK.

Where intestate's team was stalled on defendant's track, and intestate got out and ran down the track to stop the train, it was not negligence per se to go on the track for that purpose.

##### 5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RISK ASSUMED IN PROTECTING PROPERTY.

It is not contributory negligence per se for one who is under a duty to protect property to take a manifest risk to do so, unless the risk was wanton or unreasonable, and the risk in such cases is not presumed to be wanton; the test being whether a reasonably prudent man in the same circumstances would have assumed the peril.

##### 6. RAILROADS—ACTION FOR INJURIES—INJURIES ON TRACK—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action for intestate's death by being struck by a train while he was on the track endeavoring to stop it so as to prevent a collision with his wagon, evidence held insufficient to show contributory negligence in not leaving the track before he was struck.

##### 7. SAME—QUESTION FOR JURY—PROXIMATE CAUSE.

Where decedent's team was stalled on defendant's railroad crossing a few minutes before the approach of a train, so that, if he had heard the crossing signal, he would not have attempted to cross, and he got out of the wagon and ran down the track about 100 feet to stop the train, when he was struck by it, whether defendant's failure to give signals was negligence contributing to bringing intestate into the situation which caused his death held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1190.]

##### 8. SAME—CAUSE OF INJURY—FAILURE TO GIVE SIGNALS.

In an action for intestate's death by being struck by a train while he was attempting to stop it to prevent a collision with his team, if intestate would not have driven on defendant's crossing where his team was stalled if defendant had given proper crossing signals, all reasonable efforts to stop the train before it struck his team were made necessary by defendant's negligent failure to give the signals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1094.]

##### 9. SAME—ACCIDENT AT CROSSINGS—FAILURE TO GIVE SIGNALS—VIOLATION OF STATUTE—PERSONS ENTITLED TO BENEFIT OF SIGNALS.

Where intestate drove his team on defendant's railroad crossing where it was stalled, and would not have done so had defendant given proper crossing signals, and, upon hearing the approaching train, ran down the track 100 feet to stop it, he did not by going off the crossing lose the benefit of the statute requiring defendant to give signals on approaching crossings, and an instruction that, while generally the failure to ring the bell was not negligence as to a person on the track a little distance from the crossing, yet there might be circumstances where the jury would conclude it was negligence, was not error.

##### 10. SAME—EXEMPLARY DAMAGES—PERSONAL INJURIES.

In an action for intestate's death by being struck by a train while attempting to stop it to prevent a collision with his team, there being evidence that the crossing on which his team had stalled was obviously dangerous on account of the narrowness of the bridge at its approach, and that the county authorities had several times warned defendant and requested that the bridge be made safe, which was not done, the issue of punitive damages was properly submitted to the jury.

**11. RAILROADS — OPERATION — TRESPASSERS — COMPANY'S CONSENT — PRESUMPTION.**

The consent of the railroad that intestate should enter on its track to stop its train by signals to prevent a collision with intestate's wagon, which was stalled on its crossing by reason of a defect therein, will be presumed, and, in an action against the company for intestate's death, a charge of the law applicable to trespassers was properly refused.

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by J. M. Thompson, as administrator of Charles A. Thompson, against the Seaboard Air Line Railway to recover for the death of plaintiff's intestate. From a judgment for plaintiff, defendant appeals. Affirmed.

Eflrd & Dreher and Lyles & McMahan, for appellant. Geo. T. Graham and Nelson & Nelson, for respondent.

WOODS, J. Charles A. Thompson early in the night of October 23, 1905, was driving a wagon and pair of mules along the Two Notch road in Richland county. The road turns at a sharp angle to cross the track of the defendant, Seaboard Air Line Railway, and at the crossing there is a shallow ditch and a bridge on each side of the track. One of the front wheels of the wagon missed the bridge, and went into the ditch, and the mules were thus held on the railroad track. The defendant's fast train, known as the "Florida Limited," was approaching. Thompson left his team, and ran probably about a 100 feet towards the train, waving his hat in the effort to stop it. The train did not stop in time, and struck and killed both Thompson and the mules. J. M. Thompson, the owner of the mules, recovered against the defendant damages for their loss, and the judgment of the court of common pleas was affirmed by this court in *Thompson v. Seaboard Air Line Ry.*, 78 S. C. 384, 58 S. E. 1094. As administrator of Charles A. Thompson's estate, J. M. Thompson brought this action, alleging the death of his brother to have been due to the negligent, reckless, wanton, and willful conduct of the defendant, and recovered a judgment for \$3,000. Defendant appeals, charging error in the refusal to grant a nonsuit, in instructions to the jury, and in refusing to grant a new trial.

The first question raised was whether there was any evidence of negligence by the defendant constituting a proximate cause of the death of Thompson. Some of the plaintiff's witnesses testified that, by actual measurement in approaching the crossing, the train was on a straight track for 583 yards. The engine was equipped with an electric headlight. There was some evidence from W. H. Tiller, an engineer sworn in behalf of plaintiff, that under favorable conditions such a headlight would enable the engineer to see an object on the track 250 to 300 yards, but this was a misty night, and the witness said on such a night "the sweat from

the glass would stop your reflection and light to a certain extent." Although testifying that such a train as this could be stopped in about 100 to 125 yards, he said that the distance would be greater on a wet track or down grade. According to plaintiff's evidence, the fatality occurred on a down grade, and the misty night no doubt made a damp or wet track. The train was stopped just beyond the crossing. M. A. Drawdy testified he was standing on the side of the track, and saw the headlight of the approaching train and a man running along the track towards it, waving his hat as if to sign it down; that the train passed him, and he did not see it strike deceased; that the speed was not slackened until about the time it struck the mules. The impression of this witness as to the precise time the speed of the cars was slackened was necessarily vague, and hence his evidence is indefinite. Of course, the testimony of the engineer of the train that he was on the watch, saw the deceased signaling, and immediately used every effort to stop the train is to be left out of view in deciding whether the above facts prove negligence in failing to use proper efforts to stop the train. But negligence is to be proved, not assumed, and we do not think, if all the plaintiff's evidence on the point be taken as true, it would tend to establish in the mind of a reasonable juror the conclusion that the engineer was negligent in failing to see the deceased before he did, or in failing to stop the train in time. If this had been the only proof of negligence, the defendant would have been entitled to a nonsuit, but other charges of negligence are to be considered.

The bridge on which the wagon and mules were caught was built by the railroad company on its roadbed for its own purposes. Hence there can be no doubt of the duty of the railroad company to keep it in order for the safety of the traveling public. There was evidence that the bridge, though at a sharp turn in the road, was only 10 to 12 feet in width; whereas, safety to vehicles required it should be 20 feet, the same width as the highway. The wheel tracks of the wagon indicated that, if the bridge had been of the requisite width, the wheels would not have left the bridge, the wagon would not have been caught, and the deceased, of course, would have passed on in safety. From these facts it is very clear there was evidence of defendant's negligence resulting in the mules and wagon being caught. But it is insisted the court should have held as a matter of law this negligence could not be the proximate cause of the death of Thompson. The mules and wagon were in a place of utmost peril. Not only so, but their position on the track was such as to imperil the safety of defendant's approaching train and the passengers thereon. All this was due to defendant's negligence in the construc-

tion of the bridge. Thompson lost his life in the effort to stop the train, and avert the threatened loss of other lives, and destruction of the property in his charge. That effort was immediate and direct, and was the only one he could have made. He was alone, the train was approaching, and his pressing obligation was to try to communicate to the engineer the danger. This right and duty to signal the train, according to the evidence, was forced on him by defendant's negligence. Therefore, if the jury believed this evidence, it was certainly sufficient to sustain the conclusion that defendant's negligence was a proximate cause of the peril assumed by Thompson and of his death. This conclusion is fully sustained by the very analogous cases of *Cooper v. Richland Co.*, 76 S. C. 202, 56 S. E. 958, 10 L. R. A. (N. S.) 799, and *Snipes v. A. C. L. Ry.*, 76 S. C. 207, 56 S. E. 959. The defendant maintains, however, that, even if the defendant's negligence was a proximate cause of Thompson's death, yet he knew of the approach of the train, and was guilty of contributory negligence in not getting off the track before the train reached him. Under the circumstances the court could not have said it was negligence *per se* for Thompson to go on the track for the purpose of stopping the train. It is equally clear it would be very harsh judgment to say the fact that he stayed on the track too long conclusively shows he was negligent in not getting off in time to escape injury. If the evidence is credible, the emergency was brought upon him by the defendant. He was absorbed in the effort to stop the train, and no doubt excited to the degree of consternation by the emergency. He was facing a powerful electric headlight, which, it is reasonable to suppose, blinded him to the extent that he erred in his estimate of the distance of the train from him, until it was too late to escape. The rule was established in this state in 1840 by the case of *Ivy v. Wilson*, Cheves, 74, that it is not contributory negligence *per se* for one who owes the duty to protect property to take a manifest risk to save it, unless the risk was wanton or unreasonable, and that the exposure by a person so situated is not to be presumed to be wanton or unreasonable exposure to unnecessary danger. The test is whether a reasonably prudent man in the same exigency would have assumed the peril. *Wilson v. Ivy*, *supra*; *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; 29 Cyc. 524. The exceptions on this point are overruled.

There was direct evidence of the violation of the signal statute—that is, of a failure to sound the whistle five hundred yards before reaching the crossing—but the defendant contends that Thompson was not within the protection of the statute, because he was about 100 feet from the crossing when struck by the train. Therefore the circuit judge should not have submitted to the jury the is-

sue of negligence under the signal statute. Referring to the signal statute, Chief Justice Simpson for the court says in *Neely v. C., C. & A. R. R. Co.*, 33 S. C. 136, 11 S. E. 636: "Now, there can be no doubt but that the object of these sections was to prevent collisions which might occur between persons attempting to cross the track of the railroad and the locomotive and cars approaching the crossing at the same moment, and the provisions or the act did not include, nor was the act intended to include, injuries inflicted upon bystanders not intending to cross, or upon cattle that happened to be killed or injured pasturing nearby, but not upon the crossing or using it to pass from the one side to the other." This rule has been followed in this state, and is in accord with almost all precedents in other states. *Hale v. Railroad Co.*, 84 S. C. 292, 18 S. E. 537; *Fletcher v. Railroad Co.*, 57 S. C. 205, 35 S. E. 513; *Sims v. Railway Co.*, 59 S. C. 243, 37 S. E. 836; *Hutto v. Railroad Co.*, 61 S. C. 495, 39 S. E. 710; *Ringstaff v. Railway Co.*, 64 S. C. 546, 43 S. E. 22; *Fowles v. Railway Co.*, 73 S. C. 306, 53 S. E. 534. But we can find no case where the application of the statute to a case like this has been considered. Here the circumstances would warrant the inferences that Thompson's team had been caught on the track a very few moments before the approach of the train, and that, if he had, heard signals, he would not have attempted to cross before it passed. It was therefore for the jury to say whether a failure to give the signals was negligence contributing to bring the deceased into the predicament in which he found himself. The whole trouble arose at the crossing to a traveler exercising his right to cross. If he would not have gotten into the predicament but for defendant's failure to give the signal, then all reasonable efforts to extricate himself from it may well be said to have been made necessary by defendant's negligent failure to signal. If such efforts had been made by deceased while standing on the crossing, there can be no doubt that the case would have fallen under the signal statute. It would be a very technical distinction to hold that when his team was thus caught on the crossing, and Thompson extended his efforts to prevent a catastrophe 100 feet from it, he lost all benefit of the statutory protection, provided for persons passing over a crossing on the highway.

Without extended analysis of the cases on the subject, it is sufficient to say none of them in this state or elsewhere are like this case, and there is no principle laid down in them which requires such a technical distinction as is here contended for by the appellant. The request to charge on this subject was as follows: "Failure to ring the bell or blow the whistle of a locomotive approaching a crossing is not negligence as to a person on the track a little distance from the crossing." After reading it to the

jury, the circuit judge said: "Generally speaking that may be, but the circumstances may be such (and you and I are to be judges of the circumstances in each particular case) where it might be negligence. I charge you that as a general proposition, but I say there may be circumstances in each case where the jury have the right to conclude it would be negligence under certain circumstances." For the reasons stated, we think this instruction was not error as applied to this case.

The issue as to punitive damages was properly submitted to the jury. There was evidence tending to show the crossing was obviously dangerous on account of the narrowness of the bridge, and that the county authorities had several times warned the agents of the railroad company of the danger, and requested that the bridge be made safe; and that the defendant nevertheless failed to take any steps to perform the duty required of it by law. The consent of the railroad company that one in the situation of Thompson should enter on its track to stop its train by signal, and thus avert the danger of loss of valuable property or of human life, will be presumed. The circuit court, therefore, did not err in refusing to charge the law applicable to trespassers on the railroad property.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### CITY OF COLUMBIA v. MELTON.

(Supreme Court of South Carolina. Sept. 22, 1908.)

On petition for rehearing. Denied.

For former report, see 62 S. E. 245.

**PER CURIAM.** After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition for a rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

#### MITCHELL et al. v. ALLEN.

(Supreme Court of South Carolina. Sept. 19, 1908.)

On petition for rehearing. Petition dismissed, and order staying remittitur revoked.

For former opinion, see 61 S. E. 1087.

H. B. Carlisle and Jos. A. McCullough, for petitioner.

**PER CURIAM.** After careful consideration of the petition herein the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition for a rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

#### MASON v. APALACHE MILLS.†

(Supreme Court of South Carolina. Sept. 17, 1908.)

##### 1. WATERS AND WATER COURSES—USE BY UPPER PROPRIETOR—REASONABLENESS—EVIDENCE.

That the use of waters by an upper riparian owner is not the reasonable use to which he is entitled as against a lower proprietor is not necessarily shown by the fact of a decrease in its volume by such use or an increase therein by its storage and subsequent use.

##### 2. SAME—QUESTION FOR JURY.

Whether the use of the waters of a stream by an upper riparian owner is reasonable as against a lower owner is a question for the jury, where there is any evidence tending to show that its use was unreasonable; the capacity of the stream, the adaptation of machinery to it, the general usage of the country in similar cases, and any other facts bearing on the issue being matters to be considered.

##### 3. EVIDENCE—EXPERT TESTIMONY—HEARSAY.

Testimony that water of a mill pond was lowered 12 feet on a certain day by the operation of a mill, the witness admitting that he was not there at the time, and that he testified entirely from statements of others to him, is not admissible on the ground that he was testifying as an expert.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1174-1192.]

##### 4. APPEAL AND ERROR—HARMLESS ERROR.

Refusal to strike out testimony that the water of a mill pond was lowered 12 feet on a certain day by the operation of the mill, the witness admitting that he was not there at the time, and that he testified entirely from statements of others to him, is harmless, as the jury could not have failed to understand that he knew nothing of the matter he undertook to state, and therefore could hardly have received his statement as a fact, but would more likely, on account thereof, give less faith to his other testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

##### 5. WATERS AND WATER COURSES—INJUNCTION.

It being obvious from the whole evidence that the issue was to defendant's right to use a stream just as it had been using it from the time it built a dam; and there being no doubt that if there was any trespass it was a continuing one, there is no foundation for the contention that injunction should not have issued, because the general verdict for plaintiff was consistent with the conclusion that the trespass was only temporary.

##### 6. SAME.

Though the complaint after setting out the facts complained of alleged as a continuing trespass, alleged that plaintiff has been and "will be" damaged in a certain sum, yet the verdict for plaintiff cannot be held to have covered future damages, so as to render improper the granting of an injunction; it being stated by plaintiff's counsel in the course of the argument to the jury that, though the verdict should be for plaintiff, he would apply for an order of abatement of the part of the use by defendant of waters of a stream claimed to cause the high waters complained of by plaintiff, a lower riparian owner.

† For opinion on rehearing, see 62 S. E. 871.



## 7. SAME — INJUNCTION — CONDITIONS IN GRANTING.

Where it is shown that the bed of a river, where it flows past plaintiff's land, was considerably raised by sand deposited by a flood, and there is evidence that the cleaning out of the sand would so lower the bed that defendant could use the water as it is now using it without backing water on to plaintiff's land beyond the limit fixed by the court in its injunction, the injunction should be conditioned on plaintiff consenting that defendant clean out the bed through his lands, as it asks that it may, at its own expense.

Appeal from Common Pleas Circuit Court of Spartanburg County; R. C. Watts, Judge.

Action by R. B. Mason against the Apalache Mills. Judgment for plaintiff. Defendant appeals. Modified and affirmed.

John Gary Evans and Haynesworth, Patterson & Blythe, for appellant. Stanyarne Wilson and Simpson & Bomar, for respondent.

WOODS, J. The defendant is a corporation owning and operating a cotton mill on South Tiger river, in Spartanburg county. It has constructed a dam for the storage of the water of the river by which the mill is operated, between 40 and 50 feet in height. In accordance with the method approved by engineers and the custom of cotton mills in this state, the water is held back and stored at night, and from midday on Saturday until Monday morning while the mill is not running, in order to increase the volume of water and the available power while the mill is in operation. When the flow of the stream is sufficient to furnish power in excess of the requirements of the Apalache Mills, the defendant uses the surplus to generate electric power which it sells and transmits to the Victor Mills. The power developed by the minimum flow of the stream is known as the "primary power," and that by the excess above the minimum flow which is stored by the dam is called the "secondary power." The plaintiff is the owner of a tract of land of about 136 acres on Tiger river, two miles below the defendant's dam. In his complaint he asks for damages and injunction against the defendant on two causes of action. The first cause of action rests on the allegation that the defendant in 1903, "without right, carelessly, and in willful and conscious disregard of plaintiff's rights," discharged into the Tiger river great quantities of sand, which filled up the channel, and thus caused the river to rise higher in its banks and overflow, and soak the lands, and interfere with the streams and ditches by which it was drained. In the statement of his second cause of action the plaintiff alleges the unreasonable use of the stream by the overdevelopment of the water power, in that the height of the dam and the quantity of water retained and stored are out of proportion to the size of the stream, which is alleged to be small, and hence, when the mill is in operation, a quantity of water

far greater than the normal flow rushes through to the channel below with great force, causing the river to rise rapidly and unnaturally to an additional height of from four to six feet. The plaintiff thus sets out the damages alleged to result to him: "(a) The difference between the excessive flow of the water and the height of the stream while the wheel is in motion, and the almost total stoppage of the flow when the wheel shuts down, causes a constantly changing condition in the river banks, the same being soaked with water, and then as the water recedes being under the influence of the sun's rays, with the consequence of miasma, chills, fever, and other manifestations and products of malaria, by which plaintiff's said property has been seriously injured in value and the health of himself and family impaired and endangered. (b) The excessive flow of water into the river while the wheel is active causes the water to rise much beyond its natural height, and in consequence the valuable bottom land of plaintiff has become soaked and soaked so as to be no longer productive or valuable; the streams and ditches clogged so as to no longer drain plaintiff's low lands; the bridges overflowed so as at times to be impassable, or used only with difficulty and danger; the timber upon said low land destroyed by the soaked condition thereof." It is further alleged in the complaint the damages to the plaintiff are aggravated by the fact that the defendant, in addition to making an unreasonable use of the stream for its own power, undertakes to develop and sell power to the Victor Mills. The alleged unreasonable and unlawful use of the stream is alleged to be a continuing nuisance, for which the defendant has no remedy, except injunction. In the last two paragraphs the allegation is made that the defendant has expressed its purpose to continue the alleged tortious use of the stream, and "that, by the aforesaid acts and conduct of the defendant, plaintiff has been and will be damaged in the sum of \$5,000." Judgment was demanded on the first cause of action for \$1,000 damages, and on the second cause of action for \$5,000 damages, for the abatement of the alleged nuisance, and an injunction prohibiting its continuance. The answer admitted the erection of the dam and the use of the water, but denied that the dam was of unreasonable height, or that the water had been unreasonably used, or that its use had resulted in injury to the plaintiff. At the close of his own testimony, the plaintiff admitted the first cause of action had not been established, and submitted to a nonsuit as to that. There was a verdict against the defendant for \$100, and the circuit judge made an order of injunction, the terms of which will be hereafter referred to. No motion was made for a nonsuit nor for the direction of a verdict as to the second cause of action; but a motion for a new trial was made and refused. In the exceptions it is

insisted that a new trial should have been granted (1) because there was no evidence tending to show defendant's use of the stream was unreasonable; (2) because there was no evidence that defendant's use of the water caused the stream to overflow its banks; (3) because it appeared from the testimony the defendant's use of the stream would not have been attended with injury to the plaintiff, but for the accumulation of sand in the river bed produced by the great flood of 1903. The exceptions on this point cannot be sustained. The law applicable to the case is settled by *White v. Manf. Co.*, 80 S. C. 254, 38 S. E. 456, and may be thus stated in short: The different owners of land through which a stream flows are each entitled to the reasonable use of the water, and for an injury to one owner incidental to the reasonable use of the stream by another there is no right of redress. It does not necessarily follow from either the decrease in the volume of water due to its use by the upper proprietor or the increase due to the storage by the upper proprietor that there has been an unreasonable use, and therefore a right of action to the lower proprietor for any resulting injury. If it were the rule that the lower proprietor had the right to have the stream flow through his land in exactly its usual volume, the result would be to destroy the equality of right of all the proprietors of the land through which the stream flowed, and give to the lowest proprietor a monopoly of its use. Whether a riparian proprietor has made unreasonable use of the stream is always a question for the jury where there is any evidence tending to prove that the use was unreasonable. In the decision of the question all the circumstances are to be considered by the jury—the capacity of the stream, the adaptation of the machinery to it, the general usage of the country in similar cases, and any other facts bearing on the issue. These general principles are also stated and form the basis of the opinion of the Supreme Court of the United States in the very important case of *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

There was testimony in this case tending to show that the defendant's enterprise was projected and the dam constructed with the view of using not only the ordinary current of the stream, but also of storing up the water which ran into its pond for the time during the day and the week when the mill was not running, as well as the excess of water which came in time of freshets. It is, of course, true, as defendant's counsel contends, that the defendant could not let off into the channel any more water than would naturally have flowed into it if there had been no dam, but it was not impossible for defendant to combine in storage the freshet water and the water which ran into the pond while the mill was not in operation, and be

thus enabled to discharge such a volume of water as to make a stream for 12 hours of every work day considerably larger than the Tiger river would be in its natural state. On the question whether the plaintiff has in fact greatly increased the ordinary flow of the stream by storing up freshet water, and whether the increase was the result of a reasonable or unreasonable use of the water by the defendant, there was much testimony on both sides. The jury passed upon it, and this court has no power to review their finding.

In order to make good his charge that the defendant at times in operating its machinery let out water far beyond the natural flow of the stream, the plaintiff undertook to prove by George E. Ladshaw, an engineer, that on a certain Saturday the water in the pond was lowered 12 feet by the operation of the defendant's machinery. This witness, after testifying to the water being lowered 12 feet, admitted that he was not there at the time, and testified entirely from the statements of others to him. Defendant's counsel moved to strike out his testimony on this point; and the motion was refused on the ground that the witness was testifying as an expert. It seems clear that this was error, but we cannot think it could have any influence on the verdict. The jury could not have failed to understand that the witness knew nothing of the matter he undertook to state, and therefore they could hardly have received his statement as a fact. If the statement had any effect, it was more likely to weaken the jury's faith in the accuracy of other testimony of the witness quite important to the plaintiff.

The exceptions to the charge of the circuit judge have no substantial foundation. The charge throughout was to the effect that the defendant could use the stream and increase the flow in any way it saw fit, provided only such use did not result in unreasonably increasing the flow to plaintiff's injury. Not only was the law so stated in the general charge, but all the requests of the defendants, in which the law was accurately laid down, were also given to the jury. We can find no error which would justify the court in disturbing the verdict of the jury.

It remains to consider the exceptions to the order of injunction. It is obvious from the whole evidence in the case that the issue was as to the right of the defendant to use the stream just as it had used it from the time the dam was made, and there can be no doubt that, if there was any trespass, it was a continuing one. Hence there is no foundation for the position that the injunction should not have been granted, because the verdict of the jury was consistent with the conclusion that the trespass was only a temporary invasion of the plaintiff's right.

The next point is much more serious. The first cause of action is out of the case by a nonsuit to which plaintiff consented. The

second cause of action is peculiar, in this: that after the setting forth of the facts complained of, which are alleged as a continuing trespass, it is alleged that by the aforesaid acts and conduct of defendant plaintiff has been and will be damaged in the sum of \$5,000. It is elementary that, except in special cases provided by the Constitution, one person cannot take the property of another without his consent, or continually trespass upon it, and compel the owner to accept payment of money in satisfaction. So the owner whose property is subjected to a continuous trespass may have damages up to the time of trial, and also an injunction against a continuance of the wrong. But obviously, when he elects to take damages for the anticipated future trespass, he cannot have compensation by the recovery of damages, and at the same time an injunction to restrain the trespass. Here, as we have seen, on the face of the complaint, the plaintiff seeks to recover damages for the injury to be done in the future, as well as that already done by the defendant's method of using the stream. For this reason, if nothing more appeared, the verdict would be held to cover all future damages, and the injunction could not issue. But it seems this was not the view taken in the argument of counsel, for the following statement appears in the case: "Mr. Haynesworth, in addressing the jury, stated to them that, if they should render a verdict for the plaintiff, then plaintiff's attorneys would apply to his honor, the presiding judge, for an order to lower the dam, and, turning to Mr. Wilson, asked him if that were not true, to which Mr. Wilson replied that plaintiff would not ask to have the dam lowered, but would ask for an order which would cause the Victor Mill wheel to be taken out." With these statements of counsel before the jury, it cannot be fairly said the verdict was intended to cover future as well as past damages. No argument has been adduced to show that the limit beyond which the defendant was enjoined by the circuit decree from backing water in the branch on plaintiff's land was arbitrarily fixed. Under the testimony and the verdict the limit seems reasonable.

There is, however, a fact appearing beyond all dispute from the evidence, which requires modification of the order of injunction. It was shown beyond all controversy that the bed of Tiger river, as it flows by the land of plaintiff, has been raised to a very considerable extent by sand deposited therein by the great flood of 1903. The evidence shows further there is strong reason to hope the cleaning out of this sand would so lower the bed of the river that the defendant could use the water of the river just as it is now using it without backing water beyond the limit fixed by the circuit court. Section 1466, Civ. Code 1902, contemplates that all landowners shall clean out all streams upon and adjacent to their lands at least twice a year. We do

not deem it necessary to decide whether, under the statute, the plaintiff is bound to clear out Tiger river, because the defendant, waiving any claim of duty on the part of the plaintiff, formally requested of him in writing permission to clear out the river at its own expense. To this request the plaintiff made no response. Though the defendant, in good faith, has erected a dam of great value, it cannot use it so as to impair any right of the plaintiff. Nevertheless the parties are in the court of equity, and the court will not allow the plaintiff churlishly and unreasonably to keep in the river the sand deposited by the great flood of 1903, and thus restrict the use which the plaintiff would otherwise be entitled to make of the stream. As a condition of the order of injunction, the plaintiff must consent that the defendant clean out the bed of the river through his lands.

The judgment of this court is that the order of injunction made by the circuit court be modified so as to make it conditional on the plaintiff notifying defendant within 15 days after the filing of the remittitur in the circuit court of his consent that the defendant may clean out the bed of the river through his lands, and that in all other respects the judgment of the circuit court be affirmed.

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**CHEEK v. SEABOARD AIR LINE RY.**  
(Supreme Court of South Carolina. Sept. 21, 1908.)

**1. MASTER AND SERVANT—INJURIES TO SERVANT—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent collision with another train, the latter part of an instruction that an employé did not assume the risk of negligence of employes of another train, and that a train crew in G. would not assume the risk of negligence of a crew in C., must have been understood as an illustration, and not as an instruction that plaintiff assumed the risk of negligence of employes on other trains, unless they were at different places.

**2. SAME—ACTIONS—EVIDENCE—VIOLATION OF RULES.**

In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent a collision with another train, the evidence held not to show a violation of the company's rules by the crew of such other train.

**3. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent a collision with another train, there being no evidence of the violation of the company's rules by the other train crew, a charge as to the effect upon defendant's liability of such violation by the other crew was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

**4. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.**

In an action by a conductor for injuries caused by the sudden stopping of his train to prevent a collision with another train, where

the evidence showed the injury was caused by plaintiff being in such a position when the train stopped that even an ordinary jar would cause him to lose his balance, his injury must be held to be one of the risks of his employment, which he assumed, and for which he cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

Appeal from Common Pleas Circuit Court of Abbeville County; Ernest Gary, Judge.

Action by J. A. Cheek against the Seaboard Air Line Railway. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. N. Graydon, for appellant. J. L. Glenn and Wm. P. Greene, for respondent.

WOODS, J. This action for personal injuries was tried at the October, 1907, term of the court of common pleas for Abbeville county, and resulted in a verdict for defendant.

A brief statement of the testimony on behalf of the plaintiff is necessary to the consideration of the appeal. Freight train No. 20, in charge of the plaintiff as conductor, was about to end its trip at Greenwood and was within the yard limits, moving, under full control, at the rate of four or five miles an hour. The approach through the yard is slightly up grade, requiring the engineer, as the plaintiff expressed it, "to work steam to go into the yard." The plaintiff testified, as he started to get down from the cupola of the cab, a very sudden and unusual stop threw him to the floor, inflicting serious injury. T. S. Calhoun, the yardmaster, testified the train was stopped by a white light signal, because another freight train, No. 21, was approaching the main line from a side track. When both trains had been stopped by the signal, they were from 20 to 30 car lengths apart. This witness further testified that train No. 21 had not reached the main track when train No. 20 came into the yard. On cross-examination, the witness said there was no duty to protect by flagging within the yard limits, and that one in charge of an incoming train would there expect to be stopped at any time. Eli Hinson, the fireman of train No. 20, who was sworn for plaintiff, said he was on the engine looking out for signals in front, saw train No. 21 approaching the main line, but could not tell whether it had reached it; signal was given by white light; and engineer in response shut off steam and stopped the train. He could not tell whether engineer used brakes at all, but was sure he did not use emergency brakes. In answering the question whether the engineer stopped the train suddenly, the witness said: "Pretty suddenly. He didn't come right plang down at it. He stopped pretty sudden, though." In plaintiff's report of the accident to the company these questions and answers are found: "If any violation of rules caused accident give same by number. A. None. Did engineman and other trainmen use care in the handling of

train at time accident occurred, or, if any other than trainmen injured, was equipment handled properly? A. Yes."

It was, of course, conceded the plaintiff could not recover for any negligence of the engineer on his train, and the case rests on the allegation that the rules of the defendant company required the conductor or person in charge of train No. 21 to send out a flagman to warn train 20 that train 21 was on the main track. These were the rules relied on to sustain this position: "Rule 391. A train not having right of track must be entirely clear of the main track by the time it is required by rule to clear an opposing train or a train running in the same direction; failing to do so, it must be immediately protected, as provided in rule No. 399."

"Rule 399. When a train stops or is delayed under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of the train must be protected in the same way when necessary, by the fireman: (a) When a train is detained at any of its usual stops more than five minutes, or stops at an unusual place, where the rear of the train can be plainly seen from a train moving in the same direction at a distance of at least fifteen telegraph poles, the flagman must go back with danger signals not less than two telegraph poles, and as much further as necessary to protect his train; but, if the rear of his train cannot be plainly seen at a distance of, at least fifteen telegraph poles, the flagman must go back not less than fifteen telegraph poles, and put down one torpedo, and continue to a point thirty telegraph poles from the rear of his train and place two torpedoes on the right-hand rail (looking toward his train) two rail lengths apart. He must then return to the point where first torpedo was placed, and remain there until called in, when he will take up the one torpedo, and, if the weather is foggy, raining, or if it is night, he will leave a fuse burning. (b) A flagman going ahead of a train to stop an opposing train must not depend upon a flag or lamp alone to stop such train, but must place one torpedo on left-hand rail when train is approaching and proceed toward coming train, placing other torpedoes at intervals of five telegraph poles until signal is recognized, and in foggy or rainy weather or at night place a fusee. (c) When a train in motion is losing time, fusees must be lighted and thrown off to protect its rear against trains moving in the same direction, unless there be an unobstructed view of at least twenty telegraph poles or more. This by day as well as night."

"Rule Q. All freight trains will approach all stations, water tanks, and coaling stations between stations under control and so

proceed until the track is seen to be clear. The responsibility at stations, coaling stations, or water tanks between stations will rest with the following or incoming train. This will not relieve trainmen or enginemen from responsibility of protecting trains at stations as provided in rules 391 and 399."

The appeal depends on alleged errors in the charge to the jury. At plaintiff's request the following instruction was given: "That while an employé of a railroad company assumes the ordinary risks incident to his employment, he does not assume the risk of the negligence of employés on another train of cars, or engaged in another department of labor." We think the illustration used in commenting on the request that a train crew in Greenwood is not held to assume the risk of negligence of a crew in Columbia could not have been regarded by the jury as anything more than an illustration, and could not have been understood as an instruction that the plaintiff assumed the risk of the negligence of the crews on other trains, unless they were at a different place.

The other exceptions relate to alleged errors of the circuit judge in not construing the rules of the company in his charge to the jury; in not charging that, if the plaintiff was injured through disregard of the rules by the crew of another train, the defendant would be liable; and in not charging: "That under rules 391, 399, and under rule Q, it was the duty of the conductor of No. 21 to have sent out a flagman or fireman, and to put out the signals as provided by the rules; and, if the jury find from the testimony that the failure to put out the said signals contributed to the injury of the plaintiff as proximate cause of the injury and without which it would not have happened, then the plaintiff would be entitled to recover." We shall not go into an analysis of the charge and of the errors assigned, for the reason that there was a complete failure to show any violation of the rules by the crew of train 21, and therefore the requests had no application. Trains 20 and 21 were not trains delayed at stations, nor trains stopped or moving between stations. They were trains in the yard limits of the company at the city of Greenwood, and in accordance with the requirement of the company, moving under full control. Their crews were required to be, and were, on the lookout for signals to stop. Train No. 21 was not on the main track when train No. 20 entered the yard; and there was not a particle of evidence that train 20 could not be stopped without unusual jar, and without any danger of collision. It is clear from the reading of the rules that they do not contemplate the using of torpedoes and fuses, and the placing of them so many telegraph poles apart within the yard limits, in the circumstances which here appeared. The whole testimony on the part of the plaintiff shows that the injury resulted from the fact

that he happened at the moment of the stop to be in such an attitude that even the ordinary jar of stopping a train going four or five miles an hour was sufficient to cause him to lose his balance. This being so, the injury, deplorable as it is, must be attributed to the risk assumed by the plaintiff when he entered upon his perilous occupation.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### HUGHES v. ORANGEBURG MFG. CO.

(Supreme Court of South Carolina. Sept. 21, 1903.)

##### 1. PLEADING — ALLEGATIONS — COMPLAINT — CERTAINTY AND PARTICULARITY.

A complaint is sufficiently definite which states the cause of action with such particularity as to enable defendant to prepare his defense with certainty and intelligence, so that he may not be surprised at trial by issues not anticipated or required to meet claims not made, and, if the facts are exclusively or particularly within plaintiff's knowledge, more particularity should be required than when defendant has full knowledge of the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 105.]

##### 2. APPEAL AND ERROR — REVIEW — DISCRETION OF TRIAL COURT — RULINGS ON MOTIONS RELATING TO PLEADINGS.

Unless the Supreme Court is convinced that one of the parties has been placed at a disadvantage by the action of the trial court in overruling a motion to make pleadings more definite, its ruling will not be disturbed.

##### 3. PLEADING — MOTION MAKING MORE DEFINITE.

In an action by an employé for injuries sustained while operating a frame in defendant's cotton factory, the complaint alleged that the frame was in such a poorly equipped and defective condition as to render it extremely hard and dangerous for plaintiff to operate it. *Held*, that a motion to make more definite was properly overruled, as the machine was in defendant's possession both before and after accident, so that defendant could have examined it so as to be prepared to meet the allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1173-1193.]

Appeal from Common Pleas Circuit Court of Orangeburg County; Chas. G. Dantzier, Judge.

Action by Julia Hughes against the Orangeburg Manufacturing Company. From an order denying a motion to make the complaint more definite, defendant appealed. Affirmed.

Moss & Lide, for appellant. Brantley & Zeigler, for respondent.

WOODS, J. This appeal is from an order denying a motion to require the plaintiff to make her complaint more definite and certain. According to the allegations of the complaint, while the plaintiff was operating a speeder frame in defendant's cotton factory, her hand was caught and crushed. The wrongful conduct of the defendant was thus set out: "That the said frame, owing to the recklessness, willfulness, wantonness, and

negligence of the said defendant, was in such a poorly equipped and defective condition as to render it exceedingly hard and dangerous for the plaintiff to operate it, entailing upon her an unusual amount of tedious, burdensome, and perilous labor; that, owing to the imperfect working and defective condition of the said frame, which the defendant negligently allowed to exist, the plaintiff's hand was caught in the machinery thereof, and was thereby so badly cut, crushed, and mutilated as to make it necessary to amputate three of her fingers on her left hand," etc. The motion was to require the complaint to be made more definite and certain by alleging specifically in what particular the machinery or any part of it was defective, and by specifying in what particular the accident alleged in the complaint was due to a defect in the machinery. The circuit judge refused the motion on the authority of *Lynch v. Spartan Mills*, 66 S. C. 12, 44 S. E. 93, and *Moore v. Catawba Power Co.*, 68 S. C. 201, 46 S. E. 1004.

From the nature of the subject, the rule governing such motions must be very general. A complaint is sufficiently definite which sets out the alleged breach of contract or tort with such particularity as to enable the defendant to answer the charge, and prepare his defense with certainty and intelligence, so that he may not be surprised at the trial by issues not anticipated, nor be required to incur the labor and expense of preparing to meet claims which the plaintiff had no intention of making. If the complaint in the statement of the cause of action falls short of this standard, it is too indefinite. It is apparent that in the application of this rule there is a wide field for the exercise of common sense. Each case had its own special features. If the facts are exclusively or peculiarly within the knowledge of the plaintiff, more particularity should be required than when the defendant is so circumstanced as to have full information. Except in cases where this court has a strong conviction that one of the parties has been placed at a real disadvantage, the conclusion of the circuit judge ought not to be disturbed. In this case the allegation is that the frame "was in such a poorly equipped and defective condition as to render it extremely hard and dangerous for the plaintiff to operate it." The frame was presumably in the possession of the defendant both before and after the accident. It is a standard appliance or machine used in cotton mills, and it would be no hardship for the defendant to have it thoroughly examined as to its condition and operation, and thus be prepared to prove whether it was poorly equipped or defective or hard to operate.

The judgment of this court is that the judgment of the circuit court be affirmed.

## SCARBOROUGH v. WOODLEY.

(Supreme Court of South Carolina. Sept. 17, 1908.)

### 1. ESTOPPEL—PLEADING AS DEFENSE—SUFFICIENCY OF ALLEGATIONS.

Allegations in the answer in an action to recover land that defendant bought land from plaintiff and plaintiff's mother, and though he was present when the survey was made, and knew the land claimed was included therein, did not object, and that defendant subsequently cleared a part of the land without objection from the plaintiff, were insufficient to establish an estoppel, there being no allegation that defendant was misled by plaintiff's conduct, or that plaintiff at the time had any knowledge of his own claim, as silence and inaction, without positive encouragement or actual participation in the transaction, will not constitute an estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 802.]

### 2. PLEADING — AMENDMENTS — INEFFECTUAL AMENDMENTS.

Where a proposed amendment to the answer would not have cured the defect therein, it was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 802.]

### 3. SAME—DEMURRER—EFFECT OF SUSTAINING DEMURRER.

The effect of sustaining the demurrer to defendant's plea of estoppel was to leave the answer as if the estoppel had not been pleaded, since it was unnecessary to specially plead it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 568.]

### 4. ESTOPPEL — PLEADING — NECESSITY OF PLEADING.

It is unnecessary to plead estoppel in an action to recover land, and defendant could introduce evidence of estoppel under a general denial and have the issue submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 300.]

### 5. TRIAL—INSTRUCTIONS—WITHDRAWING DEFENSES—ESTOPPEL.

In an action to recover land, where a demurrer was sustained to defendant's plea of estoppel, an instruction that the court had struck out the plea of estoppel, and it was not before the jury for consideration, and had not been established by the evidence for that reason, took from the jury the issue of estoppel, and hence was error, as defendant was entitled to have the evidence of estoppel considered, though the demurrer was sustained to his plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

### 6. SAME—CURE BY SUBSEQUENT INSTRUCTION.

In an action to recover land, where a demurrer was sustained to the defendant's plea of estoppel, an instruction that the plea of estoppel had been stricken and was not before the jury for consideration was not cured by a subsequent instruction that if plaintiff stood by for years without objection, and saw defendant improve the land under the belief that he had good title, plaintiff will be estopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

Appeal from Common Pleas Circuit Court of Sumter County; J. C. Klugh, Judge.

Action by James H. Scarborough against J. M. Woodley. From a judgment for plaintiff, defendant appealed. Reversed, and remanded for a new trial.

Lee & Morse, H. D. Morse, and R. W. Shand, for appellant. L. D. Jennings, for respondent.

WOODS, J. The plaintiff recovered judgment against the defendant for the possession of two acres of land. The complaint was in the usual form. The first defense was a general denial, and the third defense related to betterments. Neither of these are involved in the appeal. For a second defense the defendant undertook to plead estoppel, alleging that he bought from Gertrude C. Scarborough, plaintiff's mother, a tract of land which was surveyed under the supervision of W. D. Scarborough, plaintiff's father, and by his direction the two acres in dispute were included in the survey and in the deed; that the plaintiff came up while the survey was in progress, and, though he was made aware of the purpose to include the two acres in the survey and sale, he made no objection; that the defendant cleared up a portion of the two acres, and brought it into cultivation, and, though the plaintiff frequently drove by the defendant's plantation, he gave no intimation of his claim to the land.

The circuit judge was right in sustaining a demurrer to the second defense of estoppel. The attempt to state this defense was fatally defective in two particulars: First, there was no allegation that defendant was misled by the conduct of plaintiff—not even a direct allegation that he supposed Mrs. Gertrude C. Scarborough, his grantor, was the owner of the land in dispute; second, there was no allegation that plaintiff at the time had any knowledge of his own claim. Silence and inaction, such as alleged here, without positive encouragement or actual participation in the transaction, which is not alleged, does not constitute estoppel. *Chambers v. Bookman*, 67 S. C. 432, 46 S. E. 39. The first defect would have been cured by the amendment proposed; but the circuit judge properly refused to allow the amendment, because the second fatal defect would have still remained, and the amendment would have been of no benefit.

The effect of sustaining the demurrer, however, was to leave the answer just as it would have been if no attempt had been made to plead estoppel. It is not necessary in this state to plead estoppel (*Lites v. Addison*, 27 S. C. 235, 3 S. E. 214), and therefore the defendant had the right under his general denial to introduce evidence of estoppel, and on such evidence have the issue of estoppel submitted to the jury (6 Enc. P. & P. 356). The court allowed the defendant to introduce evidence of the facts relied on to constitute estoppel. As there is to be a new trial, we do not refer to this evidence, further than to say it was sufficient to warrant the submission of the issue of estoppel to the jury.

The error of the circuit court was in in-

structing the jury they could not consider the defense of estoppel. This instruction was given at the beginning of the charge in this language, which could not be misunderstood: "This defendant answers the complaint, first, by a general denial of the allegations contained in the complaint; and then, secondly, he goes on and sets up a defense by way of estoppel, which you will read as set forth in the answer. But the court, before the trial begun before this jury, struck out that second defense, holding that it was not sufficient to constitute a defense, and is, therefore, not before you as a consideration, and has not been touched or substantiated by the evidence in the case, for the reason that the court held that it was not sufficient, and it is the same as if the answer did not contain that second defense, so that you will not consider that defense." This meant, not only that the demurrer had been sustained, but it took away from the jury the issue of estoppel.

It is true that the circuit judge did subsequently charge the following request submitted by defendant: "If the jury find that the plaintiff deliberately stood by for years, and without objection saw the defendant making improvements upon the piece of land referred to in the complaint, under the supposition that he had a good title thereto, then the plaintiff will now be estopped to set up his claim to the land against the defendant." If the jury did not receive a distinct impression from the charge that they could not consider the evidence on the issue of estoppel, they were, at the least, left by the irreconcilable instructions in a state of doubt and uncertainty as to their duty to consider that evidence and pass on that issue.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

#### In re DUNCAN.

(Supreme Court of South Carolina. Sept. 11, 1908.)

#### 1. ATTORNEY AND CLIENT—DISBARMENT PROCEEDING—SUFFICIENCY OF EVIDENCE.

In disbarment proceedings against an attorney for presenting false affidavits in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the alleged affidavits being that affiant committed the crime, instead of defendant's client, upon considering the evidence upon which the latter was convicted to determine the probable truth of the affidavit, which the alleged affiant denied making, the evidence held to sustain the conviction.

#### 2. SAME.

In disbarment proceedings for presenting false affidavits in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the alleged affiant denying having made the affidavit, the evidence held to show that defendant's charge that the original affidavit was stolen by the prosecuting officers was false.

## 3. SAME.

In disbarment proceedings for presenting false affidavits to the Supreme Court in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the evidence held to show that no affidavit was ever made by the alleged affiant.

## 4. SAME — GROUND FOR DISBARMENT — PRESENTING FALSE AFFIDAVITS.

Knowingly presenting false and fictitious affidavits to the Supreme Court by an attorney to obtain leave to move for a new trial, coupled with the fact that such attorney's reputation as an honorable lawyer was bad and that disbarment proceedings had been taken against him before when he was warned against dishonorable practices, is sufficient ground for his disbarment.

In the matter of disbarment and contempt proceedings in the Supreme Court against John T. Duncan. Order of disbarment.

J. Fraser Lyon, Atty. Gen., for the State.  
O. L. Schumpert, for John T. Duncan.

MEMMINGER, Circuit Judge. At the May, 1906, term of the court of general sessions for Richland county, Judge Klugh presiding, Jesse Hunter, a negro, was tried and convicted under a charge of firing upon and wounding one of a magistrate's posse sent to his house to arrest him. John T. Duncan, of the Richland county bar, defended Hunter, and, after conviction, moved Judge Klugh for a new trial, which was refused. An appeal to the Supreme Court was then taken and supersedeas bond given; the wife of said Duncan being one of the sureties thereon. There was considerable delay in perfecting this appeal; but pending the supersedeas, in December, 1907, in conformity with the practice then effective as to motions for new trials on after-discovered evidence, Mr. Duncan moved the Supreme Court for leave to apply to the circuit court on the ground of such after-discovered evidence; the said evidence purporting to be, among others, an affidavit of one Jeff Taylor stating that he was at Hunter's house at the time of the shooting for which Hunter had been convicted, and that he, not Hunter, did the shooting. This motion was resisted by Mr. Solicitor Timmerman, then solicitor of the Fifth circuit, of which Richland county was then a part. The Supreme Court refused this motion, but thereafter Mr. Duncan obtained a stay of the remittitur, and the motion came up for hearing at the next succeeding term of this court, in May, 1908. In the meanwhile, by an act of the Legislature, Mr. Solicitor Timmerman was put into the Eleventh circuit, and to the solicitorship of the Fifth circuit, composed of Richland and Kershaw counties, the Governor had appointed Christie Benet, of the Richland bar. When, therefore, the said motion came up in May, 1908, as aforesaid, Mr. Solicitor Benet represented the state, and, being notified of the motion and appearing therein, produced and read an affidavit from Jeff Taylor entirely denying that he had ever made the affidavit which Mr. Duncan claimed he had made, confessing to said shooting, an affidavit

of Jesse Myers denying that he had ever authorized an affidavit purporting to be from him which Mr. Duncan was using in support of his motion, in which Myers stated that Taylor was at Hunter's house at the time of the shooting, and other affidavits corroborative thereof. At the trial of the cause Taylor had testified that he was not at Hunter's house, and knew nothing of the shooting. Mr. Duncan, claiming to be entirely shocked and surprised at the production of these affidavits, asked for time in which to reply thereto, and was given by the court until June 2, 1908, at which time the matter being again brought up, and as and for a showing in reply to said affidavits, Mr. Duncan insisted upon reading to the court his own affidavit, couched in fierce and denunciatory language, the substance of which was to vilify Solicitors Timmerman and Benet, and to accuse them, together with Magistrate Lykes, who had committed Hunter upon the shooting charge, and others in any wise connected with that prosecution, of a vile conspiracy ("a conspiracy, dark and damnable") to exculpate Taylor, convict Hunter and his wife, and injure and degrade him, Duncan, as a lawyer; and, in support of the genuineness of the Taylor affidavit, he submitted an affidavit purporting to be from his former stenographer, Mrs. Stewart, going to show a very distinct recollection on her part of the circumstances of the making of that affidavit, its substance, and its genuineness. Whereupon the said motion for leave to apply for a new trial was again refused, and on the same day this court, of its own motion, issued an order as follows: "From the affidavits in the cause of the State v. Jesse Hunter and Francis Hunter it appears that charges are made under oath that John T. Duncan, an attorney of this court, has knowingly submitted to this court false and fictitious affidavits. It is considered by the court that the said charges should be investigated. Therefore it is ordered that the said John T. Duncan do show cause before the Supreme Court on Monday, June 8, 1908, at 10 o'clock a. m., why he should not be attached for contempt or disbarred as an attorney for submitting said affidavits. Ordered further a certified copy of this order be forthwith served on the said John T. Duncan. Y. J. Pope, Chief Justice. Ira B. Jones, A. J. C. A. Woods, A. J." And on June 6th, by a per curiam order, Mr. Attorney General Lyon being requested by the court to conduct the investigation and trial under its said order of June 2d; on motion of said Attorney General, the hearing under the order of June 2d being deferred until July 15th. On June 10th the court made another order in the matter whereunder said Duncan was directed at the same time, to wit, July 15, 1908, also to show cause why he should not be attached for a contempt of this court on account of having so vilified its officers in the presence of the court, and used towards them such offensive language as would be unwarrantable to be



used in this court under any circumstances, and so couching his charges against them and other persons in such harsh and intemperate language, and invective as to bring himself into the contempt of this court aforesaid. Associate Justice Gary being disqualified by reason of relationship to said Duncan by affinity, and not having participated in any of these proceedings, on July 15, 1908, Circuit Judge Memminger having been assigned by the Governor to take the place of Justice Gary, and the court being thus composed and ready to proceed with the matter, Mr. Schumpert appearing for Mr. Duncan and Mr. Attorney General Lyon for the state, due return was made to said orders on behalf of Mr. Duncan; the return being, as to the first order, under which disbarment was involved, for presenting false and fictitious affidavits, in substance a detailed statement of the circumstances under which he claimed the Taylor and Myers affidavits were obtained, and thus presenting a clear issue of fact upon this question: As to the second order, under which attachment for contempt was involved as aforesaid, in substance a reiteration of the alleged conspiracy charged in the affidavit of June 2d, involving the charge of theft of papers in the case by Mr. Solicitor Timmerman in conspiracy with Mr. Solicitor Benet and others, and, while reaffirming said charges, expressing regret and apology for the use of the intemperate language in which said affidavit was couched, the circumstances of extenuation being alleged to have been great haste in the preparation of the affidavit, without opportunity for revision or reflection upon the same. Whereupon, the issues being made up under said orders of the court and the said returns, and the testimony thereon being delivered orally and stenographically reported, the state being the actor therein, and the hearing continuing through the said 15th of July and the next day, and argument being heard on behalf of the respondent (Mr. Attorney General Lyon declaring his unwillingness to press the matter by argument; it being upon the facts for the court, and therefore not arguing the same), the court reserved its decision, and now, after due deliberation, proceeds to announce the same.

The questions arising for decision are whether upon the record thus presented said John T. Duncan should be disbarred and stricken from the roll of attorneys of this state; and (or) should he be punished for a contempt of this court in respect to the matter of his affidavit of June 2d aforesaid.

Upon the question of the alleged affidavits of Taylor and Myers being false and fictitious, and being thus knowingly presented to this court by Mr. Duncan as a basis for his motion for leave to apply for a new trial for Hunter in the circuit court, we have (neither purporting to have been signed by the affiant, but by mark) the affirmance of Duncan, that the affidavits were fairly made by the alleged affiants, and the point-blank denial of

the affiants of ever having made or sanctioned them. To properly solve this question, therefore, we are called upon to weigh it in the light of the intrinsic probabilities of the situation; that is, is it probably true that Taylor or Myers would either have made the affidavit purporting to have been made by him for Duncan? As to Myers, there is no light thrown directly by these probabilities. He merely states that Taylor was at the house where the shooting took place; but, as to Taylor, the Duncan affidavit, if genuine, would have him confessing to a crime for which another had been tried and convicted, and to a perjury at that trial, for he had there sworn that he was not at the house and knew nothing of the shooting. We start, then, with that as an intrinsic improbability.

The next point is: Is it true that he, and not Hunter, did the shooting? And, if true, and the fact that an innocent man had been convicted for his crime would be a cause impelling him to confess, then that might be taken as an intrinsic probability that he would make the affidavit Duncan claims he made. This point drives us to inquire whether or not it is true that Taylor, and not Hunter, did the shooting. After a careful consideration of all the evidence, we cannot but answer this question in the negative, and underwrite the verdict of the jury which convicted Hunter. There is, of course, some conflict in the testimony upon which Hunter was convicted in the circuit court, as well as that taken in this court upon this question, as there will ever be in the investigation of issues of fact; but throughout there is the direct testimony of unimpeached eye-witnesses that Hunter's wife handed him the gun, after a parley with the posse which had come to his house to arrest him, and that he did the shooting. Then we have the testimony of Sheriff Coleman of Richland county (not brought forward at the trial on circuit) of the confession of Hunter to him very shortly after his arrest. From this testimony it appears that Sheriff Coleman had known Hunter from boyhood, and thought well of him, and was well disposed towards him, and, being surprised at his becoming implicated in so serious a charge, asked him in a friendly way why he had done it, whereupon Hunter acknowledged having fired upon the posse; his excuse being that it was done under the advice of Mr. Duncan, his attorney. There is positive evidence that Taylor was not at the house, corroborative of his own statement to that effect, and no motive can be traced to him for having done the shooting. On behalf of Duncan's theory throughout that Taylor was the guilty man, we have the suggestion that Taylor, being at the house, shot in defense of Hunter, whom it is charged fled under a corner of the house, the posse opening fire on him there, and it was intimated in support of this theory that the marks of shot in that portion of the house would demon-

strate the theory. This was a matter susceptible of direct proof; but none was brought forward. Some of the witnesses brought forward on behalf of Mr. Duncan at this hearing failed utterly to corroborate his theory. The testimony from the weather bureau office at Columbia, nine miles from the scene, as to the cloudy condition of the weather at Columbia, and the inference sought therefrom, that Hunter could not have been visible for identification, fails to outweigh the positive testimony of the witnesses who were at the place and swear that there was enough light for them to see, and that they did see and identify Hunter. So we search the record in vain for a reasonable doubt as to the guilt of Hunter. We find as a fact, therefore, that Hunter, and not Taylor, did the shooting, and was properly convicted therefor on the testimony adduced at the trial in the circuit court, strengthened by developments at the hearing here. As Hunter did the shooting, and Taylor was not even present, it follows that it is highly improbable that he, Taylor, would have made the affidavit which Duncan claims he made.

In the light of this doubly demonstrated improbability, we come to a consideration of the facts surrounding the preparation and alleged execution of said affidavit. Here we have Mr. Duncan swearing that Taylor did make it before Mr. Clark, a notary public and member of the Richland bar, in his (Duncan's) office, in the presence of Mrs. Stewart, his stenographer; Mr. Clark's testimony, which is rather in the way of negative testimony, that he cannot swear whether he took such an affidavit, coupled, however, with his recollection of having sworn, at his own office, a tall black negro, whom he believed to be Taylor (but who proved to be Hunter, and not Taylor), for Duncan; the innuendo being that he had some other negro to impersonate Taylor before Mr. Clark. Then we have the testimony of Mrs. Stewart, Mr. Duncan's former stenographer. We find this testimony clearly to establish the fact that in making her affidavit of May 29, 1908, presented by Mr. Duncan as corroborative of the authenticity of his Taylor affidavit, hereinbefore referred to, wherein she appears to have substantiated the authenticity of the Taylor affidavit, as against the want of distinct recollection of Mr. Clark, she appears to have been entirely misled as to the contents of the affidavit, and did not intend and did not realize that she had given any such positive detailed statement of distinct recollection upon the subject. She now states that that affidavit was not explained to her by Mr. Duncan, and that as a matter of fact, under oath as a witness in this court in this proceeding, she cannot substantiate Mr. Duncan's claim that Taylor appeared in his office, and made the affidavit in question. Other circumstances going to throw the weight of the testimony against the authenticity of the Taylor affidavit are that

Taylor can write his name, and does sign his name wherever called upon to do so; whereas, the disputed affidavit here only imports to be signed by him by his mark, and then the circumstance of the nonexhibition of the original of the alleged affidavit in this court, or, if ever produced, its mysterious disappearance.

As Mr. Duncan accounts for the nonproduction or disappearance of the original of the affidavit by a direct charge of theft of same by Mr. Solicitor Timmerman in conspiracy with Mr. Solicitor Benet and others, and thereby raises a collateral issue, whereby he seeks to justify the truth and language of his affidavit of June 2, 1908, we pause here to weigh the evidence upon the point, and our finding of the fact is that this charge is absolutely unwarranted and unsustained by the testimony. The only fact upon which it appears that the charge could have had an origin was that some of the papers in the appeal in the Hunter case were not to be found in the office of the clerk of this court when called for; but this was entirely and satisfactorily explained by Mr. Solicitor Benet, showing that they had been in the official possession of Mr. Solicitor Timmerman, who had laid them aside, considering the case at an end, and, when it was renewed on the motion of this court, he turned them over to his successor, Mr. Solicitor Benet, who brought them into this court, and had them duly lodged and exhibited. Mr. Duncan himself as a witness herein confesses to the sufficiency of this explanation. So far as the original of the alleged Taylor affidavit is concerned, there is no sufficient proof that it ever was filed or exhibited in this court, or was ever seen by Solicitor Timmerman or Benet. A marginal note made by Mr. Solicitor Timmerman on a copy of the Taylor affidavit used at the hearing in this court, to wit, "this not in original" (being opposite some immaterial interlineations thereon), is strongly relied upon by Mr. Duncan as indicating that Mr. Solicitor Timmerman must have had before him at that time the original, and, comparing it with the copy, found these interlineations in the copy, but not in the original. There would seem to be some plausibility in this theory, but it is entirely explained away by Mr. Solicitor Timmerman, who swears in his testimony that he never had seen the original, that it was never served upon him at Lexington as Duncan swears it was, and that his marginal entry was merely as a memorandum for himself, as this was a copy being used in court, to remember to look up the original and see if the copy correspond with it; he having cause, as he says, reason sufficient unto himself for suspecting the good faith of the whole transaction at the hands of Mr. Duncan. All of this is against the truth of Mr. Duncan's grossly expressed charge as against Solicitor Timmerman and Benet, and we unhesitatingly and emphatically find it as aforesaid as

untrue, and, upon the testimony, completely exonerate these gentlemen therefrom.

Returning, now, to the main issue, as to the truth or falsity of the charge of Mr. Duncan having knowingly presented to this court an affidavit purporting to be made by Taylor, but not in fact made or authorized by him, we have found that it would be improbable for a man to confess a crime for which another had been tried and convicted, and at whose trial he had testified that he was not at the place, and knew nothing of it; that the allegations of the disputed affidavit are not true, which render it still more improbable that he would make such an affidavit; that he had no motive for doing the shooting or making an affidavit falsely confessing it; and that the circumstances beyond Taylor's mere denial of it go far towards showing that he did not in fact make it, while in support of its genuineness there is only the bald testimony of Mr. Duncan that he did make it. While even under this state of facts we might be willing to decide (and the writer of this opinion feels that he would not concur in so deciding, realizing the facility with which negroes may repudiate their affidavits under apparently corroborative circumstances, and the jeopardy in which every lawyer would stand were a disbarment to be predicated upon this alone) that the affidavit was in fact never made or authorized by Taylor, we cannot here hesitate to do so when against the probable truth of Mr. Duncan's testimony leans the heavy weight of his mortally wounded reputation for truth and veracity as a witness. Mr. Duncan having become a witness in the matter, his reputation for truth and veracity as such became assailable, and on behalf of the state nearly a score of representative members of the Richland bar, and men of other callings, living in Columbia, were called upon to testify, and did testify, that Mr. Duncan's reputation for truth and veracity was known to them, was constantly discussed, was bad, and that he could not be believed upon his oath in any matter affecting his own interests; and the cross-examination of some of the witnesses disclosed a completely shattered reputation generally at the bar. So, also, it is that in the official reports of this court we find the respondent herein, John T. Duncan, admitted to the bar during the year 1896, volume 48 of the South Carolina Reports, initial page. In 64 S. C. 461, 42 S. E. 433, we find the opinion of the court delivered by Circuit Judge Benet, acting associate justice, concurred in by Y. J. Pope, justice of the Supreme Court, now Chief Justice, and Circuit Judge Hudson, then acting associate justice, in a disbarment proceeding against this same respondent, wherein he was barely exonerated from a charge of malpractice as an attorney with some condemnation and kindly admonition. The opinion of the court in that matter commenced by animadverting upon the unique feature of it, in that it was instituted at the instance of a single

member of the bar only. In this similar proceeding here against the same respondent, within 13 years only of his said admission to the bar, and notwithstanding said kindly admonition and the ordeal of it, we find again a fact unique that the proceeding herein is instituted by the highest court of the state of its own motion, and without a single member of the bar at which he has continuously practiced, nor any other lawyer or citizen from anywhere, coming forward to say a word in support of his character or in rebuttal of the mass of testimony by which that character has been so completely demolished. Among his Brethren at the bar and among all his fellowmen, therefore, respondent stands now alone at the bar of this court impaled upon the testimony which has been brought forward directly upon the charges urged on behalf of the state by her Attorney General and that in his behalf by the able attorney of another county, who has so generously and unflinchingly represented him at this hearing, with no prop of good repute upon which to lean in this his hour of need. For those who minister in our temples of justice, in the light of the deductions which have been hereinbefore made and the conclusions which inevitably therefrom hereinafter follow, this court cannot but call to their attention the obvious value of good repute. While "custom and experience have placed values upon most of the treasures of mankind, no effort of the human mind has ever been able to estimate and determine the value of a good character," but herein no one can fail to realize but that it is in a pinch like this that character saves a man or the demonstrated lack of it overwhelms him.

Having now reached the conclusion that respondent has been proven guilty of the charge of knowingly presenting false and fictitious affidavits to this court, we do not hesitate to hold, and elaboration of reasoning is unnecessary to justify the decision, that for this act, coupled with the fact that his reputation as an honorable lawyer is completely broken down, and that he has had fair warning but has not heeded it, he should be forever disbarred and stricken from the roll of attorneys of this court, and that no lesser punishment would be commensurate with the conduct proven. So much fine language has been written, and so thoroughly has been exhausted the theme of the lawyer's duty to society and to the court, and so exalted has been the standard which has been fixed and adhered to in this state, and to which this court will forever insist upon adherence, that we decline entering upon any reiteration thereof herein. Suffice it to say that when one of our lawyers so far forgets the high ideals of his profession as to stoop to the practice herein proved against respondent, and to so have forfeited his good name amongst his associates, however harsh it may seem, and howsoever much it may bend in pity over the ruined career of a fellow man

and of all those affected by its judgment, this court can never hesitate, either upon its own motion as herein or upon a proceeding properly coming before it otherwise, to meet out the extreme penalty.

Proceeding, now, to a consideration of the charge of contempt of this court as against Mr. Duncan advanced by the Attorney General in relation to the offensive language contained in the affidavit of June 2d, while we feel that it has been clearly established that the charges contained in said affidavit, as before stated, are wholly unfounded, and the language wholly improper and impertinent and such as would be visited with proper and appropriate punishment as being in contempt of the proprieties to be observed in our courts, yet here, the proceeding for complete disbarment having prevailed, any punishment, no matter how severe, incident to and at all commensurate with such contempt, is wholly swallowed up in that following said disbarment charge that any official fixing and enforcement of it would be futile, and serve but to belittle the terrible penalty which follows the findings herein.

At the conclusion of the hearing, the Attorney General moved that the court also consider the question as to whether or not it would order said affidavit of June 2d expunged from its records, and asked that it be expunged. We are unwilling to grant this motion. Having considered the affidavit, and found that the charges therein are unsubstantiated, we prefer that the whole record should remain as filed herein, including said affidavit.

The order of the court therefore is that said John T. Duncan be, and he is hereby, ordered to be stricken from the roll of attorneys of this state, and that he appear before the clerk of this court and render up unto him his certificate of admission to practice law in this state for cancellation by said clerk; and that he, the said John T. Duncan, from henceforth and forevermore be disbarred and not be heard as an attorney or counsellor at law, nor otherwise act as a lawyer in the state of South Carolina, nor in any other state basing his claim upon the same certificate hereby ordered to be canceled and forfeited; and let the decretal portion of this opinion be forthwith served on said John T. Duncan. And it is so ordered.

### EMRY v. CHAPPELL.

(Supreme Court of North Carolina. Sept. 16, 1903.)

#### 1. ACTION—PROCEEDINGS CONSTITUTING COMMENCEMENT.

An action is commenced when the summons served is delivered to the sheriff for service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 727.]

#### 2. ABATEMENT AND REVIVAL — GROUND OF ABATEMENT—ANOTHER ACTION PENDING.

It is ground for abatement of an action that a prior suit is pending in a court of com-

petent jurisdiction in which the plaintiff can obtain all of the relief which he could in the second, and it is immaterial that there are other parties to the first suit, or that the parties occupy different positions on the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 73.]

#### 3. SAME—ACTION TO DISSOLVE PARTNERSHIP.

In an action by a creditor against a partnership, one of the defendants filed an answer against his copartner, alleging his mismanagement of the business, and that he was indebted to the firm and praying for an accounting and a dissolution, and by consent of the parties a reference was ordered for the purpose of stating an account between plaintiff and the partnership and also between the partners. Held, that the pendency of such action in that condition was ground for abatement of a second action between the partners alone for a dissolution and accounting, and for ancillary relief by the appointment of a receiver.

#### 4. SAME—PLEADING—MATTER IN ABATEMENT.

The pendency of another suit as a ground of abatement may be pleaded by way of answer, where it does not appear from the face of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 123.]

Appeal from Superior Court, Halifax County; O. H. Allen, Judge.

Action by T. L. Emry against Edward Chappell. From an order refusing to sustain a plea in abatement taken by answer, defendant appeals. Reversed.

This is an action for the dissolution of the partnership of Emry & Chappell, and a settlement of its affairs. The plaintiff also asks for an injunction and a receiver to protect the partnership assets pending the action. He bases his claim for relief upon the allegations that the defendant and himself have disagreed as partners; that he has been denied any participation in the management of the business; and that the defendant is mismanaging the affairs of the firm and converting its assets to his own exclusive use. The defendant filed an answer, in which he alleges that there is a former suit pending between the Lyon & Montague Company, which is a creditor of the firm, and Emry & Chappell, to recover a debt alleged to be due the plaintiff, and that the plaintiff Emry can have the same relief in that action as he now demands in this one. In the case of Lyon & Montague Co. v. Emry & Chappell, the defendants were served with process. The defendant Emry did not answer, the defendant Chappell answered only for himself, and averred, in his original and amended answers, that the plaintiff paid to Emry a large amount due the defendants after notice from the defendant Chappell not to do so, as Emry had already received a large sum in excess of his share of the partnership assets, and was misappropriating the same, the amount so paid being more than sufficient to pay the claim of Lyon & Montague against the defendants, and, further, that the said company was also notified by him to reserve an amount sufficient to pay their claim, which they failed to do. He further substantially alleges against his

codefendant Emry that the partners had disagreed; that Emry had mismanaged the business and misapplied the assets, converting them to his own use, so that on October 1, 1896, he was indebted to the firm in the sum of \$48,895.00, one-half of which was due to him; that he had demanded a settlement, which Emry refused and then withdrew from active management of the business, leaving him in sole charge; and that upon a settlement Emry will owe him at least \$20,000. He demands judgment for a dissolution of the partnership and an accounting of all the dealings and transactions of the firm; that its property be sold, the debts paid, and the surplus divided between the partners, according to their several and respective rights. He further prays that a judgment be rendered against Emry for \$20,000, the amount due by him to Chappell, the answering defendant. There is a prayer for further relief and costs. The record shows that all the parties agreed to refer the case for the purpose of taking and stating an account between the plaintiff Lyon & Montague and the defendants Emry & Chappell, and also between the defendants themselves, as partners, with leave to Chappell to amend his answer and to Emry to file an answer. The reference was so ordered, with the consent of all the parties. The judge passed upon the answer and the evidence of the record in the former suit, which he found, as a fact, to exist, and, after consideration of the same, refused to sustain the plea in abatement, or answer in the nature of a plea, or to dismiss the action, because the plaintiff could not obtain the same relief in the other action pending in the superior court of Nash county as he sought to obtain in this case. The defendant Chappell excepted and appealed.

Battle & Cooley and Bunn & Spruill, for appellant. E. L. Travis and Walter M. Daniel, for appellee.

WALKER, J. (after stating the facts as above). The record shows that the suit of Emry v. Chappell was commenced on May 6, 1908; that being the day on which the summons was delivered by the clerk to the sheriff, as appears by the latter's indorsement on the process. *Smith v. Lumber Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439; *Webster v. Sharpe*, 118 N. C. 446, 21 S. E. 912. The order of reference in *Lyon & Montague v. Emry & Chappell* was made, with the consent of the parties, on April 27, 1908. We refer to this matter, as it was contended by the plaintiff's counsel that this action was commenced before the reference was ordered. Pleas in abatement, being dilatory pleas, are not favored at common law or under the Code, and can be used only to present matter which defeats the present action. If the right of action is denied, the facts upon which the denial rests must be pleaded in bar, but the abatement of a suit

is the complete termination of it at law, and the abatement of the main action abates proceedings ancillary or collateral to it. The general principle of the law is that the pendency of a prior suit for the same thing, or, as is commonly said, for the same cause of action, between the same parties in a court of competent jurisdiction, will abate a later suit, because the law abhors a multiplicity of suits and will not permit a debtor or a defendant to be harassed or oppressed by two actions, if even substantially alike, to recover the same demand, when the plaintiff in the second action can have a complete remedy by one of them. 1 Cyc. 20, 21; *Alexander v. Norwood*, 118 N. C. 381, 24 S. E. 119; *McNeill v. Currie*, 117 N. C. 341, 23 S. E. 216; *Harris v. Johnson*, 65 N. C. 478. The principle is based upon the supposition that if the first suit is so constituted as to be effective and available, and also to afford an ample remedy to the plaintiff in the second, the latter is unnecessary, and should be dismissed. *Smith v. Moore*, 79 N. C. 82. The positions of the respective parties on the record in the two suits, whether plaintiffs or defendants, is not material if full relief can be had in the one first commenced. *Comrs of Craven v. Railroad*, 77 N. C. 297; *Wallace v. Robinson*, 52 N. H. 286. It is held in *Wallace v. Robinson*, supra, that, when one partner brings a suit against his copartners for an account, all the parties are to be regarded as actors, and the judgment should settle the partnership concerns between all the partners, as if each was a complainant in a suit against his copartners. In *Crane v. Larsen*, 15 Or. 345, 15 Pac. 326, the court held that the Code allows the fact that there is another action or suit pending between the same parties for the same cause to be pleaded by way of answer when it does not appear from the face of the complaint; the evident object of this provision being to prevent unnecessary litigation and to avoid a second lawsuit where the identical matter is at issue between the same parties in a former one, and, if there were other parties in the first suit not included in the subsequent one, it would not necessarily prevent the pendency of the former action from being a defence to the latter, nor would the fact that the parties, plaintiff and defendant, are reversed in the two suits, prevent the defense, if the issue in the two is the same and the same relief is attainable. The only question, therefore, is whether the plaintiff in this action can have the same relief he now seeks in the former suit. We think it clear that he can. The matters involved in the two suits, as between him and his copartner Chappell, are precisely the same and at least substantially identical. He can, by answer in the former suit, obtain the same relief he asks for in this independent action, and he can also, by proper application to the court, have such ancillary remedies as may be required to protect his interests pending the litiga-

tion, if this kind of relief is necessary to complete the identity of the two actions. It may be that the plaintiff in the former suit was entitled to judgment notwithstanding the answer by Chappell, Emry having failed to answer, and that Chappell could not litigate partnership controversies, as between him and Emry in that suit, upon the ground that they do not relate to and have no connection with the plaintiff's cause of action and constitute no defense thereto; but this matter is not before us. It is a question of pleadings and procedure, and not one of jurisdiction, and, if there was any irregularity or defect in the proceeding, it was waived by the consent of the parties to the order of reference.

It was stated by counsel at the hearing of this case in this court that the plaintiff Emry had moved in the former action to strike out the reference, for the reason that he had not, in fact, consented to it, and that his motion had not been passed upon. It may be that by motion in the cause and an amendment of the record, and by proper pleading with reference to the answer of Chappell in the former suit, it may be shown that relief cannot be had therein by the plaintiff in that case. We do not decide this question, as it is not before us. The judge of the superior court may in his discretion stay further action in this case until the plaintiff can have an opportunity to correct the record in the former suit, if it can be corrected, so as to avail him in this action, or he may dismiss this case, and require the plaintiff to start anew after having the record in the other suit amended. The plaintiff can proceed in the matter as he may be advised. All we decide now is that the court committed an error in overruling the defendant's motion to dismiss in the present state of the record in the former action, as the plaintiff can have full relief therein.

Error.

**EUREKA LUMBER CO. v. HARRISON et al.**  
(Supreme Court of North Carolina. Sept. 16, 1906.)

**1. JUDGMENTS—RES JUDICATA—NONSUIT—APPEAL—DISMISSAL.**

Where a nonsuit was granted in an action of trespass, and plaintiff took an appeal, which was dismissed on motion of defendant, under court rule 17 (28 S. E. v.), for failure to prosecute within the required time, the nonsuit and dismissal on appeal was not a bar to a subsequent action for the same trespass brought within one year thereafter.

**2. SAME—DIFFERENT CAUSE OF ACTION.**

A dismissal of an action without taking proof, on the sole ground that the cause of action was barred by the judgment in a former suit, is improper, where the complaint in the second suit contained a second cause of action not set up in the prior suit.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1234-1241.)

Appeal from Superior Court, Beaufort County; Lyon, Judge.

Action by the Eureka Lumber Company against John R. Harrison and another. From a judgment dismissing the action, plaintiff appeals. Reversed.

Wiley C. Rodman, for appellant.

**WALKER, J.** It appears from the record that the plaintiff brought an action against the defendants for a trespass committed on its land in cutting trees. At the conclusion of the testimony, the court, on motion of the defendants, adjudged that a nonsuit be entered against the plaintiff under the statute. Revisal 1905, § 539. The plaintiffs appealed from this judgment, but the appeal, not having been duly prosecuted, was dismissed in this court under rule 17 (28 S. E. v.). The plaintiffs then brought this action, for the same trespass, within one year after the other action, and the appeal therein had been dismissed. This action was also dismissed in the court below, and the injunction formerly issued was vacated, upon the ground that the nonsuit in the former action was a complete bar to the further prosecution of this action. The question, therefore, is whether a second suit for the same cause of action will lie under such circumstances. We decided in *Hood v. Telegraph Co.*, 135 N. C. 622, 47 S. E. 607, where the same point was presented, that a second action will lie, although a nonsuit had been entered against the plaintiff on the merits in a former suit for the same cause of action, and upon the same state of facts. This ruling is sustained in the following cases: *Meekins v. Railroad*, 131 N. C. 1, 42 S. E. 333; *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800; *Evans v. Alridge*, 133 N. C. 378, 45 S. E. 772; *Nunally v. Railroad*, 134 N. C. 755, 48 S. E. 998; *Tussey v. Owen* (at last term) 61 S. E. 180; *Henderson v. Eller* (N. C.) 61 S. E. 446.

We will not discuss the suggestion in the plaintiff's brief that there is an additional cause of action stated in the complaint in this action, as it is not necessary to do so. If that be correct, the ruling of the court was clearly erroneous; no proof having been taken in this case. There was error in dismissing the action.

Reversed.

**ROBERTSON v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of North Carolina. Sept. 16, 1908.)

**1. CARRIERS—LIABILITY FOR NONDELIVERY OF GOODS—STATUTORY PENALTY FOR DELAY.**

A shipper of goods to be sold by the consignee for his benefit may maintain an action to recover their value from the carrier where they were not delivered and may join therewith a claim for the penalty for unreasonable delay in delivery allowed by Revisal 1905, § 2832, which is recoverable in a proper case in addition to the value of the goods.

## 2. SAME—ACTION TO RECOVER PENALTY—DEFENSES—BURDEN OF PROOF.

In an action against a carrier, based on Revisal 1905, § 2632, to recover the penalty for a failure to deliver goods shipped within a reasonable time, proof of nondelivery raises a presumption of negligence, and casts the burden on the defendant to prove as a defense that the goods were burned, destroyed, or stolen without its default.

## 3. SAME—FORM OF ACTION.

Revisal 1905, § 2632, gives a right of action to recover a penalty from a carrier for a failure to deliver goods shipped within a reasonable time direct to "the party aggrieved," and does not require or even permit such action to be brought on relation of the state.

## 4. PLEADING—AMENDMENT—CHANGE OF FORM OF ACTION.

Even where a statute requires an action to be brought on relation in the name of the state, a failure to bring it in such form is not ground for dismissal, but an amendment will be allowed.

Appeal from Superior Court, Bertie County; W. R. Allen, Judge.

Action by W. D. Robertson against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Shepherd & Shepherd and Pruden & Pruden, for appellant. Winston & Matthews, for appellee.

CLARK, C. J. The plaintiff shipped a box of tobacco from Coleraine, in Bertie county, to Gravely's warehouse at Rocky Mount, N. C., to be sold for shipper's benefit, taking a through bill of lading. The tobacco was delivered by the first carrier, the navigation company, to the other defendant, the Atlantic Coast Line, at Tunis, N. C., on October 20, 1906, and was placed by it in one of its cars. The tobacco was never delivered. The judge who found the facts by consent finds "that search has been made for said tobacco, but there is no evidence that any one has seen it since its delivery to said railroad company October 20, 1906, and no evidence that it was burnt, stolen, or destroyed." This action was brought to recover the value of the tobacco and the penalty for 30 days' unreasonable delay. It appeared in evidence that the defendant railroad company had paid the consignee the value of the tobacco since suit brought. Upon the evidence the court rendered no judgment against the navigation company, nor for the value of the tobacco, but entered judgment against the railroad company for \$85, the penalty for 30 days' unreasonable delay allowed by Revisal 1905, § 2632.

The consignor, being the sole party in interest, was the proper plaintiff. Revisal 1905, 400; Rollins v. Railroad, 146 N. C. 153, 59 S. E. 671, in which case the plaintiff shipped the goods, as here, to be sold for his benefit.

The plaintiff had the right to recover the penalty for delay and also the value of the goods if not delivered. Both causes of action arise on contract, and they can be joined in the same action. In Meredith v.

Railroad, 137 N. C. 478, 50 S. E. 1, the plaintiff recovered for partial loss of the goods and for the penalty for delay. One does not merge the other. If it did, in some cases it would be an absolute profit to the carrier to withhold the goods and pay the penalty. In others, as in this case, it could save money and deprive the shipper of the protection of the statute by paying the value of the goods, instead of the penalty imposed by the statute. This would be a virtual repeal of the statute as to all small shipments, though they need its protection the most.

When, without its default, the goods are not delivered, as where they are "burned, stolen or destroyed," the law justly relieves the carrier from the penalty. But this is a defense, and the burden is on the carrier to prove it. Mere proof of loss raises a presumption of negligence. It does not at the same time negative this by raising a presumption that the goods were burned or destroyed, nor that they were stolen, but throws the burden of proving those matters upon the defendant, if it seeks to excuse itself. It is true the defendant did not put any witness on the stand to prove that the goods had been seen since they were put in the car, and it is not likely that it would. The plaintiff could hardly be able to do so. The tobacco was not necessarily, or presumptively, therefore, burned, or destroyed, or stolen. It may, and probably was, negligently misssent to some other of the hundreds of stations of the defendant, the Coast Line System, where it may now be lying; or it may have been negligently placed in one of the cars sent out from Tunis to distant points on other lines in other states. Wherever it may be, it is now the property of the railroad company, which has paid for it.

The judge states that "search has been made," but he does not say how thorough it was, nor when and where made. It is not probable that such search was made at all points to which the tobacco could have been misssent. There was "no evidence," the learned judge says, "that it was burnt, stolen, or destroyed." The mere fact that the goods are missing, or their present whereabouts is unknown, to the carrier, who at common law is an insurer of their safe conveyance and delivery, cannot raise a presumption of a state of facts that would excuse its failure to deliver in a reasonable time. There must be evidence tending to show burning, destruction, or theft. The judge, not only does not find such defense proven, but finds that there was no evidence of it. In Thompson v. Express Co., 147 N. C. 343, 61 S. E. 182, where the findings of fact were identical with those in this case, this court, speaking through Brown, J., "found no error," and sustained the same verdict of \$85 for the 30 days' penalty, but gave a partial new trial on the issue as to the \$50 penalty for not auditing and settling the claim for the

goods lost in 60 days, because the claim was not filed in writing.

The defendant further moves to dismiss in this court because the action is not brought "on relation of the state." Revisal 1905, § 2632, does not require this formality, but gives the action direct to "the party aggrieved," thus taking it even out of the permissive authority to use the name of the state given by Revisal 1905, § 2647. *Carter v. Railroad*, 126 N. C. 444, 36 S. E. 14, and cases there cited. Even if it were otherwise, and it had been required to bring the action "on relation of the state," the case would not be dismissed, either in the court below or in this court, for such mere informality, but an amendment would be allowed. *Harcum v. Marsh*, 130 N. C. 154, 41 S. E. 6; *Wilson v. Pearson*, 102 N. C. 318, 9 S. E. 707; *Grant v. Rogers*, 94 N. C. 760; *Forté v. Boone*, 114 N. C. 177, 19 S. E. 632, and cases there cited.

Affirmed.

#### COLEMAN et al., Road Com'rs, v. COLEMAN, County Treasurer.

(Supreme Court of North Carolina. Sept. 16, 1908.)

#### 1. MANDAMUS — JURISDICTION — JUDGE AT CHAMBERS.

Mandamus is not to enforce a "money demand," and so is properly brought before the judge at chambers; the object of the action being to compel the performance by defendant, as county treasurer, of an alleged public duty of delivering to plaintiffs a fund to possession of which they claim to be entitled under the law by virtue of their being township road commissioners.

#### 2. TRIAL—CAUSES FOR PARTICULAR DOCKETS—TRANSFER.

If an action for mandamus is improperly brought before a judge at chambers, or if there are issues of fact to be tried, it should not be dismissed, but should by order of the judge be transferred to the court for trial at term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 28-30.]

#### 3. HIGHWAYS—TOWNSHIP ROAD FUND—RIGHT TO CUSTODY.

Under Acts 1899, p. 782, c. 581, § 14, as amended by Acts 1905, p. 171, c. 161, § 1, requiring county commissioners to levy road taxes for a township on the recommendation of its road commissioners, and that the money collected from the taxes so levied be paid to the county treasurer, and kept separately from other funds by him, he being given a commission for "receiving and disbursing the road fund," and being further required "to pay the accounts against the road fund of the county and of the township, when itemized statements of the same have been certified to the road commissioners by the road superintendent and approved by them," the road commissioners of the township are not authorized to take possession of the township road fund, but the county treasurer is its rightful custodian.

#### 4. APPEAL AND ERROR—REVIEW—DISCRETION OF TRIAL COURT.

The refusal of plaintiffs' motion to amend their complaint, having been strictly within the discretion of the judge, is not reviewable.

Appeal from Superior Court, Warren County; O. H. Allen, Judge.

Action by W. R. Coleman and others, as road commissioners of Hawtree township, against J. L. Coleman, as county treasurer. Judgment for defendant. Plaintiffs appeal. Affirmed.

This is an action for a mandamus to compel the defendant, who is the treasurer of Warren county, to deliver to the plaintiffs, the road commissioners for Hawtree township, the fund which he had received from taxes levied in 1905 for road purposes, amounting to \$335.96. Acts 1899, p. 775, c. 581, as amended by Acts 1905, p. 171, c. 161, required the county commissioners to levy the road taxes for Hawtree township upon the recommendation of its road commissioners. The money collected from the taxes so levied is required to be paid to the county treasurer and kept separately from other funds by him. He is given a commission for "receiving and disbursing the road fund," and is further required "to pay the accounts against the road fund of the county and of the township, when itemized statements of the same have been certified to [the road commissioners] by the county road superintendent and approved by them." Acts 1899, p. 782, c. 581, § 14; Acts 1905, p. 171, c. 161, § 1. The plaintiffs allege that "the defendant failed and refused to deliver the road fund to them, or on their order, when demanded, or any part thereof, for the purpose of being used and expended by them for the improvement of the public roads of the township, as he is bound by law to do, though he did pay to them the taxes collected for road purposes in the year 1906. The summons was returnable before the judge at chambers on the 12th day of February, 1908. The defendant demurred to the complaint, upon the ground that the judge had no jurisdiction of the case at chambers, and, further, that no cause of action is stated in the complaint. The demurrer was sustained, the action was dismissed, and the plaintiffs appealed.

T. T. Hicks and Tasker Polk, for appellants. T. M. Pittman, J. H. Kerr, and S. G. Daniel, for appellee.

WALKER, J. (after stating the facts as above). The action was properly brought before the judge at chambers, if the plaintiffs have any such cause of action as is stated in the complaint. The object of the action is, not to enforce the payment of a "money demand," but to compel the performance by the defendant, as treasurer of the county, of a public duty. Because, in the discharge of that duty, he must deliver the fund to the plaintiff, does not make it a money demand. If the plaintiffs are entitled to the possession of the "road fund," as they allege, their action is not one to enforce the payment of money to themselves, which money they could recover by judgment and execution in an ordinary action for that purpose; but it is of a very different nature, and mandamus is



the appropriate remedy. They would get the money, it is true, not because the defendant is indebted to them, but because the law required him to deliver it to them, and he had failed and refused to discharge the duty imposed upon him. We think this view of the law is sustained by several decisions of this court in like cases. *Martin v. Clark*, 135 N. C. 178, 47 S. E. 397; *Ewbank v. Turner*, 134 N. C. 80, 46 S. E. 508; *Jones v. Commissioners*, 135 N. C. 218, 47 S. E. 753; *Audit Co. v. McKenzie* (N. C.) 61 S. E. 283. If there are issues of fact to be tried, or the case has been improperly brought before the judge at chambers, it should, by order of the judge, be transferred to the superior court for trial at term, and not dismissed. *Ewbank v. Turner*, 134 N. C. 80, 46 S. E. 508; *Jones v. Commissioners*, 135 N. C. 218, 47 S. E. 753.

But we do not think the plaintiffs have stated any cause of action in their complaint. Acts 1899, p. 782, c. 581, as amended by Acts 1905, p. 171, c. 161, does not authorize them to take possession of the fund; but the treasurer is its rightful custodian. It is clear that the plaintiffs had no power, under those acts, to disburse the road fund. That duty is required to be performed by the county treasurer, upon the certificate of the "county road superintendent" and the approval and order or orders of the plaintiffs. If any one is in law aggrieved by the failure or refusal of the treasurer to discharge this duty, a mandamus will lie to compel its performance.

The plaintiffs moved to amend their complaint; but as the motion was denied, and its refusal was strictly within the discretion of the judge, we cannot review the exercise of that discretion in this court.

There was no error in sustaining the demurrer and dismissing the action.

**Affirmed.**

#### SMITH v. CASHIE & C. R. & LUMBER CO.

(Supreme Court of North Carolina. Sept. 16, 1908.)

##### 1. COSTS—RIGHT ON FINAL JUDGMENT.

Costs in the trial court follow the result of the final judgment, and with few exceptions the party recovering final judgment below recovers all costs of that court; and hence, where plaintiff had judgment below on two former trials, costs of such trials were properly taxed against defendant.

##### 2. SAME — ON APPEAL — EXPENSES OF TRANSCRIPT AND CERTIFICATE.

Under Code, § 540, giving a successful appellant, on appeal from the superior to the Supreme Court, costs of the appellate court and those he should have recovered below had the judgment been correct, the expenses of transcript and certificate, while not a part of the costs of the Supreme Court, are a part of the necessary expenses of the appeal, and not strictly costs of the superior court; and hence defendant is entitled to have the costs of the transcript and certificate on two successful appeals

deducted from the costs taxed against it on final judgment for plaintiff.

**Appeal from Superior Court, Bertie County; W. R. Allen, Judge.**

**Action by J. T. Smith against the Cashie & Chowan Railroad & Lumber Co. Judgment for plaintiff. From an order overruling defendant's motion to tax certain costs in its favor, it appeals. Modified and affirmed.**

**Winston & Matthews and St. Leon Scull, for appellant.**

**CLARK, C. J.** This case has been here twice before, upon the defendant's appeal. 140 N. C. 375, 53 S. E. 233; 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. On this last (third) trial below the plaintiff again recovered judgment, and the defendant sought to offset against the recovery the costs it had paid in the superior court on the two former trials, whose results had been corrected on appeal, especially the costs paid the clerk for making out the transcripts for those appeals. In effect the defendant moved to tax the costs of those trials and of the transcripts thereof against the plaintiff.

The court properly refused to grant the motion as to the costs of the superior court on the two former trials. "The costs [of the trial court] follow the result of the final judgment." *Williams v. Hughes*, 139 N. C. 19, 51 S. E. 790, citing *State v. Horne*, 119 N. C. 853, 26 S. E. 36; *Kincaid v. Graham*, 92 N. C. 154. With a few exceptional instances, set out in *Dobson v. Railroad*, 133 N. C. 624, 45 S. E. 958, the party who recovers final judgment in the trial court recovers all the costs of that court. It is true that the costs of transcript and certificate are not part of the costs of this court. *Roberts v. Lewald*, 108 N. C. 405, 12 S. E. 1028. Yet it is said in *Dobson v. Railroad*, supra: "They are a part of the necessary costs of the appeal, and not strictly costs of the superior court incident to the trial and procedure in that court. Hence the successful appellant, who has paid them, is entitled to recover them from the appellee, and \* \* \* they are not recoverable back in the final judgment, should it go in favor of the opposite party. Code, § 540." It follows that, if the defendant did not actually recover the costs of transcripts and certificate paid by it on the two former successful appeals, it is entitled to have those sums deducted from the costs now taxed against it in favor of the plaintiff. Such costs are like the costs of this court on said appeals, which, paid by the unsuccessful plaintiff, appellee, cannot be recovered back by him, though he now recovers final judgment in the controversy. Indeed, the costs of defendant in the two appeals also had not been actually paid by plaintiff; but the judge properly allowed them to be deducted from the plaintiff's judgment.

The judgment is modified and affirmed.

## JONES v. JONES et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

## 1. SPECIFIC PERFORMANCE—GROUNDS—DISCRETION OF COURT.

While specific performance is not a matter of strict right, but is to be enforced in the sound, equitable discretion of the court, the relief will be granted in the absence of fraud, mistake, or other element making performance inequitable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

## 2. VENDOR AND PURCHASER—NATURE OF RELATION.

The relation of vendor and purchaser is for all practical purposes that of mortgagor and mortgagee, with all the incidents thereto.

## 3. SPECIFIC PERFORMANCE—JUDGMENT—COMPLIANCE.

The court, in a suit against the administratrix and heirs of a deceased vendor for specific performance of the contract of sale of realty, directed the administratrix on the payment of the purchase money to execute a deed, and adjudged that payment should be made by a designated date, and that in default thereof the land should be sold for cash, retaining the case for the disposition of the price. The purchaser failed to comply with the judgment and three months later the administratrix executed a deed to the purchaser on his paying the price and interest. *Held*, that the conveyance was valid, since the effect of the judgment was to declare that the heirs held the legal title, as trustees, to secure the purchase money, as if the deceased had held at his death a mortgage on the land to secure the debt.

Appeal from Superior Court, Greene County; Lyon, Judge.

Action by J. B. Jones against Allie Jones, administratrix of Gardner Jones, deceased, and others. From a judgment setting aside a deed to plaintiff, and directing the sale of land by a commissioner, plaintiff appeals. Reversed.

Plaintiff, at the spring term, 1905, of the superior court of Greene county, instituted an action against the defendant, Allie Jones, administratrix, and the other defendants, heirs at law of Gardner Jones, deceased, for the purpose of compelling specific performance of a contract, entered into by said deceased, to convey to plaintiff a tract of land in consideration of the payment of the sum of \$1,000. Appropriate pleadings were filed, and at May term, 1906, the jury, in response to issues submitted to them, found that Gardner Jones and his wife, the defendant Allie Jones, executed and delivered to plaintiff the contract as alleged, and that plaintiff had been and was then ready, able, and willing to pay the purchase money. The court thereupon rendered judgment directing the administratrix, upon the payment of the purchase money, to execute and deliver to plaintiff a deed for said land. It was further adjudged that the payment be made on or before October 1, 1906, and that in default thereof the said land be sold at public auction for cash at the courthouse door, etc., naming a commissioner to make the sale. It was further adjudged that any and all questions raised by

the pleadings in regard to the disposition of the purchase money be retained for further consideration. The cause was retained for further orders. The clerk inadvertently dropped the case from the docket. At May term, 1907, after due notice, a motion was made to reinstate the case. At the December term, 1907, the court found that Jos. B. Jones, the plaintiff, failed to comply with the judgment rendered at May term, 1906, and that the administratrix failed to advertise the land for sale as directed, but on January 1, 1907, executed to the plaintiff a deed for the said land upon the payment of the purchase money and interest. It was therefore adjudged that the deed be set aside and that the commissioner be directed to sell the land in pursuance of the decree of May term, 1906, and make his report to the next term of the court, that the cause be retained, etc. To this judgment plaintiff duly excepted and appealed.

Skinner & Whedbee, for appellant. Y. T. Ormond, for appellees.

CONNOR, J. The learned counsel for defendants contends that when the plaintiff failed to pay the purchase money on October 1, 1906, his right to call for a deed and the power of the administratrix to execute one was at an end. It is true, as insisted by defendants' counsel, that specific performance is not a matter of strict right, but is to be enforced in the sound, equitable discretion of the court; but it is also true that, in the absence of fraud, mistake, or other element, making such performance inequitable or a hardship, the courts always grant the relief demanded. The question as to plaintiff's right to call for the deed, upon the payment of the money, was fixed by the judgment of May term, 1906. There was no provision in the decree declaring a strict foreclosure of plaintiff's equity upon his failure to pay on the day fixed; on the contrary, a sale was ordered. If a sale had been made, a final decree would have directed the payment out of the proceeds of the \$1,000 and interest to defendants, and the balance would have been paid to plaintiff. The effect of the judgment was to declare the heirs at law of Gardner Jones the holders of the legal title, as trustees, to secure the purchase money and the remainder to plaintiff, just as if Gardner Jones had held, at his death, a mortgage on the land to secure the debt. This being true, we are not able to see why, upon equitable principles, the same result could not be worked out by the administratrix accepting the money at any time before the sale and making the deed. The delay of three months, with the consent of the administratrix, worked no injury to defendants—did not even delay them in getting possession of the money, as the commissioner was required, if he sold, to report his sale to the next term of the court. If the

court had rendered a decree of strict foreclosure, very unusual at this day, and plaintiff had failed to pay on the day named, a different case would have been presented.

The learned counsel suggested that a distinction was to be found between a case where the vendor sued for the purchase money and this, in which the vendee was suing for specific performance; the latter being an invocation of the equitable aid of the court. It may be that formerly, when the courts were more rigid in limiting the right to equitable relief, such a distinction, for some purposes, may have been made. This court has, for many years, treated the relation of vendor and vendee for all practical purposes as that of mortgagor and mortgagee, with all of its incidents. The decree rendered by the court at May term, 1906, was in strict accord with the practice in this state in such cases. If the land had been sold under that decree, the plaintiff would have had the surplus, after paying the purchase money. If that is paid before the sale, the defendants have received what is due them, and the plaintiff has the land.

The only question left open is the adjustment of certain rights asserted as between defendants to the fund. The judgment appealed from must be reversed, and the cause proceeded with as directed by the judgment of May term, 1906. The plaintiff will recover his cost in this court.

Error.

#### BRAME v. CLARK.

(Supreme Court of North Carolina. Sept. 30, 1908.)

##### 1. TRESPASS—TRESPASS TO REALTY—DAMAGES.

Every unauthorized and unlawful entry into the close of another is a "trespass," and from every such entry against the will of the possessor the law infers some damage.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7088-7092, 7820.]

##### 2. SAME — ACTIONS — DAMAGES — EXEMPLARY DAMAGES.

A complaint which alleges that defendant unlawfully and forcibly and maliciously entered on land in the possession and occupancy as a residence of plaintiff, with the malicious intent of seducing the wife of plaintiff, and maliciously and wrongfully insulted and attempted to seduce plaintiff's wife, states a cause of action for actual and exemplary damages.

##### 3. HUSBAND AND WIFE — INTERFERENCE WITH MARITAL RIGHTS—ACTION BY HUSBAND.

The statutes enlarging the property rights of married women, and authorizing a married woman to sue alone for injuries to her person and property, do not destroy the right and duty of the husband to be the head of the family and protect the honor of his wife, and the right to recover for injuries sustained by interference with his marital rights.

Appeal from Superior Court, Vance County; Lyon, Judge.

Action by L. W. Brame against S. W. Clark. From a judgment overruling a demurrer to the complaint, with leave to answer, defendant appeals. Affirmed.

The plaintiff filed his complaint in the following words, to wit: "(1) That on or about the 25th day of April, 1907, the defendant, near the village of Dabney, at and in the county of Vance and state of North Carolina, and near the public road leading from Dabney to Dexter, did unlawfully and forcibly, wickedly, and maliciously enter upon a certain lot or parcel of land, then in the possession and occupancy as a residence of plaintiff, with the unlawful, malicious, lascivious, and wicked intent and purpose to seduce, debauch, and carnally know one Lovetta Brame, the wife of plaintiff, and did then and there wickedly, maliciously, unlawfully, wrongfully, and willfully insult and attempt to seduce and carnally know the said Lovetta Brame, plaintiff's said wife, to plaintiff's great damage, \$2,000." Defendant demurred, for that: "(1) No special damage or injury or actionable wrong to plaintiff is alleged; the wife not being a party, and the complaint not showing that plaintiff had suffered any special damages or any damage. (2) The complaint does not set forth any facts sufficiently definite and specific to constitute a cause of action, in not setting out the acts and things complained of in such manner as that it may be seen that, if true, they constitute an actionable wrong. (3) An attempt to seduce is not actionable; no seduction or injury being alleged." His honor overruled the demurrer, allowing defendant 60 days to answer. Defendant excepted and appealed.

T. T. Hicks, for appellant. A. C. Zollcoffer and Thos. M. Pittman, for appellee.

CONNOR, J. There can be no doubt that the plaintiff has alleged an actionable wrong—a trespass upon his possession of real estate. It is elementary that "every unauthorized, and therefore unlawful, entry into the close of another is a trespass. From every such entry, against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage." Ruffin, C. J., in *Dougherty v. Stepp*, 18 N. C. 371. His honor's judgment was clearly correct. Both parties, however, discussed, although from different points of view, the question of damages, which, upon the admissions made by the demurrer, plaintiff was entitled to recover. The defendant argued the case upon the theory that two causes of action are stated—one for trespass on realty; the other for injury, etc., inflicted upon the wife. His learned counsel strongly contends that the conduct of the defendant was not an actionable wrong to the plaintiff. However this may be, and without intimating any opinion upon it, we do not so construe the complaint. The plaintiff alleges a malicious, unlawful, and forcible trespass, setting out that it was made with the malicious intent to and did in truth then and there willfully, wickedly, maliciously, etc.,

insult and attempt to seduce and carnally know plaintiff's wife. This matter is stated as the foundation for a claim of actual and vindictive damages; the cause of action being the trespass. We are asked to pass upon the question whether, in the assessment of damages, these matters may be considered by the jury in aggravation.

In *Duncan v. Stalcup*, 18 N. C. 440, Daniel, J., says: "In looking into the books we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant, and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass." In this case vindictive damages were awarded. In *Day v. Woodworth*, 54 U. S. 363, 14 L. Ed. 181, Grier, J., said: "In actions of trespass, when the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.'" This was an action *quare clausum fregit*. In *Mitchell v. Billingsley*, 17 Ala. 396, it was shown that defendant, in the commission of the trespass, used indecorous and insulting language, and that one of the defendants had a pistol. Exemplary and punitive damages were awarded. In *Merest v. Harvey*, 5 Taunt. 442, Heath, J., says: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial."

\* \* \* It goes to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages." Gibbs, C. J., said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him, except large damages." \* \* \* I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain." In this case for a trespass £500 was given. In discussing the question whether for injuries sustained by a plaintiff in respect to his marital rights his action was for trespass or case, Mr. Street says: "Clearly we are here confronted with a class of wrongs which historically have their roots in the law of trespass, but which, nevertheless, in maturity lie altogether beyond the field of trespass, and belong to that body of legal injuries in which harm is conceived as being done, not to persons or property, but to rights

incident to them." *Foundations of Legal Liability*, 264.

It is suggested that, while it is true that exemplary damages may be recovered for malicious trespass upon property and for insulting language to the owner, the wife alone can sue for damages sustained by her on account of indecent and insulting language and conduct. For the purpose of supporting this view the recent changes made by the Constitution and statutes in respect to the property and personal rights of married women are relied upon. We cannot think that because the property rights of the wife have been enlarged, and her right to sue alone for injuries to her person and property are conferred, the right and duty of the husband to be the head of the family, to protect the honor and virtue of his wife, or to recover for injuries sustained by interference with his marital rights have been destroyed. It is true that, as held by this court, while he may be reduced to a mere steward or overseer of his wife's property, he is no less her husband, with all of the rights and duties incident to that relation. That which degrades or destroys her honor must affect him. It cannot be that if, by permission of the wife, he is living on her land as his home, the law will not afford him protection against and damage for a malicious wrong done to him through his wife. The law would but mock him if, when his home is invaded, his wife insulted, and her virtue assaulted, it gave him, for such injuries, but a penny, permitting the offender to go "scot free." If in the bitterness of his wounded spirit he sought redress by violation of the criminal law, subjecting himself to infamous punishment, the sympathy of his fellow men would be but little comfort to him. No man can long retain the respect of his wife and children if he does not seek redress for a malicious trespass upon his home and attempt to seduce his wife. The ancient law declared: "A patriarch is lord in his own house and family, and no person has a right to interfere with him; not even the village elder or the imperial judge." Again it is said: "The house father was responsible for the due performance of his *vacra* and for the purity of his ritual." States grow in virtue and strength, citizens are loyal and home-loving, in proportion as the unity of the family is preserved. The husband and father is recognized as the head of the family; the wife living under his protection and looking to him to guard her person and honor from all harm. The husband must have redress for wrongs done him by awarding such actual and exemplary damages as a jury may find to be proper, rather than by violating the criminal law.

The judgment of his honor was correct, and must be affirmed.

**BASNIGHT v. SOUTHERN JOBBING CO.**  
et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

**EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY TO CONTRADICT WRITING.**

Defendants, being sued on their written guaranty as individual stockholders that their corporation would pay plaintiff a specified sum for his stock at his option, could not show by parol that it was agreed when the instrument was signed that they should not be personally liable, though their titles as officers of the corporation were affixed to their signatures.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1908.]

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by J. S. Basnight against the Southern Jobbing Company and others. From a judgment for plaintiff, defendants J. J. Baxter and W. G. O'Neal appeal. Affirmed.

This is an action by the plaintiff against the Southern Jobbing Company, J. J. Baxter, and W. G. O'Neal, to recover the sum of \$5,000, which was paid to them for 50 shares of the stock of the jobbing company, under an agreement between him and the said parties which is as follows:

"This agreement, made and entered into this May 24, 1905, by and between the Southern Jobbing Company, a corporation in the state of North Carolina, party of the first part, and Jesse S. Basnight, party of the second part, and J. J. Baxter, W. G. O'Neal, E. F. O'Neal, and David Kramer, stockholders of the Southern Jobbing Company, all of Newbern, N. C., parties of the third part, witnesseth: That the said parties of the first part and the third part do represent to the party of the second part that the exhibit marked 'A,' hereto attached, is a true and correct inventory and statement of all the liabilities of the party of the first part outstanding; that the total amount of capital stock issued by the said party of the first part is the sum of five thousand (\$5,000) dollars par value, and that for and in lieu of the dividends earned up to this time the corporation will issue stock of the value of twelve hundred (\$1,200) dollars, and will apportion three hundred (\$300) dollars of stock to David Kramer; and do further represent that there is now due the said corporation debts as shown in Exhibit B, a copy of which is hereto attached; and do further represent that the statement hereto attached, marked 'Exhibit C,' is a true and correct statement of the financial affairs of said corporation.

"Upon which representations the said Jesse S. Basnight has agreed and does hereby agree and does hereby subscribe to fifty shares of the stock in the said Southern Jobbing Company at par, to wit, \$5,000, upon the following terms and conditions: (1) The parties of the third part do agree to execute proxies, irrevocable for one year, to the said Jesse S. Basnight to vote their stock at any and all meetings of the company. (2) That the

said Jesse S. Basnight shall be elected for a term of one year treasurer of the Southern Jobbing Company and general manager thereof, at the salary of twelve hundred and fifty (\$1,250) dollars per year, to be paid in monthly or quarterly installments. (3) That the said Jesse S. Basnight shall have the option, at the expiration of one year from date, of selling the said stock, with all accrued dividends and profits, to the said Southern Jobbing Company, at the price of five thousand (\$5,000) dollars, without interest or profit added, or he shall have the option to keep and hold the said stock, together with all profits and dividends, declared or accumulated, as if the said purchase had been absolute and unconditional.

"And the said party of the first part, as principal, and the said parties of the third part, as sureties, do hereby contract and agree with the said party of the second part: (1) That upon his demand, one year from date, the party of the first part will pay to Jesse S. Basnight the sum of five thousand (\$5,000) dollars for his said fifty shares of stock. (2) That they will warrant and guarantee that the said statements and Exhibits A, B, and C are true and correct and do contain a full statement of what they purport to show. (3) That they will guarantee the payment and collection of all debts due the party of the first part as shown by Exhibit B aforesaid, on or before twelve months from date, together with interest thereon from and after maturity. (4) That the salary and proxy above shall be paid and executed as there stated.

"And the said party of the second part does hereby contract and agree that he will enter upon his duties as treasurer and general manager as aforesaid and will devote thereto such part of his time as shall be necessary and beneficial for the interest of the said corporation.

"In testimony whereof, the said parties have hereunto subscribed their names and affixed their seals this 24th day of May, 1905.

"[Seal.] Southern Jobbing Company,

"Per J. J. Baxter, Pres.

"[Seal.] J. J. Baxter, Pres.

"[Seal.] W. G. O'Neal, Sec.

"[Seal.] D. Kramer, Vice Pres.

"[Seal.] E. F. O'Neal.

"[Seal.] J. S. Basnight."

The contract is set out in the complaint. In their answers J. J. Baxter and W. G. O'Neal admit that they executed the contract, but aver that it was not executed by them as sureties, as it was agreed at the time they signed it that they should not be liable individually as sureties, and they affixed their official titles to their names and intended to sign it merely as officers of the corporation.

Without objection by the defendants the court submitted issues to the jury which, with the answers thereto, are as follows:

"(1) Was it the agreement between the parties, at the time of signing the contract

in this action, that the defendant Baxter would not be personally liable? Answer: Yes.

"(2) Was it the agreement between the parties, at the time of signing the contract in this action, that the defendant O'Neal would not be personally liable? Answer: Yes."

The defendant J. J. Baxter testified: "The plaintiff came to me with a written paper, and asked me to sign the same. I told him I would not be individually liable. I first signed the paper for the Southern Jobbing Company, and plaintiff asked me to sign individually also. I told him I would not sign individually, but would sign my name as president of the company, and would agree for my stock to be liable to him for the repayment of his money. I signed the paper, 'J. J. Baxter, President.' Plaintiff asked me not to add 'President.' I said: 'Do you take me for a fool?' He and I then agreed that I should not be personally liable, but my stock would only be liable to him in addition to all of the property of the concern, which was turned over to him as general manager." W. G. O'Neal testified to the same effect.

The plaintiff testified: That there was no such agreement, but that the defendants Baxter and O'Neal were to be liable individually as sureties, according to the terms of the contract. That before the contract was executed he had several verbal conversations with the officers of the company and told them to put their proposition in writing. Whereupon they delivered to him a paper, in the handwriting of Baxter, of which the following is a copy: "We, the stockholders of the Southern Jobbing Company, guarantee to J. S. Basnight a profit of 25 per cent. for one year on an investment of \$5,000 in our company. May 22, 1905. J. J. Baxter, President. W. G. O'Neal, Sec. and V. Pres." That in reply to that paper he handed them a paper of which the following is a copy: "May 22, 1905. To Southern Jobbing Company—Gentlemen: In lieu of your proposition of to-day, I am writing. I make you the following proposition: (1) I will take \$5,000 worth of stock at par in your company, reserving the option to return the stock to the company at the end of one year, without interest or dividends; the company and present stockholders guaranteeing to refund the money at my option at that time. (2) The company to pay me a salary of \$1,250 for the one year. (3) The present stockholders are to guarantee the collecting of all bills now outstanding, and also that the statements made include all liabilities of the company. (4) If I decide, at the end of the year, to keep my stock, it is to stand thereafter on an equal footing with all other stock. (5) You are to elect me general manager and treasurer for one year. (6) You are to give me proxies of others, so I may have a majority vote at stockholders' meeting for one year. Yours respectfully, J. S. Basnight." That J. J. Baxter wrote an acceptance of his

proposition on the paper, which is as follows: "The above proposition accepted by the Southern Jobbing Company. J. J. Baxter, President." He further testified: "I had refused to make a verbal agreement, and thought it best, if we made any trade at all, that it should be reduced to writing. I then carried the papers containing the proposition, the counter proposition, and acceptance to my attorney, W. D. McIver, and requested him to draw up the contract accordingly. He had the contract drawn up, with several copies. One was given to me, one to J. J. Baxter at his store, and another to O'Neal at the office of the Southern Jobbing Company, and afterwards the contract was signed."

The testimony of J. J. Baxter and W. G. O'Neal was objected to by the plaintiff in apt time. The objection was overruled, and the testimony admitted. The plaintiff moved for judgment notwithstanding the verdict. After consideration of the motion, the court set the verdict aside and entered judgment for the plaintiff, upon the ground that under the pleadings it was not competent to introduce oral evidence to relieve the defendants J. J. Baxter and W. G. O'Neal from individual liability, and that as matter of law each is liable on the contract as surety. The defendants Baxter and O'Neal excepted and appealed.

D. L. Ward and Simmons, Ward & Allen, for appellants. W. D. McIver and W. W. Clark, for appellee.

WALKER, J. (after stating the facts as above). The decision of this case must depend upon what appears in the pleadings. The plaintiff alleges the execution of the contract sued on, which is admitted by the defendants in their answers. The terms of that contract are plain and unambiguous. The defendants explicitly agree therein with the plaintiff that they will become sureties of the jobbing company for the strict performance of the obligation assumed by the company, which is that upon demand, and one year from the date of the contract, the jobbing company will pay to the plaintiff the sum of \$5,000 for his 50 shares of stock. There can be no doubt as to the correct meaning of this language. It is an express and unconditional promise in their individual character that the money shall be paid at the appointed time. In their answer the defendants deny this allegation, and aver that they were not to be liable personally or individually. This is a square contradiction of the terms of the contract and of the obligation to pay the money themselves, which they assumed by the execution of the instrument. The issues were framed and submitted to the jury in exact accordance with the averments in the pleadings, and oral evidence, which was offered by the defendants to support the affirmative of those issues, was admitted by the court. The evi-

dence was incompetent, and the ruling of the court in setting aside the verdict and giving judgment for the plaintiff was clearly right. There is no rule better settled in the law than that oral evidence is not admissible to vary or contradict a written instrument, unless there has been fraud or mistake, in which case it must be reformed by an independent action, or by way of affirmative defense in the same action. It cannot be changed by a collateral attack in a suit upon the instrument itself. *Etheridge v. Palin*, 72 N. C. 218; *Ray v. Blackwell*, 94 N. C. 10; *Terry v. Railroad*, 91 N. C. 236; *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399; *Bank v. Moore*, 138 N. C. 529, 51 S. E. 79; *Mudge v. Varner*, 146 N. C. 147, 59 S. E. 540. In *Meekins v. Newberry*, 101 N. C. 18, 7 S. E. 656, it is said to be "a settled rule that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake, properly alleged, parol evidence cannot be heard to alter, contradict, or modify it." Evidence, under this rule of exclusion, is never admitted if the wording is clear, or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract. *Browne on Parol Evidence*, p. 199, §§ 55, 56; *Gilbert v. Moline Plow Co.*, 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476; *The Delaware*, 14 Wall. 579, 20 L. Ed. 779; *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182. If the terms of the contract clearly and sufficiently determine the intent and meaning of the parties, the form of the signature is not important, and will not bring the case within any exception to the rule. *Fowle v. Kerchner*, 87 N. C. 49; *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941.

There are decisions of this and other courts to the effect that it may be shown by parol evidence that an obligation was not to be assumed except upon a certain contingency, or that the liability should be discharged in a certain way; these being stipulations intended to be a part of the contract, but not reduced to writing by the parties. *Braswell v. Pope*, 82 N. C. 57; *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408 (affirmed in 115 N. C. 555, 20 S. E. 210); *Kerchner v. McRae*, 80 N. C. 219; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847; *Typewriter Co. v. Hardware Co.*, 143 N. C. 97, 55 S. E. 417. Other cases are cited in *Braswell v. Pope*, supra, and *Evans v. Freeman*, supra. If the stock only was to be "liable" for the debt, we do not see why the defendants affixed their official titles to the signatures. This does not indicate, in the least, that they were limiting their liability to the stock held by them. If it was intended that the stock should be applied to the payment of the debt, and that there should be no personal liability, the company would be its own surety, and, besides, the plaintiff would have no security at all for his debt against the company, as the debt would, in law, have to be paid before any of the assets of the corporation could be used to redeem

its stock. If the stock was a security in name, it would be valueless as a security in fact. If the parties signed, as they did, for the purpose of representing the corporation, the same result would follow; but they do not profess to have executed the contract for the company.

We find no error in the ruling of the court. No error.

#### BRIDGERS v. ORMOND et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

#### 1. REPLEVIN—PROVISIONAL REMEDY—NECESSITY FOR INVOKING.

It is not essential to an action to recover personalty that plaintiff resort to the provisional remedy of claim and delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 197.]

#### 2. VENUE—PLEADING—DENIAL OF ALLEGATIONS BY MOTION TO CHANGE VENUE.

For the purpose of defendant's motion to remove a cause to another county, the allegations of the complaint must be deemed denied.

#### 3. REPLEVIN—RECOVERY OF DEEDS—PROPERTY OF REMEDY.

The old action of replevin, or the modern provisional remedy of claim and delivery, which is a substitute for replevin and detinue, is appropriate for the recovery of deeds or certificates of stock, etc., when the object is to regain possession of the specific paper, and not to rest the right or title to the property they represent; but when there is a dispute about the delivery of a deed conveying land, or when the right to demand its delivery is the issue, such proceeding will not lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 5.]

#### 4. VENUE—ACTIONS RELATING TO LAND.

Under the statute requiring an action to recover land or to determine an interest therein, etc., to be tried in the county where the property is situated, an action to gain possession of a deed deposited in escrow for delivery to plaintiff upon a performance of certain acts should be brought in the county where the land lies, since a judgment for plaintiff will have the effect of transferring to him the actual title of the land.

Appeal from Superior Court, Edgecombe County; Cooke, Judge.

Action by H. C. Bridgers against W. W. Ormond and others. From an order removing the cause to another county, plaintiff appeals. Affirmed.

John L. Bridgers, for appellant. Jarvis & Blow, for appellees.

BROWN, J. It does not appear that the ancillary or provisional remedy of claim and delivery has been resorted to in this action, and in order to maintain an action for the recovery of personal property it is not essential that it should be. The action may proceed to trial, and the title to personal property determined, without resorting to the provisional remedy.

The complaint discloses that the purpose of the action is to recover possession of a deed that has never been in possession of the

plaintiff. The deed was deposited in escrow, to be delivered upon the performance of a contract entered into by plaintiff with defendant Beaman in respect to the building of a railroad to Hookerton and the construction of a depot. The land described in the deed is situated in the county of Greene. The plaintiff's right to call for the delivery of the deed depends upon the determination of the fact in his favor that he has complied with certain conditions which entitle him to demand and receive the deed. If the allegations of the complaint are denied (which they must be taken to be for the purposes of this motion), then the right of the plaintiff to recover the land, not the deed solely, depends upon his ability to establish the facts he has alleged. Thus it is plain to us that the actual title to the land will depend upon the findings of the jury, under the instructions of the court, to the issues submitted upon the pleadings. The effect of a verdict and judgment for the plaintiff will be to transfer, not simply the deed, but the actual title of the land to him. If the deed should be destroyed in the meantime, the judgment of the court could be made to operate as a deed, or the court could decree the execution of another.

Our statute is plain, and provides that actions for the recovery of real property, or for the determination of any interest therein, or for injuries thereto, must be tried in the county where the property is situated. While the plaintiff has now no such seisin as would enable him to maintain an action against a stranger for trespass upon land, he alleges an equitable title thereto, and when he establishes the allegations of his complaint, and a final decree is entered upon the findings, he will become seised, in fact and law, of the property.

There is no doubt that the old action of replevin, or our modern provisional remedy of claim and delivery, which is a substitute for replevin and detinue, is appropriate for the recovery of deeds, or certificates of stock, and the like, when the object of the action is to regain possession of the specific paper, and not to test the right or title to the property which they represent. When there is a dispute about the delivery of a deed conveying land, or when the right to demand its delivery is the question to be determined, such proceeding will not lie. *Cobbeys on Rep.* § 2; 7 *Lawson, Rights & Rem.* § 3643; *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. 846; *Hooker v. Latham*, 118 N. C. 186, 23 S. E. 1004; *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799; s. c., 133 N. C. 44, 45 S. E. 524. The decision in the last case is put upon the express ground that there is no evidence tending to prove an escrow. That the deed which plaintiff claims is in escrow appears from his complaint.

The facts set out in the complaint are sufficient to maintain the action to compel the delivery of the deed; but the issues, when

raised, must be tried in the county of Greene, unless a removal for cause is ordered hereafter from that county to some adjoining county.

The order of removal is affirmed.

J. W. PERRY CO. v. TAYLOR BROS. et al.  
(Supreme Court of North Carolina. Sept. 30, 1908.)

**BILLS AND NOTES—"INDORSERS"—NOTICE OF NONPAYMENT AND DISHONOR.**

By the express provisions of Revisal 1905, §§ 2212, 2213, 2219, 2239, one indorsing a note in blank before delivery, without indicating his intention to be bound otherwise, is an "indorser," who, not being given notice of nonpayment and dishonor, is discharged.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3567-3568.]

Appeal from Superior Court, Greene County; W. R. Allen, Judge.

Action by the J. W. Perry Company against Taylor Bros. and others. From an adverse judgment, plaintiff appeals. Affirmed.

L. V. Morrill and C. B. Aycock, for appellant. Jarvis & Blow, for appellees.

**WALKER, J.** This action was brought to recover the amount of a promissory note made on May 23, 1906, by B. D. Taylor and others to the plaintiff, for the sum of \$2,500, with interest from its date. The defendants J. T. Bowles and A. F. Moye (appellees) indorsed the note in blank before it was delivered to the plaintiff. The note was not paid at maturity, but was dishonored. The plaintiff failed to give notice to the indorsers of nonpayment and dishonor, and they were not notified of the same until this action was commenced. The court intimated upon the evidence that, as plaintiff had failed to give notice of nonpayment and dishonor, the jury would be instructed to answer the issues in favor of the defendants, who were the indorsers. The plaintiff excepted, submitted to a nonsuit in deference to the intimation of the court, and appealed.

Whatever may have been the law heretofore, it is now provided, and was so provided at the time the note upon which this suit was brought was given, as follows: "A negotiable promissory note, within the meaning of this chapter, is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable time, a sum certain in money to order or to bearer." Revisal 1905, § 2334. "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Revisal 1905, § 2212. "Where a person, not otherwise a party to the instrument, places thereon his signature, in blank, before delivery, he is liable as indorser [under rules specified in the



section].” Revisal 1905, § 2213. “Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.” Revisal 1905, § 2219. “Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.” Revisal 1905, § 2239.

It appears, therefore, that as the defendants placed their signatures on the back of the note, and they were not otherwise parties to the instrument, they became liable as indorsers, and were entitled to notice of dishonor after its maturity. *Eaton & Gilbert on Commercial Paper*, § 108. The case of *Rouse v. Wooten*, 140 N. C. 558, 58 S. E. 430, 111 Am. St. Rep. 875, which was cited by the plaintiff's counsel, does not bear on this case, as there the defendant was a surety, and so found to be by the jury. The only question raised in that case was whether a surety is entitled to notice of nonpayment and dishonor. We held that he is not. The ruling of the judge was correct.

No error.

#### SESSOMS v. TAYLOE et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

##### 1. DETINUE—RELIEF—SCOPE OF RELIEF.

In an action for the possession of personalty or the value thereof, in the nature of the old action of detinue, the court will, in proper cases, treat the action as for foreclosure of a lien, and adjust the rights of the parties, either upon the evidence, or, if necessary, by reference to state an account.

##### 2. REMAINDERS—RIGHTS OF REMAINDERMAN.

A deed reserving a life estate gives the grantee no right to enter or cultivate the land during the life tenancy.

##### 3. USE AND OCCUPATION—OCCUPANT'S LIABILITY.

Under the express terms of Revisal 1905, § 1986, decedent, having occupied defendants' lands by their consent, but without reserved rent, was liable for a reasonable amount for the use and occupation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Use and Occupation, § 8.]

##### 4. SAME—REMEDY.

If defendants' right to sue for reasonable compensation for decedent's use of their land with their consent, but without reserved rent, does not give a lien under Revisal 1905, § 1993, giving farm lessors crop liens, defendants are confined to an action against the administrator.

##### 5. EXECUTORS AND ADMINISTRATORS—INTEREST IN CROP—WIDOW'S RIGHTS.

As between the administrator of a tenant and the landlord, who claims a crop made by

decedent, the widow is not interested in the crop further than the recovery of so much as will give her her year's support.

##### 6. LANDLORD AND TENANT—LIEN OF LANDLORD FOR RENT—RIGHTS IN SURPLUS.

If, under Revisal 1905, § 1993, giving farm lessors crop liens, a landlord may retain so much of the crop made on his land by decedent while occupying it with his consent, but without reserved rent, as will compensate him for the use and occupation, the remainder belongs to decedent's personal representative, subject to the landlord's claim under the lien for advances to decedent and the widow's year's support.

##### 7. SAME—LIEN FOR ADVANCES—RIGHT TO CROP.

Defendants, in an action to recover a crop made by decedent on their land with their consent, but without reserved rent, having offered no evidence of advances, were not entitled to hold any part of the crop therefor.

##### 8. SAME.

Though the relation of landlord and tenant existed between defendants and decedent, they could not claim any part of a crop made by him for rent, in the absence of proof of the value or amount of the rent.

##### 9. APPEAL AND ERROR—DISPOSITION OF CAUSE.

In an action by a widow to recover a crop made by her husband on defendants' land with their consent, but without reserved rent, the court erred in refusing instructions, and defendants prevailed. *Held* that, since plaintiff was entitled to sue to recover enough of the crop to pay her \$50 as her year's support, and to avoid the expense and delay of a new trial and a withholding of her allowance, the Supreme Court will modify the judgment by allowing plaintiff to obtain from the proceeds of the crop \$50, and by directing payment of costs out of the remainder and payment of the balance to defendants.

Appeal from Superior Court, Bertie County; O. H. Allen, Judge.

Action by Carrie Sessoms against Anne E. Tayloe and another. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

Eliminating all immaterial matter, the record discloses the following facts: Defendants, on February 21, 1906, were the owners of a small tract of land, which they conveyed to J. P. Sessoms, the husband of plaintiff, reserving a life estate. They permitted said Sessoms to move upon the land in January, 1907, for the purpose of cultivating and making a crop thereon. The defendants were elderly maiden ladies, living on the land. Sessoms was their nephew. It seems that he, with his wife and child, lived in the house with defendants. There was no contract between the parties in regard to rent. On January 12, 1907, Sessoms executed a crop lien, or chattel mortgage, to defendants upon all of the crops to be raised by him on the land during the year 1907, for the purpose of securing money and supplies to be advanced to him by them, to be expended in the cultivation of the crop, to the extent of \$121. At some time during the year, about July, Sessoms was taken sick, and died in September, leaving the plaintiff, his widow, and one child. Plaintiff at times worked in the crop and hired hands to do so, paying them. The

testimony in regard to time and amount paid is indefinite. Soon after the death of her husband, plaintiff applied for her year's support, and it was duly allotted to her, consisting of household and kitchen furniture, etc., and "the crop on the land of J. W. Sessoms and Anne E. and Melissa Tayloe, subject to the expense of housing and indebtedness, \$50." The entire property allotted was of less value than the amount to which she was entitled as her year's support. It seems, from the record, that a portion of the personal property, together with the entire crop made on the land, was in the possession of defendants. After the allotment, W. L. Vaughn, as agent of the plaintiff, tendered to defendants the amount of the indebtedness due them and demanded possession, which was refused. Defendants claimed that all of the crop belonged to them. On October 7, 1907, plaintiff brought suit to recover the personal property and crop, and at the same time obtained possession by virtue of the order of the clerk. Her agent housed the crop. There is no evidence of the amount advanced to Sessoms pursuant to the lien, nor of the time during which defendants worked in the crop, or the amount paid out by them for labor. One witness says that he stripped fodder one day. In the complaint, plaintiff alleges that she is the owner and entitled to the possession of the crops, and that defendants wrongfully detain them. The answer denies these allegations. The other property was eliminated from the action by an offer, on the part of defendants, to submit to judgment for the recovery thereof and "to judgment for the cost." The general issues were submitted. His honor charged the jury that the law presumed that the defendants in possession of the land are the owners of the crop; they not having parted with the life estate. Plaintiff excepted. Several requests for instructions were made by plaintiff, which will be noted in the opinion, all of which were refused, and exceptions duly taken. The jury answered the issues against plaintiff and assessed the value of the crop, "after expense of housing," at \$300. There was judgment against plaintiff and her security for the value of the crop and costs. Plaintiff excepted and appealed.

Winston & Matthews, for appellant. W. R. Johnson, for appellees.

CONNOR, J. It is settled by numerous decisions of this court that under our system of procedure, when the action is for the possession of personal property, or the value thereof, in the nature of the old action of detinue, the court will, in proper cases, treat the action as for foreclosure of liens, and adjust the rights of the parties, either upon the evidence, or, if necessary, by a reference to state an account. In *Cotten v. Willoughby*, 83 N. C. 75, 35 Am. Rep. 564, Smith, C. J., said: "If the plaintiffs recover, they will

hold as trustees, and, as all interested in the fund are before the court, we see no reason why, in the present proceeding, the mortgage may not be foreclosed, the equities involved adjusted, and the whole matter finally adjudicated in the action." In *Parker v. Brown*, 136 N. C. 280, 48 S. E. 657, an action in several respects like this, we said: "If she had a legal right to what defendant has deprived her of, the court will find and administer a remedy corresponding to her right."

What, therefore, was the plaintiff's right in respect to the crop? To answer this question, it is necessary to ascertain what right her husband, or his personal representative, had, and this involves the inquiry, what relation existed between the defendants and Sessoms in regard to his occupation of the land during the year 1907? The defendants having reserved a life estate in the land, we do not perceive how the deed of February 21, 1906, affects the legal status of the parties. The defendants were unquestionably the owners and in possession of the land. Sessoms entered and occupied it by their permission. He had no right, under the deed, to enter or cultivate the land. The testimony shows him to be an occupant, rather than a tenant. No rent was reserved. The crop, when made, was his property. Defendant's witness, Jos. Sessoms, the father of J. P. Sessoms, says: "I saw J. P. Sessoms work the crop. He was in charge of the place. \* \* \* He was in charge of the land, and they all lived there. I went there (to help work) on his account partly, and partly on account of all of them. He was my son, and I did not want to see the crop ruin." The defendants took from Sessoms a lien "on all the crops which may be made by me, upon said land, during said year," describing it as the lands of the defendants. The lien contains the provision: "And if I fail to pay the amount so advanced by the time specified, the said Anne Eliza and Melissa Tayloe shall have power to take possession of said crops and sell the same, the proceeds to be applied to the payment of said advances, and the surplus, if any, to J. P. Sessoms." This lien was introduced by defendants, but no evidence was offered showing that any amount was advanced by them. We do not find any evidence of a rent reserved by defendants, or indications of a lease of the land. It would seem that Sessoms was an occupant of the land for the purpose of cultivating it. He was liable to an action of assumpsit, for a reasonable amount, for use and occupation. "In such cases the law will imply a promise to pay compensation for the use and occupation." 2 Taylor, Landlord and Tenant, § 636. By section 1986, Revisal 1905, it is provided that "when any person shall occupy land of another, by the permission of such other, without any express agreement for rent, \* \* \* the landlord may recover a reasonable compensation for such occupation."

Whether the amount to be recovered "for use and occupation" is subject to the provisions of section 1993, Revisal 1905, that "when lands shall be rented or leased by agreement, written or parol, for agricultural purposes," etc., the crop shall be deemed to be vested in the lessor, etc., is not clear. The statute (Revisal 1905, § 1980) was enacted in 1850, because the court, following the English decisions, had held that assumpsit for use and occupation would not lie unless there was an express promise to pay therefor. *Anonymous*, 2 N. C. 485 (559); *Long v. Bonner*, 33 N. C. 27.

There is much evidence in this record indicating that defendants did not intend to charge Sessoms for "use and occupation," but that for failing to support and take care of them the deed should be "null and void." If the right to sue for "reasonable compensation" does not give any lien under section 1993, the right of the defendants is confined to an action against the administrator of Sessoms. As the interest of the plaintiff, under the allotment of her year's support, is confined to \$50, she is not further interested in the right to the crop, as between the personal representative and the defendants, than the recovery of so much as will pay her the sum of \$50. Assuming that, as between the parties to this action, the defendants are entitled to retain so much of the crop, under section 1993, as will pay the amount found to be due for use and occupation, it is manifest that the remainder belonged to the personal representative of Sessoms, subject to defendant's claim, under the lien, for amount advanced to him, and the widow's year's support. There was no evidence that any sum had been advanced. The plaintiff asked his honor to instruct the jury that, as the defendants had offered no evidence of any such advances, they could not hold any part of the crop under the lien. We think that this instruction should have been given. The plaintiff further requested his honor to instruct the jury that, even if the relation of landlord and tenant existed, in the absence of any evidence of the value or amount of the rent, the defendants cannot hold any part of the crop for rent. Taking the view most favorable for the defendants, the plaintiff was entitled to this instruction. Other instructions were asked and refused, which are not necessary to be considered. Upon the whole evidence, the plaintiff was entitled to maintain her action, certainly to the extent of recovering so much of the crop as was necessary to pay her \$50 included in the allotment.

We can see no good reason for ordering a new trial, with the delay and expense incident thereto. The small amount allowed by the law to the widow and her young children to provide for their support during the first year following the loss of the "bread winner" should not be withheld from them by vexa-

tious and expensive litigation. It is apparent, from the entire evidence, that the value of the crop made, largely by the labor of the sick husband, is sufficient to pay the widow her \$50 and discharge the lien, which cannot exceed \$121 and reasonable compensation for use and occupation. The defendants have wrongfully withheld it from her. Let the judgment be so modified that the plaintiff will retain, from the proceeds of the crop seized in this action, \$50. She will, out of the amount remaining, pay the costs incurred in the superior court and the costs of this court. The defendants will have judgment for the balance.

Modified and affirmed.

#### HADDOCK v. LEARY et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

##### 1. ADVERSE POSSESSION—COLOR OF TITLE—CONSTRUCTIVE POSSESSION—EXTENT.

Generally, where a person enters land under a claim of title thereto by deed, his entry and possession are referred to such title, and he is deemed to have a seisin of the land co-extensive with the boundaries stated in his deed, where there is no open, adverse possession of any part of the land in any other person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 547.]

##### 2. FRAUDS, STATUTE OF—PAROL AGREEMENT RESPECTING BOUNDARY—VALIDITY.

If the calls of a deed are sufficiently definite to be located by extrinsic evidence, that location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed.

##### 3. ADVERSE POSSESSION—HOSTILE CHARACTER—EVIDENCE—AGREEMENT AS TO BOUNDARY.

Where plaintiff claimed title to land by color of title and possession, defendants could show that before limitations ran he agreed with their predecessor that a particular line should be the boundary, for the purpose of showing that after that agreement plaintiff did not claim any right or have any possession beyond the line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

##### 4. SAME.

A grantee, who actually occupies part only of the land described in his deed, must claim to the boundaries in order to acquire prescriptive title to the whole tract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 551.]

##### 5. SAME—ESSENTIALS TO ACQUIRE TITLE.

Possession necessary to give title to land by limitations is a possession under color, taken by a grantee in person or by his agents, and held and claimed continuously to the boundaries of the deed, without interruption or relinquishment, for seven years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

##### 6. SAME—PRESUMPTIONS.

The presumption that one entering land under a deed constituting color of title, and definitely describing the metes and bounds of the land, claims all the land covered by his paper title, is not a conclusive presumption, and may be rebutted by proof that, though in actual possession of part of the land, he does not claim possession or ownership beyond a certain line.

Appeal from Superior Court, Jones County; W. R. Allen, Judge.

Action by W. H. Haddock against N. J. Leary and others. From a judgment for defendants, plaintiff appeals. Affirmed.

D. L. Ward and P. M. Pearsall, for appellant. Simmons, Ward & Allen and Warren & Warren, for appellees.

BROWN, J. The plaintiff introduced a grant to Thomas Pollock and subsequent meane conveyances, but was unable to connect the Duncan Cameron deed, made in 1843, with the grant. The Pollock grant and such deeds as plaintiff offered cover the locus in quo. The plaintiff, not having a connected chain of title from the state, undertook to make out his title by adverse possession. The deed from W. G. Brinson, administrator of Hiram Brinson, to plaintiff, dated June 4, 1891, constitutes the color of title under which plaintiff entered, and contains the same description, without courses and distances, as is found in the complaint.

The plaintiff testified that he was in possession of the land in dispute, and had been for 20 years, and that his deed covers it; but it is admitted that the plaintiff does not live on the locus in quo, and that there is no clearing on it. The cutting of the timber by the defendants was done on their side of a line alleged by defendants to have been established by mutual consent between plaintiff and their immediate ancestor. The plaintiff denied that there was any such agreed line, or that he had ever consented to it, and testified that he always claimed up to boundaries of his deed. The defendants were permitted to prove, over the objection of the plaintiff, that the agreed line was surveyed by one Brown, and that the plaintiff and Kit Bryan, defendants' ancestor, were present and agreed upon said line as the boundary of their respective lands and possessions. The plaintiff objected to this evidence "as incompetent and irrelevant, and for the further reason that the line alleged to have been agreed upon was not run contemporaneously with the making of the deed."

The court, among other things, charged the jury as follows: "If the deed of the plaintiff covers the land in dispute, and he was in possession of the part of the land outside of the dispute, claiming to the boundaries of his deeds, his possession would extend to all the land in his deed not actually occupied by some one else. (His possession of a part would not, however, extend to any land occupied by another.)" The plaintiff excepted to the part in parentheses. The court further charged the jury: "If you find by the greater weight of the evidence that the plaintiff and the grantor of defendants ran an agreed line on the map from K to H to G to F in 1895, and the plaintiff after that time did not claim beyond this line, you should answer the first issue 'No,' although you

should further find that the plaintiff's deed covered the land in dispute and he was living upon a part of the land embraced in his deed." To this part of the charge plaintiff excepted.

There is no question that generally, where a person entered into land under a claim of title thereto by deed, his entry and possession are referred to such title, and he is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person. If the plaintiff had shown a connected title to this land from the grant down, or if his color of title had ripened by possession into an indefeasible title prior to the marking of the agreed line in 1895, the testimony would have been incompetent; for, the plaintiff having acquired the actual title in a recognized legal manner prior to the establishment of the line, such title could not be divested by a parol agreement in regard to the running of a division line subsequently entered into, for nothing is better settled in this state than that, if the calls of a deed are sufficiently definite to be located by extrinsic evidence, that location cannot be changed by parol agreement unless the agreement was contemporaneous with the making of the deed, and this is all that the authorities cited by the learned counsel for plaintiff establishes, as we read them. *Caraway v. Chancy*, 51 N. C. 361; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033; *Buckner v. Anderson*, 111 N. C. 577, 16 S. E. 424; *Roberts v. Preston*, 100 N. C. 243, 6 S. E. 574; *Shaffer v. Gaynor*, 117 N. C. 23, 25, 23 S. E. 154.

In this case plaintiff had failed to show a chain of title by deed, and was endeavoring to make out a prescriptive title by color and possession. His deed, which was colorable title, was dated June 4, 1891. The agreed line alleged by defendants to have been run, and fixing by consent the limits of their respective possessions, was made in 1895. Consequently at that time the plaintiff had acquired no title to any of the land, for he had not then had seven years' possession of any part of it. It was, therefore, competent to introduce the evidence objected to in order to show that after the marking of that line in 1895 the plaintiff did not claim any right or possession beyond it. The evidence was competent, not upon a question of title, but upon one of possession, for the purpose of restricting plaintiff's constructive possession. It was not offered for the purpose of changing the boundaries of a deed, but to show that plaintiff made no claim up to the boundaries of his deed after 1895, but only up to this agreed line, and that by his own voluntary act he had restricted his constructive possession to the limits of the agreed line. When the grantee of a deed is seated upon a part only of the land covered by its boundaries, he must claim its boundaries in order to ripen by pos-

session his title to the whole. He must claim the right and title to the whole land, in order that his constructive possession may extend to the whole. Chief Justice Parsons has well expressed the general principle: "When a man enters on land, claiming the right and title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel." "When a man, not claiming any right or title to the land, shall enter on it, he acquires no seisin but by the ouster of him who was seised; and to constitute an ouster of him who was seised the disselsor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seised." *Kennebec v. Springer*, 4 Mass. 416, 3 Am. Dec. 227. Mr. Malone says this is the general doctrine in all the states. In support of this the author cites a large number of cases from our courts of last resort. *Real Property Trials*, p. 282, and note.

The possession which is necessary to give title under our statute of limitations is a possession under color taken by the grantee in person, or by his agents, and held and claimed continuously to the boundaries of his deed, without interruption or relinquishment, for seven years together. *Grant v. Winborne*, 3 N. C. 56, and cases cited in note. This possession or occupancy of the land does not refer to the deed, but to the fact itself, and to its hostile character. Consequently it follows that the occupant under color may restrict his constructive possession by his acts and declarations showing that he does not make his claim of title coextensive equally with his color of title. In other words, there is no rule of law which will force the occupant to claim possession and title up to the boundaries of his color. He may restrict his claim of occupancy to a part of the land embraced in his color, and the law will not extend his possession by construction beyond his claim. The law is accurately and clearly stated in 1 Cyc. 1134: "Actual possession of a part of the land under color of title will not draw to it constructive possession of the balance, unless such color of title is also accompanied by claim of title coextensive with the boundaries of the conveyance." To sustain the text the author cites cases from 10 states. "The fact that a person enters under color of title does not dispense with the necessity for a claim of right. Constructive possession is dependent, not only on color of title and actual possession of part of the land, but also on a claim of right to the whole." 1 Am. & Eng. Enc. 867; *Wade v. Johnson*, 94 Ga. 349, 21 S. E. 569; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109; *Bakewell v. McKee*, 101 Mo. 337, 14 S. W. 119; *Creekmur v. Creekmur*, 75 Va. 430. In the above case the Supreme Court of Georgia declares that "possession of land under color of title, however long continued, will not ripen into a prescriptive title, if, instead of being attended with

a claim of right, such right be expressly disclaimed pending possession."

We could quote from a great array of cases which hold substantially that constructive possession may be restricted by the acts and declarations of the occupant, indicating that he does not make his claim of title coextensive with the boundaries of his color; and some of them hold that, to constitute a disseisin constructively by possession under color, the occupant must not only be in actual possession of a part of the land covered by his deed, but his possession must be of such character as to indicate affirmatively that he does claim adversely the residue of the land included in it. We think the rule of law is best stated by the Supreme Court of Vermont in *Brown v. Edson*, 22 Vt. 362, viz.: "But we know of no instance in which a possession by construction has been held to extend beyond the claim of title. We readily grant that an entry under a survey, like the one in the present case, and the occupation of a part of the land, if there be no evidence to limit and restrict the possession, will be regarded as extending the possession constructively over the entire tract included in the survey. But we think this constructive possession may be restricted by the acts and declarations of the occupant, showing that he does not make his claim of title coextensive with the survey." This is clearly in line with what we conceive to be the law of this state, although there is a dearth of authority upon this exact question in our own reports.

We have said, however, that one entering upon a tract of land under a deed that in form constitutes a color of title, and that definitely describes the metes and bounds of the land, is presumed to prefer claim to all of the land covered by the paper title under which he holds. *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251. But this presumption in the occupant's favor is clearly not a conclusive presumption, and it may be rebutted by his adversary by proof that, although he is in actual possession of a portion of the land, he does not claim possession or ownership beyond a certain line. The testimony objected to is therefore competent to rebut the presumption that plaintiff claimed coextensive with his deed. It is doubtless true that plaintiff, if he made such agreed line, was honestly mistaken in locating his boundary; but the effect would be the same upon his possession beyond that line as if he had knowingly done it. The fact tended to prove a relinquishment of possession and claim, before the statutory period had expired, of the land on the side of the line where the cutting of the timber took place.

His honor properly submitted the matter to the jury, and we think the appellant's exceptions cannot be sustained.

Affirmed.

## HUGHES v. CROOKER.

(Supreme Court of North Carolina. Sept. 16, 1908.)

**1. EVIDENCE—PAROL EVIDENCE—CONTRADICTING NEGOTIABLE INSTRUMENT—COLLATERAL AGREEMENT.**

Where plaintiff gave his promissory notes for certain patent rights within prescribed territory, defendant agreeing as an inducement to their execution to train plaintiff's sons in selling the articles, the transaction to be incomplete until plaintiff acknowledged the performance of the agreement, parol evidence was admissible, in an action for wrongfully negotiating the notes, to show such collateral agreement.

**2. CONTRACTS—ACTIONS FOR BREACH—SUFFICIENCY OF EVIDENCE—EXISTENCE OF CONTRACT.**

In an action for wrongfully negotiating a note claimed to have been given for patent rights, under a collateral agreement that the transaction should be incomplete until defendant trained plaintiff's sons in selling the articles, evidence held to show the collateral agreement and its breach as alleged.

**3. SAME—BREACH OF CONDITIONS—AGREEMENT COLLATERAL TO EXECUTION OF NOTE.**

Where plaintiff gave negotiable notes to defendant for certain patent rights under a collateral agreement that the transaction should not be complete until defendant had trained plaintiff's sons in selling the articles, such agreement was a condition precedent to closing the transaction, and, if defendant negotiated the notes to innocent purchasers before performance thereof, plaintiff may recover of defendant the amount he was compelled to pay on the notes.

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by N. C. Hughes against E. R. Crooker. From a judgment for plaintiff, defendant appealed. Affirmed.

This action is prosecuted by N. C. Hughes against defendant for the purpose of recovering the amount paid by him, by reason of the wrongful and fraudulent negotiation of certain notes, executed by him and delivered to defendant, as the plaintiff alleges, to be held until the performance of a collateral contract by defendant. The basis of the complaint, eliminating irrelevant matter, is: Defendant, as agent of a clothes washer company of Lauderdale, Miss., proposed to sell to the two sons of the plaintiff, for the sum of \$500, certain rights within prescribed territory to sell and appoint sub-agents to sell the washing machines. Defendant, as an inducement to procure the plaintiff to sign notes for the purchase price and secure the payment thereof by mortgage on his land, promised to train his sons in regard to making sales, etc., and until he had complied with his contract, and plaintiff, or his sons, signed a certain paper, which defendant exhibited to them at the time the notes were signed, the transaction was to be incomplete and open. Defendant failed and refused to comply with the contract in regard to training the plaintiff's sons, and in violation of said contract negotiated the plaintiff's notes to purchasers for value without notice of the condition upon which they were to become binding upon plaintiff.

By reason of the conduct of defendant in the premises plaintiff was compelled to pay said notes to the purchaser, and was thereby endangered to the amount of the notes. Defendant, by appropriate pleadings, denied so much of the complaint as was material to the alleged cause of action.

The following issues were, without objection, submitted to the jury: "(1) Did the defendant wrongfully and fraudulently negotiate the notes of the plaintiff, N. C. Hughes, as alleged in the complaint? Ans. Yes. (2) What amount, if anything, is the defendant indebted to plaintiff, N. C. Hughes, by reason thereof? Ans. \$500."

A large number of exceptions were "lodged" in the progress of the trial; but many of them, involving the same questions, were not referred to in the brief. Those which are material to the decision of the appeal are referred to in the opinion. There was judgment for plaintiff, and defendant appealed.

W. C. Rodman, for appellant. Ward & Grimes, for appellee.

CONNOR, J. The exceptions to the admission of testimony are based upon the theory that the plaintiff is endeavoring to contradict the written contract. This is a misapprehension. The cause of action in no way draws into question the terms and provisions of the notes, or the contract made between the sons of the plaintiff and the washer company. The basis of plaintiff's complaint is that collateral to the written or printed parts of the transaction, and as an inducement to the signing of them, the defendant agreed that he would perform certain obligations in regard to training the purchasers in the handling and selling of the machines and right to act as agent, etc., and that until the plaintiff, or his sons, to whom the sale was made, should sign a paper, which he produced at the time, signifying that he had performed his obligation, the entire transaction was in fieri, or, in the language of the plaintiff, "unfinished until I signed my satisfaction." That such collateral agreements are enforceable and may be proven by parol, notwithstanding the rule excluding parol evidence to contradict or vary the terms of a contract reduced to writing, has been frequently decided by this and other courts. The latest case in which the principle was enforced is *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768. There the written order for certain goods was signed with a collateral parol agreement that it should not be binding until approved by one of the partners. An action was brought to enforce payment for the goods, which were shipped, but not accepted. The same objection was made to the introduction of evidence of the parol collateral agreement as here. We do not think it necessary to repeat what was said in that case, or do more than re-

fer to the authorities cited. The language of Shepherd, C. J., quoted from Kelly v. Olliver, 113 N. C. 442, 18 S. E. 698, so clearly and accurately states the principle upon which plaintiff's case and the admissibility of his testimony rests, that we could add nothing of value to it. He says: "This does not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of the contingency." Aden v. Doub, 146 N. C. 10, 59 S. E. 162. The testimony was clearly competent.

The defendant, at the conclusion of the evidence, moved for judgment of nonsuit, and by several prayers for instruction presented the contention that in no aspect of the evidence was plaintiff entitled to recover. We think that there is evidence competent to be considered by the jury to sustain plaintiff's allegation. He testified: "I can't say definitely whether or not he would not negotiate the notes; but I can say that he said I was absolutely safe, for the contract was not finished until I signed my satisfaction—that there was no finishing of the contract and that was my security. He said: 'This contract that we work under obliges every agent, in engaging a subagent, to promise him that, before he will leave him, he signs a contract saying he is satisfied. Now,' he says, 'that is your security.' And then he produces a written blank saying something, I don't remember what. He said he could not leave me—that the contract obliged him, before I sold five machines, because he was not allowed to do it, and then he says, 'I cannot leave you until you say that you are satisfied.' He showed, at that time, a blank paper to be signed when the work was done." There was much other testimony on the part of the plaintiff to the same effect. Defendant did not testify. It was not denied that defendant negotiated the notes or that they were paid by plaintiff. His honor instructed the jury in every phase of the case, putting his instructions in writing. The jury having found that the plaintiff's testimony was true, it was manifest that defendant was guilty of a breach of his contract in negotiating the notes before he had trained the sons and plaintiff had signed the paper expressing his satisfaction. This was a condition precedent to the validity or closing of the transaction. Plaintiff was negligent in trusting the negotiable notes in the custody of defendant until he had complied with his agreement. He has paid for such negligence, and is entitled to be reimbursed by the wrongdoer. While the mere breach of such a contract may not be a fraud, when, as in this case, under the charge of his honor, the jury, upon considering the circumstances and conditions surrounding the transaction, find that the defendant did not intend, at the time he made the contract, to perform his promise, his conduct in negotiating the notes, being a nonresident and taking the proceeds

out of the state, justifies the verdict of the jury.

It is difficult to understand, in the light of the experience as shown by numerous decisions of this court, why men will make such contracts. The only way, it seems, to protect them against their folly, is to demand fair, open dealing on the part of nomadic salesmen of patent rights. There is but little substantial difference between plaintiff's case and many others in which overcredulous citizens, thinking that there were "millions in it," have found that the amount invested in the purchase of patent rights measured the extent of their loss. Eliminating the element of fraud, the allegations and proof are sufficient to sustain the verdict and judgment, upon the theory that the plaintiff had not, until the performance by the defendant of his obligation, come under an absolute liability to defendant. That defendant could not have recovered on the notes at the time he negotiated them is manifest. If by negotiating them he imposed an obligation on the plaintiff to the purchaser, it is equally manifest that he is liable for such amount as plaintiff was thereby required to pay. Any other conclusion would put a premium upon the violation of duty by defendant, to his enrichment and plaintiff's loss. Taking the evidence to be true, as found by the jury, there can be no doubt that a wrong has been done by the defendant to the plaintiff for which the law will afford him a remedy. The case was fairly submitted to the jury by his honor, and we find no error in the judgment based upon the verdict.

No error.

#### STATE v. WILKES.

(Supreme Court of North Carolina. Sept. 23, 1908.)

#### CRIMINAL LAW—JURISDICTION — JUSTICES OF THE PEACE.

The offense of abandoning a crop without cause before paying advances, punishable under Revisal 1905, § 3366, by a fine not exceeding \$50 or imprisonment not exceeding 30 days, is within the final jurisdiction of a justice of the peace, and the superior court does not possess original jurisdiction.

Appeal from Superior Court, Greene County; W. R. Allen, Judge.

Tobe Wilkes was convicted of abandoning a crop without cause without payment of advances, and he appeals. Judgment arrested.

W. S. O'B. Robinson and J. P. Frizzelle, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

PER CURIAM. Indictment originating in the superior court of Greene county for willfully abandoning a crop without cause before paying advances, in violation of section 3366 of the Revisal of 1905.

In this court defendant moved to quash the proceedings and arrest the judgment upon the ground that, under said statute, the superior court had no original jurisdiction, in that the punishment is a fine not exceeding \$50 or imprisonment not exceeding 30 days. The court is of opinion, upon examination of the statute, that the offense is within the final jurisdiction of a justice of the peace, and that the superior court did not have original jurisdiction. The case cited—*State v. Robinson*, 143 N. C. 620, 56 S. E. 918—has no application, as the original record shows it originated in the justice's court.

Judgment arrested.

DAVENPORT v. NORFOLK & S. R. CO.  
et al.

(Supreme Court of North Carolina. Sept. 16, 1908.)

1. RAILROADS—INJURIES FROM CONSTRUCTION  
—RIGHT OF ACTION—ACTION BY OWNER OF  
CONDEMNED LAND.

Under the rule that the compensation for an easement in land taken by condemnation contemplated its use with a proper regard for the rights of the servient owner, recovery may be had for damages incident to the negligent construction of a railroad, though the right of way was purchased or acquired by condemnation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 362.]

2. WATERS AND WATER COURSES—DITCHES  
AND CULVERTS—DUTY IN CONSTRUCTING.

If defendant railroad constructed its roadbed across several lead drainage ditches and a number of tap ditches feeders to the lead ditches, and put in culverts under its roadbed to drain the lead ditches, but conveyed the water in the feeders to the lead ditches by lateral drains along its road, the drainage for the lead ditches should be sufficient to pass the water from both the lead and tap ditches; and, though defendant could also convey water from adjacent lands across plaintiff's land into the lead ditches by the lateral ditches along its track, both the lateral and lead ditches must be sufficient to carry off the additional water as well as the water on plaintiff's land, and a failure to so construct the ditches would be negligence, entitling plaintiff to damages for resulting injuries.

3. EVIDENCE—OPINION EVIDENCE — EXPERT  
TESTIMONY—MATTERS OF SPECIAL KNOWLEDGE—EFFECT OF INJURIES TO PROPERTY.

In an action for damages for defendant's failure to construct ditches sufficient to carry water under its roadbed, plaintiff was properly allowed to testify as to what his crops would have been in a certain year, and the value thereof, if defendant had left the ditches open; plaintiff having a personal knowledge of the conditions, as the evidence was in the nature of expert testimony on the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2343-2344.]

Appeal from Superior Court, Tyrrell County; Cooke, Judge.

Action by H. T. Davenport against the Norfolk & Southern and the Suffolk & Carolina Railroad Companies. From a judgment for plaintiff, defendants appeal. Affirmed.

There was evidence tending to show that defendant companies, having condemned a right of way, proceeded to construct their roadbed through the lands of plaintiff, and that such roadbed crossed a number of lead ditches made by plaintiff for the proper drainage of his lands, and also a number of tap ditches conveying the water of said land to the lead ditches at various points below the defendants' roadbed. That defendants constructed culverts or put in pipes at the points where these lead ditches had passed under the roadbeds, but did not make any such drainage for the tap ditches, but, in constructing its roadbed, by lateral ditches, the water which had been carried by these tap ditches, and also some water from adjacent lands, was conveyed along the side of the roadbed into the lead ditches, and, by reason of the increase of water, the culverts were not sufficient to carry off the waters of the usual and ordinary rains falling in the vicinity, and, by reason of this defect, these waters were ponded back upon the land of plaintiff, causing much damage and injury to plaintiff's lands and the crops growing thereon.

The plaintiff, testifying to his alleged injury, and the cause thereof, among other things, said: "The water on the north side of the railroad drains southwardly to a swamp. My land lies between the letters 'A' and 'D' on the maps. Before the railroad was constructed, my ditches ran just as they do now. The railroad cut ditches on each side of the track, and threw up an embankment or roadbed, and that caused all the tap ditches to fill up, only leaving open the lead ditches at 'A,' 'B,' and 'C.' The water before that time went southwardly, and was carried off by the lead ditches and tap ditches which drained my land. I cleaned out these ditches in 1893. My father and myself were renters of the land, and I purchased it in 1897. From 1897 we made good average crops for that time. Before the railroad cut the ditches, none of the water east of D nor west of A came down on my land, but since then the water for distance of half a mile east of A comes down on my land, and when there came a big rain it would come down from east of D. I think the roadbed is from two to three feet high. The land on both east and west sides of my land is higher than mine, and the fall of the land is from the north. The conditions as changed by the railroad have greatly increased the flow of water on my land, and the culverts not being sufficient to take it off promptly, the water ponded on my land, and on the south side the ditch would not be sufficient to hold the water. I have seen the water so high that it flowed over the top of the railroad. In 1906 I had in cultivation about 180 acres of corn, cotton, peas, and sweet potatoes. There were 68 acres of cotton, 80 in corn, 5 in potatoes, and the balance in peas." Witness was here asked: "If the railroad com-



pany had left open your drainage as it was before they went there, how much crop would you have made in 1906?" To this question and the testimony in response thereto defendants objected. Objection overruled. Exception. The witness answered: "I would have made a quarter of a bale of cotton per acre, and I only made 7 bales on the 68 acres. Cotton was worth 10 to 11 cents per pound, and the bales weighed 500 pounds each. I would have made 3 barrels of corn per acre, and only made 50 barrels on about 80 acres. Corn was worth \$4 per barrel. The stock peas were not damaged so much. The potato crop was a failure."

Issues were submitted and responded to by the jury as follows: "(1) Was the railroad of defendants negligently constructed, and, if so, was water thereby ponded on the lands of plaintiff as alleged? Answer: Yes. (2) If so, what damage to his lands and crops has plaintiff sustained thereby? Answer: \$1,500. (3) Has the cause of any injury to plaintiff's land in respect to drainage and as complained of by plaintiff been removed, and, if so, when? Answer: Yes; January 28, 1908."

Motion for new trial by defendants for error of the court in its ruling on the question of evidence as above indicated, and for errors in the charge. Motion overruled, and defendants excepted. Judgment on verdict for plaintiff, and defendants excepted and appealed.

Small, MacLean & McMullen, for appellants. Aydlott & Ehringhaus, for appellee.

HOKE, J. (after stating the facts as above). In *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833, a case concerning chiefly the rights acquired by condemnation proceedings, Douglas, J., delivering the opinion of the court, on page 503 of 130 N. C., on page 1030 of 41 S. E., said: "It is well settled that no damages are contemplated in the original condemnation except such as necessarily arise in the proper construction of the work." And in *Adams v. Railroad*, 110 N. C. 325, 330, 14 S. E. 859, Mr. Justice Avery, in declaring the same doctrine, said: "Whether an easement passed by private sale or condemnation, the estimate of its value is presumed to be made in contemplation of the observance on the part of the corporation of the golden maxim of the law by so exercising its privilege as to inflict no unnecessary injury on the servient owner. *Lewis on Eminent Domain*, 571; *Angell on Water Courses*, 97; *Id.* 95, 95a; *Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355; *Embry v. Owen*, 6 Exc. 369; *Pugh v. Wheeler*, 19 N. C. 50; *Walton v. Mills*, 86 N. C. 280; *Wilhelm v. Burleyson*, 106 N. C. 339, 11 S. E. 590; *Gould on Waters*, 209, 214, 401, 405; *Hosher v. Railroad*, 60 Mo. 329; *Curtis v. Railroad*, 98 Mass. 428; *Lawrence v. Railroad*, 71 C. L. Repts. 643; *Mills on Em. Domain*, 81, p.

220; *Munkres v. Railroad*, 72 Mo. 514; *Railroad v. Wicker*, 74 N. C. 220. And further, on page 331 of 110 N. C., on page 859 of 14 S. E.: "It being admitted, as a general rule, that such injuries to the servient tenement as are necessarily incident to a skillful construction of the road are considered as included in the compensation for the easement, it is clear that the skill is not to be measured by the cost of the structure alone, but by its completion upon such a location and in such a manner as to provide for the public safety and convenience without unnecessary injury to the land subject to the servitude. When the attempt is made to draw and define the line of legal right between two such conflicting claimants, it is essential always to recur to the rule, 'sic utere, ut non alienum laedas,' as the touchstone by which the culpability of conduct is to be determined. The persons who fixed the cost of the easement contemplated the building of the structure with an eye to the safety and convenience of the public, and subject to this controlling purpose, with a proper regard for the rights of the servient, as well as dominant, owner."

Applying these principles, it is generally held that for damages incident to negligent construction of a company's road recovery may be had, though a right of way has been purchased or regularly acquired by condemnation proceedings. The judge below, having properly informed the jury of this general principle, and framed the issue so as to enable them to determine the precise question, among other things, and on this issue, charged the jury: "If the jury believe the evidence, there were certain lead ditches upon the plaintiff's land indicated at A, B, C, and D on the map, and there were also a number of smaller ditches, called 'tap ditches,' which emptied into the lead ditches. The railroad crossed all these ditches, and provided no opening for the tap ditches, but did leave openings for the lead ditches, in which openings they placed pipes, and they cut ditches on each side of the railroad on its right of way for the purpose of carrying off the water that was brought by the small ditches into the lead ditches, as well as the other water; and, this being the scheme of the defendants, it must have been in full compensation for the stoppage of the small ditches and as effective as if said small ditches had been left open, and the opening for the passage of the lead ditches must have been sufficient to allow the water to pass through, and the piping put in them must have been sufficient for the purpose and the ditches properly opened for the passage of the water." And, in reference to the water which the evidence tended to show the lateral ditches had carried into the lead ditches from adjacent lands, the court further charged the jury on the issue as follows: "That if the water before drained towards the plaintiff's land, and if it was necessary in order to drain the railroad track to cut the ditches

from the adjacent lands across the plaintiff's land, then the defendant had the right to make a continuous ditch from the said adjacent land on one side across the plaintiff's land and upon the adjacent lands on the other side; but, if the jury shall find that this was done, then it was the duty of the defendant company to have the ditches, both lateral and leaders, of sufficient capacity to carry off this water in addition to that which would be upon the land without this change. And, if the jury shall find that the defendant failed to perform its duty, as explained to you above, and as a consequence of such failure the plaintiff's lands were flooded and damaged, then the jury should answer the first issue, 'Yes.' If they shall not so find, they should answer the first issue, 'No.' This, we think, is a just rule by which the rights of these parties should be determined, and is in accord with numerous decisions of this court on the subject. *Mullen v. Canal Co.*, supra; *Parker v. Railroad*, 123 N. C. 71, 31 S. E. 381; *Parker v. Railroad*, 119 N. C. 677, 25 S. E. 722; *Fleming v. Railroad*, 115 N. C. 676, 20 S. E. 714; *Staton v. Railroad*, 109 N. C. 337, 13 S. E. 933; *Emery v. Railroad*, 102 N. C. 209, 9 S. E. 139, 11 Am. St. Rep. 727; *Railroad v. Wicker*, 74 N. C. 220; *Porter v. Durham*, 74 N. C. 767.

In *Emery's Case*, supra, it was held: " \* \* \*

(6) It is the duty of a railroad company to so construct its culverts that they will carry off the water of the streams over which they are built under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although of only occasional occurrence; but it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls." And in *Wicker's Case* the principle was held to apply both to "natural and artificial drainways." A perusal of these authorities fully sustains the charge of the court and the principles applied by him in the trial of the cause. Defendants in apt time presented several prayers for instructions, embodying the position, as we understand them, that, if the land of plaintiff was lower than the adjacent lands on either side of same, the defendants would have the right to accumulate the water which would naturally flow on plaintiff's lands, and convey the same by lateral ditches in and upon the lands of the plaintiff; and for damages incident to the exercise of their right no recovery could be had. The court gave the first part of the prayer, but declined to give the latter part of the instruction, to the effect "that no recovery could be had"; and this was as favorable to defendants as they had any right or reason to expect. Conceding that the defendants, if the proper construction and safety of their roadbed required it, had the right to convey the water in question by lateral ditches to the lead ditches of plaintiff, the grievance is not that they

carried it there, but that no sufficient culvert or drainage was made to carry it off. And, this being a duty incumbent on the defendants, under the authorities cited, for damages arising from the negligent breach of such duty, recovery could be had notwithstanding the acquisition of the right of way. The exception urged for error, that the plaintiff *Davenport*, testifying on his own behalf, was allowed to answer the question, "If the railroad company had left open your drainage as it was before they went there, how much crop would you have made in 1906?" cannot be sustained. This, though often expressed in the form of opinion, is an estimate given by a witness who had personal observation and cognizance of the conditions, and should be considered as the statement of a fact. It is the witness' impression from conditions actually observed and noted by him. Even if it should be regarded as more strictly "opinion evidence," when it comes from a source of this kind from one who has had personal observation of the facts, and from practical training and experience is qualified to give an opinion which is likely to aid the jury to a correct conclusion, such evidence is coming to be more and more received in trials before the jury. *McKelvey* speaks of it with approval as "expert testimony on the facts." *McKelvey*, p. 230. The testimony offered and admitted comes, we think, within this principle, and its admission is sustained by well-considered decisions in this and other jurisdictions. *Wade v. Telephone Co.*, 60 S. E. 987, 147 N. C. —; *Britt v. Railroad* (N. C.) 61 S. E. 60 (fall term, 1908); *Taylor v. Security Co.*, 145 N. C. 385, 59 S. E. 139; *Sikes v. Paine*, 82 N. C. 280, 51 Am. Dec. 389; *Eldridge v. Smith*, 95 Mass. 140.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be affirmed.

No error.

GLASCOCK et ux. v. GRAY et al.

(Supreme Court of North Carolina. Sept. 23, 1908.)

# 1. EXECUTORS AND ADMINISTRATORS — MANAGEMENT OF ESTATE — RECOVERY OF REAL ESTATE.

An executor derives his authority from the will, and not simply from the law, and, when he proves the will as required by the law of the domicile of the testator, the will passes the property to him, wherever it may be situated, and in the absence of statutory regulation to the contrary, when a will has been admitted to probate according to the laws of the state, the executor may maintain ejectment for land in such state without taking out letters testamentary therein.

# 2. SAME—ASSETS—WHAT ARE—REAL ESTATE—RIGHT OF DEVISEE TO TAKE POSSESSION.

Generally the personal representative has no concern with the landed estate, but it goes directly to the heirs, unless otherwise directed by will, and a devisee may take possession of land devised to him after the will is admitted to pro-

bate in the state where the land is situated, whether the executor qualifies or not.

**3. SAME—FOREIGN EXECUTORS—CONVEYANCES—"ESTATE"—"INTERMEDDLE."**

Under Revisal 1905, § 28, providing that a foreign executor has no authority to "intermeddle" with the "estate" until he shall have entered into bond, etc., a foreign executor to whom land situate in North Carolina is devised in his representative capacity, with power to sell and receive the price, has no authority to convey the land without first qualifying in North Carolina; the word "estate" embracing an interest in anything that is the subject of property, and the word "intermeddle" meaning any interference with or control over any part of the estate, including a sale thereof.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653-7654; vol. 4, p. 3716.]

Appeal from Superior Court, Washington County; Ward, Judge.

Action by F. R. Glascock and wife against T. N. Gray and others, to recover possession of certain land. From a judgment for defendants, plaintiffs appeal. Affirmed.

Ward & Grimes, W. M. Bond, and Huggins, Huggins & Johnson, for appellants. Shepherd & Shepherd, Pruden & Pruden, and J. W. Bailey, for appellees.

**BROWN, J.** The plaintiffs claim title under a deed executed by the executors of P. N. Gray by virtue of a power contained in his will. In September, 1902, P. N. Gray died testate, domiciled in Ohio, seised in fee simple of the land in question in North Carolina, together with other real estate in Ohio. By his will A. H. Johnson and Philemon J. Dill, residents of Ohio, were named as his executors. The will was probated in Franklin county, Ohio, and the executors were regularly qualified in that state. In December, 1902, the will was duly admitted to probate in Washington and Tyrrell counties, N. C. The executors never qualified in North Carolina, and no administrator has been appointed therein. The will of P. N. Gray empowered the executors to sell at either public or private sale all the testator's real estate, not specifically devised to his wife, located in Ohio or North Carolina, for cash or on time payments, and to execute deeds to the purchasers. This land in North Carolina was not specifically devised to the testator's wife. On the 6th day of February, 1906, the executors sold under the power in the will the real estate in North Carolina to plaintiff, and executed and delivered a deed therefor to plaintiff. This deed was properly probated and registered in both Washington and Tyrrell counties, N. C., in which the land is located, prior to the beginning of this action. The plaintiff's title depends upon the validity of this deed.

We agree with the learned judge of the court below that the deed from the executors to plaintiffs conveyed no title, inasmuch as under the law of this state the executor must qualify here in order to exercise any control over the testator's estate. The general propo-

sition is conceded that an executor stands upon a different footing from an administrator, as the former derives his authority from the will, and not simply from the law, and, when he proves the will as required by the law of the domicile of the testator, it passes the property to him, wherever it may be situated, according to its legal effect. Therefore it has been frequently held, in the absence of statutory regulation to the contrary, that, when the will has been admitted to probate according to the laws of the state which is the situs of the property, the executor may maintain an action of ejectment for the land in such state without taking out letters testamentary therein. *Lewis v. MacFarland*, 9 Cranch, 152, 3 L. Ed. 687; 13 Am. & Eng. Enc. (2d Ed.) 918, and cases cited. These authorities would control here, but for the express words of our statute (Revisal 1905, § 28), which reads as follows: "Executors shall give bond as prescribed by law in the following cases: (1) Where the executor resides out of the state. And no foreign executor has any authority to intermeddle with the estate until he shall have been entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards."

The proposition contended for by the appellant is also conceded that generally the personal representative has no control over and no concern with the landed estate. It goes directly to the heirs, unless directed in some other channel by the will. So it follows that a devisee may take possession of land devised to him after the will is admitted to probate in the state where the land is situated, whether the executor qualifies or not. But this land in controversy is devised to the executor with power to sell, convey title, and receive the purchase money. It is not given to the executors individually, but in their representative capacity. This money may become necessary assets with which to liquidate the testator's debts in this state. Devisees or residuary legatees residing in this state may be interested in its ultimate distribution. Therefore, for reasons of state policy, our statute prohibits the foreign executor from exercising any control over the estate, both real and personal, until he qualifies under our own laws.

We are unable to give the words of the statute the narrow construction contended for, and to hold that the word "estate," as used therein, refers only to personal assets. Such interpretation of the law would tend largely to destroy its usefulness. We must assume that the Legislature used the word "estate" in its true legal significance; and as such it embraces an interest in anything that is the subject of property, especially in lands. Preston defines it to be "the interest which any one has in lands, or in any other subject of property." 1 Prest. Est. 20; 2 Blk. Com. 103; 2 Crabb, Real Prop. p. 2,

§ 942. To the same effect are Coke and all other English authorities. Coke, Litt. 345. In the American courts the word "estate" is a word of the greatest extension and broadest significance. It comprehends every species of property, real and personal. 2 Redfield on Wills, c. 14, § 48; Deering v. Tucker, 55 Me. 287; Godfrey v. Humphrey, 18 Pick. (Mass.) 537, 29 Am. Dec. 621.

The word "intermeddle" is of equally broad significance, and prohibits any interference with or control over any part of the estate until the terms of the act are complied with. This certainly would forbid a sale by a foreign executor of the landed estate situated here. Although the facts in *Scott v. Lumber Co.*, 144 N. C. 45, 56 S. E. 548, are a little different from this case, we think the principle upon which that case was decided is the same in this. It is there said that a deed to real property made by foreign executors by virtue of authority in the will is void in this state unless the executors qualify here. In support of that statement of the law the Chief Justice cites the very statute we have quoted, and grounds the judgment of the court upon it.

We are of opinion that in the trial in the superior court the judge committed no error.

#### SIMMONS v. DEFIANCE BOX CO.

(Supreme Court of North Carolina. Sept. 23, 1908.)

##### 1. JUDGMENT—FRAUD—EFFECT—REMEDY.

A judgment procured by fraud is voidable only, and it can only be set aside by an independent action because it depends on extraneous facts which the parties are entitled to have found by a jury.

##### 2. SAME.

Where it is sought to set aside a judgment for irregularity because of want of service of summons, the court must find the facts and correct the record to speak the truth, and, where there was no service of summons nor appearance by defendant, the judgment is void.

##### 3. SAME—"DIRECT PROCEEDING."

Where it is sought to set aside a judgment for irregularity because of want of service of summons, a motion in the cause to correct the record and make it speak the truth, and show that there was no service of summons nor appearance by defendant, is a direct proceeding, and is the appropriate remedy.

##### 4. CORPORATIONS—PROCESS—SERVICE — SUFFICIENCY—"OFFICER"—"MANAGING OR LOCAL AGENT."

A foreman acting under the direction of the superintendent of a corporation is neither an "officer" nor a "managing or local agent" of the corporation, and is not a person on whom service of summons on the corporation can be made.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4203-4204, 4320-4323; vol. 8, p. 7708; vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by Nathan Simmons against the Defiance Box Company. From a judgment granting a motion to set aside judgment,

and setting aside the judgment, plaintiff appeals. Affirmed.

W. D. McIver and R. A. Nunn, for appellant. H. L. Gibbs and Simmons, Ward & Allen, for appellee.

CLARK, C. J. Motion to set aside a judgment. The court found as facts: "The summons issued April 27, 1907. It was read, and a copy delivered to S. D. Mesic at defendant's mill May 4, 1907. At that time L. M. Baltes was superintendent and manager of said mill, and Mesic was an employé as foreman of the mill, employing and discharging hands under the instruction of the superintendent. He was not an officer of the company (unless the above facts make him such), and had no authority to pay out and receive money on behalf of the defendant. After the officer left, Mesic handed the summons to Baltes, the superintendent, who was advised by counsel that there had been no legal service, and no attention was paid to the action. At October term, 1907, judgment by default and inquiry was taken. At November term the inquiry was executed, and judgment final was entered on the verdict. At February term, 1908, motion was made to set aside the judgment on the ground that there had been no legal service of the summons upon the defendant company."

The plaintiff moved to dismiss the motion on the ground that the remedy was by civil action. The motion to dismiss was properly denied. When it is sought to set aside a judgment for fraud, that must be done by an independent action, because it depends upon extraneous facts, which the parties are entitled to have found by a jury. The judgment is not void for fraud but voidable. On the face of the record it is regular. But, when it is sought to set aside a judgment for irregularity, in that there has been no service of summons, it is for the court to find the facts, and correct the record to speak the truth, and, if in fact there was no service of summons nor appearance by the defendant (which would waive service of summons), the judgment is void. *Smathers v. Sprouse*, 144 N. C. 637, 57 S. E. 392, and cases there cited. The words used in that case, "direct proceeding," do not mean "an independent action." A motion in the cause when appropriate is a direct proceeding. In the well-known case of *Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356, it was held that, when there was no service of process, the judgment could be set aside by motion in the cause. "Where it appears from the record that a person was a party to an action when in fact he was not, the legal presumption that he was a party is conclusive, until removed by a correction of the record itself by a direct proceeding for that purpose." *Sumner v. Sessoms*, 94 N. C. 377. This means by motion in the cause, for the

court corrects the record to speak the truth. To same purport *Doyle v. Brown*, 72 N. C. 393, where it is said: "Where the summons was not served on defendant, and he did not enter an appearance, nor have any knowledge of the action until after default judgment, the judgment is void, and will be set aside on motion." In *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, the summons had been served upon another man who had the same name, and the court said: "A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court, or in a different and distinct proceeding in the same court."

His honor also correctly held that the "foreman, acting under the directions of the superintendent," is neither "an officer" nor "a managing or local agent" of the company, and hence was not a person upon whom service of summons upon the company could be made. If this were not so, service could be made on the boss spinner or boss weaver of a cotton factory, or the foreman of the roundhouse or any other foreman of a railroad, acting under orders of a superintendent who is present.

Affirmed.

**GAY v. ROANOKE R. & LUMBER CO. et al.**  
(Supreme Court of North Carolina. Sept. 23, 1908.)

**1. WITNESSES—IMPEACHMENT.**

Where, in an action for injury to land, defendant in open court admitted that plaintiff was the owner and in possession of the land, and plaintiff in his direct examination claimed damages resulting from the burning of the timber on the land, it was competent by way of direct impeachment of him to ask him if some one else did not own the timber.

**2. CONTRACTS—CONSTRUCTION—QUESTION FOR COURT.**

Where the language of a contract is free from ambiguity, its construction is for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 767-770.]

**3. MASTER AND SERVANT—LIABILITY FOR INJURY TO THIRD PERSONS—"INDEPENDENT CONTRACTOR."**

One contracting to cut for another his timber into saw logs, and deliver the logs over tram roads built at his own expense, to load a specified number of feet per day for each working day, to cut the timber in workmanlike manner, to pay for any delays, resulting from a failure to securely load the logs, etc., for a specified sum per M feet, for merchantable logs, cut, hauled, and delivered, is an independent contractor within the definition that an independent contractor is one who undertakes to produce a given result, but so that, in the actual execution of the work, he is not under the order or control of persons for whom he does it, and he uses his own discretion in things not specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1242, 1243.

For other definitions, see Words and Phrases, vol. 4, pp. 3542-3543; vol. 8, p. 7686.]

**4. SAME.**

Where a contract is for something that may be lawfully done, and it is proper in its

terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved in respect to the manner of doing it, and the person for whom the work is to be done is interested only in the ultimate result, and not in the several steps as it progresses, he is not liable to third persons for the negligence of the contractor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1245-1253.]

Appeal from Superior Court, Greene County; Lyon, Judge.

Action by B. R. Gay against the Roanoke Railroad & Lumber Company and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial awarded.

The following is the contract between the Roanoke Railroad & Lumber Company and Jackson Bros., referred to in the opinion:

"This agreement made this 1st day of February, 1905, by and between W. R. Jackson and Milton H. Jackson, trading as Jackson Brothers, of Lugwell, Pitt county, North Carolina, and the Roanoke R. R. and Lumber Company, of Norfolk, Virginia, a corporation duly organized under the laws of North Carolina, witnesseth:

"That whereas the said Roanoke R. R. and Lumber Company own certain tracts of timber in Greene and Pitt counties, North Carolina, on the East Carolina Railroad, which timber up to this time has been logged by Surry Parker, of Pine Town, North Carolina. The said Parker owning certain logging equipment, which he has this day sold to the said Jackson Brothers, and the said Jackson Brothers being desirous to enter into a contract with the said Roanoke R. R. and Lumber Company for logging said timber: Now, therefore, this agreement witnesseth:

"(1) That the said Jackson Brothers agree to cut all of the timber the said Roanoke Railroad and Lumber Company now own or may hereafter purchase during the existence of this contract in Pitt and Greene counties adjacent to the territory which they now own into saw logs, 16 feet 4 inches, 14 feet 4 inches, and 12 feet 4 inches long and deliver said logs over tram roads, built at their own expense to side tracks along the line of said East Carolina Railroad, and to load same on flat cars furnished for the purpose.

"(2) The said Jackson Brothers agree to load twenty thousand (20,000) feet per day for each working day until this contract is completed and to load not less than thirty-five hundred (3,500 ft.) of logs measured by Doyles' rule on each and every car furnished them, and they are not required to load more than seven cars on any one day.

"(3) That said Jackson Brothers agree to cut the timber in proper and workmanlike manner and as close as the said Roanoke Railroad and Lumber Company may direct and to cut all and every suitable tree into logs before leaving any one location.

"(4) The said Jackson Brothers further

agree to load said cars in proper manner, logs being secured to stand transportation by the railroad and the said loading to be done according to directions as given by the Atlantic Coast Line Railroad Company.

"(5) They further agree that they will pay for any delays or damage that may occur to the Atlantic Coast Line Railroad should they fail to load the logs as agreed upon as per contract between the East Carolina Railroad Company and the Atlantic Coast Line Railroad and the said Roanoke Railroad and Lumber Company, dated the day of and which contract is made a part of this agreement, which is such portions of this agreement as may refer to the penalties for not loading cars when set in on sidings for that purpose.

"(6) The said Jackson Brothers agree to keep up at their own expense in good working order the locomotive and logging cars furnished them by the said Roanoke Railroad and Lumber Company for the purpose of doing said work. To unload all railroad iron furnished them for the purpose of laying tracks at their own expense, and when through with said contract to take up all of said railroad iron, spikes and splices and to load them on cars furnished for moving of same; and also to return said locomotive and cars loaded on cars of the Atlantic Coast Line Railroad when through with them in good order. The Roanoke Railroad and Lumber Company hereby agrees to furnish said Jackson Brothers all the railroad iron and locomotive and logging cars necessary to do this work and to pay to them the sum of three dollars (\$3.00) per thousand feet for merchantable logs so cut, hauled and delivered and located on cars of the Atlantic Coast Line Railroad on the side track located for the purpose, and to pay them on the 5th and 20th of each month for the work done. It is further and mutually agreed that all logs loaded on said cars shall be sound and merchantable, and if the said Jackson Bros. shall load any log not sound and merchantable then they shall be responsible for all freight and expenses on all such logs; and it is further mutually agreed that all measurement of logs shall be made by Doyles' rule by a competent log scaler to be employed by the said Roanoke Railroad and Lumber Company who shall measure said logs as soon as they arrive at their destination at Pinners Point, and that a statement of all logs so received shall be made to the said Jackson Bros. twice a month: And whereas the said Roanoke Railroad and Lumber Company have this day advanced to the said Jackson Bros. the sum of three thousand dollars (\$3,000) to be paid to the said Parker aforesaid for his logging equipment, it is hereby mutually agreed that the said Jackson Bros. shall give to the said Roanoke Railroad and Lumber Co. a bill of sale on said property purchased from said Parker and that the said Roanoke R. R. & Lumber Co. shall retain

out of the sum of \$3.00 to be paid to Jackson Bros. for each thousand feet of logs delivered the sum of fifty (50c.) cents until all of said \$3,000 with interest is paid back to said Roanoke R. R. & Lumber Co., and it is further mutually agreed that after the said \$3,000 is paid off, that said Roanoke R. R. and Lumber Co. shall retain the sum of twenty-five cents (25c.) per thousand feet out of said contract money until all of this contract is completed and all of the timber owned and hereafter purchased by the said Roanoke R. R. & Lumber Co. is logged in accordance with this contract at the completion of which the said Roanoke R. R. and Lumber Co. agree to pay all of said sum so retained with interest to the said Jackson Brothers. But it is hereby understood that the said sum to be retained for the faithful performance of this contract shall at no time exceed the sum of (\$2,000) two thousand dollars and all amounts accruing above said sum of two thousand (\$2,000) shall be paid to the said Jackson Brothers."

These issues were submitted: "(1) Is the plaintiff the owner and in possession of the land described in the complaint? A. Yes. (2) Did defendants Walter and M. H. Jackson negligently kindle the fire that burned the lands of the plaintiff, as alleged in the complaint? A. Yes. (3) Did the defendant Roanoke Railroad & Lumber Company, its agents, servants, or employes, negligently kindle the fire that burned the lands of the plaintiff, as alleged in the complaint? A. Yes. (4) What damage, if any, is the plaintiff entitled to recover in this action? A. \$1,300."

Skinner & Whedbee, Moore & Dunn, and Galloway & Albritton, for appellants. Wooten & Clark, for appellee.

BROWN, J. It is unnecessary to consider all the errors assigned, as they may not arise on another trial. Two errors assigned in the record we think are fatal to the judgment rendered.

1. One of the tracts of land alleged to have been burned over was called the "Williams land." The defendants' counsel asked the plaintiff on cross-examination if the timber on that land was not owned by some one else at the time of the fire. The question, upon objection by plaintiff, was excluded. In this we think his honor erred. We suppose the question was excluded upon the idea that defendant was attempting to prove title to land by parol. We do not take that view of it. The record states that the defendant "admitted in open court that the plaintiff was the owner and in possession of the land upon which the trespass was alleged to have been committed." The plaintiff had been examined in his own behalf as to the extent of his damage, and a part of his damage he claimed arose from the burning of the timber on the Williams land. On cross-examination it was competent to ask him if some

one else did not own the timber on that land. In other words: Had he not sold it? It was a direct impeachment of the estimate of damage plaintiff had testified to on his examination in chief. Had the defendant offered parol evidence by a witness other than the plaintiff for the purpose of proving a sale of the timber by plaintiff, a different proposition would be involved.

2. It is admitted that the defendant the Roanoke Company owned certain timber in Greene and Pitt counties, and that the codefendants Jackson Bros. were cutting and removing it for the company. During the trial a certain contract dated February 1, 1905, entered into between the Roanoke Company and Jackson Bros., was put in evidence by defendant the Roanoke Company for the purpose of exonerating them from liability by showing that Jackson Bros. were independent contractors, and not its agents. The defendant the Roanoke Company moved to nonsuit, and also requested the court to charge the jury: "That upon the evidence in this case the defendant W. R. Jackson and M. H. Jackson were at the time of the injury alleged in the complaint independent contractors in the logging and operating of the railroad, and defendant Roanoke Railroad & Lumber Company would not be in any wise liable for the conduct or act of either of the Jackson Bros. concerning such operation." His honor refused to give this instruction prayed for, and defendants excepted. A very careful examination of the record discloses no evidence whatever as to the relations existing between these defendants, except the written contract under consideration, and, as to that, the court charged: "That the paper writing introduced by the defendants, termed a 'contract' between Jackson Bros. and the defendant corporation, does not make Jackson Bros. independent contractors, but you can consider such contract in passing upon the liability of defendant company as to whether they [Jackson Bros.] were independent contractors." Defendant excepted. It is patent that, if as matter of law this paper writing does not make Jackson Bros. independent contractors as charged, his honor erred in telling the jury that "you can consider such contract in passing upon the liability of defendant company as to whether Jackson Bros. were independent contractors"; for it is elementary that, where the language of a contract is free from ambiguity, its construction is for the court, and not for the jury. The ruling of which the Roanoke Company may justly complain, however, is in the construction the judge himself placed upon the instrument. In our opinion, according to its terms, Jackson Bros. held the relation of independent contractors engaged in the cutting and removal of the timber of the Roanoke Company. There is nothing in the language of the instrument by which Jackson Bros. are made the servants of the Roanoke Company em-

ployed to superintend the work of cutting and removing the timber. Jackson Bros. come clearly within the recognized definition as to what constitutes an independent contractor. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Pollock on Torts, 78; Barrow on Neg. 160. The law is well stated in *Young v. Lumber Co.* (N. C.) 60 S. E. 658, a case strikingly like this, and by which it is controlled. Mr. Justice Connor, speaking for the court, says: "When a contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved either in respect to the manner of doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master."

We think the judge below should have sustained the motion to nonsuit as to the Roanoke Company, and it is so ordered. As to the defendants Jackson Bros., we award a new trial.

HOKE, J., concurs in result.

#### **LATIMER v. GENERAL ELECTRIC CO.**

(Supreme Court of South Carolina. Sept. 29, 1908.)

##### **1. MASTER AND SERVANT—DANGEROUS PLACE IN WHICH TO WORK—DUTY TO WARN SERVANT.**

Where a master sets a servant to work at a dangerous place or with dangerous appliances, and knows, or ought to know, that the servant is not aware of the danger, the master must warn the servant; but where the servant knows the danger of the situation, warning is not required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 297, 308, 309.]

##### **2. SAME—NEGLIGENCE—EVIDENCE.**

Where, in an action against a master for injuries to a servant, the servant testified that he was working close to a wire and did not know that it was heavily charged with electricity, but that the master was aware of it and of the servant's ignorance, and failed to warn the servant and assured him of safety, there was evidence of negligence of the master sufficient to go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044-1050.]

##### **3. SAME—ASSUMPTION OF RISK.**

Where a servant was ignorant that a wire was electrically charged, and acted in reliance on the master's assurance of safety, and the danger of injury by coming in contact with the wire was hidden, the servant did not assume the risk of injury from contact with the wire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

**4. SAME—CONTRIBUTORY NEGLIGENCE.**

Where a servant was ignorant of the hidden danger from an electrically charged wire, and acted in reliance on the master's promise to cut off the current and his assurance of safety, the servant was not guilty of contributory negligence in failing to take precautions to avoid contact with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 676.]

**5. TRIAL—CHARGING JURY—MATTERS OF FACT.**

Remarks of the judge during the trial on the admissibility of the evidence, or in refusing motions for nonsuit or for a directed verdict, do not as a general rule fall within the inhibition of the Constitution against charging the jury as to matters of fact.

**6. SAME.**

Where, in an action for injuries to a servant by contact with an electrically charged wire, counsel for defendant in argument referred to certain conduct of defendant's superintendent as proper, the remark of the trial judge, in the presence of the jury, that the superintendent was careful not to interfere with other people's property, but was absolutely reckless of the lives of those working under him, was prejudicial to defendant as an expression of the opinion of the judge on the facts.

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

Action by Walker R. Latimer against the General Electric Company. From a judgment for plaintiff, defendant appeals. Reversed.

Patterson, Haynsworth & Blythe, for appellant. G. W. S. Hart and John R. Hart, for respondent.

**JONES, J.** The plaintiff recovered judgment on verdict against defendant for \$1,380 as damages for personal injuries resulting from contact with a "live" wire while in the employment of defendant in installing an electrical equipment in Lenora Mills, at Yorkville, S. C. The complaint alleged that the injuries were caused by the negligent and wanton conduct of defendant in several particulars; but plaintiff's case practically narrowed to the question whether defendant breached its duty to plaintiff in directing him to work in a place of great danger, in close proximity to an electrically charged wire known to defendant, but of which plaintiff was ignorant, without any warning of such danger. Besides a general denial, defendant pleaded assumption of risk and contributory negligence. Exceptions are now taken to refusal of defendant's motion for a nonsuit and for a direction of verdict. These motions were made upon the grounds (1) that there was no evidence of negligence in failing to warn plaintiff; (2) that the evidence showed conclusively that plaintiff assumed the risk; (3) that the evidence showed conclusively that plaintiff was guilty of contributory negligence.

There was some testimony tending to show that plaintiff was about 30 years old, and that he had some experience as telephone lineman, had on one or two occasions helped to string up uncharged electric wires or cables, had never worked on wires charged

with high voltage of electricity, but knew it was dangerous to come in contact with such wires. Mr. Nye was superintendent for defendant in installing the electrical equipment, and a few days before the injury employed plaintiff as a lineman. On March 18, 1906, in finishing the work, Mr. Nye directed plaintiff to go on top of the transformers and paint certain parts of the equipment there. There were three transformers, each about five feet high, resting on a brick foundation, and to do the work properly it was necessary for plaintiff to go on top of them. Having finished painting on the third transformer, plaintiff observed a place on one of the others which had been overlooked, and in attempting to go here to paint it he raised his body from a stooped position and his back came in contact with a live wire, which was suspended from the roof and extended over the transformer, about 3½ or 4 feet above it, and was connected with the lightning arrester. The direct current from the power company's main line was transmitted into each transformer by means of a wire connecting with an oil switch, and when this switch was properly thrown the current was cut out from the transformer, and in such condition there was no danger of contact with a live wire connected with the transformer. The danger of the situation arose from the deadly current flowing through the wire over the transformer connected with the lightning arrester. It appears that the oil switch would not cut the current off this wire. No warning was given plaintiff that this wire was live; but on the contrary, it appears from the evidence that Mr. Nye, the superintendent, assured plaintiff that he would cut the oil switch and there would be no danger. This also further appears: "Did you know there was any high-current wire right above you? A. No, sir; not after Mr. Nye told me he had cut off the current and ordered me to work. Q. Did Mr. Nye assure you that there was no danger? A. Yes, sir. Q. Is that what led you to go up there, Mr. Latimer? A. Yes, sir."

It is true that at the time of the trial plaintiff testified that the wire above him was connected with the lightning arrester and was not deadened by the throwing of the oil switch; but such knowledge after the occurrence is not surprising, and does not, of course, conclusively show that he had such knowledge before the occurrence, in view of his testimony to the contrary. The general principle of law applicable here is thus stated in *Owings v. Moneynick Oil Mill*, 55 S. C. 487, 33 S. E. 512: "It is the duty of the master, when a servant is set to work at a dangerous place, or with dangerous machinery or other appliances, to warn the servant of the danger to which he is exposed, where he knows or ought to know that the servant is not aware of the danger; and it is negligence on the part of the master to fail to give such warning in such a case. But



where the servant knows the dangerous nature of the situation in which he is required to work, or of the machinery or other appliances which he is to use, such warning would not only be useless, but would be absurd." As there was testimony tending to show that plaintiff did not know that the wire very near which he was put to work was live, and that defendant was aware of such danger and of plaintiff's ignorance thereof, and yet failed to warn plaintiff of danger, but assured him of safety, there was evidence of negligence to go to the jury.

Assumption of risk by the plaintiff was not conclusively shown by the testimony. If plaintiff was ignorant of the fact that the wire was live, and acted in reliance upon defendant's assurance of safety, as he testified, it cannot be affirmed that he assumed the risk. The danger was not obvious, but was hidden, as according to the testimony no one, from mere inspection of the wire, could know that a deadly current was flowing through it. *Mew v. Railway*, 55 S. C. 100, 32 S. E. 828; *Elms v. Southern Power Co.*, 79 S. C. 508, 60 S. E. 1110. Nor is contributory negligence the only inference of which the testimony is susceptible. If plaintiff was ignorant of the hidden danger, and was acting in reliance on the defendant's promise to cut off the current and assurance of safety, he would naturally and reasonably regard the wire harmless, and thus fail to take the necessary precaution to avoid contact with it. There was, therefore, no error of law in refusing the motion for nonsuit and to direct a verdict for defendant.

The remaining exception relates to the following incident during the trial: Plaintiff had testified that previous to going upon the transformer he asked Mr. Nye if he had got the current cut off, to which Mr. Nye replied that he had not; that he could not get in the telephone office, and could not find the manager; that plaintiff then said: "I have just quit work for them, and I can get in the office. I know how to operate the switch board, and I could have the current cut off." To which Mr. Nye replied: "No; that won't do. It will look like we are intruding on them. We will go down and cut that oil switch out, and there will be no danger, and we will finish up the work and quit for the day." In the argument on the motion for nonsuit Mr. Haynesworth, attorney for defendant, alluded to this testimony and spoke of the conduct of Mr. Nye in not authorizing an intrusion into the telephone office as very proper, whereupon his honor, Judge Watts, the jury being present, made this remark: "He (meaning Mr. Nye) was careful not to interfere with other people's property, but absolutely reckless of the lives of the people working under him." Mr. Haynesworth then said: "As your honor has already reached that conclusion in advance of the argument, it is unnecessary for me to continue." Whereupon Judge Watts

said: "I have reached the conclusion not to grant a nonsuit in this case." Appellant contends that the remark of the judge that Mr. Nye, the alleged representative of defendant, "was absolutely reckless of the lives of the people working under him," was a strong expression of opinion as to a material question of fact in the case, and, being made in the presence of the jury, was in effect a charge upon the facts, in violation of the Constitution.

The general rule is that remarks made by a circuit judge in the course of a trial upon the admissibility of evidence, or in refusing motion for nonsuit, or motion to direct a verdict, does not fall within the inhibition of the Constitution against charging the jury as to matters of fact. *State v. Marchbanks*, 61 S. C. 17, 39 S. E. 187; *State v. Thrallkill*, 71 S. C. 142, 50 S. E. 551; *Tinsley v. Tel. Co.*, 72 S. C. 352, 51 S. E. 913; *Willis v. Telegraph Co.*, 73 S. C. 383, 53 S. E. 639; *State v. Arnold*, 80 S. C. 383, 61 S. E. 891. But in *Willis v. Telegraph Co.*, the court declared: "No doubt, if such comments were carried to the extent that would make the circuit judge a participant in the decision of the facts upon which the issue depended, there would be good ground for a new trial, as amounting practically to a disguised charge of facts." In *State v. Arnold* the court said: "Possibly a case might arise in which a judge might abuse his privilege to give his reasons for refusing such a motion [to direct verdict], by using language which would be reasonably calculated to impress upon the jury his opinion as to what are the facts of the case, or as to the force or sufficiency of the testimony, etc." We think the circuit judge in this case transcended the limits of his power and discretion, to the prejudice of appellant. He expressed before the jury in the strongest terms his opinion on the facts as to the vital issue in the case, and there is no reason to doubt that such remarks impressed the jury that the court not only thought the defendant negligent, but absolutely reckless, in protecting the lives of its employes. For this reason there must be a new trial.

The judgment of the circuit court is reversed.

#### BROWN v. THOMPSON et al.

(Supreme Court of South Carolina. Sept. 30, 1908.)

##### 1. COVENANTS—BREACH—EVICTION.

Where a deed of conveyance calls for a perfect title, the purchaser cannot set up an incumbrance as a breach of the warranty, unless he has been evicted under it or has actually extinguished it to protect his title and possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 157.]

##### 2. SAME.

A grantee cannot repudiate the invalid title under which he entered, and recover the entire purchase money, where the grantor sold in

good faith, with no knowledge of a defect, or where both parties in executing the deed had in view the superior title; and where the grantee buys up the better title the grantor can only be compelled to refund the amount paid therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 248.]

### 8. SAME.

Where the parties to a deed calling for perfect title apprehended that the land was subject to a judgment, and the land was incumbered by such judgment, and the purchaser took an assignment of the bond of the purchaser at a sheriff's sale, there was breach of the warranty to the extent of the consideration paid for the outstanding title, and the vendor has the right to the agreed purchase money, less the sum paid for the bond at the sheriff's sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 248.]

Appeal from Common Pleas Circuit Court of Spartanburg County; R. O. Purdy, Judge. Action by C. T. Brown against J. C. Thompson and another. From a judgment of dismissal, plaintiff appeals. Reversed.

S. T. McCravy and Simpson & Bomar, for appellant. C. P. Sims and O. L. Schumpert, for respondents.

WOODS, J. This action was brought for \$550, the balance alleged to be due on the purchase money of a tract of land. The plaintiff, C. T. Brown, on 18th December, 1894, made a deed of conveyance to the defendant J. C. Thompson, with the usual clause of general warranty; the consideration expressed being \$700. On the same day Brown and Thompson made an agreement with respect to the purchase money and the occupation of the land, of which the following is a copy: "South Carolina, Spartanburg County. Know all men by these presents, that we, C. T. Brown, of the first part, and J. C. Thompson, of the second part, do make and adopt the following as our contract, that is to say: I, J. C. Thompson, agree to pay C. T. Brown fifty dollars per year for the rent of the Hammett land, bought of said Brown, till the titles are perfected. Then I am to pay the balance of seven hundred dollars, not paid as heretofore as rent as aforesaid, but in no instance not more than seven hundred dollars is to be paid. And it is the true intent and meaning of the parties to this contract that fifty dollars a year is to be paid till the land titles are perfected. Then the balance is to be paid in two years from that date, with interest from perfection of the title. Witness our hands and seals this December 18, 1894."

The defect in the title, apprehended by the parties, arose out of a claim that the land should be subjected to a judgment in favor of the executors of C. B. Hammett against Agnes R. Brown, the mother of C. T. Brown, from whom he had derived title. The deed of Agnes R. Brown to C. T. Brown was dated 29th July, 1893, and the Hammett judgment was not entered until 27th October, 1894; but the purchase money of \$800

was not to be paid until the titles were perfected, and, Mrs. Brown having died, none of it has ever been paid. The land was sold by the sheriff under the Hammett judgment, and bid off by Stanyarne Wilson, Esq., for \$100. Mr. Wilson, without taking title, assigned his bid to the defendant J. C. Thompson for the consideration of \$423. and the sheriff made title direct to Thompson. In explanation of his failure to bid on the land, Brown offered evidence tending to prove that he had a verbal agreement with Thompson that the latter should bid to the amount of \$700 in the interest of both. The defendant J. C. Thompson denied that he had made such agreement, or that Mr. Wilson had bid off the land for him. As we view the case, however, these issues of fact are not vital.

The master reported that the plaintiff did not have a valid title when he conveyed to J. C. Thompson, because the land was subject to the Hammett debt; that Thompson subsequently acquired a good title from the sheriff by virtue of the sale under the Hammett judgment; and concluded from these facts that Thompson owed the plaintiff nothing on his contract for the purchase money. In these findings the circuit judge concurred and dismissed the complaint.

We agree that, for the purposes of this case, the Hammett debt must be considered to have been a lien or charge on the land, in the hands of Mrs. Agnes R. Brown, and C. T. Brown, to whom she conveyed, and the defendant Thompson, to whom C. T. Brown conveyed. Had the deed expressed the whole contract, Thompson could not have set up the incumbrance as a breach of the warranty, unless he had been evicted under it, or had actually extinguished it in whole or in part to protect his title and possession. *Whitworth v. Stuckey*, 1 Rich. Eq. 407; *Evans v. McLucas*, 12 S. C. 64; *Childs v. Alexander*, 22 S. C. 185; *Lessly v. Bowie*, 27 S. C. 193, 3 S. E. 199; *Moss v. Jeffries*, 32 S. C. 195, 10 S. E. 939; *Nathans v. Steinmeyer*, 57 S. C. 393, 35 S. E. 733; *Computing Scales Co. v. Long*, 66 S. C. 382, 44 S. E. 963, 65 L. R. A. 294.

Thompson did not adopt the course of extinguishing the incumbrance and thus perfecting his title by direct payment of the judgment, but chose the plan of taking an assignment of the bid of the purchaser at the sheriff's sale, and by this means acquiring title from the sheriff. Many authorities will be found holding that where the title of the grantor fails completely, and the grantee has to purchase the outstanding valid title to protect himself, this is a constructive eviction. Under the general principle, above stated, as established in this state by the authorities cited, we think there would in such case be a breach to the extent of the consideration necessarily paid for the acquisition of the outstanding title, and the grantee could recover the amount so paid in an action against his grantor, or have it

credited on the unpaid portion of the purchase money. But the general rule is that the grantee, who has acquired the better title, cannot repudiate the invalid title under which he entered and recover the entire purchase money. Certainly he cannot do so where the grantor sold in good faith, with no knowledge of a defect, or where both parties, in executing the deed or contract of sale, took into consideration or had in view the superior title. The Supreme Court of the United States adopts this language in stating the rule: "That if a vendee buys up a better title than that of a vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." *Galloway v. Finley*, 12 Pet. 264, 9 L. Ed. 1079. This was laid down as the principle to be followed in the courts of law, as well as equity, in *Ward v. Revil*, 3 Rich. 427, which was cited and applied in *Parker v. Walker*, 12 Rich. 138, although in the latter case the vendor had fraudulently embraced land in his deed for which he had no title. The principle is discussed and applied, also, in *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239, and *Holloway v. Miller*, 84 Miss. 776, 36 South. 531.

It follows that the plaintiff has the right to the purchase money of \$700, with interest from the date of the perfecting of the title by the sheriff's deed, less \$50 paid by defendant to him under the contract, and \$423 paid by defendant for Mr. Wilson's bid at the sheriff's sale.

The judgment of this court is that the judgment of the circuit court be reversed.

#### GRAY & SHEALY v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Sept. 29, 1908.)

##### 1. TRIAL—QUESTIONS FOR JURY—DIRECTING VERDICT.

Where, in an action for damages for and the abatement of a nuisance caused by smoke, dust, and noise from the operation of a coaling chute, and for the obstruction of a street, there was no evidence of the obstruction of the street, it was not error to charge that there could be no recovery on that ground, and that ordinarily no citizen may bring an action for obstruction of a highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376-389.]

##### 2. HIGHWAYS—OBSTRUCTION—REMEDY—INDICTMENT—ACTION BY PRIVATE CITIZEN.

While generally indictment is the remedy for the obstruction of a public highway, a private citizen may maintain a civil action for damages or abatement on allegation and proof of such obstruction and of direct and special damages resulting to him different in kind from that sustained by the public.

##### 3. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTION—ACTIONS BY PRIVATE CITIZENS—COMPLAINT.

A complaint in an action for damages for and the abatement of a nuisance obstructing a street, which alleges that, in disregard of the rights of plaintiff as the owner of lots on the

street, which was his only means of access thereto, defendant obstructed the street by digging a pit therein, rendering it impassable, and that as a result thereof plaintiff was excluded from the street and access to his property by means thereof destroyed, diminishing the value of his property, states a cause of action, since it shows a direct injury to plaintiff, different in kind from that sustained by the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1506.]

##### 4. APPEAL AND ERROR—REVERSIBLE ERROR.

Where, in an action for damages for and the abatement of a nuisance created by a coaling chute, causing dust and noise to the injury of plaintiff, and the obstruction of a street in front of his premises, causing direct and peculiar injury to him, the court properly denied relief on account of dust and noise occasioned by the chute, the error in refusing relief for the obstruction of the street was not ground for the reversal of the whole case, but the judgment will stand without prejudice to the right of plaintiff to a new trial for the obstruction of the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4555-4559.]

Gary, A. J., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; R. C. Watts, Judge.

Action by Gray & Shealy against the Charleston & Western Carolina Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed, without prejudice to the right to plaintiffs to bring a new action.

W. C. Irby, Jr., Stanyarne Wilson, and Sanders & De Pass, for appellants. S. J. Simpson and Simpson, Cooper & Babb, for respondent.

JONES, J. This action was to recover damages for an alleged nuisance and abatement thereof, and resulted in a verdict and judgment for defendant. The complaint charged that the nuisance was created by the defendant's erecting on its premises in the town of Laurens a high coaling chute, the operation of which caused smoke, dust, cinders, and noise, day and night, to the injury of plaintiff's abutting property. The complaint further alleged nuisance, in that the erection of the coal chute obstructed Hance street, a public highway of Laurens, and excluded plaintiff from the use of said street, and wholly prevented and destroyed ingress to plaintiffs' property, to plaintiffs' great damage. The case contains this statement: "No testimony was offered as to the obstruction of the alleged public street referred to in the complaint, for the reason that his honor held at the outset of the case that the remedy for a nuisance of that kind was by indictment, and not by action."

Appellants' first exception is directed against this ruling of the court, and the sixth exception is to the following charge relating to that subject: "I charge you as a matter of law that, even if the defendant railway company here have obstructed a public street over there, under the testimony in this case,

and under the law, the plaintiffs are not entitled to any damage for that, because, whenever a public road is obstructed, that affects the public generally, and parties can be indicted for obstructing a public road, one that was laid out and dedicated to the public, or where the public have acquired the right to go over—any obstruction and interference with that road the parties can be indicted for and punished. That is a misdemeanor under the laws of this state. So no citizen has a right ordinarily to bring any action for damages for the obstruction of a public road. The public generally is interested in that, and that can be done by indictment." Inasmuch as there was no testimony whatever as to the obstruction of the street, it was not error to charge that there could be no recovery on that ground "under the testimony." Nor was it error to charge that "ordinarily" no citizen has the right to bring an action for damages for obstruction of a highway. The general rule is that indictment is the remedy for obstruction of a public highway. The exception to the rule is that a private citizen may maintain a civil action for damages or abatement with respect to a public nuisance upon allegation and proof of such obstruction and of direct and special damages resulting to him, different in kind from what the public may sustain. The rule and exception has been illustrated by numerous cases in this state. *Carey v. Brooks*, 1 Hill, 367; *McLauchlin v. Railroad*, 5 Rich. Law, 590; *Steamboat Company v. Railroad Company*, 30 S. C. 546, 9 S. E. 650, 4 L. R. A. 209, 14 Am. St. Rep. 923; *Steamboat Co. v. Railroad Co.*, 46 S. C. 336, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688; *Cherry v. Rock Hill*, 48 S. C. 560, 26 S. E. 798; *Threatt v. Mining Co.*, 49 S. C. 180, 26 S. E. 970; *Baltzger v. Railway*, 54 S. C. 250, 32 S. E. 358, 71 Am. St. Rep. 789; *Manson v. Railway*, 64 S. C. 130, 41 S. E. 832. The charge, therefore, affords no basis for a new trial of the issues which were submitted to the jury.

The ruling, however, which is complained of in the first exception, gives us more concern; for the ruling was based, not upon the testimony, but upon the allegations of the complaint. In other words, the effect of the ruling was tantamount to sustaining a demurrer to the cause of action based upon the obstruction of the street, and it appears that because of such ruling no testimony was offered on that matter. The allegation of the complaint is as follows: "More than 20 years prior thereto there was a street or traveled place, known as Hance street, known, used, occupied, enjoyed, and claimed by the public, and so recognized by the public, and for a great number of years worked by the said town of Laurens as one of its streets or traveled places, which was and is the only means of egress for a large part of the resi-

dence lots, among which are the lots belonging to plaintiffs herein, and that neither the defendant nor any one else had the right to obstruct or close the same; that nevertheless, and in defiance and disregard of the rights of plaintiffs, because of their ownership of lots fronting upon said traveled place or street, and which was their only means of egress to the same, the said defendant, Charleston & Western Carolina Railway Company, using and enjoying the franchise and rights of the said Greenwood, Laurens & Spartanburg Railway Company, oppressively and with a high hand have obstructed and closed said street or traveled place by digging a deep pit for the hoisting apparatus of said chute on the said road, by reason of which the use thereof has been rendered wholly impossible to the public and to these plaintiffs, and by otherwise obstructing said street or traveled place, and appropriating the same to the private use and purposes of said defendant corporation; that as a direct result thereof plaintiffs have been entirely excluded from said street, and ingress to their property by means thereof wholly prevented and destroyed, and that the said property of plaintiffs and its value have been specially, peculiarly, and materially diminished by being deprived of said street; that the damage to plaintiffs by the aforesaid nuisance is specific and different in kind, as well as in degree, from the damage to the public generally, by reason of the matters and things hereinbefore alleged," etc. We think the complaint states a cause of action for street obstruction, as it is alleged that such obstruction directly prevents and destroys ingress to plaintiffs' abutting property, to their injury. This, if established by proof, would be a direct injury, peculiar to plaintiffs and different in kind from that sustained by the public. We are impressed, however, that this error should not work a new trial on the other issues, which were submitted to the jury upon the testimony, but should only operate to hold the judgment to be without prejudice of the right of plaintiffs, if so advised, to a trial upon the cause of action for street obstruction.

The remaining exceptions relate to rulings as to the admissibility of testimony. We find no merit in these exceptions. An examination of the record shows that the testimony which it is claimed was excluded was in fact admitted in full measure, and appellant in no wise prejudiced.

The judgment of the circuit court is affirmed, but without prejudice to the right of the plaintiffs, if so advised, to have a trial upon the cause of action for street obstruction.

GARY, A. J. The judgment should be reversed, and I think there should be a new trial without attaching a condition.

**GERATY v. ATLANTIC COAST LINE R. CO. et al.**

(Supreme Court of South Carolina. Sept. 25, 1908.)

**1. CARRIERS—REFRIGERATOR CAR SHIPMENT—FAILURE TO PROPERLY RE-ICE—EVIDENCE.**

Though the complaint for injury to a shipment in a refrigerator car is based only on lack of proper re-icing, and makes no allegation of delay in transportation, plaintiff may show the schedule time for the car, and the delay in its transportation, as bearing on the necessity of re-icing the car more times when so delayed than when running on schedule time.

**2. SAME—TIME SCHEDULES—ADMISSIBILITY.**

A carrier's schedule of running time is admissible against it, though printed the year before the shipment with relation to which it is introduced; there being no evidence of change.

**3. TRIAL—INSTRUCTIONS—NECESSITY OF CONSTRUCTING CONTRACT.**

The only issues in an action for injury to a shipment in a refrigerator car being, as stated by the trial court, whether the car had been properly re-iced, and, if not, whether the injury was due to that or some other cause, and there being nothing in the bill of lading affecting such issues, the carrier may not complain that the court in stating the issues did not construe the bill of lading; it not being disputed that the carrier assumed the obligation to re-ice adequately from point of shipment to destination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

**4. CARRIERS—BILL OF LADING—DELAY IN TRANSPORTATION—RE-ICING REFRIGERATOR CARS.**

Clauses in a bill of lading, exempting the carrier from liability for delay in transportation arising from specified causes, did not relieve it, when delay occurred, from the obligation which it assumed to re-ice a refrigerator car from point of shipment to destination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 703.]

Appeal from Common Pleas Circuit Court of Charleston County.

Action by W. C. Geraty against the Atlantic Coast Line Railroad Company and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Mordcael & Gadsden and Rutledge & Haggood, for appellants. Legare, Holman & Baker, for respondent.

**WOODS, J.** The allegations of the complaint necessary to an understanding of the appeal are that the "Armour Car Lines" is a corporation which undertakes to furnish cars, properly iced, for the transportation of perishable vegetables and other articles of like character, and the Atlantic Coast Line Railroad Company is a corporation doing business as a common carrier of freight; that on 3d April, 1906, the Armour Car Lines furnished at Yonge's Island, S. C., a refrigerator car to be loaded by plaintiff with cabbage plants for transportation to Muscatine, Iowa; that the car was loaded with 1,000,000 cabbage plants, consigned to Hahn Bros. Company, at Muscatine, and received by the Atlantic Coast Line Railroad Company at Yonge's Island, one of its stations, for trans-

portation; that the plaintiff paid the freight charges to the Atlantic Coast Line Railroad Company, and also paid the refrigerator charges for the car; that the defendants failed to ice the car properly in the course of transportation, and for lack of proper re-icing the car became hot, and plants of the value of \$904.80 were wilted, scalded, and otherwise injured, so that they were entirely worthless. The defendants by their answer denied that the car was not properly iced in the course of transportation, and denied that the cabbage plants were injured from that cause. The plaintiff recovered judgment for \$900, and the defendant appealed.

The defendants first assign error in the admission of the railroad schedule and other evidence tending to show delay in transportation; their contention being that, as there was no charge in the complaint of delay in transportation, the schedule was irrelevant. The witness John W. Geraty testified that according to the schedule furnished him by the soliciting agent of the Atlantic Coast Line Railroad Company the car's time from Yonge's Island to Muscatine should have been 79 hours and 5 minutes, whereas the actual time was 191 hours, making a delay of nearly 112 hours. There was testimony from the same witness that refrigerator cars should be re-iced every 12 hours, and from one of the defendant's witnesses that re-icing every 24 hours was sufficient. There was also testimony as to the re-icing stations, and the number of times and the places where the car was re-iced. In view of this aspect of the issues, it was clearly competent to introduce evidence of the schedule time of the car and the delay in its transportation, as tending to show that the car required to be re-iced a greater number of times when delayed 112 hours than when running on regular schedule.

It was not a valid objection to the schedule that it was printed in the year 1905, because there was no evidence of any change made for the year 1906. As the witness John W. Geraty expressly testified the schedule offered was quoted to him by Mr. Renneker, the agent of the Atlantic Coast Line Railroad Company, there is no foundation for the objection that there was no proof that the schedule was quoted by an agent of either of the defendants. The defendants afterwards proved Renneker was the agent of the railroad company.

The defendants have no reason to complain that the circuit judge, in stating the issues to the jury, did not construe the bill of lading. As the circuit judge well said, the only issues were whether the car had been properly re-iced, and, if not, whether the cabbage plants perished from that cause, or from some other cause. There were no requests to charge as to the meaning of the bill of lading, and we are unable to discov-

er any clause or expression in it affecting the issues in the cause. The plaintiffs did not complain of delay in transportation, but of failure to re-ice in the course of a transportation of 191 hours. It was not disputed by the defendant that, in consideration of the charge paid for the refrigerator car, the obligation was assumed to re-ice adequately from point of shipment to destination. The clauses in the bill of lading, providing for exemption from liability for delay in transportation arising from certain specified causes, did not relieve the defendants of the duty to re-ice when the delay occurred.

The judgment of this court is that the judgment of the circuit court be affirmed.

### REYNOLDS & CRAFT v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. Sept. 30, 1908.)

#### 1. CARRIERS—CONNECTING CARRIERS—LIABILITY.

At common law a connecting carrier is not bound by the contract as to freight rates fixed by the initial carrier, issuing a through bill of lading, unless the initial carrier acted with authority as agent for the connecting carrier; and where the initial carrier without authority agrees to transport goods for less than the regular rates of the connecting carrier the latter may collect the usual rates, and the shipper must look to the initial carrier for damages for breach of contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 868, 869.]

#### 2. SAME—EXCESSIVE FREIGHT CHARGES—RECOVERY BY SHIPPER.

A connecting carrier, who is a party to a contract of through shipment, made by the initial carrier having authority to make such contract, is bound to pay back to the shipper any excess of freight charges received.

#### 3. SAME.

Under 24 St. at Large, p. 1, making each carrier the agent of its connecting carrier, and providing that a through contract of shipment shall be the contract of each carrier, etc., a connecting carrier, acting on a through bill of lading issued by the initial carrier for an intra-state shipment, is a party to the contract, and is liable to the shipper for exacting excessive freight charges.

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Action by Reynolds & Craft against the Seaboard Air Line Railway. From a judgment for plaintiffs, defendant appeals. Affirmed.

Efrid & Dreher, for appellant. A. D. Martin and E. L. Asbill, for respondents.

WOODS, J. In July, 1905, the Southern Railway Company received at Ft. Mill, S. C., a car load of machinery to be transported and delivered to the plaintiffs at Swansea, S. C. The bill of lading stated the weight at 41,700 pounds, and the freight rate at 28.4 cents per 100 pounds. As the Southern Railway does not reach Swansea, which is a station on the Seaboard Railway, the machinery was received from the Southern Railway at

Columbia, and carried by the Seaboard to Swansea. The real weight of the machinery was 14,700 pounds, instead of 41,700, as stated in the bill of lading; but the Southern Railway Company had contracted with the plaintiffs that it should be charged for as 20,000 pounds, in order that plaintiffs might receive the benefit of the car load rate of 28.4 cents per 100 pounds. The defendant, the terminal carrier, refused to deliver the machinery, except upon payment of \$118, the freight on 41,700 pounds at the rate stated in the bill of lading. The plaintiffs under protest paid the charge exacted, and brought this action in a magistrate's court to recover from the Seaboard Railway Company the excess freight charge of \$61.62, the difference between the freight on 20,000 and 41,700 pounds at the agreed rate. As the facts appear in the record, there is no doubt of the plaintiffs' right to recover the excess charge. The only question is whether the plaintiffs must look to the Southern Railway Company, and not to the Seaboard Railway Company. The judgment of the magistrate in favor of the plaintiffs against the Seaboard Railway Company was affirmed by the circuit court.

Under the common-law rule, as settled by the adjudications in this country, a connecting carrier is not bound to comply with the contract as to freight rates fixed by the carrier issuing a through bill of lading, and is not responsible to the shipper for mistakes made in the bill of lading, unless the contracting carrier, in issuing the bill of lading, acted, not only for itself, but as agent for the connecting carrier under authority express or implied. If by the bill of lading the initial carrier, without authority from the connecting carrier, agrees to transport goods for less than the regular rates of the connecting carrier, such connecting carrier may nevertheless collect its usual rates, and the shipper must look to the carrier with whom he contracted for damages for breach of its contract. The principle stated is recognized and applied in *Lewis v. Atlanta & C. A. L. R. Co.*, 25 S. C. 249, and also in the following cases in other states: *Detroit, etc., R. R. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031; *Schneider v. Evans*, 25 Wis. 241, 8 Am. Rep. 56; *Mount P. Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 106 N. C. 207, 10 S. E. 1046; *Goodin v. So. Ry. Co.*, 125 Ga. 630, 54 S. E. 720, 6 L. R. A. (N. S.) 1054; *Crossan v. N. Y., etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. Rep. 408.

So, also, it would seem on the same principle, if the shipper makes a contract with the initial carrier, evidenced by a bill of lading which calls for an overcharge of freight to be paid before delivery of the goods, the terminal carrier, receiving the goods to be delivered on payment of the charges set down in the bill of lading, cannot be held responsible by the consignee for the mistake made by him or the shipper and the contracting carrier in their agreement, and be held liable to

refund the overcharge, unless the initial carrier contracted as agent of the terminal carrier. If the terminal carrier was a party to the contract of shipment, then, of course, it is as much bound to pay back any excess of freight charges received by it through mistake, whether its own or that of the initial carrier, as would be the initial carrier.

It is not necessary to decide whether there was any evidence tending to show that the Southern Railway Company had authority to make the defendant Seaboard Railway Company a party to the contract, and undertook to do so. This was an intrastate shipment, and the statute of the state fixes the relation of the two carriers. Section 1 of the act of 1908 (24 St. at Large, p. 1) provides: "That all common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in, or acted upon by such carriers, shall in this state, with respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of the state, any through bill of lading, way bill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carriers as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them."

This statute has been held constitutional as to shipments entirely within the state. *Venning v. A. C. L. R. R. Co.*, 78 S. C. 42, 58 S. E. 983, 12 L. B. A. (N. S.) 1217. Under the statute, when the Seaboard Railway Company recognized, acquiesced in, and acted upon the through bill of lading, it became a party to the contract of shipment, and was as much bound not to exact the excess charges due to a clerical mistake as was the Southern Railway Company in whose name the contract was made. The Seaboard Air Line Railway Company having exacted freight charges for 41,700, when there was in fact, according to the weighing of its own agent, only 14,700, which it had contracted to deliver as a car load of 20,000 at 28.4 cents per 100 pounds,

it is liable to the plaintiffs for the excess due to the clerical error.

The judgment of the circuit court is affirmed.

### SQUILACHE v. TIDEWATER COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. Sept. 11, 1908.)

#### 1. MASTER AND SERVANT—ACTIONS FOR INJURIES—DECLARATION—SUFFICIENCY.

In an action by a servant against the master, it is generally necessary to distinctly allege the duties of the defendant to the plaintiff charged to have been violated; but if what is averred in the declaration, in connection with the manner of averring a breach of those duties, sufficiently shows what such duties are, the declaration will be regarded good on demurrer, the allegations of duty in such cases being superfluous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 817.]

#### 2. EVIDENCE—JUDICIAL NOTICE.

When such duties are statutory, and the facts are alleged from which those duties arise, the court will take judicial notice of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 87.]

#### 3. ALIENS—RIGHT TO SUE—PERSONAL INJURY ACTION.

As a general rule an alien, not an enemy, may maintain in the proper courts suits to vindicate his rights and redress his wrongs, including actions for personal injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, §§ 61-63.]

#### 4. MASTER AND SERVANT—DUTY TO FURNISH "REASONABLY SAFE PLACE TO WORK."

A "reasonably safe place to work," required of the owner or operator of a coal mine, with respect to ventilation and the accumulation of dangerous gases therein, after he has provided ample means of ventilation and employed a competent mine boss and fire boss, as required by sections 409 and 410, Code 1906, means, in the eye of these statutes, a reasonably safe place in the first instance; and the subsequent negligence of such mine boss or fire boss in allowing the accumulation in the mine of noxious gases in dangerous quantities will be regarded as the negligence of a fellow servant of the miner, not imputable to the owner or operator, and as a risk assumed by such miner at the time of his employment, and such owner or operator will not be liable in damages for personal injuries sustained by him therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-572.]

#### 5. SAME—FELLOW SERVANTS—COMPETENCY.

Such fire boss is not shown to be incompetent by evidence of his want of knowledge of the use of an anemometer; such instrument not being one of those required by the statute to be used by him in the operation and ventilation of the mine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 973.]

#### 6. SAME—NEGLECT.

Stoppage, for brief periods, of the fan on the outside of a coal mine provided by the owner or operator for the ventilation thereof, during suspension of work therein, whether for the purpose of making needed repairs or otherwise, will not constitute such evidence of negligence of the owner or operator as will render him liable in damages for injuries sustained by a miner employed therein from an explosion of gas in

the mine, occurring on a subsequent day; such negligence, if any, being properly imputable to the mine boss or fire boss, fellow servants of such miner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 209.]

**7. TRIAL.—INSTRUCTIONS.—ABSTRACT PROPOSITIONS.**

Instructions, too general in terms and containing no sufficient reference to any evidence to which they would be properly applicable, amount to mere abstract propositions, and should be rejected.

**8. APPEAL AND ERROR.—HARMLESS ERROR.—INSTRUCTIONS.—REJECTION.**

The rejection of an instruction, although correct, if the subject thereof has been sufficiently covered by another instruction given, will not constitute reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

(Syllabus by the Court.)

Error to Circuit Court, McDowell County. Action by Dominick Squillache against the Tidewater Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Rucker, Anderson, Strother & Hughes, for plaintiff in error. Strother, Taylor & Flanagan and R. R. Smith, for defendant in error.

**MILLER, J.** The plaintiff sued for injuries sustained in the coal mine of the defendant. The declaration, in three counts, the demurrer to which was overruled, after averring defendant's ownership of the mine, servancy of plaintiff as a miner therein, and alleged duties of the defendant with respect to the accumulation of fire damp, gases, fumes, and vapors, charges, by way of assigning breach thereof, in the first count, that it negligently and knowingly permitted to accumulate in said mine where plaintiff was employed, without knowledge thereof on his part, fire damp, fumes, gases, and vapors, which, becoming ignited, exploded with great power and violence, and burned with great heat in and about where plaintiff was engaged in the discharge of his duties; in the second count, that it negligently failed to employ a competent fire boss, to keep at said mine safety lamps, to have said mine examined and notice of the accumulation and existence therein of fire damp and other dangerous gases given to its employes, to ventilate said mine, to provide the necessary travelling ways and other means of escape, to provide ample means of ventilation, and to cause air to be circulated through the entries and headings, so as to dilute, render harmless, and carry off said dangerous and noxious gases, and by reason thereof the same became ignited, and exploded with great power and violence, and burned with great heat in and about where the plaintiff was engaged in the discharge of his duties; in the third count, that the defendant negligently failed and refused to employ a fire boss, and to provide ample means of ventilation, and to cause the air to circulate through

said mine and the working part thereof in sufficient quantities to dilute, render harmless, and carry off the dangerous gases known by the defendant to be generated in dangerous quantities in said mine, and negligently and knowingly permitted such fire damp and other dangerous gases to accumulate and exist in said mine, without plaintiff's knowledge, and to become ignited, and to explode with great power and violence, and burn in and about where plaintiff was engaged in the discharge of his duties—whereby, as alleged in each count, the plaintiff was then and there "bruised, burned, wounded, suffocated, and injured," laying his damages at \$10,000.

The alleged duties of the defendant charged to have been violated are not very distinctly averred in the second and third counts; but what is averred, taken in connection with the manner of averring a breach of those duties, we think renders the counts sufficient. The allegations of duty are superfluous in such cases. 6 Thomp. Neg. § 7456. The first count, containing an averment of the statutory duty, is in the form given in Hogg, Pl. & Forms, 373, adjudged sufficient in *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304. But, the facts being alleged from which the statutory duties arise, the court will take judicial notice of the statute; a breach of those duties being averred. *Moundsville v. Velton*, 35 W. Va. 217, 13 S. El. 873.

The principal ground of demurrer relied on is that the duties directly or impliedly alleged, failure to perform which it is charged resulted in the injuries complained of, are those which the statute (sections 409 and 410, c. 15H, Code 1906) impose upon the mine boss or fire boss, fellow servants of the plaintiff, and for whose negligence it is argued the defendant is not liable. But it is averred, in the second count, that the defendant failed to employ a competent fire boss, and, though not in terms, it is substantially alleged that it failed to employ a competent mine boss; and, it being alleged in the third count that the defendant negligently failed to ventilate or to provide ample means of ventilation, and to cause air to be circulated, etc., thereby negating a discharge of defendant's duties in the premises, we think these counts are substantially good on demurrer. The proposition for which the defendant contends, therefore, properly arises on the trial of the facts.

Another preliminary question presented here, but apparently not seriously relied on by the defendant, relates to the rejection of two special pleas tendered, challenging the right of the plaintiff, a citizen and subject of the Kingdom of Italy, to sue in the courts of this state. These pleas were properly rejected. An alien, not an enemy, may take and hold, by inheritance or purchase, real estate within this state. Such right is written in our Constitution and statute law. Const. art. 2, § 5 (Code 1906, p. xiviii); Code



1903, §§ 3018, 3019. And the general rule is that he may maintain suits in the proper courts to vindicate his rights and redress his wrongs, including actions for personal injuries. 2 Kent, Comm. § 62; 2 Cyc. 107, and notes; Succession of Rixner, 48 La. Ann. 552, 19 South. 597, 32 L. R. A. 177; 1 Bouv. L. Dict. 130.

There was no attempt to support by proof the plaintiff's case, except by evidence of the presence and explosion of gas in the mine, some evidence of the ignorance of the fire boss in the use of the anemometer, and that the large fan on the outside of the mine was shut down for a part of the day previous to the accident, when the mine was not being operated, without leave of the proper authority. It is claimed, also, that the presence in the mine of gas in dangerous quantities was evidence of want of capacity of the means of ventilation. There was, however, positive and uncontradicted evidence of the experience of the fire boss, and of his skill and ability to detect gas in dangerous quantities by the use of a safety lamp, and that the means of ventilation were ample and had always before produced an abundant supply of air in the mine. The view we take of the case renders it unnecessary to refer to the evidence, except in this general way. The plaintiff below had a verdict and judgment thereon against the defendant for \$3,000, to reverse which and various rulings of the circuit court on the trial the defendant has brought the case here upon writ of error. The points relied on are covered by the motion to exclude the plaintiff's evidence, objections to the giving and refusing of instructions, and finally by the motion of defendant to set aside the verdict and award it a new trial, and for judgment for defendant notwithstanding the verdict.

The defense to the action in the court below, as it is here, was, first, that the injuries sustained were due to a powder explosion, or a blow-out shot, in room No. 27, where the plaintiff was when he received his injuries; second, that, although the injuries sustained may have been the result of a gas explosion, the defendant, having provided and maintained ample means of ventilation and employed a competent mine boss and fire boss, as required by law, discharged its whole duty to the plaintiff, any negligence being that of the mine boss or fire boss employed, fellow servants of plaintiff, and for which defendant is not liable. There was little evidence to support the first defense, except the presence in the room, after the explosion, of an exploded powder can, and that like serious injuries were not sustained by others in as close proximity as the plaintiff to the place where the gas was ignited. There is positive evidence of the presence of gas in dangerous quantity in room No. 46, from 150 to 190 feet from room No. 27, and the ignition thereof from the lamp of another miner almost simultaneously with the explo-

sion at room No. 27, burning, also, a miner at work in room No. 48. It is claimed by plaintiff that this gas, ignited in room 46, exploded in room 27, injuring him. There is a conflict of evidence, therefore, preponderating in favor of the plaintiff; and we cannot disturb the verdict of the jury thereon, manifestly against the defendant.

The last is the principal defense. As to it the position of the plaintiff is, first, that defendant's duty to plaintiff was not fully discharged, as claimed, and that, besides what was done, the defendant was obliged, at common law as well as by statute, in the operation of the mine, to see that the air was "circulated around the main headings and cross-headings and working places" in the mine "to an extent that will dilute and render harmless and carry off the noxious and dangerous gases therein," and thereby to provide and maintain continuously a reasonably safe place to work, which it neglected to do; and, second, that his injuries were due to the alleged incompetency of the fire boss, and the shutting down of the fan on the outside of the mine on the day preceding the accident, resulting, it is claimed, in the unusual accumulation of gas in the mine and the explosion thereof. The evidence of the defendant shows the employment and competency of the mine boss, and there is none to the contrary. We need give this subject no further consideration therefore.

Three questions, then, are presented for determination: What was the extent of the duty of defendant with respect to ventilation of the mine? Was the fire boss incompetent? And, lastly, was it an act of negligence, chargeable to the defendant and contributing in an approximate degree to the injuries of the plaintiff, to shut down the fan on the outside of the mine the day preceding the accident? We must consider them in the light of our statute, referred to, and previous adjudications thereon.

It seems to us that the provisions of the statute furnish a complete answer to all three questions, and particularly to the first. It is true, as a general rule, as this court has said in *Jackson v. Railroad Co.*, 43 W. Va. 380, 382, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, following *Madden v. Railroad Co.*, 28 W. Va. 617, 57 Am. Rep. 695, that the duty of the master to provide a reasonably safe place to work, included in the general duty to furnish a safe plant, is a nonassignable duty; but, as is said in that case: "Would you say that when the farmer, mine owner, or lumberman sends a lot of hands upon his work in charge of a foreman or boss or overseer—call him as you may—he is to indemnify them against every mistake of the foreman while doing the work? That would make every business very perilous." Of course, this language must be regarded as having particular application to the facts in that case, but is significant here as pertaining to the general rule, stated there, that a master cannot be

held liable for an act of mere operation, no matter by what servant done. The act in question, in its several sections, was plainly intended to provide a complete code of rules and regulations for mine owner and miner, enacted particularly, as its several provisions plainly indicate, in the interest and for the protection of the miner; and so jealous of his rights and interests has the Legislature been that by sections 409 and 410 it has imposed upon the owner or operator of the mine the duty of employing a competent fire boss and mine boss, with ample duties and powers prescribed, which, with reciprocal duties also imposed on the miner, are to be regarded as sufficient for reasonable safety and protection. And with respect to the subject of proper ventilation, involved in this case, the statute plainly commands that, after the owner or operator has provided and maintained the ample means of ventilation prescribed, and employed a competent fire boss and mine boss, each of these officers of the law shall be so far superior to the employer that the owner has no control over them in their respective spheres. So complete is the authority of the fire boss that a miner, without notice from him, cannot enter the mine without incurring liability to fine and imprisonment. He is made the sole judge of the safety of the mine upon the inspection required of him. The owner has no control over him within the line of his duties; for, by the very terms of the statute, he "shall have no superior officer." By the provisions of the statute, the mine boss is required "to keep a careful watch over the ventilating apparatus." It is his duty, also, to "visit and examine every working place in the mine as often as practicable and as to him may seem necessary, \* \* \* to the end that such mining places shall be made safe," and "shall not direct any one to work in an unsafe place unless it be for the purpose of making it safe." It is clear, from these provisions, that these two officers are the absolute masters of all matters pertaining to the inside working of the mine—the fire boss, so far as relates to the inspection thereof for dangerous gases, and the notice and warnings of its condition to be given on the outside; the mine foreman, of the operation of and control over the ventilating apparatus and the general conduct of the operations; the duties of the one supplementing and correlating those of the other. The duty of the owner, having in the first instance provided a reasonably safe plant, being notified by the mine boss "of his inability to comply with any of the requirements" of the law, is "to at once attend to the matter complained of by" him, "to enable him," the mine boss, "to comply with the provisions" of the law.

But it is argued that the requirements of said section 409, that the air by means of the ventilation provided "shall be circulated around the main headings and working places to an extent that will dilute and render

harmless and carry off the noxious and dangerous gases" in the mine, imposes this particular duty upon the owner, regardless of the duties imposed upon the fire boss and mine boss, and that any negligence therein must be imputed to the owner or operator. The answer to this proposition is that the circulation of the air in the manner and by the means provided is, by the terms of the statute, so inseparably involved in the performance of the duties imposed exclusively upon the fire boss and mine boss as to render it impossible of performance except by them in the discharge of their duties. We do not think that any fair consideration of the statute and of its manifest purposes will warrant us in giving it a construction so harsh and burdensome to the operator. A safe plant, or a reasonably safe place to work, required of the master, with respect, at least, to the ventilation of the mine, means in the eye of this law that it shall be so in the first instance. It was not intended that he should be made liable if it should afterwards be rendered unsafe by the negligent manner in which the boss or foreman directed the work. As was said by the Supreme Court of Virginia in *Coal Co. v. Wells*, 96 Va. 418, 31 S. E. 614, 616, an action for damages for injuries sustained by the falling of a piece of slate from the roof of a coal mine: "It was the duty of the defendant company to provide a reasonably safe place in which the plaintiff was to work, and this duty it could not assign to another; yet, if it was in the first instance in a reasonably safe condition, and afterwards rendered unsafe by the negligent manner in which its mine boss directed the work to be done or the needed precautions taken, whereby the plaintiff was injured, the mine boss would be properly held a fellow servant of the plaintiff, or that this was one of the risks assumed by plaintiff, \* \* \* especially if the evidence showed that from the nature of the work the condition of the place was constantly changing, and the duty of keeping it in safe condition in the prosecution of the work devolved both upon the plaintiff and the mine boss." To the same effect are *Consolidated Coal & Mining Co. v. Floyd*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848, and *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 423, 28 L. Ed. 440.

This court is committed to the proposition that a fire boss and mine boss are, in the performance of their statutory duties in the operation of the mine, fellow servants of the miner, and the operator is not liable for injuries sustained by the miner by reason of the negligent performance of those duties. *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 80 S. E. 107, 40 L. R. A. 812; *McMillan v. Coal Co.*, 61 W. Va. 531, 57 S. E. 129, 11 L. R. A. (N. S.) 840. These decisions were predicated mainly upon the several cases in Pennsylvania cited, interpreting similar statutes of that state from which ours were evidently copied; and we can see no good

reason for receding from the doctrine of those cases. The Pennsylvania cases cover gas explosions, as well as falling roofs, and further discussion of the principles involved would be unprofitable. Those cases, holding the fire boss and mine boss fellow servants of the miner, seem to have been based mainly on the fact that the statute required their employment, and imposed upon them duties independently of the operator; but in some jurisdictions an ordinary mine boss, whose employment was in no way compulsory, has also been held to be a fellow servant of a miner. *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; note to *Welston Coal Co. v. Smith* (Ohio) 87 Am. St. Rep. 545, 575. We are aware that the courts of Indiana, Illinois, and Ohio have construed similar statutes in those states differently; and Mr. Freeman, in his note to *Welston Coal Co. v. Smith*, regards the rule of those cases the better one, "dependent upon the nature of the work the boss was engaged in when guilty of the negligence causing the injury," and if "performing for the master any duty owed by the latter to his employes his negligence would be that of a vice principal rather than that of a fellow servant." But we think the reason for the rule of our own and other cases cited in that note the better one, particularly as applied to the special provisions of our statutes. The Supreme Court of the United States, it is true, in the case of *Descrant v. Cerillos Coal Railroad Co.*, 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127 has construed Act Cong. March 3, 1891, c. 564, § 6, 26 Stat. 1105, similar to ours, requiring the ventilation of coal mines in the territories of the United States by the mine owner or manager, as being mandatory on him, and as rendering him liable for any neglect or failure therein of himself or of any one delegated by him to perform the statutory duties; but that statute does not, like our statute, require the appointment by the owner of a fire boss and mine boss, and give them, and not him, such exclusive control of the operation and inspection of the mine. That statute was plainly intended to impose the whole burden and risk on the owner, not only in the first instance, but also in the further operation of the mine, with respect to ventilation required; and the decision, therefore, cannot be regarded as a case in point against the construction given our statute. But we are asked to reconsider our former decisions, for the reason that the statute of Pennsylvania, construed by the decisions of that state followed by us, relates to operations in the anthracite fields, and, unlike ours, required the fire boss and mine boss to be selected from those who have passed examinations and obtained certificates of competency from an examining board created thereby, leaving the mine owner no choice of persons outside of this class. But we do not think any reasonable distinction can rest on this ground. True, the owner,

obeying the Pennsylvania statute in this particular, could not be charged with negligence for employing an incompetent mine boss or fire boss, as he may be under our statute; for the certificate of competency would, as a general rule, be his protection.

The next question is, was the fire boss incompetent? Our answer is, if he was, the record does not show it. So far as the evidence goes, he had all the qualifications required or contemplated by our statute. He had had 16 or 17 years' experience as a coal miner, had "knowledge of fire damp and other dangerous gases," and was "able to detect the same by the use of a safety lamp or lamps," and so far as we can see from the evidence "had practical knowledge of the subject of ventilation of mines and the machinery and appliances used for that purpose," as required by law. But we are asked to hold him incompetent because he said he had never used an anemometer, an instrument not mentioned in the statute, but used for measuring air. This would be to interpolate into the statute a qualification not required by it. The anemometer is not one of the instruments required by the statute to be kept on hand or furnished by the owner. A safety lamp is. By it the fire boss is required to be able to detect the presence of dangerous and noxious gases. It was due to the alleged presence of these in dangerous quantities that the plaintiff alleges he sustained his injuries. There is positive evidence that the ventilating machinery was adequate. If the fire boss was ignorant and incompetent in the use of the anemometer, if required, the plaintiff could not charge the defendant with his injuries, without allegation and proof that they were traceable to that particular cause. The plaintiff offered no evidence of the incompetency of the fire boss. His ignorance of the use of the anemometer appeared upon his cross-examination. Plaintiff relied on the evidence of the presence of gas in the mine as *prima facie* establishing the negligence of the defendant; and his counsel rely on *Graham v. Coal & Coke Co.*, 38 W. Va. 275, 18 S. E. 534. The court does say in that case: "That gas was in the mine in violation of law follows from the simple fact that an explosion of it, entailing injury to the miner, took place." No fire boss was employed in that case—an act of negligence in itself, rendering the operator liable for that reason for the negligence in suffering explosive gases to accumulate in dangerous quantities in the mine, which would have been imputed to the fire boss if one had been employed, but properly imputed in that case to the operator.

Was the stopping of the fan the day preceding the accident such negligence of the defendant to which the jury could refer the plaintiff's injuries? The evidence does not disclose the length of time the fan was not in operation. Witnesses say that at 9 o'clock in the morning and at 12 o'clock noon of

July 4th the outside fan was not running; but for how long a time this continued they do not say. Other witnesses who saw this fan say it was running during July 4th at 6 o'clock, at 9 o'clock, and between 11 and 12 o'clock in the morning, and between 4 and 5 o'clock in the afternoon, and all night of July 4th; so that, if this fan had stopped running at the particular times mentioned, it may have been and probably was only for a very short time, to make repairs or for some other unavoidable reason. Unfortunately the fan runner in charge that day was dead at the time of the trial, and the exact fact can never be known. Section 409 contemplates the necessity of shutting down the fan when necessary, and provides that the workmen shall then be immediately instructed to withdraw, and that "no mine operator shall be required to keep the fan going where it is necessary to shut it down for the purpose of repairing machinery or doing other work in the mines which may make it necessary." But, say this contingency, justifying shutting down the fan, had not arisen, the mine was not being operated, no miners were at work in the mine, and if the fan was stopped, and the injuries of the plaintiff could be proximately referred to that cause, to whom may we, under the law of fellow servantry, impute the negligence? Certainly not to the owner.

In my investigations I have found the English cases of *Knowles v. Dickinson*, 2 *Ellis & Ellis* (Q. B.) 705, and *Brough v. Homfray*, 15 *Min. Rep.* 6, *L. R.* 3, *Q. B.* 771, relating to the ventilation of coal mines. In the first, a criminal case giving construction to *St. 13 & 19 Vict. c. 108, § 4*, the facts were that the ventilating apparatus was stopped at about 2 o'clock on each Saturday afternoon, and did not recommence working until between 5 and 6 o'clock on the following Monday morning, resulting in the accumulation of a great amount of foul air and dangerous gases in the mine in the meantime, of which the miners complained when returning to work on Monday morning. The statute required, among the rules to be observed, "an adequate amount of ventilation" to "be constantly produced in all collieries," in order that the working places of the pits and levels of such collieries might "under ordinary circumstances be in a fit state for working," and imposed a penalty on the owner or agent if any colliery should be worked and the rules neglected or willfully violated; and it was held that the agent of the colliery, which was actually worked only on such days, incurred the penalty for breach of the rule by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work between Saturday night and Monday morning, for, notwithstanding such suspension, the colliery was "worked" during that time within the meaning of that section. In the second case it was held "not sufficient compliance with this rule to cause ventilation

to pass along the working places and traveling roads, but that so much of the mine must be kept so ventilated as to render the working places and traveling roads safe." The case here presents no such state of facts as appeared in those cases. Our statute is not the same as the English statute. That provided for no special agents, with exclusive control of operations, as our statute does. While it is true it was held in the first case that the word "worked" covered the period of suspension from Saturday to Monday, neither case can be regarded as opposed to our views and the construction given our statute, for the case proven here involves no such period of suspension as there, or as to justify even the inference of negligence on the part of the defendant or of the fire boss or mine boss. Our statute contemplates and excuses such temporary shutting down of the fan as was proven in this case, and provides for adequate protection of the miner.

It remains to consider the instructions. The objections to plaintiff's instructions numbered 1, 3, 4, 5, and 7, given, are that they do not propound the law correctly, are inapplicable, and misleading. Nos. 1, 3, 4, and 5 in general terms told the jury that it was the duty of the defendant "to use reasonable care and diligence for the safety of its employes"; that the plaintiff had the right, in entering the service of defendant, to presume it had discharged this duty, he being presumed to have assumed only those ordinary risks connected with his employment existing after discharge by defendant of its duties; that the specific nonassignable duties of the defendant were to provide plaintiff a "suitable and reasonably safe place in which to work," "to provide and maintain for the operation of its mines in mining coal \* \* \* reasonably safe and suitable structures and instrumentalities," to use "ordinary care," "reasonable care, foresight, and prudence" therein, and not expose plaintiff "to dangers, perils, or hazards from which he could be guarded" thereby; and each tells the jury, in general terms, that if they find from the evidence defendant failed in the performance of any of those duties, and by reason thereof and without negligence on his part the plaintiff was injured in the manner alleged, they must find for him. The seventh defines the words "ordinary care," used in said instructions, to mean "such watchfulness, caution, and foresight as under all the circumstances of the particular service a corporation controlled by prudent and careful officers should exercise." The only evidence offered to prove negligence, and to which these instructions could possibly have application, related to the presence of gas in the mine, stoppage of the fan, and alleged incompetency of the fire boss. As we have concluded that as matter of law there was no evidence of incompetency of the fire boss, and any negligence in suffering an accumulation of gas in the mine and in stopping the fan was that of fellow

servants of the plaintiff in the operation of the property, and not of the defendant in the first instance in establishing and maintaining a safe plant, these instructions, if not too general in terms, as they are, could have no application to the case attempted to be made. They are therefore reduced to mere abstract propositions, and contain no reference to any evidence to which they are applicable, and are objectionable on both grounds. *Claiborne v. Railway Co.*, 46 W. Va. 363, 33 S. E. 262; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *Parkersburg Ind. Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255; *Parker v. Building & Loan Association*, 55 W. Va. 134, 40 S. E. 811; *State v. Dodds*, 54 W. Va. 289, 295, 46 S. E. 228.

But it is said in argument that instruction No. 1 was taken from *Skidmore v. Railway Co.*, 41 W. Va. 296, 23 S. E. 713, as it seems to have been. While such an instruction is copied into the opinion in that case as one given by the court below, yet on the hearing here this court was not called upon to pass judgment thereon. We are not called upon here to decide, and do not decide, whether an instruction in such general terms, without any reference to the evidence, and disconnected from other and more specific instructions, would not be good in any case. All we do decide is that it is inapplicable to this case, for the reasons assigned, and should not have been given.

Instructions 8 and 9 should not have been given. The first confuses the shutting down of the fan, which requires permission of the district inspector, with the temporary shutting down thereof, not requiring such permission, and erroneously assumes that the particular instances proven when the fan was not running on July 4th constituted negligence imputable to the defendant. No. 9 erroneously assumes there was evidence that the fan did not have capacity to supply the mine. As we have shown, there was no evidence justifying either of these instructions. They do not state correct propositions of law applicable to this case, and should not have been given.

With respect to defendant's instructions Nos. 1, 2, 3, 5, 9, 10, and 12, refused: The first is a peremptory instruction to find for the defendant. The views already expressed regarding the merits of the plaintiff's case would render this instruction proper. As we have held, the negligence, if any, was the negligence of the fire boss or mine boss, not imputable to the defendant. Defendant's instruction No. 6, given, told the jury, if such was the fact, they should find for the defendant. Of the other instructions given, No. 7, properly told the jury that all the duties of the defendant, not shown by the evidence to have been omitted, are presumed to have been performed; No. 8, that the mere fact that there was an explosion and injury to the plaintiff was not in itself sufficient to fix the liability on the defendant, or raise

any presumption of the defendant's negligence, the burden being on the plaintiff to prove by a preponderance of evidence some positive act of negligence. No. 11 stated in different language practically the same proposition as No. 8; and No. 4 told the jury that if the plaintiff knew, or ought to have known, that the defendant's mine generated gas in dangerous quantities, and entered the mines on the morning he was hurt without warning as to its safety given him by the fire boss on the outside of the mine, they should find for the defendant. The plaintiff admits having entered the mine without such notice. At least he says, when inquired of on this subject, that he did not see the mine boss before he went into the mine; and to the question whether, on the morning he was hurt, the fire boss gave him notice or warning that the mine was safe for him to go in, he answered: "No, sir; nobody told me; I did not see him." The injury is shown to have occurred shortly after the plaintiff went into the mine on the morning of July 5th. We think the instructions for the defendant, given, properly propound the law of the case, and without disregarding these instructions the jury could not have found otherwise than for the defendant; hence instruction No. 1 should have been given.

Defendant's instruction No. 2 was properly rejected. It erroneously assumes, as a general proposition, that the duty of the operator of a mine to provide a reasonably safe place to work applies only to the particular place the employé is appointed to work, and tells the jury that if, from the evidence, they find the plaintiff at the time of his injuries had gone to room No. 27 for some purpose of his own, and not as a place to work, they should find for the defendant. If the instruction had been applied to an abandoned part of the mine, where gas was known to exist in dangerous quantities, and against which plaintiff might have been warned, it would be applicable; but in this instance it could only have related to the evidence that the plaintiff had gone to room No. 27 to get his tools, and thence to his new place of assignment by the mine boss. The plaintiff undoubtedly had a right to go there for that purpose; and if rightly in the mine, and at a place where he had the right to assume the mine was reasonably safe, the defendant would not be excused for any breach of duty to him.

We think instruction No. 3 was also properly rejected. It assumes negligence on the part of the defendant in permitting gas to accumulate in the mine, but tells the jury that if, from the evidence, they find the gas would not have occasioned injury unless ignited by a fellow servant, who went into the mine without permission of the fire boss, or without notice or signal from the latter that the mine was safe, the plaintiff cannot recover. If there was culpable negligence

of the defendant, the mere fact that the fellow servant who ignited the gas had gone into the mine without such notice would not excuse the defendant for injuries resulting to the plaintiff while rightfully in the mine. This instruction is based on *Berns v. Coal Co.*, supra. In that case it was assumed that the miner injured was rightfully in the mine, and that a fellow servant with lighted lamp went into a dangerous part of the mine, contrary to orders of the operator, resulting in the injury of the plaintiff—quite a different state of facts from those in this case.

Instructions 5, 9 and 10 were rather too general, and are without specific reference to any evidence to which they are applicable. Besides, their rejection, as well as rejection of No. 12, we do not think constituted error, as the subjects of those instructions were sufficiently covered by instructions Nos. 6, 7 and 11, given. In such case the refusal of an instruction, although correct, is not error. *Arthur v. City of Charleston*, 51 W. Va. 182, 41 S. E. 171; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. 488.

Our conclusions on the points involved will necessarily reverse the judgment below; but, because the court erred in not giving the peremptory instruction to find for the defendant, shall we give judgment here for it? As we cannot affirmatively see that a different case may not be presented on a new trial, we have concluded simply to reverse the judgment and award the defendant a new trial.

#### STATE v. DOYLE.

(Supreme Court of Appeals of West Virginia.  
Sept. 11, 1908.)

##### 1. INDICTMENT AND INFORMATION—FELONY—CONVICTION OF MISDEMEANOR.

Upon the trial of an indictment under section 915, Code 1906, the waiver of the allegation and proof of former conviction by the prosecuting attorney is not to the prejudice of the defendant; and, the unlawful sale as alleged being proved to the satisfaction of the jury, it is not error to sentence the defendant accordingly on a verdict of "guilty of a misdemeanor as charged in the within indictment."

##### 2. SAME.

Upon the trial of such indictment, the prosecuting attorney may, with the permission of the court and without the consent of the defendant, waive proof of the aggravation of the former conviction alleged in the indictment and try the defendant on the allegation of selling without license.

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Mike Doyle was convicted of an illegal sale of liquors, and brings error. Affirmed.

W. E. McDougle, R. S. Blair, and W. R. Brown, for plaintiff in error. The Attorney General, S. A. Powell, and S. M. Hoff, for the State.

McWHORTER, J. The grand jury of Ritchie county at the January term, 1907, returned an indictment "for felony" against Mike

Doyle for unlawful retailing, containing an allegation that he had been convicted at a former term for a like offense. At the same term at which the indictment was found the prosecuting attorney waived the charge of felony contained in the indictment, to which the defendant objected and moved the court to quash the indictment, which motion was overruled by the court, to which ruling of the court in refusing to quash the indictment the defendant excepted and entered his plea of not guilty. The case was continued, and at the next term a jury was impaneled and returned a verdict of guilty of a misdemeanor as charged in the indictment. The defendant moved the court to set aside the verdict and grant him a new trial because the same was contrary to the law and the evidence, which motion the court overruled, and to which ruling of the court the defendant excepted. The defendant moved the court in arrest of judgment, which motion was also overruled, and defendant excepted. The defendant then moved the court to suspend its judgment for 30 days, which motion was also overruled, and defendant excepted, and the court entered judgment upon the verdict for \$100 and 90 days' imprisonment in the county jail. The defendant procured a writ of error and supersedeas, and says the court erred in allowing the prosecuting attorney to waive the felony charged in the indictment and to compel the defendant to go to trial on another and different charge than that for which he was presented by the grand jury, and that the court erred in overruling the motion of defendant to quash the said indictment, in admitting improper evidence on behalf of the state as shown in the bill of exceptions No. 1, in giving the oral instructions given by the court on its own motion, and not on the motion of the state, over the objection of the defendant, and in refusing to set aside the verdict and not granting a new trial.

The first assignment of error is the waiver by the prosecuting attorney of the felony charged in the indictment and placing the defendant on trial for a misdemeanor, which he claims was a violation of his constitutional rights, in that he was tried for an offense which was not charged in the indictment. The indictment is for the unlawful sale of intoxicants without a state license therefor, and has all the elements of a good indictment for unlawful retailing, but coupled with that is the fact of a former conviction for a like offense, alleged in aggravation of the offense charged in the indictment. Section 4583, Code 1906, provides: "If a person indicted of felony be by the jury acquitted of part and convicted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." In case at bar there was no amendment of the indictment by striking out any portion of it to

bring it within the influence of Bain's Case, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, as claimed by the defendant. In that case a part of the indictment was stricken out, so that it was held not to be the indictment found by the grand jury. The prosecuting attorney in case at bar simply declined to prosecute upon the charge of felony, or to prove the aggravation as alleged in the indictment, but was content to try it upon the misdemeanor, which was well alleged in the indictment. As to the duty of the prosecuting attorney, Mr. Bishop in the first volume of his Criminal Law, in section 815(a), says: "In all our states, the prosecuting officer acts under a discretion committed to him for the public good. He is not, as of course, to pursue to conviction every offender against whom he can obtain adequate evidence. Nor is it his duty to convict every prosecuted person of the highest offense which can be carved out from the mass of his entire evil-doings. It is among the most important functions of a state's attorney to select, out of what the law permits, the charges which he will bring against offenders. They have no power to elect, and above all they cannot object if he overlooks their heavier offendings and pursues them simply for the lighter." And in the same volume, in section 789, statutes of the character of said section 4583 are referred to as follows: "It is competent for legislation to abrogate the common-law rule whereby an act cannot be both a felony and a misdemeanor, or to modify the consequences of the rule. \* \* \* Beyond which, in a large and increasing proportion of our states, the rule and its consequences have been partly or fully done away with by statutes; so that, for example, there may be a conviction of misdemeanor on an indictment for felony, or proof of a felony may be introduced to sustain an indictment for a misdemeanor." *Brigg's Case*, 7 Pick. (Mass.) 177; *State v. Evans*, 40 La. Ann. 216, 3 South. 838; *Baker's Case*, 12 Ohio St. 214; *Strubble's Case*, 71 Iowa, 11, 32 N. W. 1.

Suppose the prosecuting attorney had gone to trial upon the indictment as it stands, and had proved the sale charged in the indictment, but had offered no evidence of the fact of former conviction of a like offense; it would hardly be questioned that the jury would have had a right to convict for the unlawful sale charged and the defendant be sentenced as for a first sale. The prosecuting attorney simply chose to prosecute for the misdemeanor, and not exact the penalty for the felony, of which it would seem the defendant could not complain. Section 1391, *Bishop's New Criminal Procedure*, says: "The simple form of the nolle prosequi is to the entire indictment, but it may be to a part of the counts, or even to a separable part of any one count, such as, on an indictment for the burning of a dwelling house and barn, it may be to the barn alone. \* \* \* On a charge of assault with intent to murder there

may be a nolle prosequi as to this intent and a conviction for the assault alone." And section 1390 says the prisoner's consent to such nolle prosequi is not essential. *State v. Whitt*, 39 W. Va. 468, 19 S. E. 873, is cited and relied upon by the defendant as being conclusive of this case. In that case the indictment was clearly insufficient as an indictment for a felony, and, being returned by the grand jury in their finding as an indictment for a felony, the entry of the finding was in conflict with the indictment on which the accused was tried; but the case at bar differs from that, in that it was a good indictment for a felony, hence the record of the finding and the indictment were in entire harmony. The court did not err in overruling the motion to quash the indictment.

It is complained that the court erred in giving the oral instructions; the first telling the jury "that, while there are two sales alleged, which would constitute a felony, the felony has been waived by the prosecuting attorney, and you are only to try the case as if it were a single sale, and you are not to allow the existence of the charge on the face of the indictment to prejudice you in your findings," whereby the jury was specifically instructed to disregard the aggravation of the offense by the fact of the former conviction as alleged in the indictment. It is contended that this oral instruction misled the jury to the prejudice of the defendant, in that it states, contrary to law, that there are two sales alleged in the indictment, which would constitute a felony. The jury could not have misunderstood this instruction, as they were particularly charged that they were to try only for the single sale, a simple violation of the law in making a sale, and there was no evidence in the case, except as to the single transaction mentioned by Shrader, and the circumstances attending that one transaction between witness Shrader and the defendant was all that was left in the case when the prosecutor did not choose to prove the former conviction.

The other oral instruction was that they (the jury) were "the sole judges of the weight of the testimony and what it proves, that being a matter peculiarly within the province of the jury to determine." As to this instruction the law is so well settled that it would seem to be unnecessary to say anything further concerning it. As said in *Bowers' Case*, 43 W. Va. 180, 27 S. E. 301: "It is not worth while to cite authority for the proposition that, where there is evidence tending to criminate, the jury is almost uncontrollably the judge of its force and weight, and of the proper inferences from the facts proven."

It is contended that there is no evidence to support the verdict in the case. Would the facts and circumstances warrant the jury in finding the verdict of guilty? There was no motion to strike out the evidence,

but the same was submitted to the jury on the evidence of the state. The testimony of Jacob Shrader is that he went to the house of the defendant "and asked him if he was selling booze, and he said he were not. I then—we were talking there, and as we come out to the gate there was a quart of whisky setting at the corner of the coal house, and I picked up the quart of whisky and laid down a dollar and a half, and Mr. Doyle told me to leave no money there; that he was not selling whisky." Witness states that, when they first saw the whisky, "Mr. Doyle first made answer, 'Whose whisky were that?' and he says, 'There is a quart of whisky.' He said, 'Take that out of here; I don't want it here.'" When the witness applied to the defendant to buy whisky, defendant told him that he was not selling whisky, but went out with him through the house in sight of the whisky, told him to take the whisky away, that he did not want it there, but to leave no money, as he was not selling whisky. Witness Shrader says he did not see defendant take the money, and stated on cross-examination that he and Lester Hickman and Mark Taylor went to the place where the money was left when the whisky was taken, and they found it still there, or money like it in denomination. But this was some days after Collins and Moss looked for it, soon after the money was left there, and did not find it, and say it was not there, and they would have seen it if it had been there. Defendant saw witness put the money down and take the whisky away. It is a very strange circumstance that the money should be found there nearly a week after the transaction, when others had some days before that time looked for it and it was gone. The circumstances of the case are such that the jury were fully justified in their conclusion that the whisky was the property of the defendant and that he had made a sale thereof to the witness. As to the sufficiency of circumstantial evidence to convict for selling intoxicating liquors, see 23 Cyc. 249 (D), and authorities there cited.

Counsel for defendant cite the Case of Ferrell, 22 W. Va. 759, as being a stronger case against defendant than this. In that case the witness went into defendant's room, found some whisky in a bottle in a box, took a drink from the bottle, laid down 10 cents, and went out. There was no evidence that such a thing ever happened there before, and no evidence that the defendant knew anything about it, that he received the money, or knew that witness had taken the whisky. Very different this case, where witness went to defendant to buy whisky, defendant told him he was not selling whisky, but they went out together, where they were in sight of the coveted bottle, when defendant called witness' attention to the whisky and told him to take it away, but to leave no money, as he was not selling whisky. It is

clear, from the manner of Shrader's testimony, that he was an unwilling witness, and did what he could to shield the defendant. The jury believed, and were justified in believing, that the defendant's telling the witness Shrader to take the whisky away, but to leave no money, was simply a subterfuge to cover up the transaction. There was evidently a complete understanding between Shrader and the defendant. Shrader wanted the whisky, and Doyle wanted to sell it. The question was, how was the sale to be effected, and yet not be a sale? The whisky was in a bottle on the ground. How it got there nobody was to know. The money was to take its place on the ground, but contrary to the directions of Doyle, who was particular to tell him to leave no money, as he was not selling whisky. If it were not his whisky, why should he direct Shrader to take it away? It was simply one of those transparent subterfuges resorted to by the man who wants to buy and the man who wants to sell in violation of the law prohibiting sale without a permit under the law. Their trick was not well planned. An intelligent jury of honest men could not fail to "see through it" at a glance.

There were exceptions taken to the ruling of the court in permitting certain evidence to go to the jury. Witness John M. Collins testified that he arrested defendant on a warrant sworn out by Shrader for selling whisky. Objection was made to witness reference to the warrant, as the warrant was the best evidence and should be introduced; but the court ruled that the warrant was only used as evidence to fix the time that the witness Collins and Moss were on defendant's premises, they having been there to search for whisky and other intoxicating liquors, and looking for the money which Shrader stated he left there, and it was to show that they were making this search before the time that Shrader stated that he and Mark Taylor and Lester Hickman found the money there. Defendant does not even put Taylor or Hickman, or either of them, on the stand to corroborate the finding of the money. Witnesses Collins and Moss both testified that they had gone to the place where the money was left about the next day after the transaction, and the money was not there then. Several days after that was when Shrader said he and Hickman and Taylor went and found the money. This was evidently another scheme, and afterthought to help them out, but too late. The court only allowed the warrant to be used in fixing the date when Collins and Moss found the money gone, which was several days before Shrader, Hickman, and Taylor were said to have found it. No evidence was admitted which could have prejudiced the defendant in his defense. "An appellate court does not reverse the trial court for errors in the admission of evidence, when it can clearly see that no prejudice did



or could result therefrom to the accused." *Stover v. Commonwealth*, 92 Va. 780, 22 S. E. 874.

As counsel for defendant make no mention in their brief of the error assigned in the court's refusal to suspend the judgment for a period of 30 days, they do not seem to rely upon it, and we think there is nothing in the assignment.

We see no error in the judgment, and it must be affirmed.

# TALLEY et al. v. FERGUSON et al.

(Supreme Court of Appeals of West Virginia.  
Sept. 11, 1908.)

## 1. TRUSTS—RIGHTS OF BENEFICIARIES—ALIENATION OF INTEREST.

In land conveyed to a trustee for the maintenance of a family, none of the beneficiaries has any distinct or separable interest, during the existence of the trust for that purpose, which he can charge or alien.

## 2. SAME—CONSTRUCTION OF GRANT—LIFE ESTATE.

A grant to wife and children, without more, creates in the wife and children in being at the time a joint estate in equal portions; but in a grant for the use and benefit of a wife and children, by its terms declaring it to be a provision for the family, any manifest indications which support reasonable construction of a life estate in the wife, with remainder to the children, will be followed, and that construction given, so that after-born children may take, and so that the life tenant may have sufficient income to support the children.

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County.

Bill by William N. Talley and others against James H. Ferguson, trustee, and others. Decree for plaintiffs, and Vicie Nighbert, administratrix, appeals. Affirmed.

Payne & Payne, J. E. Chilton, and Berkeley Minor, Jr., for appellant. D. C. Gallaher, for appellees.

ROBINSON, J. The decree appealed from set aside and declared null and void a deed of trust and perpetually enjoined and restrained the trustee and beneficiary from enforcing the same. The land covered by the deed of trust was a valuable tract on the west side of the Kanawha, in the county of that name, and below and near the mouth of Coal. It had been conveyed, by deed dated April 20, 1867, by Rachael M. Tompkins and her children to Henry P. Tompkins, trustee, that deed reciting that the said Rachael M. Tompkins, the mother of Beverly Tompkins, and his brothers and sisters, the grantors therein, "being willing and desirous of making a settlement and provision out of their several interests and portions in said estate for the maintenance of the wife and children of the said Beverly Tompkins, do hereby grant unto Henry P. Tompkins, for the uses and trusts hereinafter declared," etc., with this sequent provision: "In trust that he, the said Henry P. Tompkins, will hold the tract of land

\* \* \* for the sole use and benefit of the wife and children of the said Beverly Tompkins, and free from all debts, demands, or claims upon him, the said Beverly Tompkins, and upon this further trust that he, the said Henry P. Tompkins, will apply the rents, issues, and profits of the tract of land hereby conveyed to the use and benefit, maintenance, and support of the wife and children of the said Beverly Tompkins." The deed contains this additional clause: "And it is known to the parties making this grant that the said Beverly Tompkins is embarrassed with debt, and it being their intention, as before stated, to make a provision for his family, the said grantors do hereby expressly declare that the property shall not in any mode or manner be subjected to or made liable for the debts of the said Beverly, either those now existing or any that may be created in the future."

Later Henry P. Tompkins resigned this trust. An order was entered by the circuit court of the said county appointing B. Tompkins "trustee for Sally Tompkins and her children in the place of said H. P. Tompkins, but not to take place until B. Tompkins shall give bond before the clerk of this court in the penalty of \$2,500, with good security approved by the clerk, conditioned according to law." There is no evidence that this bond was ever given. Beverly Tompkins, trustee, and Sallie H., his wife, petitioned said circuit court for leave to execute a deed of trust on said real estate to secure the payment of \$2,500. On January 7, 1882, it was adjudged, ordered, and decreed "that said petitioners have leave to borrow said sum of \$2,500 upon the faith of said real estate, and secure the payment of the said sum and its interest by deed of trust duly executed by them and each of them on said real estate so conveyed and held for the use of the said Sallie H. Tompkins as aforesaid." The children of the said Beverly and Sallie were not made parties to this proceeding, nor were they given notice thereof. Notwithstanding this, on January 30, 1882, a deed of trust on the land aforesaid was executed to James H. Ferguson, trustee, by Sallie H. Tompkins and Beverly Tompkins, "her husband and trustee," to secure to James A. Nighbert the sum of \$2,000, with interest, payable two years thereafter. Beverly Tompkins signed and acknowledged this deed of trust as "trustee of Sallie H. Tompkins," and Sallie H. Tompkins acknowledged it as "the wife of Beverly Tompkins (who is also her trustee)." It is this deed of trust that has been declared null and void and the enforcement of which has been perpetually enjoined.

The case resolves itself into brief questions. Is Nighbert's deed of trust valid? Did Beverly Tompkins have authority as trustee to convey thereby? And did Sallie H. Tompkins have any interest that she could convey? We may safely and at once pronounce that Beverly Tompkins had no such standing as trustee.

tee as he professed to have in the making of this deed of trust. It is practically conceded that he had not such authority, never having given the bond required by the order appointing him. Of equal certainty is it that any interest which the children may have had in the land aforesaid was not conveyed by the deed of trust in question. They were not parties to Nighbert's deed of trust, nor to the proceedings in court upon which it was sought to be based. And this calls upon us to construe the grant of said land by the aforesaid deed of April 20, 1867, and to inquire as to what interests were given the wife and children by that deed.

We observe that the land was conveyed "in trust," to be held by the trustee "for the sole use and benefit of the wife and children of the said Beverly Tompkins," and "upon this further trust" that the trustee "will apply the rents, issues, and profits of the tract of land conveyed to the use and benefit, maintenance, and support of the wife and children of the said Beverly Tompkins." Let us also distinctly note that the conveyance is declared to have as its intention the making of "a provision for his family"; that is, the family of the said Beverly Tompkins. And by no means let us overlook the part of this deed which must control greatly in its interpretation, that part being declaratory that the property "shall not in any mode or manner be subjected to or made liable for the debts of the said Beverly." The foregoing provisions enlighten us as to the ownership of the land conveyed by the deed. This was not a conveyance directly to the wife and children. In such case the words "wife and children" would be words of purchase, and the wife and children living at the date of the delivery of the deed would take jointly, even to the exclusion of after-born children. It was a conveyance to a trustee for the use and benefit of a family. And it is provided how this use and benefit shall accrue to them; that is, by the trustee's applying the rents, issues, and profits of the tract of land to the use and benefit, maintenance, and support of the wife and children. Here is the real purport of the conveyance. We see it in the words "rents, issues, and profits," "use and benefit," "maintenance and support." We see it again most clearly in the word "family." Manifestly, this deed was intended to set over the land to the family of Beverly Tompkins, to be of use to them, and to support and maintain his wife and children, through the instrumentality of the trustee. And yet it is insisted that Sallie H. Tompkins was by this deed vested with an equitable estate in fee in the whole of the land. This position is untenable, and cannot meet our approval for a moment. To concede it would absolutely defeat the clearly expressed intention of the grantors. Yea, it would absolutely override the safeguards thrown around the property conveyed by this deed, so that the same might be applied to the pur-

poses desired by the grantors. Concede to Sallie H. Tompkins such interest in the land, or in fact any interest other than a life estate subject to the trust arrangement for the family, then we shall be inconsistent, not only with the clearly expressed intention from the four corners of the paper, but particularly with the defined provision that the property was granted so that it could in no mode or manner be subjected to or made liable for the debts of Beverly Tompkins. For, in case of her death, leaving him surviving, he would take by the curtesy, and his creditors would deny to the children surviving the rents, issues, and profits, use and benefit, maintenance, and support, or, at any rate, prevent the full operation of the trust arrangement for the family. The universal and fundamental rule of interpretation must prevail. The intention of the grantors must be sought from the plain words of the instrument, and be upheld.

Denying an equitable estate in fee to Sallie H. Tompkins, as we do, then it is said that the deed vested in her and the four children in being at the time of its execution a joint estate in the land, and that Nighbert's deed of trust is a valid and subsisting lien upon her interest therein. Connected with this contention are questions presented as to the validity of the execution of the deed of trust, it being insisted that the same was signed and acknowledged by Beverly Tompkins not as husband, but by Beverly Tompkins as trustee, and that, therefore, the deed of trust is one by a married woman of her separate estate in which her husband did not join. But the view we take of the ownership of the land attempted to be bound by the deed of trust saves us the necessity of determining these questions.

Clearly the deed aforesaid created such a trust that the beneficiaries took no interest which they could alien or anticipate. Such alienation or anticipation would obviously defeat the purpose of the trust, and undo all the grantors intended to do in its making. If a joint estate was intended, and the mother could anticipate or alien immediately, certainly any one of the children could do likewise. Thus the property, placed in the hands of a trustee as a producing whole for a distinct purpose, could be disturbed, and that purpose overridden. We hold that the deed conveying this property to a trustee for the use and benefit, maintenance, and support of the wife and children of Beverly Tompkins, and for the purpose of making provision for his family, created a blended trust, in which the interests of the beneficiaries were so inseparable that none of them could be aliened during the existence of that trust. "Where property is settled for the maintenance of a family, the expenditure must not exceed the annual income, nor can any debt contracted by the head of the family (himself only one of the cestuis que trust), nor by the trustee (although the profits of the trust property be

pledged for their payment), be charged on the prospective profits beyond the current income, so as to deprive the beneficiaries of the support provided for them. \* \* \* The purpose is to protect the property against the improvidence and waste of the cestui que trust, and to make that which, under their management, would have been dissipated in a short time, a permanent fund, furnishing some support for the household for an indefinite period. Hence no one of the cestui que trust has any interest separable from the rest which can be charged or disposed of by him. The fund is provided for the common support of the family, and can only be enjoyed jointly." 2 Minor's Inst. (4th Ed.) 227. This doctrine is supported by many cases there cited. It is, however, simply the application of sense and equity. In *Perry on Trusts*, § 386a, we find it as follows: "But a trust may be so created that no interest vests in the cestui que trust. Consequently such interest cannot be alienated, as where property is given to trustees to be applied, in their discretion, to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So, if the property is given to trustees, to be applied by them to the support of the cestui que trust and his family, or to be paid over to the cestui que trust for the support of himself and education and maintenance of his children; in short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees, nor the cestui que trust, nor his creditors or assignees, can divest the property from the appointed purposes. Any conveyance, whether by operation of law or by the act of any of the parties, which dis appoints the purposes of the settlor by diverting the property or the income from the purposes named, would be a breach of the trust. Therefore it may be said that the power to create a trust for specific purposes does in some sort impair the power to alienate property." The deed under consideration created no mere passive trust, but an active one. A simple reading of the words vouches this. And it gave to Sallie H. Tompkins no separate and distinct interest that she could incur during the existence of this active trust, as was attempted to be done by the deed of trust to Nighbert.

The deed did not vest an estate in the wife and children in joint tenancy. It was not a direct conveyance, but a provision for the family. The grant contains more than a mere conveyance to the wife and children. If it were simply a conveyance to wife and children, *Wills v. Foltz*, 61 W. Va. 262, 56 S. E. 473, 12 L. R. A. (N. S.) 283, and *Fitzpatrick v. Fitzpatrick*, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, would apply. Then a joint estate in the wife and children in esse would be created. Those cases determine upon the words "wife and children,"

without more; but in this case there is much more in the words of the deed to control in the construction of the grant. To *Wills v. Foltz*, supra, as reported in 12 L. R. A. (N. S.) 283, we find an eminently valuable case note, wherein we are shown that "the tendency of the courts is to construe a devise or grant to a person and her children as constituting a life estate, with a remainder to the children, and they seize hold of any indications manifest in the will to work this estate out, in order that after-born children may take under the will, and that the life tenant may have sufficient income to support the children. This construction then gives to the children as a class an estate as purchasers." Reading the deed under consideration, can we for a moment conceive that it was the intention of the grantors that it should apply only to the children in esse at the time? Other children were afterwards born to Beverly Tompkins and his wife. Were they to be excluded from this provision for his family? Good sense can answer this only in the negative. Yet, if we say the wife and children took jointly, subject to the trust interposing, we must deny these after-born children a share in this estate. This is not in harmony with a provision for the family. The after-born children became at their birth members of the family. Then what is a reasonable construction of the grant? Surely that which will promote the inherent and manifest purpose of the grantors; and this leads us to hold that the only interest of the wife in this property was a life estate. We may well adopt the language in *Faribault v. Taylor*, 58 N. C. 219, wherein it is said: "The construction which would give the property to her and her present children only, as tenants in common of the absolute interest in it, is inadmissible, both because it might, by diminishing the present and immediate interest in the wife, be an inadequate support for her during her life, and because it would exclude from the benefit of the fund any children she may thereafter have. The manifest intent of the testator will be much more effectually carried out by giving to the wife a life estate, with a remainder to all the children which she now has, or may hereafter have." Does not the deed indicate an intention that the wife should take a life estate, that she may thus have the benefit of the estate, and that she may thereby rear and educate the children, who shall take the remainder at her death? Most certainly these children were not to take immediately. For them to do so would disturb the whole arrangement provided in the deed. Can we say that the mother could absolutely take any portion immediately? Her so doing would likewise frustrate that arrangement. Neither was immediately vested. A trust in their favor interposed. Now, when was the property to vest absolutely? Must we not say, only when the family ceased to exist, and not earlier? The arrangement is declared to be a provision for the family;

and the duration of that provision must logically be coexistent with the family. When the family ceased to exist, the trust provision was to end. But when does the family cease to exist? Shall we not, in sense, say at the death of the mother—the natural guardian and head, as this arrangement presents itself? Was it not the intention simply to preserve the estate together as long as the family should be held together as only a mother can hold it? Only a life estate in the wife and mother is consistent with such intention. And no other interest in the wife is consistent with the conveyance of the land so as to be in no mode or manner liable for the debts of the husband. And this construction seems to be natural and reasonable for the carrying out of the provisions of the deed, for the letting in of after-born children, and for the making of the arrangement just that provision it was declared by the deed to be. Sallie H. Tompkins had only a life estate in the property. That life estate was subject to the trust arrangement. Through this life estate and that arrangement provision was made for the family. And that life estate was so subject to and interwoven with the trust arrangement, so necessary to the support and maintenance, use, and benefit of herself and children, that she could not transfer, assign, or alien it; for to permit her to do this would break up and destroy the trust created by the grantors.

The decree of the circuit court is right, and we affirm it.

#### GREENLEE v. STEELSMITH et al.

(Supreme Court of Appeals of West Virginia.  
Sept. 11, 1908.)

#### 1. MINES AND MINERALS—MINING PARTNERSHIP—ADVANCES—LIENS.

Mining partners operating oil leases have a lien on the social property for advances or balance due them after payment of debts; but, having divided the product of the business by division orders giving to each his share of the product in severalty and separating it from the balance, no such lien exists on the product thus divided, but the lien remains valid on the social property used in operating the said leaseholds.

#### 2. APPEAL AND ERROR—REVIEW—REVERSAL.

An appellate court will not reverse a decree on the application of an appellant who is clearly shown by the record not to be aggrieved or prejudiced by the decree claimed of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

(Syllabus by the Court.)

Appeal from Circuit Court, Pleasants County.

Bill by Clinton D. Greenlee against Amos Steelsmith and others. Decree for plaintiff, and defendant Butler County National Bank appeals. Affirmed.

V. B. Archer, for appellant. Merrick & Smith, for appellee Oil Well Supply Co. C. A. Kreps, for appellee Greenlee.

McWHORTER, J. At the April rules, 1901, Clinton D. Greenlee filed his bill in

equity in the circuit court of Pleasants county against Amos Steelsmith, the Butler County Bank, of Butler, Pa., a corporation, the Pittsburg Refining Company, a corporation, Wm. N. Miller, trustee, Sadie E. Braun, the Eureka Pipe Line Company, a corporation, the Oil Well Supply Company, a corporation, and the First National Bank of Marietta, Ohio, a corporation, and alleged that he was then, and for some time past had been, associated with said defendant Steelsmith as a mining partner in the ownership, development, and operation of two certain leases for oil and gas purposes in Pleasants county—one known as "Friend Wagner" lease and the other as "T. J. Wagner" lease; that plaintiff was owner of one-half of the first-mentioned lease and three-fourths undivided interest in the T. J. Wagner lease; that he and the said Steelsmith had since the date of said leases acquired their said several interests therein by sundry mesne assignments, transfers, and conveyances set out in the bill; that Steelsmith assigned and transferred unto his daughter, the defendant Sadie E. Braun, all his right, title, and interest in the T. J. Wagner lease, described as the one-fourth interest therein; that as a result of the various operations upon the said leasehold premises there was located upon the said Friend Wagner lease nine producing wells, producing on an average 40 or 50 barrels per day, which wells were equipped with the necessary oil well appliances to successfully operate them, and upon the T. J. Wagner lease were located five producing wells, producing on an average 16 to 20 barrels per day, and likewise equipped for operating the same; that plaintiff had the sole management and control of the said operations; that the cost and expenses of putting down the wells and operations on the property had been very large; that in the beginning, after oil was found on the property and production begun, division orders were signed and filed with the pipe line company, and the oil produced had since then been run to the individual credit of plaintiff and said Steelsmith, except that the oil belonging to Steelsmith, produced since about the 5th of December, 1899, upon the execution by said Steelsmith of a mortgage or deed of trust upon certain of his property, which included his interest in the said Friend Wagner lease, had been run in the pipe line to the credit of the defendant the Butler County National Bank for the purpose of said mortgage, and that since said assignment by Steelsmith of his interest in the T. J. Wagner lease to his daughter, Sadie E. Braun, the oil produced from that lease and belonging to Steelsmith's interest had been run into the pipe line to the credit of said Braun, and that the bank and Braun had from time to time disposed of the oil produced and run to their credit, and plaintiff had received no part thereof nor benefit therefrom; that on the 5th day of December,

1899, said Steelsmith executed to the defendant Pittsburg Refining Company a deed, along with other property, for all his interest in the Friend Wagner lease, and on the same day the Pittsburg Refining Company executed to the defendant Wm. N. Miller, trustee, a deed of trust conveying all the property deeded to it by Steelsmith in trust to secure an indebtedness of some \$65,000 set out in the trust deed, and that on the 23d of January, 1900, said Steelsmith assigned to defendant Butler County National Bank all his right, title, and interest to said deed of trust; that complainant had no personal knowledge whatever of said conveyances, or the assignment of said Steelsmith of his interests in the said trust to the bank, and only recently obtained knowledge of the existence thereof, and had no knowledge of the purpose or intention of said Steelsmith, the refining company, or the bank in making said papers, and had only recently learned of the assignment of Steelsmith's interest in the T. J. Wagner lease to his daughter; that he always looked to Steelsmith for contributions to the expenses of the developments and operations upon the property, and that during most of the time the burden thereof had been carried by plaintiff, and for the last year or more said Steelsmith had contributed very little, except by way of giving his notes, to the operations upon the property and expenses incident thereto; that the property was then indebted to the plaintiff and others, growing out of the operations up to the 1st of February, 1901, about \$8,440.17, all representing the unpaid portion of said Steelsmith's liability incurred in the operation, plaintiff having fully paid his share of the expenses; that of said indebtedness about \$3,373.09 was represented by unpaid merchandise accounts chargeable to Steelsmith, that \$454.49 was represented by a note of Steelsmith dated December 24, 1900, payable to plaintiff, and indorsed by him for the accommodation of Steelsmith, and \$655.64 was represented by a note given by Steelsmith in the name of the Pittsburg Refining Company, of which company he was president and manager, dated November 28, 1900, and payable to plaintiff, and indorsed by him for the accommodation of Steelsmith, and \$2,000 thereof represented by another note of Steelsmith, dated November 26, 1900, payable to plaintiff, and indorsed by him for the accommodation of Steelsmith, and which said several notes plaintiff had been obliged to take up out of the banks where they had been discounted for Steelsmith's accommodation, and no part of which had ever been paid by Steelsmith, and the residue, \$1,957.56, was represented by a note of the Pittsburg Refining Company, dated December 22, 1900, payable to plaintiff, and by him indorsed for the accommodation of Steelsmith, and which note remained due and unpaid, and was held by the defendant the First National Bank of Marietta, Ohio, and was past

due, and which notes were made and delivered by Steelsmith and by the refining company to cover advancements made by plaintiff on behalf of Steelsmith in said operations and to pay bills contracted in his behalf in relation thereto; that they were not accepted by plaintiff in payment of the indebtedness, but were to operate as payments when actually paid by him; that, in addition to the said indebtedness of \$8,440.17 against the interest of Steelsmith in said leaseholds, the defendant the Oil Well Supply Company claimed that the interest of said Steelsmith, and also of plaintiff, and that plaintiff and Steelsmith, were each individually liable to it upon a note executed to it by Steelsmith, originally for \$4,000, which had been reduced from time to time by Steelsmith to about the sum of \$3,010.15, and which note was executed to said Oil Well Supply Company by Steelsmith to discharge his proportion of the indebtedness of said property to said company for oil well supplies purchased and used on the property in their operations; that by the acceptance of said note from Steelsmith in payment there was a novation of said indebtedness pro tanto, and the said supply company thereby relieved plaintiff from the payment of so much of said indebtedness, and that neither he nor his interests were longer liable therefor, but that Steelsmith and his interests in said property were alone bound for said debt, which made the amount as of the 1st of February, 1901, against Steelsmith the sum of about \$11,450.93; that during the time of the accumulation of said indebtedness against the interest of Steelsmith the defendant the Butler County National Bank had received the benefits and proceeds of the sale of the oils produced from the Friend Wagner lease, and defendant Braun had received the benefits and collected the proceeds from the T. J. Wagner lease, and no part thereof had gone to the costs of production, and plaintiff had been obliged to carry the burden of said indebtedness, except the debt due the said Oil Well Supply Company on said note.

The bill alleged the insolvency of Steelsmith, and the filing of his petition in bankruptcy, and inability to pay his debts, and plaintiff was obliged to manage and control said property to protect the same, and to incur and to pay the expenses of the operations thereon, and, in view of the fact that said interests of Steelsmith and Braun in said leaseholds had become doubtful security to him for the said indebtedness to him and advancements by him, he was entitled to have sequestered and held in the pipe line the oil produced from said property and run to the credit of said Steelsmith or the said Braun, and subjected to the payment of said indebtedness; that he was entitled in this court to have the business between him and Steelsmith, as said mining partners, finally wound up and settled, and to have the property sold and the debt against it and the advancements

made by him paid and discharged out of the interest of said Steelsmith therein. The bill prayed that the pipe line company be enjoined from delivering to Steelsmith, the Butler county National Bank, Wm. N. Miller, trustee, Sadie E. Braun, or to their agents, etc., any of the oil thereafter produced and run into the pipe line to the credit of either of said parties from either of said leaseholds, and for a final settlement in this cause of the accounts between plaintiff and Steelsmith, Pittsburg Refining Company, and Sadie E. Braun, pertaining to the operations and developments of said leaseholds; that he have a decree against Steelsmith, the refining company, and Braun for the advancements by him on account of the said operations on said property, and that the business of the mining partnership or partnerships be wound up and be sold, and the interests of Steelsmith, the refining company, and Braun in the proceeds thereof be subjected for the payment of said indebtedness incurred on behalf of Steelsmith's interest in said property, and after the payment thereof to the payment of the advancements made by plaintiff on account of Steelsmith and on account of Braun's interest; and that the defendants be enjoined and inhibited from in any way interfering with plaintiff in the management and operation of said property until the same should be sold and disposed of under decrees of the court; and for general relief.

The Oil Well Supply Company filed its answer, setting up its claim, on the 22d of October, 1901.

On the 2d day of January, 1902, the following consent decree was entered: "This day came Clinton D. Greenlee, by W. N. Miller, his attorney, and Amos Steelsmith, Sadie E. Braun, and the Butler County National Bank of Butler, Pa., by V. B. Archer, their attorney, and the controversy between the said complainant and the defendants Amos Steelsmith, Pittsburg Refining Company, Sadie E. Braun, and the Butler County National Bank having been settled and compromised out of court, according to an agreement in writing between the said Clinton D. Greenlee, the Pittsburg Refining Company, and Sadie E. Braun, a copy of which is filed with the papers of this cause, and by which the said Clinton D. Greenlee has purchased from the said Pittsburg Refining Company and Sadie E. Braun their respective interests in the Friend Wagner lease and the Thomas J. Wagner lease in the bill mentioned, at the price of \$17,500, proportioned between the properties according to the production of oil as follows: \$13,125 to the Friend Wagner lease and \$4,375 to the Thomas J. Wagner lease. And from said several sums of purchase money there is deducted the indebtedness due from each property to the said Clinton D. Greenlee for operating expenses as per statement in writing filed in this cause as follows: First, from the purchase money for the said Friend Wag-

ner lease the sum of \$7,987.54, leaving a balance of purchase money due to the Pittsburg Refining Company of \$5,045.34; second from the purchase money for the Thomas J. Wagner lease the sum of \$1,939.62, leaving a balance of purchase money due to the said Sadie E. Braun of \$2,435.38. And for which said balance of purchase money the said Clinton D. Greenlee has executed and delivered to the said Pittsburg Refining Company the note of the Greenlee Trading Company, Limited, dated December 6, 1901, payable on demand by the legal holder thereof after February 6, 1902, with certificates for 70 shares of preferred stock of the Greenlee Oil Company attached as collateral, and a like note of the Greenlee Trading Company, Limited, to the said Sadie E. Braun, dated December 6, 1901, for the balance due on the purchase money of the Thomas J. Wagner lease, payable on demand after February 6, 1902, with a certificate for 30 shares of preferred stock of the Greenlee Oil Company attached as collateral, and the said Pittsburg Refining Company and the said Sadie E. Braun have delivered to the said Clinton D. Greenlee the deeds for their several interests in the said leaseholds, by consent and agreement it is adjudged, ordered, and decreed that the said sale and transfer be confirmed. And by like consent and agreement of the parties it is further adjudged, ordered, and decreed that the injunction heretofore awarded in this cause be wholly dissolved, and that the Eureka Pipe Line Company do deliver to the Butler County National Bank and the said Sadie E. Braun the oil run into the pipe line to their credit, respectively, from the said Wagner leases prior to November 22, 1901, all oil run to their credit on and after that date to be delivered to said Greenlee. And it is further adjudged, ordered, and decreed that, in compliance with the contract aforesaid between the said Greenlee and the Pittsburg Refining Company and Sadie E. Braun, the note of the Greenlee Trading Company, Limited, of \$5,045.34 is to be taken and held by the Butler County National Bank, or sufficient of the proceeds thereof, to cover the indebtedness claimed against the said property and against said Greenlee and the said refining company and the said Steelsmith, amounting to \$3,281.06 and interest from November 24, 1901, until the question of the liability of the said Clinton D. Greenlee or the said property shall be finally determined in this cause and subject to the order of the court in relation thereto. And this cause is discontinued, except as to the matter of controversy between the said plaintiff and the defendants as to the claim of the Oil Well Supply Company as set forth in its answer in this cause, and the said leaseholds are wholly released from all claim or lien of any of the parties hereto heretofore existing therein. And as to the said claim of the Oil Well Supply Company this cause is continued for further hearing on the incoming testi-

mony which may be taken in said issue." Which decree was signed by the plaintiff, Greenlee, and the defendants Steelsmith, Braun, Butler County National Bank, and the Pittsburg Refining Company.

Depositions were taken on behalf of the plaintiff and of the defendant the Butler County National Bank, and filed in the cause. On the 22d day of February, 1907, the cause came on to be heard and the following decree was entered: "This cause came on this day to be heard upon the former orders and decrees, upon the consent decree entered in this cause on the 2d day of January, 1903, upon the bill, the separate answer of Sadie E. Braun, the separate answer of Oil Well Supply Company, the separate answer of Butler County National Bank, upon general replications to said answers, upon the provisions of said consent decree and the agreement therein referred to, by which sufficient funds arising from the sale of the interest of the Pittsburg Refining Company in the property in this cause mentioned were taken and held by the Butler County National Bank to cover the indebtedness claimed against said property and against said Greenlee and Pittsburg Refining Company, as set forth in said decree, until the question of the liability of said Greenlee or said property should be finally determined in this cause, and subject to the order of the court in relation thereto, upon the deposition of Louis Braun, taken by the Oil Well Supply Company, and the deposition of R. V. Ritts, taken by the Butler County National Bank, under the provisions of said decree, and the pleadings in this cause, and was argued by counsel. On consideration whereof, the court is of opinion, and doth adjudge, order, and decree, that the amount due and owing from the late partnership of Greenlee and Steelsmith to the said Oil Well Supply Company, including interest to this date (February 12, 1907), is four thousand and ninety-nine and  $\frac{22}{100}$  (\$4,099.32) dollars, and that the said property in said consent decree referred to as conveyed by the Pittsburg Refining Company to C. D. Greenlee was at the time of said sale and conveyance liable for said indebtedness as mentioned in said consent decree. It is therefore further adjudged, ordered, and decreed that the Butler County National Bank, out of the proceeds of the note for five thousand and forty-five and  $\frac{24}{100}$  (\$5,045.34) dollars in said consent decree mentioned, do pay to said Oil Well Supply Company the said sum of four thousand and ninety-nine and  $\frac{22}{100}$  (\$4,099.32) dollars, with interest thereon from the 13th day of February, 1907, until paid, and the costs herein expended by said Oil Well Supply Company. And, this cause being now fully determined, it is ordered to be left off the docket."

From such decree the defendant the Butler County National Bank appealed, and assigns four several causes of error as follows:

"First. The court erred in decreeing that there was due \$4,099.32 from the defendant Steelsmith to the plaintiff, Greenlee. Second. The court erred in decreeing that there was due the Oil Well Supply Company from the partnership of Greenlee and Steelsmith the sum of \$4,099.32. Third. The court erred in rendering a decree against the Butler County National Bank, a defendant, in favor of the Oil Well Supply Company, a codefendant, for the sum of \$4,099.32, with interest. Fourth. The court erred in entering and rendering a decree against your petitioner, the Butler County National Bank, in favor of the Oil Well Supply Company, for the sum of \$4,099.32, as both the Oil Well Supply Company and your petitioner were defendants to the bill instituted by Clinton D. Greenlee, when in fact there was no cross-bill or answer praying affirmative relief filed by the Oil Well Supply Company against its codefendant, your petitioner, or any issue whatever authorizing a decree against one codefendant in favor of another."

Appellant, by counsel, in its brief says, "For convenience we will consider these assignments practically together," and starts out with the proposition that the Oil Well Supply Company had no standing whatever in this cause, because, he says, at the date of the institution of this suit the plaintiff had no right to sell the leasehold premises as the property of a mining partnership for whatever amount of advances he might have made for the benefit of Greenlee and Steelsmith, for the reason that the property was no longer social assets; that at the beginning of the production of oil from the wells division orders were signed and filed with the pipe line company, and the oil produced thereafter was run to the individual credit of the parties entitled thereto—and cites *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777 (Syl., point 5), where it is held: "Partners have a lien on a social property for advances or balance due them, after the debts; but if they have divided the property or product of the business, giving each his share in severalty and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with 'division orders' in oil mining." Appellant's counsel clearly misapprehends the scope of this decision. The division orders for the separate delivery of the product of the leasehold divides nothing but the product. The equipment for its production is quite expensive, and remains the property of the mining partnership, and the expense of keeping the same in working order and adding to the facilities for production is very considerable, and all the appliances purchased and provided for that purpose are partnership property, and subject to the liens against it in favor of creditors or of the partner advancing moneys for the same, while the product itself is not subject to such lien after division orders are made.

It is not contended here by appellee that

he has any lien on the product which has been severed by the division orders, but upon the social property that has not been so divided. The language quoted by counsel for appellant from the opinion in the Neely Case from page 77 of 47 W. Va., page 830 of 34 S. E. (49 L. R. A. 468, 81 Am. St. Rep. 777), shows clearly that, if there was a mining partnership, the division orders did not divide the whole social assets, for there it is said: "Now these partners agreed to have division orders when they began business (that is, the pipe lines to give each certificate of his share of the oil committed to them, which was a product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction." The proceeding in that case was against the oil itself after orders of division which separated it from the social property. When Greenlee purchased these leasehold estates for \$17,500, he did not purchase the oil in the pipes, which had been severed from the social assets not divided and delivered in the pipe lines to the several parties entitled thereto; but he purchased the whole of the social assets, including the interest of those holding the division orders, which carried with it the productions thereafter.

It is contended by appellant that, if the leaseholds were social assets, the execution by Greenlee and Steel-smith of division orders was a release of Greenlee's lien. From what has been said it is clear that his lien was only released on the product from the time that it entered the pipe lines to the credit of the different parties entitled thereto, but remained in force as to the social assets not divided.

Counsel for appellant contends that there could be no decree in favor of the Oil Well Supply Company against its codefendant the Butler County National Bank, without filing its answer in the nature of a cross-bill and making the bank a party thereto, upon the doctrine that to authorize a decree between codefendants there must be pleadings upon which such decree can be predicated. We are unable to see that there was any issue between the Oil Well Supply Company and the Butler County National Bank. The Supply Company had filed its claim against the mining partnership of the plaintiff and Steel-smith and the Pittsburg Refining Company. The claim was well established, and, indeed, was not contested, as to its validity against the partnership; but the issue, and the only issue, was as to whether the note executed by Steel-smith (originally for \$4,000) to the supply company to discharge his proportion of the indebtedness of said property, and which had been reduced from time to time to \$3,010.15, had been accepted by the said Oil Well Supply Company in payment of said Steel-smith's proportion of said account,

or whether it was taken with the understanding that it should be applied as payment only when actually paid. At the time of the entering of the consent decree on the 2d day of January, 1902, this was the only issue left to be adjudicated, and the cause was by said decree discontinued, except as to that matter. "And as to the said claim of the Oil Well Supply Company this cause is continued for further hearing on the incoming testimony which may be taken in said issue." It will be observed that by the provisions of said consent decree the note of the Greenlee Trading Company, Limited, of \$5,045.34, was to be taken and held by the Butler County National Bank, or sufficient of the proceeds thereof, to cover the indebtedness claimed against the said property and against the said Greenlee and the said refining company and the said Steel-smith, amounting to \$3,281.06 and interest from November 24, 1901, until the question of the liability of the said Clinton D. Greenlee or the said property should be finally determined in the cause and subject to the order of the court in relation thereto.

It is true the Butler County National Bank afterwards, on the 23d of October, 1902, filed its answer, denying many allegations of the bill and seeking to raise issues which are inconsistent with the terms of said consent decree; denying, among other things, the right of plaintiff to have the business between himself and Steel-smith and said mining partners in the operation of said leaseholds finally wound up and settled; and denying his right to have the property sold and the debts against it and the advancements paid and discharged out of the interest of Steel-smith therein. And this, too, after the sale had been made of the property and provision for the payment of said advancements out of the proceeds, and the sale and transfer confirmed by the said consent decree signed by the Butler County National Bank and others. It is not competent for the Butler County National Bank, or any of the parties consenting to the decree, to raise an issue for readjudication which was settled by the decree. In 16 Cyc. 798, it is said: "Applying the rule against taking inconsistent positions, parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith to the prejudice, injury, or disadvantage of the party or the person setting up the estoppel." And authorities are there cited. The evidence afterwards taken on behalf of the supply company established the fact clearly that the note was taken, not as payment of Steel-smith's interest, but to be applied thereto when paid, thereby holding Greenlee, as well as the social property, liable for the same.

It further appears from the evidence of J. V. Ritts, president of the Butler County National Bank, and taken and filed in behalf



of said bank, that the note for \$5,045.34 and its interest was more than sufficient to pay the claim of the Oil Well Supply Company, which was \$3,281.06, with interest from November 24, 1901, and the balance due the Butler County National Bank, which, according to the testimony of Ritts, remaining unpaid on the notes held by it, aggregating \$65,000 and secured by the mortgage or trust deed, was about the sum of \$1,200 on the last unpaid note at the time the testimony of Ritts was taken in February, 1905. So that after the payment of the claim of the Oil Well Supply Company, and all that remained due and unpaid of the balance going to the Butler County National Bank, out of the \$5,045.34 note held by it for the purpose of satisfying the claim of the Oil Well Supply Company, when the liability of the plaintiff and the social property should be found to be liable therefor, there was a considerable sum left over. The Butler County National Bank, having been paid all that was secured to it by the deed of trust or mortgage, could have no further interest in the matter, except to account for such surplus arising from said note of \$5,045.34 and interest to the parties entitled thereto as remained in its hands after the payment of the claim of the Oil Well Supply Company and the balance of about \$1,200 due it on account of the deed of trust or mortgage securing the \$65,000 represented by the notes aggregating such amount. The appellant fails to show that it is in any manner aggrieved by the decree of February 22, 1907, but, on the contrary, shows by its own evidence that it had been paid in full all the claims it represents, and that a surplus remained in its hands after paying the Oil Well Supply Company's claim and all of its own claim. This being true, how can it maintain this appeal. "An appellate court will not reverse a decree at the instance of a party not prejudiced by it." *Handy v. Scott*, 26 W. Va. 710. And in *Clark v. Johnston*, 15 W. Va. 804, it is held: "It is not sufficient to reverse a decree that there is error in it. The error must be prejudicial to the appellant, or it will not be reversed on his application." In *Williamson v. Hays*, 25 W. Va. 609, it is decided that: "To entitle any person to obtain a writ of error or appeal from a judgment, he must be both a party to the case and be aggrieved by the judgment." And in *Miller v. Rose*, 21 W. Va. 291, it is held that: "The court must be affirmatively satisfied that there is error in the judgment of the court below to the prejudice of the plaintiff in error before it can reverse such judgment."

Counsel for appellant discusses other questions in his brief, as do also counsel for appellees, but notice of them here is rendered unnecessary; the record showing so plainly that the money left in the hands of the appellant for the payment of the Oil Well Supply Company's claim and the claim due ap-

pellant under the deed of trust or mortgage was more than sufficient therefor.

The appellant is not in any manner prejudiced or aggrieved by the decree of February 22, 1907, and the same must be affirmed.

# CENTRAL OF GEORGIA RY. CO. v. COOK & LOCKETT. (No. 653.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

## 1. CARRIERS—FREIGHT SHIPMENT—BILLS OF LADING—RECEIPT OF GOODS.

The issuing of a bill of lading by a carrier is only prima facie evidence of the receipt of the goods. If the bill of lading is issued prior to the time the goods are tendered to the carrier, it does not become effective until the goods are offered to the carrier in such a condition as that it should receive them.

## 2. SAME—FREIGHT OFFERED IN DAMAGED CAR.

Under the rules of the railroad commission, as well as by general law, no railroad company is required to accept for carriage any goods, unless they are tendered in such condition that the transportation thereof is safe and practicable. The tender of a car load of such commodities as, under the rules of the commission, are to be loaded by the shipper, is not a good tender if the car is unsafe.

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Cook & Lockett against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Cruger Westbrook and Wooten & Hofmayer, for plaintiff in error. Mann & Milner, for defendants in error.

RUSSELL, J. Cook & Lockett recovered a verdict for \$500 damages against the Central of Georgia Railway Company for the nondelivery of a car load of barrel staves. The railway company's motion for a new trial was overruled, and exception is taken to that judgment, as well as to certain anterior rulings, to which objections were preserved by exceptions pendente lite. It appears from the evidence that Cook & Lockett on October 6, 1906, obtained from an employé of the plaintiff in error, in the office of its agent at Albany, Ga., a bill of lading for the transportation of a car load of barrel staves from Albany to Century, Ga., a station six miles from Albany, on the line of its railroad. The bill of lading was of standard form. This car load of staves had been brought to Albany from Lockett's mill by the Georgia Northern Railroad, and at the time of the issuance of the bill of lading by the Central of Georgia Railway Company the car containing the staves was at the yard and in the possession of the Georgia Northern Railroad Company. Cook & Lockett had paid to the Georgia Northern the freight from Lockett's mill to Albany, and the Georgia Northern had issued a trackage order for the delivery of the car to the Central of

Georgia Railway. According to the evidence a trackage order is issued by a railroad company to its yardmaster to place a certain car on a siding or to deliver it to a connecting line. According to the evidence, Cook & Lockett being entitled to one "free movement" of the car after it arrived at its destination, the Georgia Northern was bound to deliver the car in question to the Central free of charge. The paid freight bill of the Georgia Northern was delivered to the agent of the Central at the time the bill of lading was issued, and the agent was informed by the shipper that the car was in the possession of the Georgia Northern, and an order had been issued for it to be delivered to the Central.

So far as appears from the evidence, neither the shipper nor the agent of the Central had any knowledge or intimation that the car in possession of the Georgia Northern was in any other than good condition for shipment, and the evidence of the defendant's agent that the plaintiff was informed by him at the time the bill of lading was issued that the car would go forward as soon as it was received from its connection is not controverted. In other words it is clear from the evidence that the car had not been accepted for shipment by the carrier at the time the bill of lading was issued. Evidence not disputed was introduced, showing the existence of a local custom at Albany, among the different railroads entering that city, under which, for the convenience of shippers, bills of lading are issued, even though the proposed shipment is in the possession of another railroad in the city, either upon proof that a trackage order has been issued by the delivering line upon whose tracks the car is supposed to be, or upon sufficient proof that a car has been ordered delivered to a receiving carrier. The existence of this custom is due to the fact that otherwise the shipper would have to go to the office of the receiving railroad perhaps more than once before the particular car for which he sought a bill of lading had passed inspection and had been delivered. It appears from the evidence that the car in question was several times shifted upon the track which was usually used for delivery by the Georgia Northern to the Central, and each time it was rejected by the inspector acting in behalf of the Central as being dangerous to life and property. The car was first marked or tagged as in bad order on October 4th, and it was not shifted to the delivery track until October 11th. At this time it had "condemnation" marked on it, and one end of the car was knocked out. After having been placed upon the transfer track on the 12th and 13th, and refused by the Central, it appears to have been repaired by the Georgia Northern so far as the end of the car was concerned; but when it was again shifted back on the transfer track on the 15th and 16th it was each time refused by the inspec-

tor because the car had been knocked off the center plate, and, according to the testimony of the inspector, was in a more dangerous condition than when refused before. The evidence that at no time when the car was tendered to the Central Railway would the carriage of the car have been safe to human life and property was undisputed. The car was never accepted by the joint inspector for carriage by the Central. It never left the Georgia Northern Railroad tracks or its possession until October 17th, when by the direction of the plaintiffs it was placed by the Georgia Northern on its dray track and unloaded by the plaintiffs themselves.

To rebut this testimony the plaintiffs introduced evidence that the agent of the railroad more than once admitted that the car had been received and would be forwarded by the Central Railway. The plaintiffs testified that they went a number of times to the freight office to find out about the car, and each time were assured that it would go forward by the next train. One of the plaintiffs testified that the agent in the freight office said that the car had been received and accepted, and would go forward by the next train. This statement was denied by the agent in question. The plaintiffs claim damages for the delay and failure to deliver caused by the defendant company's breach of its contract, consisting of the following items: That they lost 100 barrels of crude turpentine, worth \$500; that they were compelled to pay out to laborers, who were compelled to be idle by reason of the nondelivery of the staves, \$375; and for their expense in finally hauling the staves from Albany to Century \$16—making a total of \$881 of actual damages. The evidence disclosed that the still was closed for about six days and that the plaintiffs bought 315 beer barrels in Albany to replace the barrel staves, which it was estimated would make 450 barrels.

In our opinion the verdict in favor of the plaintiffs was unwarranted, and the court erred in not granting a new trial upon the defendant's motion. It would subserve no useful purpose to discuss serialim the very numerous exceptions contained in the motion for new trial. We may say, in passing, that none of the exceptions as to the amendments allowed by the court are meritorious. The greater number of the amendments offered were made in response to special demurrers, but the court did not err in allowing the amplification of the plaintiffs' petition, nor in allowing the damages claimed to be increased in the petition from \$500 to \$1,000.

The controlling question in the case is: Was there a delivery of the freight to the defendant carrier? We think the plaintiffs failed to show that the staves in question were ever accepted by the carrier for shipment; and, of course, that such was the case is an indispensable element in the case. It is true that a bill of lading in the standard form is introduced in evidence; but a bill of

lading is not a contract of carriage. It is only prima facie evidence of the receipt of the goods. The bill of lading is subject to explanation, and when it is brought in question it may be shown that the goods described therein were not in fact received by the carrier.

The evidence of the custom by which bills of lading are issued in Albany in advance of actual delivery is of comparative little importance, because the evidence is undisputed that the car in question was in fact never accepted for shipment by the Central of Georgia Railway Company, and was never in proper condition to be received by it. The refusal to accept the car in the condition in which it was shown by the undisputed testimony to have been was justified by rule 26 of the railroad commission, as follows: "No railroad company shall be required to accept for carriage any goods, unless the same shall be of such character and in such condition and so prepared for shipment as to render the transportation thereof reasonably safe and practicable." The courts take judicial cognizance of these rules. The evidence is undisputed that the condition of this car was such that its transportation was neither safe nor practicable. Had the shipment been less than a car load, the duty might have devolved upon the Central of Georgia to unload the staves from the unsuitable car; but under the rules of the railroad commission car load lots of barrel staves are to be loaded by the shipper, and therefore it was the duty either of the shippers themselves or of the Georgia Northern Railroad, and not the duty of the Central of Georgia, to have unloaded the contents of the wrecked car and to have loaded them into a safe car.

We bear in mind that there was an issue as to whether the shipper was aware of the custom, and as to whether the custom attempted to be shown was more than purely local. But, regardless of the issuance of the bill of lading, we think it clear that the railroad was not required, after it became aware of the condition of the car, to endanger life and property by attempting to transport it.

Judgment reversed.

#### HUNTER v. STATE. (No. 1,254.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

##### 1. CRIMINAL LAW—WEIGHT OF EVIDENCE—NEGATIVE AND POSITIVE TESTIMONY.

While "the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist because many witnesses, who had the same opportunity of observation, swear that they did not see or know of its having transpired," nevertheless the weight of the testimony as a whole is for the jury, and ordinarily they are not absolutely bound to accept positive in preference to negative testimony. *Innis v. State*, 42 Ga. 474.

##### 2. SAME—"NEGATIVE TESTIMONY."

When two persons have equal facilities for seeing or hearing a thing, and one swears that it occurred and the other that it did not,

the testimony of neither witness is negative, within the purview of the foregoing rule. *Civ. Code* 1895, § 5165.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, p. 4740.

##### 3. WEAPONS—CONCEALED WEAPONS—EVIDENCE.

The foregoing principles are applicable to the trial of a criminal case for the carrying of concealed weapons, where the witnesses for the state testify that the defendant's person was in their view, that she drew a pistol from under the cover of an apron she wore, and that it was hidden from view till she drew it, and the witnesses for the defendant testify that she had the pistol in her hand by her side, open to view, and not under the apron.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Jane Hunter was convicted of carrying a concealed weapon, and brings error. Affirmed.

J. C. Edwards, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

#### FAIN & STAMPS v. ENNIS. (No. 884.) (Court of Appeals of Georgia. Sept. 28, 1908.)

##### 1. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

To give in charge the law of implied warranty is not reversible error, where a purchaser relies on an express warranty which is merely coextensive with the warranty which the law implies.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, §§ 4219-4228.]

##### 2. WEIGHTS AND MEASURES—SWEET POTATOES—WEIGHT PER BUSHEL.

In the absence of an express agreement otherwise, the law fixes the weight of sweet potatoes at 55 pounds to the bushel.

##### 3. APPEAL AND ERROR—RULINGS ON EVIDENCE—SETTING OUT OBJECTIONS—NECESSITY.

Grounds of a motion for new trial complaining of errors in the admission or rejection of testimony, but which fail to set out the objections, if any, that were urged in the court below, will not be considered.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, § 2945.]

##### 4. SAME—HARMLESS ERROR—RULINGS ON EVIDENCE.

The minor errors in the admission or rejection of testimony do not warrant the reversal of the judgment sustaining the verdict of the jury.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, §§ 4153-4160, 4187-4193.]

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by J. H. Ennis against Fain & Stamps. Judgment for plaintiff, and defendants bring error. Affirmed.

Ennis sued Fain & Stamps for \$229.13, balance due for sweet potatoes which he had sold them. The defendants pleaded that the plaintiff sold the potatoes under an express

warranty that they were sound, yellow yam, sweet potatoes, when, as they contended, the potatoes were as a matter of fact very unsound and of a mixed variety. The evidence at the trial was very conflicting. The defendant's contention that the potatoes were not yellow yams was not borne out by the evidence; but there was evidence from which the jury could have inferred that the potatoes were not sound. The jury returned a verdict in favor of the plaintiff. The defendants' motion for a new trial was overruled, and they except.

Moore & Pomeroy, for plaintiffs in error.  
E. D. Thomas and Anderson, Felder, Rountree & Wilson, for defendant in error.

RUSSELL, J. (after stating the facts as above). 1. The controlling question in this case arises upon exceptions to the charge of the trial judge. The defense was the breach of an express warranty that the potatoes were sound. The judge charged the jury as follows on the subject of warranties: "Now the law presumes there is an implied warranty in the sale of all articles. There is an implied warranty that the goods sold are merchantable and reasonably suited to the use intended; and so that is an implied warranty that Ennis made, when he sold Fain & Stamps those potatoes, that they were merchantable and reasonably suited to the use intended. So, if you believe from the evidence in the case that they were merchantable and reasonably suited for the use intended at the time Ennis sold to Fain & Stamps, then you will find a verdict in his favor for what you think he is entitled to recover. If, on the contrary, you believe those goods were not reasonably suited to the use intended and not merchantable, and that they were rotten potatoes, and when he bought them that they were rotten potatoes, then you will find for the defendants, Fain & Stamps. While that implied warranty is on all goods sold, still that implied warranty does not prevail upon the natural decay of goods otherwise sound. \* \* \* If you believe those potatoes were sound at the time of sale, but still they had been treated in such a way and were in such a condition that they were not merchantable, not reasonably suited to the use intended, then you will find that way on that contention." At the conclusion of this charge the attorney for the defendants stated to the court: "We also contend there was an express warranty in the original transaction, in which the plaintiff warranted that they were sound and merchantable potatoes." Whereupon the court said: "It is the same thing I charged. If he did not make any warranty at all, the implied warranty would be that they are reasonably suited to the uses intended; and if he made an express contract it would be that they were reasonably suited to the use intended. So it is the same thing."

The express warranty on which the defend-

ants relied was that the potatoes were sound. This warranty was merely coextensive with the warranty which the law implied, and did not confer any greater rights on the purchaser than the law conferred without it. If Ennis had sold sweet potatoes to the defendants without any express warranty at all, the law would have implied a warranty that the potatoes were merchantable, reasonably suited to the uses intended, and that he knew of no latent defects undisclosed. Civ. Code 1895, § 8555. Sweet potatoes which are unsound are not merchantable, and would not be reasonably suited to the uses intended in the present case. In the last analysis, therefore, the law governing this transaction, while inaptly stated, was not incorrectly given in charge to the jury, though the judge labeled it implied warranty, instead of express warranty. The substance of the law is the guide for the jury. Its nomenclature may be disregarded. The error of the judge was therefore harmless.

The cases to which we are cited are not in point. They relate to cases in which the express and the implied warranty are not coextensive. See, however, *Crankshaw v. Schweizer Mfg. Co.*, 1 Ga. App. 363, 58 S. E. 222, and *Hawley Furnace Co. v. Van Winkle Mach. Works*, 4 Ga. App. 85, 60 S. E. 1008, which review and explain the rule intended to be laid down in *Johnson v. Latimer*, 71 Ga. 470.

The defense that the potatoes were not yellow yams is not supported by any evidence. The undisputed evidence as to this is that there were about 12,000 pounds of white or mixed potatoes in the two car loads, and that the parties had adjusted this by a reduction of 10 cents a bushel in the price.

2. The price at which the potatoes were sold was 60 cents a bushel. In calculating the amount of their verdict the jury allowed 55 pounds to a bushel. There is no evidence in the record of any agreement between the plaintiff and the defendant as to the number of pounds to a bushel governing this transaction. One of the witnesses stated in the course of his testimony that it required 60 pounds of these potatoes to make a bushel. He admitted, however, that he did not weigh the potatoes, or see them weighed, and therefore the statement was hearsay, and without probative value. *Moultrie Co. v. Driver Co.*, 122 Ga. 26, 49 S. E. 729; *Suttles v. Sewell*, 117 Ga. 216, 43 S. E. 486; *Equitable Mtg. Co. v. Watson*, 119 Ga. 282, 46 S. E. 440. In any event, in the absence of any agreement otherwise, the law declares the weight of sweet potatoes to be 55 pounds to the bushel. Pol. Code 1895, § 1634.

3. Some of the grounds of the motion for new trial complain of errors in ruling on the admission or exclusion of evidence. The fourth, eighth, and eleventh grounds do not state wherein the testimony was objectionable, or upon what grounds it was urged to the court below that the evidence should be

admitted or excluded. We are consequently without authority to consider these objections. *Maynard v. Interstate Bldg. & Loan Association*, 112 Ga. 443, 37 S. E. 741 (2); *Giles v. Vandiver*, 91 Ga. 193, 17 S. E. 115.

4. The record discloses a few minor errors in the admission and rejection of evidence, but none of them is, in our judgment, sufficiently grave to warrant the grant of a new trial.

Judgment affirmed.

**BRANNON & POTTS v. ATLANTA & W. P. R. CO. (No. 1,087.)**

(Court of Appeals of Georgia. Sept. 28, 1908.)

**CARRIERS—LIVE STOCK SHIPMENTS—ACTION FOR INJURIES.**

The allegations of the petition in connection with the provisions of the special contract made a part thereof show a good cause of action, and the court erred in sustaining a general demurrer and dismissing the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 953-955.]

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by Brannon & Potts against the Atlanta & West Point Railroad Company. From a judgment sustaining a demurrer to the petition, plaintiffs bring error. Reversed.

Brannon & Potts brought suit against the Atlanta & West Point Railroad Company to recover \$202.50, the value of a mule which they alleged was shipped in company with 21 other mules and 2 horses by them from Atlanta to Moreland, Ga. It was alleged that the stock when delivered to the railroad company in Atlanta was in good condition and order, and that the company agreed in consideration of a freight rate to safely transport and deliver all of said animals to the plaintiffs at Moreland, Ga., the shipment of said stock being under a special contract made by the plaintiffs with the defendant and attached to the petition, and that the company violated its contract of shipment and was negligent in transporting and undertaking to deliver the animals to the plaintiffs at Moreland, Ga., in the following particulars: "When the car containing said animals arrived at Moreland, Ga., defendant company had no proper or suitable place or means for unloading said animals from said car at said point, and undertook to unload said animals from said car onto the merchandise platform of its depot at said point, and while defendant company was thus unloading said animals one of said mules fell on and from said platform, thus breaking one of its legs, and thus rendering said mule useless and worthless, and wholly destroying its value; that the company failed and neglected to safely deliver said mule to your petitioners at Moreland, Ga., and made no delivery of said mule to your petitioners at

said place at all, and said mule was never received by your petitioners at said point, but was kept and retained by defendant company." By an amendment it was alleged that when the car in which the live stock was loaded arrived at Moreland, Ga., "the said platform was wet and slick, which was unknown to plaintiffs when said stock was shipped, and defendant was negligent in not placing sawdust, gravel, or some substance on said platform to prevent said stock from slipping or falling thereon. The said mule slipped and fell on account of said improper means afforded by defendant for unloading said stock and the wet and slick condition of said platform." The defendant filed a general and special demurrer to the petition, and the court sustained the general demurrer and dismissed the petition; and error is assigned on this judgment.

W. C. Wright, for plaintiffs in error. Dorsey, Brewster, Howell & Heyman, H. A. Hall, and Lamar Rucker, for defendant in error.

HILL, C. J. (after stating the facts as above). We think the allegations of the petition show a good cause of action against the carrier. A general allegation that the carrier had received the shipment in good order and did not transport it safely, but delivered it to the consignee in a damaged condition, would have been sufficient to put the carrier upon its defense, without any specific allegations of particular acts of negligence. *L. & N. R. Co. v. Warfield & Lee*, 129 Ga. 473, 59 S. E. 234. The plaintiffs, however, set forth as a part of their petition the special contract made with the shipper under which the live stock was transported, and allege that the carrier violated the terms of this contract in certain particulars; and it is insisted in support of the demurrer filed by the defendant that the allegations of negligence, taken in connection with the terms and conditions of this special contract, show that the carrier is not liable for the alleged damage to the mule. It is well settled that the carrier by special contract made with the shipper can limit or qualify the liability which the law imposes upon it; but this right does not go to the extent of exempting it from the result of its own negligence. *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750; *Central of Ga. Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 110 Am. St. Rep. 170, 4 L. R. A. (N. S.) 898. And the contract in this case does not attempt to do so; for it expressly stipulates that the carrier is liable for loss or damage to said animals resulting from the negligence of its agents or servants. Under the law it is the duty of a carrier of live stock to provide safe and proper facilities and a safe and proper place for unloading the stock from its cars at the point of destination, and the carrier is liable for injuries sustained by the animals while being unloaded in consequence of insufficient facili-

ties used or furnished by it for unloading stock. 5 Amer. & Eng. Enc. of Law (2d Ed.) p. 449. In *East Tennessee, Virginia & Georgia Ry. Co. v. Hermann Brothers*, 92 Ga. 384, 17 S. E. 344, the Supreme Court says: "Even if a defect in a platform from which a railroad company is loading a horse upon a car would, under any circumstances, excuse the company for injuring the horse by reason of such defect, it certainly would not do so in the absence of full diligence to discover the defect before exposing the horse to the risk of injury."

Now, the allegations of the petition on this point are that the defendant company had no proper or suitable place or means for unloading animals from the car at Moreland, the point of destination, and undertook to unload the animals from the car on the merchandise platform of its depot, and while it was thus unloading the animals one of the mules fell on and from the platform, breaking one of its legs and wholly destroying its value; and by an amendment it was alleged that the platform was wet and slick, which condition was unknown to the plaintiffs when the stock was shipped, and that the defendant was negligent in not placing sawdust, or gravel, or some substance on the platform to prevent the stock from slipping or falling thereon, and that the mule slipped and fell on account of the improper means afforded by the defendant for unloading stock and the wet and slick condition of the platform. To meet these allegations of negligence it is said that the contract in this case provides that the shipper shall unload the stock, and that, if the carrier furnished any one to assist in so doing, he should be deemed an employé of the shipper. We do not think it makes any difference whether the shipper or the carrier was to unload the stock. In either event it was the duty of the railroad company to have a safe place at which to unload the stock, whether the unloading was done by the defendant or by the shipper, unless the unsafe condition of the place was known to the shipper and he nevertheless undertook to unload his stock at that place, taking the risk of their being injured on account of its unsafe condition. But the allegations of the petition on this point are that the railroad company undertook to unload the stock itself, entirely through its own agents, and while thus unloading them onto the merchandise platform of its depot in its unsafe condition, which unsafe condition was unknown to the plaintiffs, the mule in question fell and broke its leg.

It is also insisted in behalf of the defendant that under the contract its duty in reference to transporting and delivering the stock ceased altogether after the stock had been delivered to the consignee. This would be true; but the allegation is that the mule in question was never delivered to the consignee by the defendant, but, on the contrary, was kept and killed by the defendant

on account of its worthless condition, caused by the injury received in unloading it from the car by the agents of the defendant. Notwithstanding the special contract limiting the liability of the carrier, where the stock was injured in the possession of the carrier, the law would raise a presumption of negligence which it would be incumbent upon the carrier to rebut by proof, showing the exercise of that degree of diligence required by the contract. *Georgia Southern & Fla. Ry. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 732.

Assuming the truth of the allegations of the petition in this case in connection with the contract, which was made a part thereof, we think liability would be the legal result, and that therefore the court erred in sustaining the general demurrer and dismissing the petition. *Cooper v. Raleigh, etc., Ry. Co.*, 110 Ga. 659, 36 S. E. 240.

Judgment reversed.

### PAYTON v. GULF LINE RY. CO. (No. 1,255.)

(Court of Appeals of Georgia. Sept. 28, 1906.)

#### 1. CARRIERS—TRANSPORTATION OF PASSENGERS.

A railway company, which has sold a passenger a ticket for transportation on a certain train, commits a breach of public duty toward him, as well as a violation of its contract, by causing the train to leave from the station yards without coming to the depot, where it is accustomed to receive passengers into the train, and without giving the passenger a reasonable opportunity to get aboard.

#### 2. ACTION—NATURE AND FORM—PLEADING—PETITION—CONSTRUCTION.

A petition, in which it is uncertain, from the allegations made, whether it is brought *ex contractu* or *ex delicto*, will, in the absence of a timely special demurrer pointing out the defect, be given, as to this matter, that construction most favorable to the upholding of the plaintiff's full case as laid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 175.]

(Syllabus by the Court.)

Error from City Court of Ashburn; D. B. Nicholson, Judge.

Action by Claude Payton against the Gulf Line Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Payton sued the railway company, in substance alleging that at Ashburn, Ga., on a day named, he went to the depot of the defendant company, from which its passenger trains customarily left, and bought a ticket from Sylvester, Ga.; that this was about 20 minutes before the time the train was scheduled to leave; that he waited about an hour, and discovered that the train had gone out on its trip, leaving from the yards, instead of from the depot; that the quickest, nearest, and best way for him to get to Sylvester was to hire a horse and buggy and drive through from Ashburn to Sylvester, a distance of about 20 miles; that he had to pay \$5 for this transportation, and lost a half

day's time, of the value of \$20; that the conductor of the train had been informed by the plaintiff that he expected to go on that train, and he caused the train to leave him purposefully. The plaintiff asked for \$200 damages, actual and punitive. The defendant demurred generally to the petition, on the ground that it set out no cause of action and that the damages claimed were too remote and contingent. The court sustained the demurrer and dismissed the action.

J. A. Comer and Claude Payton, for plaintiff in error. Perry & Williamson, for defendant in error.

POWELL, J. (after stating the facts as above). 1. The petition sets forth a good cause of action as to the actual damages sustained, whether it sounds in contract or in tort. A railroad company, which has made a contract of transportation with a proposed passenger, and then without notice causes its train to leave without coming by the place at which it is accustomed to receive passengers, and without giving the proposed passenger a chance to get aboard, not only breaks its contract with him, but also violates a public duty toward him. *Savannah R. Co. v. Bonaud*, 58 Ga. 180; *Durden v. So. Ry. Co.*, 2 Ga. App. 66, 58 S. E. 299; *Perry v. Central Railroad*, 66 Ga. 746 (1). The measure of damages in such cases is fully set forth in *Central Railroad v. Combs*, 70 Ga. 533, 43 Am. Rep. 582.

2. If the suit were construed to be an action *ex contractu*, punitive damages would not be recoverable, and all claim as to them should be stricken from the petition (*Ford v. Fargason*, 120 Ga. 706, 43 S. E. 180); but the fact that a petition prays for too much does not render it subject to general demurrer (*Pierce v. Middle Ga. Land Co.*, 131 Ga. 99, 61 S. E. 1114; *Kupferman v. McGehee*, 63 Ga. 250). However, the allegations leaving it uncertain as to whether the suit is brought on the breach of the contract or for the special damages arising from the public wrong, and this formal defect not having been complained of by special demurrer, the petition will be given that construction most favorable to the assertion of a cause of action in plaintiff's favor, and will be held in the present case to be an action *ex delicto*. *Lytle v. So. Ry. Co.*, 3 Ga. App. 221, 59 S. E. 595, and citations; *Jenkins v. Seaboard Ry.*, 3 Ga. App. 381, 59 S. E. 1120; *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750.

The court erred in sustaining the demurrer. Judgment reversed.

THOMASON et al. v. KEENEY. (No. 956.) (Court of Appeals of Georgia. Sept. 23, 1908.)

1. BONDS—ACTIONS—PETITION—SUFFICIENCY.

A petition in a suit on a contractor's bond, executed as a part of the contract and for the

faithful performance thereof, which sets forth in full the contract and bond, and alleges the specific breaches of the contract resulting in damages to the plaintiff, and giving the items of damages claimed, and containing allegations that the plaintiff obligee fully complied with all the terms and conditions of the bond, is good as against a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, §§ 157-179.]

2. SAME—GENERAL ALLEGATION OF PERFORMANCE—NECESSITY.

Where the facts recited in the declaration show performance on the part of the plaintiff as obligee in a bond of all its terms and conditions, a general allegation of performance is unnecessary. 1 *Chitty on Pleading*, 535; *Gould on Pleading*, § 13.

3. SAME—CONSTRUCTION—QUESTIONS FOR JURY.

A requirement in a contractor's bond that the obligee shall give immediate notice to the surety of any default by the contractor is equivalent to a requirement of reasonable notice, and what is reasonable notice is in each case a question of fact for the jury. *Killian v. Georgia R. Co.*, 97 Ga. 728, 25 S. E. 384; *Atlantic Compress Co. v. Young*, 118 Ga. 868, 45 S. E. 877; *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379, 34 South. 933; 21 Cyc. pp. 1733, 1734, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 443.]

4. SAME.

Where a contractor's bond provided that "if the principals shall voluntarily abandon said contract, or be lawfully compelled by the obligee to cease operations thereunder by reason of their nonperformance of any of its terms or conditions, then the surety shall have the right, in its option, to assume the said contract and to sublet or complete the same," a reasonable time should be given to the surety, after the default of the contractor, in which to exercise such option. What would be a reasonable time is a question to be determined by the jury under the facts and circumstances of each particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 388, 443.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between J. A. Thomason and others and H. G. Keeney. From the judgment, Thomason and others bring error. Affirmed.

Dodd & Dodd, for plaintiffs in error. E. M. & G. F. Mitchell, for defendant in error.

HILL, C. J. Judgment affirmed.

TAYLOR v. VIRGINIA-CAROLINA CHEMICAL CO.

VIRGINIA-CAROLINA CHEMICAL CO. v. TAYLOR.

(Nos. 809, 810.)

(Court of Appeals of Georgia. Sept. 23, 1908.)

MASTER AND SERVANT—INJURY TO SERVANT—DANGEROUS PREMISES.

In an action by a servant against a master for personal injuries received through a dangerous condition in the place of employment, the petition should make it appear that the servant had neither actual nor constructive knowl-

edge of the thing complained of. "As to this the allegation that the servant 'did not know' of a defect is a statement of fact, and is sufficient as alleging actual lack of knowledge. Freedom from implied knowledge can be alleged in the form of a legal conclusion only when the facts set forth show such a state of circumstances as to relieve the plaintiff from such an imputation; otherwise, the court will disregard the legal conclusion and give judgment on the facts actually stated."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 848.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by B. F. Taylor against the Virginia-Carolina Chemical Company. From an order granting a nonsuit, plaintiff brings error; and from orders overruling demurrers to plaintiff's petition, defendant assigns cross-error. Judgment reversed on cross-bill, and main bill of exceptions dismissed.

Feagin & Urquhart and J. E. Hall, for plaintiff in error. N. E. & W. A. Harris, for defendant in error.

POWELL, J. The main bill complains of the granting of a nonsuit; the cross-bill of the overruling of demurrers, general and special, to the plaintiff's petition. The cross-bill, containing an initial and controlling question, must, under the established rule, be first decided.

There was no error in overruling the general demurrer, nor the special demurrers, excepting the one about to be noted. The plaintiff alleged that while making his rounds as a watchman in the defendant's plant he stepped upon some sulphuric acid negligently left on the floor in the path he was expected to walk, and he fell and received severe burns. The only allegation as to the plaintiff's lack of knowledge as to the condition of the floor is contained in the following words: "Petitioner says that he did not know of this fact, could not have known of it by the exercise of ordinary care, and did not have equal means with those of the master for knowing the fact." The petition discloses no reason why the plaintiff could not see the acid on the floor and in his pathway. The facts alleged do not disclose any inferential reason why the danger was not obvious to him. The extract from the case of *Cedartown Cotton Co. v. Miles*, 2 Ga. App. 82, 58 S. E. 289, quoted in the headnote, is directly in point. The present petition differs from the one under review in the case of *Southern States Cement Co. v. Helms*, 2 Ga. App. 314, 58 S. E. 524, in that the circumstances there alleged inferentially negated a lack of knowledge on the servant's part, and the special demurrer there was itself imperfect. The plaintiff's testimony explained how it happened that he did not see the acid or know of it; but his pleading did not. The special demurrer to this deficiency in the petition should have been sus-

tained and the case will therefore be reversed on the cross-bill.

Having reversed the case on the cross-bill on a ruling on a demurrer, it follows that the main bill must be dismissed; and further discussion would be mere obiter. *General Supply Co. v. Lawton*, 131 Ga. —, 62 S. E. 294. We have previously commented on the apparent hardship which the rule sometimes works; but it is the rule.

Judgment reversed on the cross-bill of exceptions. Main bill of exceptions dismissed.

## ORR STATIONERY CO. v. DR. BELL & LEE DRUG CO. (No. 693.)

(Court of Appeals of Georgia. Sept. 28, 1908.)  
PARTIES — MISNOMER — AMENDMENT OF PETITION.

All misnomers in pleadings being amendable instantler, a suit by the Orr "Shoe" Company against the Dr. Bell & Lee "Shoe" Company on an account, made a part of the petition, which shows that the real plaintiff was the Orr "Stationery" Company and the real defendant the Dr. Bell & Lee "Drug" Company, is amendable by striking the word "Shoe" from the petition and inserting in lieu thereof the words "Stationery" and "Drug," as descriptive of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 164.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by the Orr Stationery Company against Dr. Bell & Lee Drug Company. Judgment for defendant, and plaintiff brings error. Reversed.

A suit on an account was brought, in which the petition described the plaintiff as the Orr "Shoe" Company, and in one paragraph described the defendant as the Dr. Bell & Lee "Shoe" Company, a firm composed of P. E. Bell and E. E. Lee, though in other paragraphs of the petition the defendant was described as Dr. Bell & Lee "Drug" Company, composed of the same persons. As a part of the petition the account, which was the subject-matter of the suit, was stated to be the indebtedness of the Dr. Bell & Lee "Drug" Company to the Orr "Stationery" Company. The account was itemized, showing articles of stationery sold by the Orr Stationery Company, of Atlanta, to the Dr. Bell & Lee Drug Company, of Sylvester, and this bill of particulars was sworn to by Chas. A. H. Orr, "of the firm of Orr Stationery Company." Process was against the Dr. Bell & Lee Drug Company, and the partners thereof, and service was made accordingly. The petition, considered as a whole, left no room to doubt that the use of the word "Shoe" in the petition, descriptive of plaintiff and of defendant, was a palpable misnomer or clerical mistake. When the case was called the plaintiff offered an amendment "striking from the second line of the introductory of the petition" the word "Shoe," and inserting in lieu thereof the word



"Stationery," so that the misnomer in stating the name of the plaintiff should be corrected by changing the name "Orr Shoe Company" to that of "Orr Stationery Company," and also striking from the petition the word "Shoe" and inserting in lieu thereof the word "Drug," so as to correct the misnomer in stating the name of defendant firm, by changing the name from "Dr. Bell & Lee Shoe Company" to that of "Dr. Bell & Lee Drug Company." In support of the amendment the affidavit of the attorney who prepared the petition was introduced without objection, reciting that the use of the word "Shoe," descriptive of the plaintiff and of the defendant, was an inadvertent misnomer, and that the amendment gave the correct names of both plaintiff and defendant, and that they were the names intended to be used by the attorney in drawing the petition, and that the amendment was for the purpose of correcting the misnomer and giving the correct names of both plaintiff and defendant, as was intended by the original petition, and was not a scheme to substitute new parties. This amendment was objected to by the defendant, and the court sustained the objection, and on demurrer dismissed the petition. The exception to this ruling constitutes the only material error assigned.

Polhill & Foy, for plaintiff in error. Payton & Hay, for defendant in error.

HILL, C. J. (after stating the facts as above). The judgment of the court refusing to allow the amendment to the petition was erroneous. The suit was on an account, which was a part of the petition, and this account clearly established the fact that the real plaintiff and the intended plaintiff was not the Orr "Shoe" Company, but the Orr "Stationery" Company, and that the real and intended defendant was not the Dr. Bell & Lee "Shoe" Company, but was the Dr. Bell & Lee "Drug" Company. The use of the word "Shoe," therefore, in the introductory part of the pleading, was a manifest misnomer, the unintentional adding of a wrong word as a part of the names of both plaintiff and defendant, and is equivalent to giving a wrong initial or Christian name in pleading. This misnomer could have been properly corrected instantan on motion of the plaintiff. The authority for this ruling is to be found in Civ. Code 1895, § 5102, which, in harmony with the practical purpose of legal investigation, sweeps away all such technical quibbles in pleadings by declaring that "all misnomers, whether in the Christian name or surname, made in writs, petitions, bills, or other judicial proceedings on the civil side of the court, shall, on motion, be amended and corrected instantan, without working unnecessary delay to the party making the same." The misnomer in the present case, when considered in connection with the bill of particulars, was slight, and could not pos-

sibly have been misleading. Its correction by the plaintiff could certainly do no harm to the defendant. The defendant knew who the real creditor was, if any, and it was unnecessary and unjust that the real creditor should have been delayed in the collection of his debt by a misnomer which was patent to the debtor.

It will be noted that the section of the Code, supra, does not provide a remedy only for the instantaneous correction of slight misnomers in pleading, but declares that "all misnomers" in civil pleading are amendable; and in the case of *Murphy v. Peabody*, 63 Ga. 524, Justice Bleckley states that no case of misnomer is "too desperate to be healed." "Certainly it is a wide miss to write 'George' Foster when the draftsman means 'Charles J.'; but such a blunder is only a misnomer and the remedy is easy and instantaneous. The rule of amendment is as broad as the doctrine of universal salvation." This liberal, practical, and common-sense enunciation of the great jurist has been uniformly followed by the Supreme Court, and all such frivolous tactics of obstruction consigned to well-merited desuetude. *Carey v. Cranston*, 99 Ga. 77, 24 S. E. 869; *Maddox v. Central of Ga. Ry. Co.*, 110 Ga. 301, 34 S. E. 1036; *Jarrett v. City Electric & Ry. Co.*, 120 Ga. 472, 47 S. E. 927.

The foregoing ruling makes it unnecessary to pass upon any of the other assignments of error, or upon the motion to dismiss the writ of error, as all the other assignments and the motion to dismiss are based upon the assumed correctness of the judgment refusing to allow the amendment in question.

Judgment reversed.

#### SMITH & SIMPSON LUMBER CO. v. LOUISVILLE & N. R. CO. et al. (No. 872.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

#### JUSTICES OF THE PEACE — JURISDICTION — BREACH OF PUBLIC DUTY.

The allegations of the petition showing a suit to recover damages for breach of a public duty, the justice court was without jurisdiction. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Smith & Simpson Lumber Company against the Louisville & Nashville Railroad Company and others. Judgment for defendants before a justice. From a judgment overruling a certiorari, plaintiff brings error. Affirmed.

The Smith & Simpson Lumber Company brought suit in a justice's court against the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, lessees operating the Georgia Railroad, to recover the sum of \$11 "for breach of contract." The plaintiffs allege in their petition that on February 4, 1907, they shipped over

defendant's line one car load of lumber for delivery at Atlanta, Ga., for which shipment the regular charges of transportation were paid; that the car of lumber arrived in Atlanta over the Georgia Railroad on February 20, 1907, and that on said last date petitioners directed the Georgia Railroad to deliver the car of lumber to the Central of Georgia Railroad, a connecting line, for delivery to the consignee; that the delivery of the car load of lumber as directed by petitioners was not made to the Central of Georgia Railroad until March 9, 1907, a period of 11 days, excluding all free time allowed by law and the railroad commission; that storage rule 13 of the Georgia railroad commission required that all such deliveries shall be made within 24 hours after directions for delivery have been made, and provides that upon a violation of said rule the railroad company at fault shall pay the consignee \$1 per day per car for each day of the continued infraction of the rule; and it is alleged that the delay of the Georgia Railroad in delivering the car of lumber to the Central of Georgia Railroad constituted a breach by the defendants of their contract to transport and deliver within due time, for which breach of contract petitioners were damaged in the sum of \$11, "the measure of damage provided by the rule of the railroad commission and by law." It is further alleged that on March 12, 1907, a written demand was made upon the defendants for payment of the claim of damages, and, the damages not having been paid, the defendants were duly cited to appear before the railroad commission of Georgia to answer said claim for damages, and that the railroad commission, after considering the case, certified that sufficient cause had not been shown to relieve the Georgia Railroad Company from the penalty of said claim. The defendants filed in the justice's court a plea to the jurisdiction on the ground that the suit was one to recover a penalty or liquidated damages prescribed by the railroad commission for a breach of public duty. The justice sustained the plea and dismissed the suit. Whereupon the plaintiffs presented to the judge of the superior court a petition for certiorari. The writ was sanctioned, but at the hearing the certiorari was overruled, and on this judgment error is assigned.

Moore & Pomeroy and W. W. Hood, for plaintiff in error. Philip H. Alston, for defendants in error.

HILL, C. J. (after stating the facts as above). The plaintiffs denominate the suit one for damages for breach of contract; but the allegations clearly show that the real character of the suit is one for damages arising from a breach of a public duty imposed upon the defendants by a rule of the railroad commission, and to recover the amount of damages fixed by the commission for the violation of the rule. The only measure of damages set out is that fixed by the railroad com-

mission for the violation of its rule. It is an elementary principle that the nature of an action is to be determined by its allegations, and not by the nomenclature of the plaintiff. Following the decision of this court in the case of Pennington v. Douglas, Augusta & Gulf Ry. Co., 3 Ga. App. 665, 60 S. E. 485, we think the suit is clearly one for damages resulting from a breach of a public duty by the defendants. See, also, the case of A., K. & N. Ry. Co. v. Shippen, 126 Ga. 784, 55 S. E. 1031. Justice courts in this state have no jurisdiction of this class of cases. Civ. Code 1895, § 4068. It therefore follows that the judgment overruling the certiorari must be affirmed. Savannah, Florida & Western Railway Co. v. Snider, 1 Ga. App. 14, 57 S. E. 898; Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 S. E. 517; A., K. & N. Railway Co. v. Shippen, supra.

Judgment affirmed.

#### ZUBER v. CENTRAL OF GEORGIA RY. CO. (No. 873.)

(Court of Appeals of Georgia. Sept. 28, 1908.)  
JUSTICES OF THE PEACE—JURISDICTION.

This case is controlled by the decision of this court this day rendered in the case of Smith & Simpson Lumber Company v. Louisville & Nashville Railroad Company (No. 872) 62 S. E. 472.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. W. Zuber against the Central of Georgia Railway Company. Judgment for defendant before a justice. From an order overruling certiorari, plaintiff brings error. Affirmed.

Moore & Pomeroy and W. W. Hood, for plaintiff in error. Lamar Rucker, for defendant in error.

HILL, C. J. Judgment affirmed.

#### DE LOACH & CO. v. ÆTNA INS. CO. (No. 1,078.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

1. INSURANCE—POLICIES—CONDITIONS—ADDITIONAL INSURANCE.

Where an insurance company issues a policy of fire insurance, and by indorsement thereon permits other insurance in a specified amount, and afterwards itself issues another policy in favor of the same person on the same risk, and grants permission for a different amount of additional concurrent insurance, and each policy contains the usual provision in present general use against additional insurance unless specially permitted, the insured cannot, without avoiding the policies, procure a total insurance in excess of the largest amount permitted under either of them. The permits are not cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 871.]

Russell, J., dissenting.

(Syllabus by the Court.)

## 2. INSURANCE—"OTHER INSURANCE."

The term "other insurance," used in an indorsement on a fire policy, means insurance in addition to that effected by the policy itself.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5102-5104; vol. 8, p. 7743.]

## 3. WORDS AND PHRASES—"OTHER."

The natural, usual, and normal use of the word "other" is to indicate a differing from or an addition to the thing or things immediately in contemplation.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action by De Loach & Co. against the Aetna Insurance Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. T. Burkhalter and Hines & Jordan, for plaintiffs in error. King, Spalding & Little and W. G. Warnell, for defendant in error.

POWELL, J. De Loach & Co. sued the Aetna Insurance Company on two policies of fire insurance, one for \$1,500, dated January 23, 1905, and the other for \$500, dated February 4, 1905. The defendant filed an answer, setting up that in each of the policies sued upon it was stipulated that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy"; that by the policy sued on, dated January 23, 1905, it is stipulated in writing that "permission is granted for \$1,500 other insurance, warranted concurrent herewith"; that on February 4, 1905, plaintiffs took out a policy for \$500 in the same company, and on February 24, 1905, a policy for \$1,200 in the Insurance Company of North America, thereby creating \$1,700 additional insurance upon the property so insured, being \$200 in excess of the amount for which permission was given, whereby this policy was void. The defendant further pleaded that by its policy of February 4th permission was given for \$2,000 other insurance, warranted concurrent therewith, and that at the time this permission was given plaintiffs had in existence \$1,500 other insurance, by the policy sued on dated January 23d; that under the permission, therefore, for \$2,000 other concurrent insurance, plaintiffs could take out only \$500 in addition to these two policies; but they afterwards, without any further or other permission, took out the policy for \$1,200 in the Insurance Company of North America, thereby causing to be written upon said property \$2,700 of insurance other than said \$1,500 allowed by the policy of February 4th, being an excess of \$700, whereby this policy of February 4th became void. On the trial of the case the facts set up in the defendant's answer as to the insurance carried on the property appeared from the plaintiffs' evi-

dence. According to his testimony the value of his stock of goods was about \$4,000. The court on motion awarded a nonsuit.

The plaintiffs contend that the two indorsements on the policies, taken in connection with the whole transaction, were adequate to authorize a total concurrent insurance of not less than \$3,500, and that the aggregate of the policies procured was only \$3,200. Let us see if this contention can be sustained. The meaning of the term "other insurance," as it appears in the indorsement on the first policy, is easy of ascertainment. The insured was then carrying only the \$1,500 provided for by that policy, and the other insurance permitted must have meant insurance in addition to that effected by the policy itself. Ga. Home Ins. Co. v. Campbell, 102 Ga. 107, 29 S. E. 148. The company thus formally evinced a willingness to carry the risk, provided the hazard was not increased by the insured's obtaining more than \$3,000 total insurance on the property. When a few days later the company itself wrote the second policy, by which it undertook to carry \$500 of this \$1,500 other insurance permitted by the first policy, it was necessary, in order that this policy should be formally complete, that something should be said as to the first policy; for it was one of the general provisions contained in each policy that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance" covering the same property. It is true that the law would have estopped the company from insisting upon this provision as against its own prior policy; but this did not relieve from the necessity or the prudence of an express statement of the waiver which the law would have raised by implication, so far as the formal perfection and completeness of the policy as expressing the full and actual contract between the parties is concerned.

This being the situation, what was done? The insurance company, after attaching to the policy form a schedule showing an insurance thereunder of \$500 on the stock of goods in question, added the words: "Permission granted for \$2,000 other insurance warranted concurrent herewith." Stress again falls upon the expression "other insurance." Other than what? The natural, usual, and normal use of the word "other" is to indicate a differing from or an addition to the thing or things immediately in contemplation. Again we quote the language of Justice Lumpkin in the Campbell Case, 102 Ga. 107, 29 S. E. 148: "The words 'other insurance,' as here used, must have meant insurance in addition to that effected by the policy itself, or which was allowable under its terms." Neither under the policy itself nor by any of its terms, except this very indorsement, was any insurance other than this \$500 effected or allowed. No other mention had been made of the prior policy. Construed by its own terms, no rea-

reasonable intendment can be given to the second policy, as indorsed, other than that it was the intention of the parties to limit the total concurrent insurance to \$2,500.

We are not willing to say, however, that in determining the meaning of this second policy all sight is to be lost of the prior contract existing between the same parties as to the same subject-matter. It may be that the terms of each would so influence the other that the insured might have taken a total insurance of \$3,000 without rendering either policy void. As to this we do not say, for it is not before us. But we are willing to say that where there are two policies written by the same insurer in favor of the same person on the same property, and they contain the provision in present general use against unpermitted additional insurance, the insured cannot, without avoiding the policies, procure a total insurance in excess of the largest sum permitted under either of them. We concede that, if an insurer employs in his contract ambiguous language, he is to suffer to the extent that as between two reasonable constructions that is to be adopted which is most favorable to the insured. In our opinion the language here used is not capable of any reasonable construction other than the one here given. We do not think that either party to the contract thought that the company was expressing permission for the insured to procure \$4,000 insurance—that is, \$2,000 in addition to both the policies—on a stock of goods worth according to the plaintiffs' highest claim only about that sum. There is nothing to indicate an intention that the permissions were to be cumulative.

Judgment affirmed.

RUSSELL, J., dissents.

# MAYOR, ETC., OF CITY OF BRUNSWICK v. ÆTNA INDEMNITY CO. (No. 960.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

## 1. DAMAGES—LIQUIDATED DAMAGES AND PENALTIES—CONSTRUCTION OF STIPULATIONS.

Prima facie the amount of money named in a bond conditioned for the faithful performance of the obligations of a contract is a penalty, and not liquidated damages; and a recovery in an action upon the bond will be limited to the amount of the actual damage sustained and proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 155.]

## 2. SAME.

Where to secure the performance of the terms of a contract there is a stipulation for the payment of a fixed, unvarying sum upon the breach of any of several promises of varying degrees of importance, especially where the damages for the breach of some of them would be easily ascertainable, the sum named will be construed to be a penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 165.]

## 3. SAME.

The designation of a conventional amount to be paid upon the breach of a contract will

not be held to liquidate the damages, where it is apparent that it was not the intention of the parties that the obligor could escape further liability by paying that sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 156.]

(Syllabus by the Court.)

Error from City Court of Brunswick; A. D. Gale, Judge.

Action by the mayor and city council of Brunswick against the Ætna Indemnity Company on an indemnity bond. Judgment for defendant, and plaintiff brings error. Affirmed.

The Southern Electric Railway, Light & Water Company, with a view of constructing and operating a number of public utilities, including gas works, an electric light plant, and an electric street railway, at Brunswick, Ga., began negotiations through one Neff, its agent, with the mayor and council of that city for certain rights, permits, and franchises, including the use of the public streets, the fee to which was vested in the city. The city council, pursuant to the negotiations, passed an ordinance in which the desired franchises were granted, the conditions under which they were to be enjoyed were stipulated, and a number of covenants were imposed upon the grantees. Among other things, the grantees of the franchises were not to cut or molest any shade trees without special consent; were not to lay tracks, except in certain portions of the street; were not to charge any passenger more than five cents for any continuous passage in any cars they might operate; were to grant transfers; were to permit policemen to ride free; were to obey all ordinances regulating the speed of cars; were to pay a proportionate part of street paving in certain cases; were to pay as a franchise fee a certain annual percentage of the gross earnings; were not to charge beyond a certain price for illuminating gas and electricity; were to supply a certain amount of water free to the city for the purpose of flushing sewers; were to buy an existing gas and water plant, if required by the city to do so; were to hold the city harmless from all damages by reason of injuries to person or property caused by the laying of tracks, the making of excavations, etc.; were to pay any judgment which might be rendered against the city on any of these accounts; and were to pay any damage that might be done to public sewers, water mains, etc. There is no distinct covenant that the grantee shall exercise the franchises granted; but it is provided in section 8 that "the rights powers, franchises and privileges herein granted shall cease, determine and be forever void if the said Neff, his associates, successors and assigns, fail to begin in good faith the construction of said street railway system within four months from the date of the passage of this ordinance, and unless said Neff, his associates and assigns, shall, twelve months

from such date, have constructed and in operation at least four miles of such electric street railway system within the limits of said city, and the remainder, if any, within thirty-six months after such date." Ample provision was made for the forfeiture of the different franchises by nonuser or by failing to maintain the utilities contemplated. The ordinance was conditioned that the rights and privileges granted should not pass to the grantees until they signified their acceptance in writing of the terms of the ordinance, in which event the ordinance should have not only the force of law, but also the effect of a contract. It was further provided that within four months thereafter the grantees should file with the mayor and council "a bond in the penal sum of \$10,000, assuring due and faithful performance of each and every covenant assumed to be performed by the grantee herein."

The Southern Electric Railway, Light & Water Company filed its acceptance and gave the bond in the sum required, with the Aetna Indemnity Company as surety. The condition of the bond is: "That whereas, the mayor and council of the city of Brunswick, Georgia, on August 10, 1905, passed and adopted an ordinance entitled 'An ordinance to grant unto J. H. Neff, his associates, successors and assigns, a right and franchise for the operation of a street railway system, electric light, gas and water plants in the city of Brunswick, Georgia, and for other purposes;' and whereas said J. H. Neff has assigned and transferred to the Southern Electric, Gas & Water Company, a corporation under the laws of the state of Maine, all his rights and privileges and franchises under said ordinance, a copy of which ordinance is attached hereto as a part hereof: Now, therefore, if said the Southern Electric, Gas & Water Company, a corporation under the laws of the state of Maine, its successors and assigns, shall duly and faithfully perform each and every covenant assumed to be performed by the grantee in the aforesaid ordinance (except, however, that the aforesaid the Southern Electric, Gas & Water Company, its successors and assigns, shall be excused and relieved from the performance of any covenant or duty assumed under the terms of said franchises by the grantee, his associates, successors and assigns, where performance is prevented by pending litigation or any order, decree or judgment of a court of competent jurisdiction), then this obligation to be void; otherwise, to remain in full force and effect."

The mayor and council brought the present action against the principal and surety in the bond, reciting the adoption of the ordinance, its acceptance by the Southern Electric, Gas & Water Company, and the giving of the bond in the terms mentioned above; also alleging that "among other things assumed to be done by the said J. H. Neff, his associates, successors, and assigns, in and under said ordinance and contract, and

which became by his acceptance of such ordinance a covenant and duty to be performed by him, his associates, successors, and assigns, as set out in said ordinance, was that covenant, as stated in section 8 of said ordinance, that said J. H. Neff, his associates, successors, and assigns, should begin in good faith the construction of said street railway system, provided for in said ordinance, within four months from the date of the passage of the ordinance, and that said Neff, his associates, successors, and assigns, should twelve months from such date have constructed and in operation at least four miles of such electric street railway system within the limits of said city of Brunswick, and the remainder, if any, within thirty-six months after such date." It is further alleged that, without excuse, the grantees of the franchise have wholly neglected to build any and all of the street railway. Another allegation of the petition is the following: "At the time of the giving of said bond no actual damages were in contemplation of the parties thereto in case of any default on the part of said the Southern Electric, Gas & Water Company in the performance of any of the covenants or conditions in said ordinance expressed. In fact, the actual damages sustained by petitioner by reason of the failure of said principal in said bond to carry out the terms of said ordinance are necessarily speculative and uncertain, if not absolutely incapable of proof, and such was known to be the case by the parties to the transaction when the bond was tendered and accepted, and therefore petitioner is entitled to recover from said defendants, the full amount of said bond, to wit, ten thousand dollars, as stipulated damages for the breach thereof, with interest on said sum from the date of such breach, and from the failure of said principal to perform the first covenant which he was bound to perform under said ordinance, to wit, that of beginning in good faith the construction of said street railway system in said city within four months after the passage of the ordinance." It is further alleged that without excuse the grantees of the franchise have wholly neglected to build any and all of the street railway.

The Aetna Indemnity Company, the surety, filed a general demurrer, which the court sustained, and the city excepts.

R. D. Meader and Francis H. Harris, for plaintiff in error. C. T. Dodd and Dodd & Dodd, for defendant in error.

POWELL, J. (after stating the facts as above). 1. In our opinion, construing the ordinance as a whole, it did not contain any covenant on the part of the grantees to exercise the street railway franchise, but merely gave them an option to enjoy the privileges granted on condition that the work should progress to the extent indicated within the time limited. However, since the stress of

the argument—and the case was well and ably argued here—fell upon the point as to whether the sum expressed in the bond is liquidated damages or a penalty, and since we have come to the conclusion that upon the solution of this question the result will be the same, we have decided to rest our decision on this rather than on the ground that the ordinance and contract between the parties did not create the covenant claimed.

It is conceded that the city has not sustained any actual damages of such nature as to be susceptible of proof and recovery in a court of law. The plaintiff rests its case, and of logical necessity must rest it, squarely upon the proposition that the sum specified in the bond is recoverable as liquidated damages—as a sum estimated and fixed in advance by the parties as representing fair and just compensation to the obligee for those damages which naturally would be sustained by a breach of the contract, but which would probably be so speculative, uncertain, remote, or difficult of calculation as to render an ordinary action inadequate or unavailable. The contention of the defendant, of course, is that the \$10,000 is merely a penalty; that this sum is named, not to liquidate any damages, but to represent the maximum amount for which the surety would be bound toward the indemnification of the obligee against those actually legally computable damages it might sustain from any breach of the contract.

We note a marked custom among the judges who have had occasion to deal with the question as to whether a sum so named is a penalty or liquidated damages to begin the discussion with some statement to the effect that the construction of such contracts presents a question of most vexing and perplexing nature, and in conformity to the custom we may as well make the same remark. However, looking to the nature of the whole contract as contained in the bond and the ordinance, and keeping in mind a few well-established rules of construction, we cannot believe that it is seriously doubtful but that the amount specified in this contract is purely and solely the ordinary penalty usually found in bonds with conditions annexed. In the first place, section 21 of the ordinance, in requiring the bond, prescribes that it shall be in the "penal sum" of \$10,000. This is evidentiary, though not controlling on the question. *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345 (1).

2. Then, under the terms of the bond, the makers stand bound in the sum named unless the principal therein "shall duly and faithfully perform each and every covenant assumed to be performed by the grantee in the aforesaid ordinance." The rule is well recognized that a stipulation for the payment of a definite unvarying sum on the breach of any of several promises of varying degrees of importance, especially where the damages for the breach of some of them would be easily ascertainable, is to be construed as a penalty.

*Swift v. Crow*, 17 Ga. 609; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; *Graham v. Bickham*, 4 Dall. 143, 1 L. Ed. 778, 1 Am. Dec. 323; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355. To quote from *Bayley, J.*, in the case of *Davis v. Penton*, 6 Barn. & Cress. (13 E. C. L. R.) 216: "Where the sum which is to be a security for the performance of an agreement to do several acts will, in cases of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." To the same effect are the oft-cited English cases of *Kemble v. Farren*, 6 Bing. 141, 3 M. & P. 425, 7 L. J. C. P. 258, 31 Rev. Rep. 366, and *Hornor v. Flintoff*, 9 M. & W. 678. Looking to the writing before us, is it reasonable to presume that the parties intended that the obligors of the bond were to be liable for \$10,000 if the principal therein cut a shade tree without permission, or refused to let a policeman ride free, or failed on some occasion to furnish the requisite amount of water to flush the sewers? And yet each and all of these are covenants assumed by the acceptance of the ordinance, and a failure as to any of them would as completely breach the bond as a failure to build and operate the street railway within the time required.

3. Furthermore, where the stipulated sum which by the agreement is to be paid upon a breach of the contract is held to be a liquidation of the damages, and not a penalty, it becomes the maximum as well as the minimum sum that can be collected, no matter how greatly, certainly, and definitely the obligee has been damaged by the breach or breaches. *Foot v. Co. v. Malony*, 115 Ga. 985, 42 S. E. 413; *Swift v. Powell*, 44 Ga. 123. For example, under the present contract the grantees of the franchise covenanted to indemnify the city against such claims for damages as might from time to time arise through acts of omission or commission in the exercise of the franchises. Now, if the amount to be recovered for each and every breach of the contract has been liquidated by the stipulation of the sum named, the obligors might be held liable for this amount for some minor violation, and thereafter could with impunity commit persistent, flagrant, and heavily damaging breaches without liability; in other words, could pay the \$10,000 and thereafter break the contract at will. They might leave excavations in the streets unguarded until the recoveries against the city by injured persons amounted to five times \$10,000, might refuse to pay to the city the promised percentage of its gross earnings, might injure and damage the city's existing sewers and water mains at will, and yet, having paid the sum stipulated and liquidated as covering each and every breach, they could suffer no further liability. This reduction ad absurdum finds a parallel

In the case of *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. 286, 26 L. R. A. 115. The designation of a conventional amount will not be held to liquidate the damages, where it is apparent that it was not the intention of the parties that the obligor could escape further liability by paying that sum.

The foregoing canons of construction seem so clearly to control the present case as to render unnecessary any allusion to the doctrine that in cases of doubt the courts favor the construction which holds the stipulated sum to be a penalty and limits the recovery to the amount of damage actually shown, rather than a liquidation of the damages. The court did not err in sustaining the demurrer.

Judgment affirmed.

**WIDINCAMP v. PHENIX INS. CO. OF BROOKLYN.** (No. 1,201.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

**1. INSURANCE — POLICY — CONSTRUCTION — "CHANGE OF INTEREST."**

Where a policy of fire insurance provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard," and subsequently to the issuance of the policy the insured, without the consent of the insurance company, executed to a third person a bond for title to the property, received a part of the purchase price and delivered possession, a change of interest in the subject of the insurance was effected, and the policy became void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, § 799.]

(Syllabus by the Court.)

**2. WORDS AND PHRASES—"INTEREST."**

The word "interest," as applied to property, is broader than the word "title." It is practically synonymous with the word "estate."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3696-3702; vol. 8, p. 7691.]

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action by one Widincamp against the Phenix Insurance Company of Brooklyn. Judgment for defendant, and plaintiff brings error. Affirmed.

For the purposes of the decision, the following abstract will be sufficiently full and accurate: Widincamp procured from the defendant insurance company a policy in the sum of \$1,500, insuring his house, worth \$3,000, against loss by fire. The policy contained the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of

the insured, or otherwise." Widincamp made an executory sale of the property to one Smith and gave him a bond for title. Smith was in possession of the property at the time of the fire, and had paid a portion of the purchase price, though the record does not disclose how much. In an action upon the policy, these facts appearing, the court upon demurrer gave judgment in favor of the defendant.

W. T. Burkhalter and Hines & Jordan, for plaintiff in error. Slaton & Phillips and Warnell & Anderson, for defendant in error.

POWELL, J. (after stating the facts as above). The effect of the insured's giving a bond for title, accepting a portion of the purchase price, and admitting the vendee into possession was that the insured retained the legal title to the property and the vendee acquired an equitable estate. As to such a transaction it is a settled rule of law that an equitable conversion takes place, and the property is treated for most purposes as if the legal title had passed; for example, the property descends to the vendee's heirs as realty, while the vendor's interest—that is, his right to have the purchase money and to hold the legal title as security therefor—goes to the vendor's personal representative. The vendee in equity is looked upon and treated as the owner of the land. *Vancouver Bank v. Insurance Co.* (C. C.) 153 Fed. 447; *Pomeroy, Eq. Juris.* § 368. Under such circumstances, both vendor and vendee have an insurable interest in the property. While the proposition is well established by authority that, in the light of the rule which provides that the policy will be strictly construed against the insurer to prevent a forfeiture, such a transaction would not violate a provision in a policy contracting against a change of title only, the language here is broader. The "interest" of the insured must not change. The word "interest," as applied to property, is broader than the word "title." It is practically synonymous with the word "estate." In *Lowery v. Powell*, 109 Ga. 194, 34 S. E. 297, quoting from Anderson's Law Dictionary, Justice Little says: "An estate is defined to be the quantity of interest which a person has, \* \* \* from absolute ownership down to naked possession."

After a study of the authorities, we find no case holding that, under a policy in which the provision against alienation is as broad as the one sub judice, the insurance is not voided by a sale of the property, accompanied by delivery of possession and the receipt of part of the purchase price, although the insured retains the legal title. The following cases squarely hold that in such a case the insurance becomes void: *Ladd v. Aetna Ins. Co.*, 70 Hun, 490, 24 N. Y. Supp. 384; *Gibb v. Philadelphia Ins. Co.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; *Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499. The principle

is also recognized in the case of *Arkansas Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. Rep. 129. Cases apparently to the contrary easily distinguish themselves upon close examination, either through the fact that the provisions in the policy there under consideration are not so broad as the present one, or that the transactions in the particular instances did not progress far enough to place any of the insured's former interest into the third person.

An insurance company which is willing to write a policy of \$1,500 on a house in which the insured has an interest to the extent of \$3,000—that is to say, is willing to carry half the risk if the insured himself will carry the other half—should not, if it writes such a policy and carefully provides against any change of that interest, be held to the contract if the insured without its knowledge and consent divests himself of all or any material part of that interest which it was contemplated he should have and retain in the risk. The rule may work individual hardships, but there is nothing inherently wrong in it; and in most cases it is very useful to the protection of insurers, and, indeed, to the public safety itself.

Judgment affirmed.

#### CANDLER INV. CO. v. COX.

#### COX v. CANDLER INV. CO.

(Nos. 641, 642.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

##### 1. CONTRACTS—CONSTRUCTION.

The rule which requires a contract to be considered as a whole and that no portion shall be discarded—that it shall be construed "*ut res magis valeat quam pereat*"—was properly applied by the trial judge in holding that the contract in this case required a continuous foundation wall.

##### 2. SAME—PERFORMANCE OR BREACH—SUBSTITUTED PERFORMANCE.

A contract which requires the building of a wall is breached by failure to build it, although a substitute more suitable for the purpose be provided, unless the stipulation requiring a wall has been waived; and any damage resulting from the breach of the contract which required a wall, instead of piers, as well as the cost of the wall itself, would be recoverable.

##### 3. DAMAGES — MEASURE — BREACH OF CONTRACT.

Under the terms of the contract in this case the proper measure of damage was applied. A., having contracted to build a wall, as well as to insure the preservation of B.'s building, B., upon proof of the breach of the contract, was entitled, by express terms of the contract, to recover the cost of the wall, as well as all damage which resulted to her building in the general construction of A.'s building.

##### 4. CONTRACTS—EVIDENCE—SUFFICIENCY.

The verdict was supported by the evidence, and there was no error in refusing a new trial. The terms of the contract itself precluded the consideration of the greater portion of the assignments of error urged by the defendant.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Kate Cox against the Candler

Investment Company for breach of contract. Judgment for plaintiff. Defendant brings error, and plaintiff assigns a cross-bill. Judgment on the main bill affirmed, and cross-bill dismissed.

Candlers, Thomson & Hirsch and Rosser & Brandon, for plaintiff in error. Slaton & Phillips and Jno. L. Hopkins & Sons, for defendant in error.

RUSSELL, J. After more than one examination and consideration of the numerous points raised by the brief and suggested by the record, though several times confused by the multiplicity of questions and the mass of the testimony, we are prepared to adhere to the conclusion we first reached when this case was argued. We have been diliberate, because of our respect for the great ability of the counsel for the plaintiff in error and the zeal and earnestness with which their positions were maintained. The more familiar, however, we have become with the record, the more we have become satisfied that no sufficient reason has been shown for reversing the judgment of the lower court in refusing a new trial. Stripping the case of those contentions which plainly could not have been material, and confining our view to those points where the difference between the parties is radical, the questions to be determined are extremely simple.

In the first place, it becomes necessary to determine the nature of the action. It is plainly a suit for the breach of a contract. The contract between the parties is set forth in full, and its breach is made the basis of the plaintiff's petition. If the contract was broken in any respect, the plaintiff had a cause of action against the defendant company, and under the terms of the contract the measure of the damages would be whatever amount it would cost the plaintiff to put her property, or at least the north wall of her building, in the same condition in which it was at the time the contract was entered into. This much being certain, it became, after the introduction of the contract, merely a matter of evidence for the jury as to whether the plaintiff's wall and building were damaged, and, if so, to what extent; that is, what sum would be necessary to enable the plaintiff to do for herself what the defendant had contracted to do for her.

1. In our judgment the contract was properly construed by the judge of the city court of Atlanta. We do not think that the proper construction of the contract admits of any doubt, especially when the rule is applied which requires a contract to be construed the more strongly against him who proposes it. The contract was as follows: "Georgia, Fulton County. This agreement, made and entered into this 19th day of March, 1904, between the Candler Investment Company, a corporation created by and existing under the laws of the state, of the one part, and



Mrs. Kate Cox, of said county, of the other part, witnesseth: That party of the first part, being the owner of the property known as 'old First Methodist Church lot,' in the city of Atlanta, bounded on the north by Houston street, on the east by Pryor street, on the south by an alley and the property of said Mrs. Kate Cox, known as No. 113-15-17 Peachtree street, and on the west by Peachtree street, and desiring to make proper and needful excavations on its said property up to the dividing line between its said property and the said adjoining property of said Mrs. Kate Cox, to the depth of about twenty-eight feet, for the purpose of constructing a seventeen-story fireproof building, with basements, and having given party of the second part notice of its intention so to excavate for said purpose, has proposed to party of second part, as a measure of extraordinary care and precaution for sustaining her land, that, if she would consent to first party excavating under her foundation and erecting a wall thereunder, it would do the same without cost to her, taking due care and precaution, in so doing, to protect her said premises, and in the event of injury to her to be responsible for all damage she may sustain by reason of said excavation or any work in connection therewith. That party of the second part accepts said proposition and agrees that party of the first part may, at its own expense and without cost to her, excavate under her north wall, which adjoins the south property line of party of first part for the purpose of erecting thereunder such foundation as may be necessary and proper to sustain her land and prevent said wall from falling, or any injury thereto which will damage said property of second party or cause any damage or injury to her tenants. And in the event any such damage or injury should accrue, party of the first part to be liable therefor, and to save party of second part harmless from any loss of any character whatever that may arise from anything done by party of first part, its agents, employes, or contractors, in connection with the aforesaid work, or the erection of said building in general" (signed by the parties).

It is a well-settled and salutary rule of construction which requires not only that every contract shall be construed in pari materia, but that no portion shall be discarded if it can be avoided—"ut res magis valeat quam pereat." In the first clause of the contract it will be observed that the Candler Investment Company proposed to put a wall under the wall already built by Mrs. Cox. In view of the well-settled opinion that a continuous wall is preferable, for the purpose of bearing a great strain, to disconnected piers (a view which seems to be overwhelmingly supported by testimony in the present case), it is hardly to be supposed that Mrs. Cox, in accepting the proposition of the Candler Investment Company to put a sufficient wall under her

building, would volunteer the less desirable and more unequal support furnished by piers. This, no doubt, would have been the common-sense view of the situation if the court had submitted the contract to the jury for construction; but, applying the legal maxim of construction to which we have just adverted, which requires that one part of a contract shall be illustrated by the other portion, to preserve the whole, we have no difficulty in reaching the conclusion that, as a wall had been proposed in the first clause of the contract, it must naturally be supplied as qualifying the word "foundation" in the second clause of the contract. In fact, to make legal sense, the word "wall" must be implied to follow, in the contemplation of the parties, the word "foundation," in the second clause of the contract, as fully as if it had been expressed. The wall proposed in the first clause of the contract was a foundation wall. It was to go down to whatever depth was necessary to support the Cox wall in an unchanged and uninjured position. No matter how constructed, it was to begin at the point on the surface of the earth where excavation ceased, and extend upward under the Cox wall until it supported it. The wall spoken of in the first clause was a wall continuous, for foundation purposes. It was a foundation wall. The foundation in the second clause of the contract, unless a change had been more specifically made, could only refer to the foundation wall mentioned in the first clause.

2. The plaintiff in error having contracted to build a foundation wall, this contract was breached when piers were built, even if the piers were sufficient for the purpose of supporting the wall in question. Mrs. Cox, having contracted for a wall, is entitled to have a wall, unless she waived it, even though the piers were more suitable for the purpose. Of course, in that event she could not recover damages, because it would be *damnum absque injuria*. If, however, the breach of the contract resulted in damages to the wall of Mrs. Cox's building, which the defendant voluntarily contracted to insure against all damage, she would be entitled to recover those damages which resulted from any breach of the contract. The jury were authorized to find in favor of the plaintiff, either for damages due to excavating under Mrs. Cox's wall, or for failing to properly support it, so as to leave her building in as good condition as it was at the time the contract was entered into, because the plaintiff in error voluntarily assumed that liability as an insurer.

3. It is stressed by the plaintiff in error that the proper measure of damage was not applied, even if a verdict in favor of the plaintiff was authorized. It is insisted that the proper measure would be the difference between the market value of the property before the construction of the Candler building and since its construction, or, in other words, the difference between the market value of Mrs. Cox's property before the changes

in its condition were effected and since. It is manifest that this would not be either a fair or a fixed measure, nor one readily ascertainable. This measure would depend upon the fluctuation of real estate values, which might be, and frequently would be, dependent on extraneous circumstances wholly disconnected from the injury. It is incompatible with the right arising from the breach of contract, because it would disregard, in every instance, the primal right of property owners to possess their property in such condition as they might see fit. We think the true measure of damage is the difference in value between the wall of Mrs. Cox's building in its condition at the time of the making of the contract for any purpose for which the wall was used or might be used and for which it might have a value, and its value for the same purpose after the changes wrought by the defendant company had been effected. In other words, to speak concretely, if at the time the contract was made Mrs. Cox's building stood on a firm foundation, not subject to sagging, settling, leaning, or other displacement and (Mr. Bruce, who supervised its construction, describes the original clay foundation as "elegant"), and was so constructed that she, or any one who might purchase the building from her, could safely and properly use the wall in the construction of a five or six story building, and if by the breach of the contract, in which the Candler Investment Company guaranteed to prevent any injury, the wall was left in a condition where it had been loosened from the end walls of the building, and placed upon a foundation where it would have no value, or would be unsafe as a portion of a wall for a five or six story building, then the measure of Mrs. Cox's damages would be whatever it would cost to build a wall which the plaintiff in error had originally contracted to build, and to replace upon this foundation a wall as suitable in every respect as Mrs. Cox's wall originally was for all the purposes for which the original wall could have been used. Mr. Walker testified (and the jury had the right to place their verdict upon his testimony) that it would require \$4,025 to remove the piers and excavate the dirt between them, and to replace the wall in its original condition. The jury having found a verdict for only \$3,500, the plaintiff in error cannot complain that the verdict is without evidence to support it.

4. It is insisted by plaintiff in error that the court, having sustained the demurrer, striking from the plaintiff's petition all allegations of damages which were dependent upon the purposes for which Mrs. Cox intended to use the wall, erred thereafter in permitting evidence tending to show the use to which the wall in question could be put; and the ruling of this court in *Missouri Life Insurance Company v. Lovelace*, 1 Ga. App. 448, 58 S. E. 93, is cited to sustain the position that the ruling upon the demurrer, not

being excepted to, became the law of the case upon that subject, and that the lower court could not thereafter reverse itself. We think it perfectly plain that the two rulings of the trial court are consistent with each other. It is a well-settled principle, however, that the construction which a court places upon its own antecedent rulings is generally to be respected. But, aside from this, we see a vast difference between purposes to which the plaintiff intended to put her building (and as regards to which any damages must necessarily be vague and speculative) and the purposes to which as a matter of real value a wall could be put either by the owner or by any one else who might become possessed of the property. The intention to use the property for a specific purpose might or might not materialize; but the fact that the property could be used for a certain and specific purpose gave it a general market value.

Counsel for the plaintiff in error in their brief say: "Supposing in this case the cost of building a wall is adopted, and we pay the money, and Mrs. Cox never does build. Her rents and incomes are unchanged from the property, and she gets our money and interest thereon in addition, and that, too, while the market value of her lot is undiminished. She profits by the transaction; whereas she is only entitled to be compensated for actual loss." The fallacy of this argument exists in the fact that under the stipulations of the contract Mrs. Cox was insured against damages to her property, which must include actual physical damages, which might be independent of any profits arising from her investment. Suppose, for instance, she had occupied the building as a dwelling, there would be no pecuniary profits to consider. But, as we view it, the question of profits does not enter into the question at all, because, if Mrs. Cox, instead of continuing to rent, as in the case supposed by the plaintiff in error, let it be supposed that she preferred to convert the store into cash, then the question would arise which would determine the true measure of damages, to wit, would the probable purchaser pay as much for the wall in its condition after the breach of the contract as he would have paid had the contract been completed according to its terms? The wall must be disconnected from every other concomitant circumstance of value, because the contract concerns it alone, and because, regardless of the contract, Mrs. Cox would have been entitled to any appreciation in the value of her business location, or of the ground upon which the building was placed, due to a growth of the city or any other extrinsic circumstance. Under the evidence in this case the jury were required to find that there had been a breach of the contract. They were authorized to find the amount which the plaintiff recovered.

The rulings of the trial judge upon the demurrers, and as to the admission of testimony, are free from any material error, and

the law of the case was fully and fairly presented. There was, therefore, no error in refusing a new trial upon the motion of the plaintiff in error. The contract which the plaintiff in error had entered into was so broad and sweeping in its nature that the express terms of the contract estopped it from asserting several of the propositions which it attempted to have presented to the jury, and by which ordinarily it might have protected itself from a recovery or diminished the amount. We will give one example. In the

sixth ground of the amendment to the motion for new trial the plaintiff in error excepts to the refusal of the court to instruct the jury that Mrs. Cox could not, in this action, recover for damage caused by excavations on the land of the Candler Investment Company and not on Mrs. Cox's land. The principle invoked by the written request is sound law as a general rule, and but for the terms of the contract in evidence it would have been error to refuse the request presented; but in this case the plaintiff in error by express contract had obligated itself (as will be seen from the contract) to vary the usual rule and "save party of second part harmless from any loss of any character whatever that may arise from anything done by party of first part, its agents, employes, or contractors, in connection with the aforesaid work or the erection of said building in general." In this state of the evidence we think the trial judge very properly refused the instruction contained in the request, which, but for the stipulations of the undisputed contract, he would doubtless have given. By the terms of its contract the plaintiff in error, waiving its rights as a coterminous landowner, insured the defendant in error. It became an insurer against any injury to Mrs. Cox's wall, and guaranteed to prevent any injury to her wall which would damage her property or injure and damage her tenants.

The affirmance of the judgment of the city court of Atlanta overruling the motion for new trial renders any consideration of the cross-bill unnecessary, and it is accordingly dismissed.

Judgment on the main bill of exceptions affirmed. Cross-bill dismissed.

#### TAYLOR v. STATE. (No. 1,035.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

##### LARCENY—EVIDENCE.

The evidence authorized the verdict, and the judgment of the court overruling the motion for new trial is not, for any reason assigned, erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 149-173.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

George Taylor, alias Saxton, was convicted of larceny, and brings error. Affirmed.

Glawson & Fowler, for plaintiff in error. Wm. Brunson, Sol. Gen., and Roland Ellis, for the State.

RUSSELL, J. The defendant in the court below was convicted of the offense of simple larceny. The evidence showed that upon the pretended plea that he needed some money to change a \$100 bill, he procured \$57 from the prosecutor. There was no intention on the part of the prosecutor to convey the title of the \$57 to the defendant; but the defendant merely asked the use of the prosecutor's money for the purpose of carrying it to another and putting it with other money, so as to make change for a \$100 bill. It is plain from the evidence that the money was taken by the defendant with no intention of returning it to the prosecutor, but with the intent to steal. The prosecutor (who seems to have been a well-meaning, ignorant, country darkey), who had just sold a bale of cotton, was left standing on the street corner to await the return of the defendant. The defendant, however, did not return in a reasonable time, if ever. Even if we were to grant his contention that he did return, but that the prosecutor had left, the intent to convert the money to the defendant's own use is fully apparent from the testimony that he subsequently saw the prosecutor and had an opportunity of returning the money then, but instead of doing so he avoided the prosecutor and hastily removed out of his sight. Judgment affirmed.

#### JONES v. STATE. (No. 1,036.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

##### CRIMINAL LAW—OBJECTIONS TO EVIDENCE.

A defendant, being separately tried, cannot successfully object to testimony offered against him on the ground that it was obtained by an illegal search and seizure of another person, though that person be jointly indicted with him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 876, 877.]

Russell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Henry Jones, alias Z. R. Seals, was convicted of crime, and brings error. Affirmed.

Glawson & Fowler, for plaintiff in error. Wm. Brunson, Sol. Gen., and Roland Ellis, for the State.

POWELL, J. This plaintiff in error was charged as an accomplice of one Taylor, as to whom a judgment of conviction has been this day affirmed. See Taylor v. State, 62 S. E. 482. As to the main points this case is controlled by that decision. The record, however, presents one additional ground of error. A policeman testified to arresting both prisoners and finding through a search a purse on each of them. The arrest was without warrant and seems to have been illegal.

Counsel for defendant in a single ground of his motion complains of the admission of this testimony as a whole on the ground that through the alleged search and seizure of the two prisoners the defendant was compelled to incriminate himself. Reference is had to the opinions of this court in *Hammock v. State*, 1 Ga. App. 128, 58 S. E. 66; *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390, and citations. So much of the testimony as related to the finding of the purse on the codefendant was certainly not subject to this objection by the prisoner in the present case. He could complain only as to evidence involuntarily disclosed by himself under the compulsion of the illegal search and seizure. An exception to the whole of a piece of testimony, where part of it is admissible, is, according to the familiar rule, to be overruled.

Judgment affirmed.

RUSSELL, J. (dissenting). I am fixed in the opinion that there should be no relaxation of the rule announced by this court in *Hammock v. State* and *Hughes v. State*, *supra*. Every consideration of sound public policy calls specially for the enforcement of this rule, where it appears that the arresting officer, has been overzealous in the prosecution. In my opinion the well-recognized rule that an objection is worthless which is directed as a whole to testimony, some of which is competent and some illegal, has no application under the peculiar facts of this case. If the testimony to which objection was made had been that the policeman took a pocketbook of a certain description from the person of the defendant and another pocketbook of a certain description from the person of another defendant, the rule would have applied, unless counsel had specified in his objection that he referred only to the testimony relating to the pocketbook taken from the defendant, and the objection would properly have been overruled. But under the language used by the witness the defendant was precluded from separating the good from the bad. The witness' language was: "I found two pocketbooks on them; one on each." It was impossible to separate what was subject to objection from that which, under the rule stated in the headnote, was not subject to the specific objection urged. The conglomerate statement of the state's witness, containing a poisonous element obnoxious to our Constitution, which it was impossible to segregate, and the state having offered its testimony in the form it did, the defendant, in my opinion, had the right to attack it as he did.

COKER et al. v. OLIVER. (No. 1,010.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

#### 1. ATTORNEY AND CLIENT—CONTINGENT FEE.

Where an attorney at law has taken a claim for suit and collection on the terms that he is to have a certain percentage of the recovery for

his services, and after judgment the client, without the consent of the attorney, takes from the debtor property in full settlement of the judgment, he becomes liable to the attorney for the full amount of the fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 355.]

#### 2. SAME—EVIDENCE.

In a suit to recover the fee from the client, evidence as to the real value of the property taken in payment of the judgment is immaterial.

#### 3. WITNESSES—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Communications to a person who is an attorney at law are not confidential and privileged from proof against the person making them, unless made to the attorney in his capacity as such. Mere casual personal conversations with the attorney are not privileged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 749-751.]

#### 4. ATTORNEY AND CLIENT—ACTION FOR SERVICES.

The evidence authorized the judgment rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 368-372.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. M. Oliver against F. M. Coker and another, executors. Judgment for plaintiff, and defendants bring error. Affirmed.

Jno. L. Hopkins & Sons, for plaintiffs in error. D. K. Johnston and C. D. Hill, for defendant in error.

RUSSELL, J. In 1897 F. M. Coker employed Oliver as an attorney to bring suit in Alabama against one Reed on two promissory notes. Oliver obtained judgment on the notes in 1897. Numerous letters passed between Oliver and Coker with reference to the claim, and, while Oliver did not collect anything upon the judgment, it appears that this was perhaps due to the fact that Reed had no property standing in his own name upon which a *fi. fa.* could be levied. In 1904 Coker purchased \$15,000 in stock of a pecan corporation which Reed was promoting, and paid for it with the judgment Oliver had obtained against Reed and \$5,000 in cash. Oliver's petition, in the present case, alleged that he sued the Reed notes to judgment and obtained judgment for \$5,450 principal and \$893.80 interest to the date of judgment. He averred that Coker agreed to pay him 10 per cent. of the amount of the judgment, principal and interest, when collected, for his services, and that about July 29, 1904, Coker settled the judgment directly with the defendant for the full face amount. Coker died before the case was reached for trial, and his executors, the present plaintiffs in error, were made parties in his stead. The gist of the answer is that Coker did not make such settlement of the judgment as would entitle Oliver to any fee. It is averred, not only that Coker never collected any money from Reed, but that he lost practi-

cally all of the \$5,000 in cash that he put in the pecan grove scheme. The defendant also pleaded the statute of limitations.

Coker having died, and the plaintiff being therefore incompetent to testify as to his alleged contract of employment, one of the questions raised by the record is whether the court erred in permitting one B. H. Hill, an attorney at law, to testify in reference to certain statements alleged to have been made to him by Coker. The objection urged to Mr. Hill's testimony was that his information was derived from relationship of attorney and client. The plaintiffs in error next insist that the court erred in excluding testimony tending to show that property or stock which Mr. Coker took in settlement of the judgment which Oliver had obtained was of no value at the time that it was obtained by Coker, and of no value at the time of the trial. The plaintiffs in error, having also moved for a new trial upon the ground of newly discovered evidence, contend that the court erred in not sustaining that ground of the motion. We shall consider these several grounds in this order.

1. The witness B. H. Hill was permitted to testify as follows: "I asked Coker if he had employed Oliver, and Coker said, 'Yes, he took the case on the same terms that you declined,' which was a contingent fee of 10 per cent." The same witness was permitted to testify, also, "He (Coker) stated to me that Mr. Oliver accepted the case for collection on the terms I declined, 10 per cent. of whatever was collected, on contingent fee." We find no error in the admission of this testimony. The evidence does not show that Mr. Hill, at the time of the conversation, was Mr. Coker's attorney in any sense, or that he at that time intended to employ him as an attorney, or that the conversation was had with Mr. Hill as an attorney, in contemplation of his employment. It is plain from the testimony that the information that Mr. Hill obtained was voluntarily given by Mr. Coker in a casual, friendly conversation. It cannot be taken in any sense as a privileged communication, or as one which should be excluded upon the well-settled ground of sound public policy.

2. The court did not err in excluding the testimony sought to be elicited from the witness F. M. Coker, Jr. The real value of the stock which Mr. Coker took in exchange for the judgment Oliver had obtained in his behalf was irrelevant to the present issue. Oliver was not consulted and had not consented to the exchange. Mr. Coker had the right to deal with the debt due him by Reed as he saw proper, provided his action did not defeat Oliver's right to collect and retain 10 per cent. of the principal and interest of the judgment for his services as an attorney at law. Unless some act or omission on the part of his attorney, in connection with the transfer contributed to his loss, the attorney's right would not in anywise be affected by

the fact that the client preferred to take property, instead of money, in settlement of the *fi. fa.* the attorney had procured. Having placed the claim in the attorney's hands for collection, Mr. Coker could not defeat this right of the attorney, and if he saw proper to make a settlement with his debtor for less than the face value of the claim, without the attorney's consent, the attorney would still be entitled to claim and to hold his client liable for 10 per cent. of the face value of the judgment. If it would be relevant to show that Coker had made a bad trade in disposing of the judgments in which the attorney had an interest, to the extent of 10 per cent. of the amount collected, for his services rendered, and that by reason of that fact the amount the attorney should receive must be diminished, it would be equally relevant to show that in another instance, the client, being a good trader, had gotten more for the judgments than it was really worth, and therefore that the attorney was entitled to 10 per cent. on a greater sum than the face of the judgments. Of course, Coker could have shown that he had never collected anything, and in that event no liability whatever would have attached to him, under the evidence that the fee was dependent upon collection. But a client who has placed a claim in the hands of an attorney for collection, and who makes a settlement of any kind of such claim with his debtor without consulting his attorney and obtaining his consent to the settlement, will be presumed to have collected the claim in full, or to have received such a settlement as was satisfactory to him as payment in full. It was, therefore, immaterial what was the value of the stock which Mr. Coker took in exchange for his judgment. He did not consult his attorney, Mr. Oliver.

It is further to be presumed (as it is not to be inferred that he would expect to diminish Mr. Oliver's compensation without his knowledge or consent) that Coker at that time considered the stock an equivalent for the full value of his judgment. Of course, if Coker had made no settlement, and Oliver had collected nothing, Oliver would have been entitled to no fee, contingent or otherwise; but, just as it was not in the power of Oliver, without Coker's consent, to make a settlement with Reed by which Coker would receive less than his 90 per cent. of the face value of his judgment, so it was not within the power of Coker, after having intrusted his claim to Oliver, and after Oliver, in pursuance of the contract, had obtained the judgment, to settle the claim in such a way that Oliver would receive less than his 10 per cent. without his consent. Where the relation of attorney and client exists, and the sole compensation of the attorney is to be a certain percentage of the claim or demand he is employed to collect, his right to that proportion of the entire demand or claim is as absolute as his client's right to the amount

from which that per cent. is to be deducted. Of course, it is within the power of the client, upon the failure of the attorney to perform services, or for negligence to perform, to withdraw from the contract, which has already been broken by the attorney by non-performance of his duties; but even in that event the attorney should be notified that he has been discharged.

3. The newly discovered evidence comes within the rule of impeaching testimony, and, therefore, afforded no ground for new trial. While it is insisted that it was not sought to impeach, still this is the only effect of the testimony. Mr. Hill testified that he was not the attorney of Mr. Coker at the time of the conversation related by him. It was sought to show by the letter that he was at that time Mr. Coker's attorney. Furthermore, as the letter was all along in the possession of the defendant, we think that the court very properly, therefore, held that this testimony could not be classified as such newly discovered evidence as requires the grant of a new trial.

4. We think that the evidence fully authorized the finding of the trial judge, to whom the case was submitted without the intervention of a jury. That Mr. Coker employed Mr. Oliver as an attorney to collect the Reed notes under some kind of contract is shown by the fact that Oliver, in the state of Alabama, had the notes and obtained judgment upon them for Coker. Coker having died, Oliver's mouth was closed, and he was prevented from testifying as to the nature of the contract, or any communication which had passed between Coker and himself. The evidence of Mr. Hill was to the effect that at one time Mr. Coker had tried to get him to collect the notes upon a contingent fee of 10 per cent. of the amount collected, but that he declined to make such a contract. Mr. Hill testified, however, that subsequent to his declining to take the notes, in the course of a casual conversation with Mr. Coker, the latter told him that he had employed Mr. Oliver to collect the notes upon the same terms that he (Hill) had declined. It appears that Reed had no property standing in his own name, and that for that reason no immediate effort was made by Oliver to collect the judgment by levy, though the matter was the subject of continued correspondence between Coker and Oliver. At length, as appears from the correspondence, Oliver was about to have certain property levied upon as the property of Reed, the defendant in *fi. fa.* Perhaps, due to this fact, Coker was able to effect a settlement with Reed.

At any rate, without the knowledge or consent of Oliver, Mr. Coker effected a settlement with Reed, by which he obtained \$15,000 in stock of a pecan grove corporation in return for \$5,000 in cash and the cancellation of his judgment obtained against Reed. Presumably, Mr. Coker was of the opin-

ion at that time that the stock in the corporation he was purchasing was of some value, for he invested \$5,000 in cash in the enterprise. If the stock was of any value approaching par, he received full value for the judgment, because, in addition to the stock which he received for cash, he obtained \$10,000 of additional stock in return for a judgment amounting to but little over \$8,000. But, whether it was a good trade or a bad trade, it was his settlement of the claim which had been placed in the hands of the attorney for collection, upon which the attorney, so far as the evidence discloses, had been as reasonably diligent as the circumstances would warrant, and a settlement with reference to which the attorney was not consulted. The client could not be permitted, without clearer proof that the attorney had failed to discharge his duty, either to break or alter the contract previously made. Judgment affirmed.

HILL, C. J., disqualified.

#### WOODALL v. STATE. (No. 745.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

##### 1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.—STATEMENT OF DEFENDANT.

The right of a defendant in a criminal trial to make to the court and jury such statement in the case as he may deem proper in his defense is not to be governed or restricted by the rules controlling the admissibility of evidence. The statement of the defendant can properly include a statement of the reasons which influenced his actions in the transaction under consideration, even though his actions were dependent upon or caused by the acts of others, which he may also properly relate. It is error to interrupt a defendant in making his statement, merely because, under the rules of evidence, the statement made by him would be technically objectionable, if the facts stated by him are in fact connected with those facts upon which he bases his defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1689.]

##### 2. DISTURBANCE OF PUBLIC ASSEMBLAGE—DIVINE WORSHIP.

A minister of the gospel is not guilty of disturbing divine worship, because by his preaching upon an occasion when he bona fide claims the right to do so another is prevented from occupying the same pulpit. The statute of this state against disturbing divine worship was not designed as a means of determining the respective rights of contesting claimants to a benefice.

—(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

Henry Woodall was convicted of disturbing divine worship, and he brings error. Reversed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., and Zach Childers, Sol., for the State.

RUSSELL, J. We hold the judgment of the lower court, refusing the defendant a new trial, to be erroneous upon two of the exceptions made in the record.

1. The defendant was proceeding to make his statement to the jury, when he was interrupted as we think improperly by the trial judge. As appears from the record the defendant had stated to the jury as follows: "I was up to Mt. Mary Church last third Saturday and Sunday in April. On Saturday afternoon they held a conference and made resolutions that Brother Redding could not preach there the third Sunday, as he was there Saturday and did not come into church at all. I was elected pastor of Mt. Mary Church and as delegate to Mt. Pilgrim association. I went up to Macon, Ga., as a delegate from Mt. Mary Church, as the minutes will show, to Mt. Pilgrim Primitive Baptist Association, held at Dennis Church, near Macon, Ga., on October 4-6, 1906"—when the court stopped him and said: "You must confine your statement to Sunday, or go down," and thereafter the defendant, in obedience to the court, was required to confine his statement to what occurred on the Sunday on which the offense was said to have been committed. We think this interruption of the defendant's statement was an abridgment of his legal right to make such statement as he deemed proper in his own defense, and as such demands the grant of a new trial. We have heretofore, in *Richardson v. State*, 3 Ga. App. 313, 59 S. E. 916, expressed our view upon the right of the defendant in a criminal trial to make, without unnecessary embarrassment, a statement which is not governed by the rules which control the admissibility of evidence. Upon this subject the court was not divided in opinion. In the present case we think that the defendant had the right to state, as he was doing at the time he was interrupted, the prior transactions, which were reasons influencing his actions on the Sabbath in question, and facts from which the jury might have inferred that he in fact violated no law in preventing Redding from preaching by taking charge of the services and preaching himself, or at least might properly have concluded that he did not intend to disturb divine worship. He had the right to state to the jury the authority by which he assumed to preach, and that Redding had been unfrocked, if such was the case.

The facts in the present case are not similar to those in *Montross v. State*, 72 Ga. 262, 53 Am. Rep. 840, *Wells v. State*, 97 Ga. 210, 22 S. E. 958, or *Nero v. State*, 126 Ga. 554, 55 S. E. 404. In the *Montross* case the defendant was properly prevented from reading to the jury as a part of his statement outrageously vulgar extracts from other publications as a justification of his own violation of law. In the *Wells* case there was an attempt to read a letter as part of the statement, and the same thing was true in *Nero's* case, in which the "attempt to bolster up his unsworn statement by making profert of documents, letters, or the like" is condemned; but in the present case the minutes

kept by each faction of this church had been introduced, and hence the defendant here was not making the minutes a part of his statement without introducing them, and thus unfairly depriving the state of the opening and concluding argument. The criticism on this practice is expressed by Judge Evans in *Nero's* Case, as follows: "Without such proof he cannot place them before the jury as corroborating evidence of what he says. It would be extending his privilege far enough to accord him the right of making a statement to the effect that he had received a document or letter of a certain purport, without permitting him to produce the same and read it for the purpose of convincing the jury of its existence or genuineness."

It appears from the record in this case that the court had previously permitted a set of minutes to be introduced in testimony showing that Redding had been turned out of the church and this defendant selected to preach in his stead, as well as another set showing that Redding was pastor. It was for the jury to say which was the truth. With this evidence in, the defendant certainly had the right to state that he was acting upon the faith of his connection with and of his authority in the congregation, and the fact that he had gone as a delegate from Mt. Mary Church was not an uncorroborated circumstance, otherwise inadmissible, made merely to bolster up his statement. The minutes were in evidence. Certainly the defendant had the right to call the attention of the jury to what those minutes showed, as well as to state that it was upon the faith of the facts evidenced by the minutes that he acted. In each of the cases to which we have been referred, and which are stated above, the defendant was attempting to prove by his statement facts not in evidence, which could be better supported by proper evidence. In the present case the evidence had been introduced. The defendant was merely referring to and explaining his connection with this evidence, as we think he had a right to do.

2. Regardless of the error in interrupting the defendant in his statement, we think the verdict of guilty was without evidence to support it, and therefore contrary to law. It is manifest from the record that there was conflict between two rival factions in a negro church, as to which was entitled to carry on religious services at Mt. Mary Church. It is undisputed that the plaintiff in error was a preacher, and all that he did or said on the occasion which is the subject-matter of the indictment was directly to carry out the sole object of preaching himself, instead of letting the rival pastor preach, at the time and place set out in the presentment, and to the congregation assembled. It is undisputed that he wanted to carry on divine worship, and not to prevent it, and that, as a matter of fact, divine worship was carried on. It is true his ministry might

have prevented some one else from ministering at the same time to the spiritual needs of the flock; but as the evidence fails to show that the defendant did anything more than prevent his contesting brother from preaching, by preaching himself, we cannot hold that this comes within any of the allegations of the presentment, even if it is in any event a crime.

The statute which forbids the disturbance of a congregation of persons, lawfully assembled for divine worship, is intended to protect citizens in the right of worshipping the Deity in their own way, without the slightest molestation or hindrance. It is directed against any one who in any way does anything which will prevent religious services. But the statute was never designed to be used as a means of settling, by a criminal prosecution, the respective rights of contestants for the privilege of carrying on divine worship at a particular time or in a particular house of worship. That complete separation of church and state which is absolutely essential no less to our political than to our religious liberty forbids the state to recognize either of two contesting factions as the lawful congregation, which has been lawfully assembled at a particular church for divine worship (where the purpose of each is to carry on divine worship), except under the ordinary rules of evidence, which shall disclose which organization or faction is legally entitled to the possession of the premises. In the absence of such evidence, and where it is plain, as in the present case, that the only purpose of the accused was to conduct divine worship himself in a proper, decent, and orderly manner, it can well be said that he has the same right to protection against disturbance on the part of others (who would perhaps prefer to hear a different pastor) as they would be entitled to receive against his preaching. It is beyond the power of the courts to settle by criminal prosecutions the respective rights of contesting claimants to a benefice even in a negro church.

Judgment reversed.

#### COLEMAN v. STATE. (No. 746.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

##### 1. CRIMINAL LAW—JURISDICTION—CONFINEMENT UNDER SENTENCE OF ANOTHER COURT.

That a defendant in a criminal case is confined in jail under sentence for a felony, of which he has been convicted in a superior court, does not of itself present any bar to his being tried upon an indictment for misdemeanor pending against him in a city court. Even if in any case there should be a conflict of jurisdiction between the courts, the defendant, who is before the court for trial, cannot take advantage of the fact that his presence has been illegally or improperly obtained.

##### 2. SAME—TRANSFER FROM SUPERIOR COURT TO CITY COURT.

The entry upon the minutes of a city court of an order of the judge of the superior court directing the transfer of certain indictments for

misdemeanor to such city court, where such transfer is authorized by law, is sufficient to give the city court jurisdiction of the several cases transferred by the order.

##### 3. CRIMINAL LAW—WRIT OF ERROR—REVIEW—REQUESTED CHARGES ORALLY PRESENTED.

Assignments of error based upon the refusal of a trial court to charge the jury in accordance with requests orally presented by counsel cannot be considered by this court.

##### 4. DISTURBANCE OF PUBLIC ASSEMBLAGE—DIVINE WORSHIP.

The evidence authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Americus; Chas. A. Crisp, Judge.

Mose Coleman was convicted of disturbing divine worship, and he brings error. Affirmed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., and Zach Childers, Sol., for the State.

RUSSELL, J. Mose Coleman excepts to the judgment overruling his motion for new trial, and also to the judgment finding against his special plea to the jurisdiction. The special plea, which was by agreement heard by court, is as follows: "And now comes the defendant and enters this his special plea in said case, and says: (1) That the city court of Americus, Georgia, has no jurisdiction over the defendant in this case for the following reasons: That he is now under sentence and serving a sentence from the superior court of said county, and sent for assault with intent to murder, having been found guilty in said court at the May term and sentenced to 12 months in the chain gang, or a fine of \$250, and that he is now in custody under said sentence, and this court has no jurisdiction of the person of the defendant while he is serving this sentence imposed by the superior court of Sumter county. (2) Defendant further says that this court is out of jurisdiction in this case for the reason that said case is now pending in the superior court of said county, there being an indictment found by the grand jury at the May term of Sumter superior court, and that there is no order on the minutes of the superior court transferring this case to the city court, neither is there any order entered on the minutes of the city court of Americus, Georgia, showing that said case has been duly transferred and entered upon the minutes. The defendant says, before this court can get jurisdiction of the case in the superior court of said county by the grand jury, must be by duly signed order of the superior court entered upon the minutes of said court, and then entered upon the minutes of this court; and it appearing that neither of this has been done."

1. The first ground of the special plea is sufficiently dealt with in the headnote. This ground was really nothing more than a motion to continue the case. Any person having an interest in maintaining the jurisdic-



tion of the superior court, or the state (having an interest in the service of the defendant as a convict from the superior court), could perhaps be heard upon this question; but it is immaterial so far as the defendant is concerned, unless it appear that by reason of his prior sentence and consequent confinement he has been rendered less prepared for trial than he otherwise would have been. This lack of opportunity for preparation might be good ground for continuance, but is no basis for a special plea.

2. It appears that the evidence did not sustain the second ground of the defendant's plea to the jurisdiction as stated, because it appears that the order of the judge of the superior court transferring the presentment in question was entered upon the minutes both of the superior and the city courts. The court, therefore, did not err in finding against this ground of the special plea. It is insisted in the brief of counsel for the plaintiff in error that the entry should have been made upon the minutes of the city court from a certified transcript of the order which had been entered upon the minutes of the superior court. This, perhaps, would have been the more regular mode of procedure, if it were indispensable that the order of the judge of the superior court should be entered upon the minutes of the city court.

3. We have already, in the case of Woodall v. State, 62 S. E. 485, expressed our views upon the subject of enforcing the respective rights of contesting claimants to the occupancy of a church by prosecution for disturbing divine worship. We cannot say, however, in the present case, that the jury were not authorized to find that this defendant violated the law. He would have had the right, as one of a committee appointed by his church conference, to notify Redding not to preach on the Sunday in question. But if (as testified by several witnesses, whose testimony the jury believed) he proceeded further, by snatching the would-be preacher from the pulpit and telling him that if he attempted to preach he would give him the worst whipping a man ever got, this conduct would not only disturb the congregation, but his action became individual, and not representative, because he exceeded his instructions.

Judgment affirmed.

#### SEABOARD AIR LINE RY. v. CHAPMAN. (No. 860.)

(Court of Appeals of Georgia. Sept. 28, 1908.  
On Rehearing, Oct. 2, 1908.)

#### 1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE— INTOXICATED PERSON.

In viewing the conduct of an intoxicated person for the purpose of determining his negligence or contributory negligence, the state of mind produced by the intoxication may be disregarded; for he will be judged as if the con-

duct occurred while he was in the possession of his normal mental capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 119.]

#### 2. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK.

The duty of a master to use ordinary care to keep his premises and to conduct his business in such manner that his servants may perform their duties in safety is but a phase of the broader and more anciently recognized doctrine of the common law that every person who expressly or impliedly invites another to come upon his premises or to use his instrumentalities is bound to use ordinary care to protect the invited person from injury.

(a) It will not be presumed or implied, against a master engaged in lawful business, that he invited his servants to come upon his premises or to use his instrumentalities for the purpose of committing crime, or that he should anticipate their doing so.

(b) A servant who enters upon the premises of his master, not for the lawful discharge of a duty, but for the purpose of violating the law, is entitled to no higher degree of protection from the master than an outsider under similar circumstances.

(c) In North Carolina it is a misdemeanor for an intoxicated person to take charge of a locomotive as engineer. Therefore in that state an engineer, who while intoxicated is attempting to get upon an engine to take charge of the same, is not upon the premises of the railway company in the discharge of his duty, but is there attempting to commit a crime; and the company and its other servants do not owe him that degree of care which they owe to employes there in the line of duty, but owe him only that degree of care which they owe to other intruders.

(d) A railway company, when sued by an engineer for injuries received by him in the state of North Carolina through the unsignaled moving of a locomotive which he was attempting to mount for the purpose of taking charge of it, may plead and prove in defense to the action that the engineer was intoxicated and that the statutes of North Carolina make it a misdemeanor for an engineer to be in charge of a locomotive while intoxicated. This is true, although the engineer was injured before his attempt to get upon the engine and to take charge of it had proceeded far enough to render him amenable to prosecution under the statute.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reld, Judge.

Action by H. S. Chapman for personal injuries against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

The following brief statement will be sufficient to illustrate the points necessary to a full discussion of the case, although the record is somewhat lengthy:

Chapman was employed in the yards of the defendant at Hamlet, N. C., as a yard engineer, and was what is known as an "extra man"; that is to say, he was not regularly assigned to any particular engine, but was used to fill vacancies caused by the absence of other engineers. For several days prior to the date on which he was hurt he had been running a yard engine, which was regularly operated by Engineer Sanders, who was absent on account of sickness. On the morning in question Sanders had returned to work and was

engaged in operating the locomotive; but by reason of his failure to register his return, according to the practice of the employés, the fact was unknown to Chapman, and he therefore went out shortly after 7 o'clock to relieve the night engineer and to take charge himself. He approached the locomotive upon the fireman's side, and according to his contention, just as he was in the act of mounting, and as he was upon the steps, the engine was moved suddenly backward, without the ringing of bell or the giving of other audible signal, and he was thrown under the wheels of the engine. He did not see the engineer, and the engineer did not see him. A rule of the company required the bell to be rung before the engine was moved.

The plaintiff pleaded and relied upon a statute of the state of North Carolina, as follows: "Any servant or employé of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant, or employé who shall have suffered death in the course of his service or employment with said company by the negligence, carelessness, or incompetency of any other servant, employé or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company"—and set up that he was in the line of his duty at the time he was hurt. The company denied negligence on the part of itself and servants, and set up the plaintiff's own lack of care. Numerous witnesses were introduced, who swore that the plaintiff was drunk, and even staggering, as he approached the engine. He admitted that he had taken a drink before breakfast, but denied that he was in any way intoxicated. The issue as to this was sharply drawn.

On the trial the defendant offered an amendment to its original answer, in which it pleaded, that by a statute of North Carolina, "if any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation, \* \* \* be intoxicated, he shall be guilty of a misdemeanor," and that at the time the plaintiff received his injuries he was intoxicated, and was not entitled to recover damages against the defendant. The defendant also offered this statute in evidence, and the court rejected it as irrelevant.

The defendant also separately offered in evidence the following rules of the company, which were excluded by the court:

Rule 7: "The use of intoxicants, while on duty, is prohibited. Their habitual use, or the frequenting of places where they are sold, is sufficient cause for dismissal."

Rule 19: "Intoxication, or the habitual use of intoxicating liquors by employés, is strictly forbidden, and will be sufficient cause for dismissal from the service of the company. Total abstinence in this particular,

and in the use of opium or other narcotic drugs, is necessary to safety in operating the road, and employés in any capacity who frequent gambling houses or places where liquor is sold will not be retained in the service. Employés will not be prevented from obtaining meals at hotels which maintain a bar, but are cautioned not to frequent such bar."

As to the plaintiff's being intoxicated at the time of the injury, the court in substance instructed the jury that, if they found that the plaintiff was intoxicated at the time he was injured, they might consider this fact in determining whether he was guilty of contributory negligence or a failure to exercise due care. The court further charged: "A man who voluntarily becomes intoxicated or drunk neither gains nor loses in his civil rights. The law requires that he be judged by the standard of every prudent man in sober, normal condition, acting under the same or similar circumstances. In other words, the railway company in this case would not be excused, if it was negligent and caused injury to the plaintiff by its negligence, from liability because the plaintiff was drunk, if he was drunk (and you settle that question for yourselves), provided the plaintiff was in the exercise of ordinary care; that is, just that care which every prudent man would have exercised under the same or similar circumstances. On the other hand, the plaintiff cannot excuse himself under the law from the failure to exercise the care which every prudent man would have exercised under the same or similar circumstances by the fact, if it was a fact, that he was intoxicated. In other words, gentlemen, the law, in the administration of civil rights, treats all people alike, and treats all people as normal, sober people, so far as this question of drunkenness is concerned; and, as I said in the beginning, the plaintiff neither gains nor loses by the simple fact, within itself, of being intoxicated or drunk, if he was, and you settle the question whether he was or not. The question is allowed to go to you to be considered on the proposition whether the plaintiff was in the exercise of ordinary care or not. If he was intoxicated or drunk, and failed to exercise that care which every prudent man would have exercised under the same or similar circumstances, he will have to take the consequences. His intoxication or drunkenness would not excuse him. On the other hand, if he did exercise the degree of care which every prudent man would have exercised under the same or similar circumstances, then, if he was drunk or intoxicated, that fact, within itself, would not bar his right of recovery."

It seems that in North Carolina slight fault on the part of the servant will not bar a recovery in an action against the master, but that only a dereliction gross enough to amount to a failure to exercise ordinary care and diligence will have this effect.

Brown & Randolph, for plaintiff in error. Berner, Smith & Hastings, for defendant in error.

POWELL, J. (after stating the facts as above). It must be kept in mind throughout this opinion that this cause of action arose in North Carolina, and the substantive rights of the parties are to be measured by the laws of that state. Thus viewed, we find no error in the charge of the court as to the effect of the plaintiff's intoxication, so far as the question of contributory negligence is concerned. In that state, it seems, the employé can recover from the employer for negligence of a fellow servant, subject to the defense of contributory negligence, on the same terms as if the injured employé were a third person on the premises by invitation or under other rightful circumstances. As to these things, each party bears to the other the duty of exercising ordinary care. That state and our own have the same rule as to the effect of a person's intoxication in the determination of the quantum of care expected of him. He must judge and act with the same skill and caution as if he were a sober person. Compare *Rollestone v. Cassirer*, 8 Ga. App. 161, 59 S. E. 442, with *Smith v. Railroad Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

It is our opinion, however, that the court erred in not allowing the defendant to plead and prove the North Carolina statute by which it is made a misdemeanor for any person to be in charge of a locomotive engine while intoxicated. Its relevancy to the case inheres in the question as to the defendant's negligence, rather than in the question as to the plaintiff's contributory negligence. The principal negligent act upon which the plaintiff relies for a recovery is that an engineer of the defendant company put the engine in motion without causing the bell to be rung. To show that he was one of the persons to whom this duty of ringing the bell was due, the plaintiff alleged that at the time of the injury he was an employé, conducting himself within the line of his duty. Some such allegation was necessary on his part; for, although the rule required the ringing of the bell, and although a failure to give this warning would, in a general and abstract way, be neglect, still, unless the plaintiff was one of those persons for whose benefit this duty was required, the omission would not be actionable negligence as to him. "The plaintiff who has established the fact that a defendant has been guilty of doing what he ought not to have done, or of not doing what he ought to have done, has something further to do, in order to show a cause of action in his behalf. He must show, not only that he has directly and proximately suffered injury therefrom, but also that he is so related to the duty and the neglect thereof that he has a right to complain. Therefore, although an act be negligent, it does not afford a given

plaintiff a cause of action unless it is negligent as to him." *Platt v. So. Photo Material Co.*, 4 Ga. App. 164, 60 S. E. 1071.

It seems so sufficiently clear as to justify the simple statement, without elaboration, that if the plaintiff in this case were a trespasser, and without any invitation from the company attempted to mount the engine, and the engineer, without actual or constructive knowledge of his presence, moved the engine and hurt him, he could not recover, although the bell was not rung. By alleging that he was an employé in the line of his duty when he approached the engine and attempted to mount it, the plaintiff shows a right to be upon the premises, a right to be where he was, a right to claim the usual warning before the engine was moved. Now, the defendant was entitled to show anything which would negative the plaintiff's right to be where he was and would place him in the attitude of a trespasser; and it must be remembered that an employé, when not in the line of or in the discharge of some duty of his employment, stands in relation to the master and to the master's other servants just as any other member of the general public would. *Snowball v. Seaboard Ry.*, 130 Ga. 85, 60 S. E. 189; *S. F. & W. Ry. Co. v. Flannagan*, 82 Ga. 580, 9 S. E. 471, 14 Am. St. Rep. 183. Now, if the plaintiff was intoxicated at the time of his injury, and was trying to get upon the locomotive to take charge of it as engineer, he was not there in an effort to perform a duty, but to violate the law; for to take charge of an engine while intoxicated is a crime in North Carolina.

The law implies an invitation from the master to the servant to enter and remain upon and to move about in his premises, and to handle, use, and be in range of his tools, appliances, and machinery, so far as necessary to the performance of the servant's duty. Indeed, it is out of this implied invitation and the common-law principles regulating the duties of a landowner to invited persons upon his premises, that the courts have largely constructed that portion of our jurisprudence which relates to the duties of the master as to the servant's safety while he is engaged in the work. But *prima facie*, at least, it will not be presumed that a master whose occupation is lawful invites a servant to come upon his premises or to use his instrumentalities to violate the law. *Rollestone v. Cassirer*, 8 Ga. App. 161, 59 S. E. 442 (1). If the plaintiff was intoxicated, the very moment he became so, every rule, usage, instruction, direction, or command of the master, given him while he was sober, by which he was authorized to enter upon the locomotive and to take charge of it, became immediately abrogated, and remained so until he became sober, or until the master, with knowledge of his drunkenness, gave him new authority. If he was intoxicated, and came upon the company's premises for the purpose of violating the law, he was no longer an employé

in the line of his duty, but was a mere trespasser, or quasi trespasser, and entitled to no higher degree of care than any other person who might have attempted to climb upon the engine to violate any other criminal statute would have been. The necessary result of the court's action was to deprive the railway company of this line of defense.

In the most excellent brief filed by the defendant in error, and in the concise and pointed argument of his counsel, the insistence is made that any error in the rejection of this statute and of the rules of the company upon the subject of intoxication is harmless, because the court admitted to the jury all the evidence offered upon the subject of the plaintiff's intoxication, and their verdict was, in effect, a finding that he was sober. Not so; for the jury might have found that, although the plaintiff was intoxicated, he managed to conduct himself on the particular occasion just as a sober, prudent man would have done, and that, despite his drunkenness, he did no negligent act, and in this event, under the charge of the court, he would have been entitled to recover. The statute of North Carolina, however, does not forbid merely the intoxicated engineer, who is not capable of exercising ordinary care and diligence, from taking charge of a locomotive, but in wider terms makes it a misdemeanor for any intoxicated person to do so. Under this statute intoxication, not conduct, is the criterion.

Since there is to be a new trial, we may add that the court committed no error in excluding rule 7, referred to above, but should have admitted rule 19. This last-named rule is especially relevant in connection with the North Carolina statute on the same subject.

Judgment reversed.

#### On Rehearing.

Counsel in his petition for rehearing makes the point that in the original decision we considered the case as if the negligence were solely that of the engineer who moved the engine. He insists that the negligence consisted in the fireman's failure to ring the bell. The petition is so worded as to rely upon the negligence of both these employés. Of course, the thing that hurt the plaintiff was the fact that the engineer moved the engine suddenly and before the usual warning had been given. The failure to ring the bell could not have hurt the plaintiff, but it did tend to relieve his own action in getting on the engine at that particular moment from an imputation of contributory negligence. We concede that it is true, as counsel insists, that the rule alleged to have been violated reads, "The engine bell must be rung before the engine is moved," and not "the engine must not be moved until the bell is rung"; but it is our opinion that the one thing of necessity connotes the other.

Counsel insists that the fireman who par-

ticipated in the alleged negligence had actual knowledge of the plaintiff's presence at the time of his injury, and that through the fireman's actual knowledge the engineer had constructive knowledge, and that in light of this knowledge of his presence, actual to the one servant and constructive to the other, they owed him ordinary care, even though he was a trespasser. In our opinion it is seldom that constructive knowledge of a trespasser's presence is sufficient to raise a duty toward him. Generally actual knowledge is required. No such constructive knowledge as is here asserted is sufficient. Besides, even if ordinary care and diligence ever becomes the true standard of the measure of duty owed a trespasser, it is to be remembered that the same conduct may fulfill this standard as to a person in the situation of a trespasser, and not fulfill it as to a person differently situated. As to how the quantum of ordinary diligence varies in cases of trespassers, see *De Vane v. A. B. & A. R. Co.*, 4 Ga. App. 136, 60 S. E. 1079; *Charleston Ry. Co. v. Johnson*, 1 Ga. App. 441, 57 S. E. 1064. The controlling error in the trial under review was that the court, by striking the defendant's plea, shut off all inquiry into the question of the relative rights and duties of the respective parties to the transaction, as viewed from the standpoint that the plaintiff came to the engine to violate the law, and was therefore a trespasser.

Rehearing denied.

#### JOHNSON v. ROME RY. & LIGHT CO. (No. 1,075.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

#### NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The petition set out a cause of action, and the court erred in dismissing it on general demurrer.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by Alexander Johnson for personal injuries against the Rome Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

This case arises upon the court's sustaining a demurrer to the plaintiff's petition, which in substance alleged as follows: The defendant is engaged in transmitting electric light and power, and for that purpose had wires strung along the streets of the city of Rome. One of the wires thus used for the transmission of electricity was strung around the corner of Second avenue and East Fourteenth street, and had been covered with insulated wrappings. By the pressure of a limb of a tree the insulation had been worn off for two or more weeks at the time of the injury mentioned in the petition. The wire had been caught under the limb of this tree and was stretched down-

ward thereby. The plaintiff, as a helper to one Ben Lumpkin, had been employed to trim the trees along this portion of the street, and while trimming this particular tree the limb against which the wire was pressed released the wire, and it flew up and struck the plaintiff on the hand. The wire was heavily charged with electricity, and the plaintiff, in addition to being shocked, was knocked out of the tree to the ground, a distance of 35 feet, and thereby sustained enumerated injuries. The plaintiff alleged his own ignorance of the condition and dangerous character of the wire.

The following ordinance of the city of Rome was set forth in his petition: "All electric light and power wires must be fastened to insulated tie wires. The use of uninsulated tie wires is prohibited. All tie wires must have an insulation equal to that of the conducting wire. Wires must be tightly stretched, and never allowed to sag to such an extent as to be capable of coming in contact with each other, with signs, or neighboring objects." Likewise an ordinance of said city was set forth as follows: "Be it ordained that it shall be unlawful for any person or persons to chop, skin, cut or mutilate any shade tree on the sidewalks or streets in the city of Rome, or to cut therefrom any limb, or drive any nails or spikes or other substance into said trees, or to attach, fix or fasten any wire or cable or anything else to any tree, or in any manner interfere with the same, and any person violating this ordinance, upon conviction of the same, shall be fined not more than one hundred dollars or sentenced to work on the streets of the city not longer than 30 days: Provided, that any person desiring to cut or trim any shade tree on the sidewalks or streets of the city may make application to the chairman of the street committee for a permit, and if the chairman of the street committee shall decide that it is necessary to trim or cut the trees or tree mentioned in said application he may grant the same, stating in the permit how it shall be done and that said work must be done under the supervision of the street overseer."

Plaintiff further alleged that in pursuance of this last-mentioned ordinance Ben Lumpkin, the man by whom he had been employed, had made application to trim this tree, and that the following permit had been granted: "Rome, Ga., Jan. 15, 1907. This permit authorizes Ben Lumpkin to perform according to city ordinances the following named work: Cut limbs off of trees on Second avenue in front of Dr. Harbin's and others. This permit is to be approved by chairman of street committee before work is done. At No. — on — (street or avenue), the said number being the place of business or residence of —. This permit must be delivered to the city sanitary inspector, who must be present when said work is done.

J. R. Cantrell, City Clerk. Permission: F. J. Kane, Chairman St. Com."

The plaintiff further alleged that this permit was printed on a plumber's permit blank, and by reason of the form on which it was printed the work was erroneously directed to be done under the supervision of the city sanitary inspector, instead of the street overseer. The defendant is charged with being negligent in allowing the wire to run against the tree, in allowing it to remain there, in allowing the insulation to be rubbed off, and in failing to inspect, discover, and remedy such condition; also it is charged that the wire was not tightly stretched, but sagged and hung against said tree, in violation of the ordinance mentioned above, and that it was negligent in permitting contact between the live wire and the tree, in violation of said ordinance.

Seaborn & Barry Wright, for plaintiff in error. Dean & Dean, for defendant in error.

POWELL, J. (after stating the facts as above). If the defendant was rightfully in the tree, the petition sets forth a cause of action. *Atlanta Consolidated Street Railway v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798. *Compare Augusta Street Railway Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203. The contention of the electric company is that the plaintiff was in the tree, attempting to trim it, without first complying with the city ordinance which he himself sets up in his petition. This tree was not the property of the electric company, and therefore the plaintiff was not a trespasser upon its premises; and those decisions which define the relative duties existing between landowners or similar proprietors and trespassers upon their premises are not immediately in point. On the other hand, if the plaintiff at the time of the injury was himself engaged in an unlawful act, and this was the proximate, contributing cause of his injury, he should not recover, provided the particular phase of his conduct in which the unlawfulness consisted was an act of which the defendant had a right to complain, either by reason of the fact that it breached some duty which the plaintiff as a fellow citizen owed to the defendant, or because the plaintiff placed himself within the range of the defendant's dangerous instrumentality in a manner which the defendant could not reasonably have anticipated. See *Platt v. So. Photo Material Co.*, 4 Ga. App. 164, 60 S. E. 1068. The mere fact that the plaintiff is doing some criminal act at the time he is injured will not necessarily as a matter of law prevent a recovery from a defendant by whose negligence he has been injured. This rule is well settled.

But, looking to the question as to whether the plaintiff was in the tree in violation of law, we cannot say that he was. The ordinance of the city clearly contemplates that such persons as obtained permission from the chairman of the street committee might law-

fully trim or cut shade trees in the city; and, of course, permission to a principal would be sufficient authority for all agents or helpers working under his supervision. It is true that the ordinance directs that the chairman of the street committee shall state in the permit how the work is to be done and shall direct that it be done under the supervision of the street overseer; but we think that these provisions of the ordinance are merely directory, and that a person who has obtained the permission of the chairman of the street committee could not be convicted of a violation of the ordinance, even though that official omitted to state therein the details referred to. In the present instance the formal permit is written upon a plumber's blank, and is signed by the city clerk; but by his indorsement thereon the chairman of the street committee has also expressed his permission. But, even if under this permit the presence of the city sanitary inspector was necessary while the work was in progress, this requirement was in no wise for the benefit of the defendant, and his absence does not give it any better position in the case. See the Platt Case, *supra*, headnote 2 (c).

If the plaintiff stood charged with a violation of this ordinance, and the facts which appear in this record were before us, we would have to hold that he could not be convicted, because of his substantial compliance with the ordinance. His position is entirely different from that of the plaintiff in the Chapman Case (decided this day) 62 S. E. 488, for according to the allegations there the plaintiff came upon the premises of the defendant and put himself within the range of a dangerous instrumentality for the avowed purpose of committing a crime. In the present case the plaintiff, with every intention of obeying the law and after substantial compliance with its terms, went, not upon the premises of the defendant, but upon the premises of a third person, the city, to do an act which was apparently legal, and which, so far as the relations between the parties are concerned, was affected with no illegality. The court erred in sustaining the demurrer.

Judgment reversed.

#### CHARLES v. VALDOSTA FOUNDRY & MACHINE CO. (No. 1,017.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

##### 1. CORPORATIONS—PLEADING—DESCRIPTION—DEMURRER—"COMPANY."

The words "Valdosta Foundry & Machine Company" import a corporation, and are sufficient as against a special demurrer on the ground that there is no party plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2053.]

For other definitions, see Words and Phrases, vol. 2, pp. 1347-1350.]

##### 2. SAME—USE OF TRADE-NAME.

An individual, who is doing business in a trade-name, can in such trade-name sue and be sued, especially where the suit relates to the business conducted in that name. If the name

in which suit is brought is not in fact the plaintiff's trade-name, the question should be made by a plea of misnomer, and not by demurrer to the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 156, 157.]

##### 3. REPLEVIN—PETITION—DESCRIPTION OF PROPERTY.

In a suit to recover personal property, a petition which sets forth the name of each article of property sued for and the value of each article is sufficiently definite as to the description of the property. These general terms of identification can be aided and rendered specific by parol testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 215.]

##### 4. EVIDENCE—DOCUMENTS—BILL OF SALE—NOTICE.

A conditional bill of sale, duly recorded, is admissible in evidence without preliminary proof of execution; and where such bill of sale specified the property sold as named articles of machinery bought from the vendor this was sufficient to put all persons dealing with the vendee on notice of the vendor's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1571.]

##### 5. APPEAL—REVIEW—EVIDENCE.

There is no reversible error in any of the assignments, and the undisputed evidence demanded the verdict as rendered.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by the Valdosta Foundry & Machine Company against J. B. Charles. Judgment for plaintiff, and defendant brings error. Affirmed.

The Valdosta Foundry & Machine Company brought an action of trover in the city court of Sylvester against J. B. Charles. The petition contains the usual allegations as to title in the plaintiff, possession by the defendant, value, and demand and refusal, and sets forth the following description of the property: "One 6x18 Fay Company inside moulder; one dry kiln; one Goodie & Waters resaw; one Smith comb, rip and cut saw; one board conveyor; one haul-up rig and cars; one sawdust rig and chain; one iron car; two 30 lb. frog and switches; one lath binder; one twin engine; one 2,000 lb. balance wheel; one 24x18 mandrel pulley; forty feet 2-3/16 shafting; five boxes; five coupling; sixty feet 2-7/16 shafting (Job 199), and one saw guide."

To this petition the defendant filed a special demurrer on the following grounds: (1) That it nowhere appears in the declaration whether the Valdosta Foundry & Machine Company is a partnership, a corporation, or the mere trade-name of an individual. (2) Because the description of the property sued for as set out in the petition is insufficient to put the defendant on notice as to the particular property referred to; this ground of the demurrer going to the description of each item of the property embraced in the petition, it being insisted that the description as given is too indefinite to enable the defendant to intelligently prepare a defense. (3) That it

nowhere appears in the petition what right the plaintiff has to any item of the property therein specified; the bare allegation of title to such property being insufficient. (4) That the petition does not set out the definite and specific value of each item of the property sued for; the statement of the aggregate value being insufficient.

To meet the grounds of the special demurrer the petition was amended as follows: (1) "By inserting after the words, 'The petition of Valdosta Foundry & Machine Company,' in the first portion of the petition, and before the first paragraph of the same, the following words: 'The same being a trade-name under which E. L. Thomas does business,' so that that portion of the petition, when amended, shall read as follows: 'The petition of the Valdosta Foundry & Machine Company, the same being a trade-name under which E. L. Thomas does business, respectfully shows,'" etc. (2) By giving the specific value of each item of the property. (3) By striking from the petition the aggregate value of \$1,000, and in lieu thereof inserting as the aggregate value \$2,450.50.

The defendant objected to the foregoing amendment on the grounds that there was not enough to amend by, that the amendment offered showed that the suit was null and void for want of the proper party plaintiff, and that it sought to add a new party plaintiff. The amendment was allowed, and this ruling excepted to *pendente lite*. After the petition had been amended as above set forth, the defendant moved to dismiss the same, "because said proceeding is absolutely null and void for want of a proper party plaintiff, the Valdosta Foundry & Machine Company being neither a partnership nor a corporation, but the mere trade-name under which E. L. Thomas does business," and, being neither a natural person, a corporation, nor a partnership, could not legally institute the action, and, there being no party plaintiff, the suit is a mere nullity and cannot be amended. The court overruled the motion to dismiss, and the defendant excepted. A general demurrer was also filed by the defendant, which was overruled, and the judgment overruling the same was excepted to *pendente lite*.

After the overruling of the defendant's special and general demurrers, and of his motion to dismiss, the defendant filed a plea denying each paragraph of the plaintiff's petition, and the case went to trial before a jury. After the evidence of the plaintiff was heard, the defendant introducing none, the court directed a verdict for the plaintiff for \$949.37, and the defendant filed a motion for a new trial, embracing some of the grounds already covered by exceptions to the judgment overruling the demurrer, and, besides the general grounds, the following additional special assignments of error: (1) The direction of a verdict for the plaintiff, as there was a conflict in the evidence as to the value

of each and every item of property in question; (2) that the identity of the property had not been conclusively proved; (3) that the title of the plaintiff to the property in controversy was not shown by the evidence; (4) that the court erred in admitting in evidence the conditional bill of sale covering the property in controversy, without first requiring proof of its execution, and because the description of the property contained in this instrument was not sufficient to show that it was the same property testified about and sued for, or to put the defendant on notice that the title to the property therein described was in the plaintiff. The court denied the motion for a new trial, and this judgment is assigned as error.

C. E. Hay and Claude Payton, for plaintiff in error. J. B. Murrow and Perry & Williamson, for defendant in error.

HILL, C. J. (after stating the facts as above). 1, 2. The words "Valdosta Foundry & Machine Company" import a corporation, and the court properly overruled the special demurrer based on the ground that there was no party plaintiff. *Van Winkle Gin & Machine Works v. Mathews*, 2 Ga. App. 249, 58 S. E. 396; *Georgia Fire Association v. Borchardt*, 123 Ga. 185, 51 S. E. 429; *Holcomb v. Cable Co.*, 119 Ga. 466, 46 S. E. 671. The amendment of the petition, therefore, setting out the real character of the plaintiff, was unnecessary, unless it was denied that the plaintiff was a corporation and this denial was shown by proof. The amendment, however, was allowed by the court, and, the petition as amended showing that the plaintiff was in fact not a corporation, but was an assumed or trade name of an individual, the question made by the motion to dismiss the petition on the ground that the suit was brought neither by a corporation, a partnership, nor a natural person, and that therefore there was no real party plaintiff, is necessary to be determined. The motion to dismiss, being in the nature of a general demurrer, admits the truth of the allegation that the Valdosta Foundry & Machine Company was the trade-name under which E. L. Thomas did business; so the question arises whether an individual can, in an assumed or trade name, bring a suit. It is well settled by frequent decisions of the Supreme Court that no suit can be lawfully prosecuted save in the name of a plaintiff having a legal entity either as a natural or as an artificial person; in other words, that in every suit brought in this state there must be a real plaintiff and a real defendant. *Anderson v. Brumby*, 115 Ga. 649, 42 S. E. 77; *W. & A. Railway Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. The underlying purpose in requiring that there shall be real parties to all litigation is that there shall be some one upon whom the judgment of the court shall be effective.

It is entirely competent for a person to as-

sume any business name which he desires, except as prohibited by statute (see Civ. Code 1896, § 2636), and all contracts made by him in that name shall be binding, and if he brings suit in that name he will be afterwards estopped from denying the binding effect of any judgment in such suit; and the person who thus sues in a trade or business name cannot, in his real name, be afterwards heard to dispute any judgment rendered in the case in which he was a party plaintiff under the assumed or trade name. *Clark Brothers v. Wyche*, 126 Ga. 24, 54 S. E. 900. Mr. Justice Atkinson, in the case just cited, says: "So it is not so much the name, but the identity of the person who causes the name to be employed, that is the main question." And further: "If Mrs. Wyche under the assumed name [George Foundry & Machine Works] caused the foreclosure proceeding to be instituted in that name, the proceeding, so far as she is concerned, would not be wanting in respect to a real party plaintiff, and she would, after judgment, be estopped to raise the point that the suit was not brought in the name of a natural person, a partnership, or a corporation. She is capable of suing. By her true name, or whatever name she adopts, the suit will be sufficient to bind her whenever it appears that it is instituted at her instance. It is not a question of fictitious parties. The parties are real, one acting under an assumed name, but nevertheless a real party." The foreclosure proceeding alluded to by the learned justice was instituted by Mrs. Wyche under the assumed name of George Foundry & Machine Works, which was admitted to have been the name under which she conducted business; the mortgage being made to her in that name. Under a plea of recoupment a verdict was obtained against the plaintiff in excess of the amount sued for, and Mrs. Wyche subsequently contested the validity of this verdict and of the judgment obtained thereon on the ground that there was no legal entity as a party plaintiff in the foreclosure suit, and that she, as an individual, was not bound by the judgment in that suit. The Supreme Court held that she could not, after having instituted suit in her trade or business name, deny in her real name the validity of the judgment or its binding effect upon her.

We think the principle announced in this case is applicable to a suit by a party in a trade or business name; in other words, that if a judgment in such a suit would be binding upon the real party suing in such business or trade name, the suit itself, being one by an individual in his assumed or trade name, would meet the requirement of the law that there should be a real party plaintiff. Under the doctrine laid down in the *Clark Case*, supra, a defendant, sued by a plaintiff under an assumed or trade name, where a judgment is obtained against him, could not have such judgment set aside or arrested on the

ground that there was no real party plaintiff. Of course, the defendant is entitled to be sued by a real party plaintiff, and if he desires to contest the fact that he is so sued he can do so by a plea in abatement, and set up a misnomer in the name of the party plaintiff. But if he admits, as he does by general demurrer or by motion to dismiss, that he is in fact sued by a real party plaintiff, although in such suit the trade or business name is used, we can see no reason in law or logic why such suit would not be a valid one against him, or why he would not be fully protected, and the purpose of the law in requiring real parties substantially complied with. We therefore conclude that either a natural or artificial person, who is transacting business under an assumed or trade name, can in such name maintain or defend a suit. This is clearly indicated by the decision in the *Clark Case*, supra, and we think is implied by the Supreme Court in the case of *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205. It is a well-known fact that many firms retain their original name many years after the original partners composing them have either retired or died, and that business is continued to be transacted in the name of such original firms; and we see no legal reason why individuals may not be allowed to adopt as their trade or business name any name they please, and by such name sue and be sued.

The plaintiff in error relies upon the case of *W. & A. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. In that case the suit was brought by the "Dalton Marble Works," and a motion was made to dismiss on the ground that there was no allegation that the Dalton Marble Works was a corporation or partnership, and it was not the name of an individual. To meet this objection an amendment was made, adding after the words "Dalton Marble Works" the words "H. P. Colvard, Proprietor." The court held that it was not certain that the name "Dalton Marble Works" imported either a corporation or a partnership, and that the amendment negated such a construction of the words, but, on the contrary, showed that the "Dalton Marble Works" was in fact neither a corporation, a partnership, nor an individual, but merely the name of Colvard's property; that the words "H. P. Colvard, Proprietor," simply indicated that he was the owner of the "Dalton Marble Works," and that the suit was therefore instituted in the name, not of a natural or artificial person, but of a piece of property, and that therefore there was no real party plaintiff. In the present case the amendment which was allowed alleged that the Valdosta Foundry & Machine Company was the trade-name of E. L. Thomas, under which he was in fact doing business. The words added by the amendment disclosed a real individual, carrying on his business under a definite, fixed trade-name.



which was used by the real individual in his suit. The two cases are therefore distinguished in the allegations made by the amendments, respectively; and we think, as above indicated, that the case sub judice falls more clearly within the reason of the rule as laid down by the Supreme Court in the Clark Case, *supra*.

3, 4. The description of the property sued for, set out in the petition as amended, is sufficiently specific and definite. If this description leaves any doubt as to the identity of the property, the doubt can be easily solved by parol evidence. In pleading very meager terms of identity may be sufficient; parol evidence being admissible under such general words of description to identify the property. In mortgages or conditional sales of property "the courts lay hold of slight circumstances to supplement the descriptive words." The words of description contained in this petition are more definite and specific than similar descriptive words approved by the Supreme Court as sufficient in the case of *Thomas Furniture Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333.

The ground of special demurrer that the petition did not give the value of each article sued for, and that it was not sufficient, on the question of value, to state only the aggregate value of the articles, is sufficiently met by the amendment, which was properly allowed. This amendment sets forth, opposite the name of each one of the articles sued for, its value, and then the aggregate value of the articles.

5. The grounds of the motion for a new trial are without merit. There was no con-

flict in the evidence as to the identity of the property sued for, or the fact that it belonged to the plaintiff, and that it was in the possession of the defendant when demand was made and when the suit was filed. Only two witnesses testified on the question of value, and the verdict, as directed by the court, was for a less sum than the amount testified to by either witness. The property sued for was the same property which had been sold by the plaintiff, as set out and described in the conditional bill of sale, and the title of the plaintiff to the property in question was retained until paid for by this written instrument which was duly executed and recorded. Besides this documentary evidence of title, the plaintiff swore positively that the property belonged to him, and there was no denial of this fact by the defendant. On the general grounds, therefore, the verdict was the only one that could have been rendered under the undisputed evidence and all reasonable inferences fairly deducible therefrom.

There was no error in admitting in evidence the conditional bill of sale, covering the articles sued for, without preliminary proof of its execution. It was not objected to as improperly admitted to record, and when such instruments are duly executed and recorded, they are admitted in evidence without formal proof of execution, as in the case of mortgages. *Anderson v. Leverette*, 116 Ga. 732, 42 S. E. 1028.

We find no merit in any of the assignments of error, and the judgment is therefore affirmed.

Judgment affirmed.

**WELCH WATER, LIGHT & POWER CO. v. TOWN OF WELCH et al.**

(Supreme Court of Appeals of West Virginia. Sept. 11, 1908.)

**1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—MANDAMUS—TAX LEVY.**

A town makes a contract for furnishing it for public use light and water. At the date of the contract statute gives the town power to tax up to a certain rate or limit. A later retroactive statute limits the power of the town to tax to a lower rate. The later statute is void, as to such prior contract, under federal and state Constitutions, because impairing the obligation of the contract, and the courts will compel the town to impose taxes at a rate sufficient to meet such contract, notwithstanding such later act, so its levy do not exceed the limit fixed by the statute in force at the date of the contract.

**2. MUNICIPAL CORPORATIONS—MUNICIPAL INDEBTEDNESS.**

Municipal indebtedness forbidden by the Constitution discussed by Judge Brannon.

(Syllabus by the Court.)

Application by the Welch Water, Light & Power Company for a writ of mandamus against the town of Welch and others. Writ awarded.

Rucker, Anderson, Strother & Hughes, for petitioner. B. R. Smith, for respondents.

BRANNON, J. In March, 1902, the town of Welch granted to D. J. Howell a franchise to use its streets and alleys for supplying electric light and water for public and private use in the town, and contracted with Howell to furnish light and water for the public use of the town for a term of years; the town agreeing to pay Howell a compensation by periodical installments. Howell assigned the right conferred upon him by the franchise to Welch Water, Light & Power Company, a corporation, and that corporation erected a plant, and for a number of years up to the present time furnished the town for its use light and water, for which it became indebted to the corporation in a considerable sum, and issued to it various orders or drafts payable out of the town treasury. These drafts were presented to the sergeant of the town for payment, but he failed to pay them, saying that there was no money in the treasury with which to pay them. The water company demanded of the council that it levy a tax to pay the same, but the council failed to do so, and said orders remain unpaid. The company asks a mandamus to compel such levy.

At the date of the contract, the statute law authorized the town to impose taxes up to the rate of \$1 on the \$100 property valuation, but in 1905 the Legislature passed an act limiting the power of taxation of the town to 50 cents on the \$100 valuation, and in 1907 passed an act limiting it to 40 cents, and in 1908 passed an act still further limiting the rate to 35 cents on the \$100 valuation. The water company asks this court for a mandamus against the town council to re-

quire it to impose a tax to pay said debt. It is settled law that a statute in force at the date of a contract is an element of it as to its construction and binding force or obligation, as much as if the written contract expressly so declared. *United States v. Quincy*, 4 Wall. 555, 18 L. Ed. 403. *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090, holds that tax laws for taxes to meet city contracts are part of such contracts. See 8 Cyc. 931, and 15 Am. & Eng. Ency. L. (2d Ed.) 1046. The contract involved in this case had by the statute law then in force taxation as its only means of payment, and, liability for payment being a most vital element of the contract, we can say that the parties looked to taxation as the source of payment, the only means of payment. The law then in force gave the town power to levy taxes up to the rate of \$1 on the \$100 valuation of property. That was a part of the contract. The parties looked to this taxation, and contracted with reliance upon it. The Legislature could not impair the contract or change its obligation by either wholly taking away the power of taxation or limiting it, so as to destroy or delay payment, or render payment uncertain or indefinite, because the federal and state Constitutions forbid any statute impairing the obligation of contracts.

It does not help the case to say that because the rate of taxation is only lessened there is no impairment of the contract, for it has been held that "the objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those that are, however minute or apparently immaterial in their effect upon the contract, impairs its obligation." *Green v. Biddle*, 8 Wheat. 84, 5 L. Ed. 547. "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is by the Constitution not to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." *Planters' Bank v. Sharp*, 6 How. 327, 12 L. Ed. 447. Reiterated in *United States v. Quincy*, 4 Wall. 535, 18 L. Ed. 403. The legislation in this instance very plainly postpones payment materially; indeed, appears so to operate as to leave nothing, after other current and indispensable town expenses, to go to the plaintiff's debt. In *United States v. Quincy*, supra, we find it held that: "Where a state authorized a municipal corporation to contract and to exercise power of taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. Neither the state nor the corporation can any more impair the obligation of the contract in

this way than in any other. Laws requiring the requisite amount to be collected to pay municipal bonds, which were in force when the bonds were issued, cannot be annulled by subsequent legislation. A subsequent act restricting the power to tax, so far as it affects said bonds, is a nullity." The court said that the city must tax as if the later act had not been passed, and that "a different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and delusion." In *Wolff v. Mayor of New Orleans*, 108 U. S. 358, 26 L. Ed. 895, it was held that a Legislature may at any time restrict or revoke powers of a municipality, including power of taxation, "provided its action do not operate directly upon contracts of the corporation so as to impair their obligation by abrogating or lessening the means of their enforcement"; that, if it so operate, the legislation "must be disregarded." *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. Ed. 1090, holds legislation of a state impairing contracts made under its authority by a city void, "and the court in enforcing the contract will pursue the same course and apply the same remedies as though such invalid legislation had never existed." The case of *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936, declares these principles as fixed. Those were cases where rates of taxation were lessened from what they were when the contracts were made, and thus they fit this case. In *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620, we find it stated as sound law that, "where the recourse for payment of bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for payment of the bonds is forbidden by the Constitution of the United States, and is null and void." In the later case of *Scotland County v. United States*, 140 U. S. 41, 11 Sup. Ct. 697, 35 L. Ed. 351, we see that the federal Supreme Court has decided that, when authority is granted a municipality to contract a debt by the issue of negotiable securities, the power to levy taxes to meet at maturity the obligation to be incurred is implied. Code 1906, c. 47, § 28, gave the town of Welch power to light its streets and to erect, or authorize others to erect, electric light and water works, and thus the town would have power to make this contract, and under the case just cited would have implied power to levy taxes to meet the contract; but, in addition, that statute gives express power of taxation. That the contract was a valid contract is beyond question. It is true that the return says in a general way that it is invalid. Why it is is not specified. I do not see that the question of its validity under section 8, art. 10, Const. (Code 1906, p. lxxix), as creating a debt be-

yond its limitations, is before us, as the data as to the taxable property and other things are not presented. Even if they were, it would be a question whether, as the pay for light and water is by installments, there is the creation of a debt in the constitutional sense as beyond current annual expenses. In *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 841, it is held that "a limitation of municipal indebtedness is not violated by a contract for a supply of water or gas at an annual rental merely because the aggregate of the rentals during the life of the contract may exceed the limit of indebtedness." Much authority sustains this view. *Beard v. City of Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 239; 8 Am. & Eng. Ency. 1002, last note; 20 Am. & Eng. Ency. 1175; *City v. Gardner*, 97 Ind. 1, 49 Am. Rep. 417; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191. I would regard this as good law. Why cannot a town make an agreement for light and water for a period beyond a year to be paid for in installments in future after the light and water shall have been furnished, though the aggregate installments would exceed the limit of the Constitution? If it could not, it would be hurtful to the town's powers. It can make a contract for one year, and why not for several, if the cost for one year do not go beyond the limit? Is it not current expense? The Constitution is intended to forbid a fixed present debt payable in the future, of a permanent nature, not current annual expenditures. *List v. Wheeling*, 7 W. Va. 501; *Beard v. City of Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 44 Am. St. Rep. 240; *City v. Gardner*, 97 Ind. 1, 49 Am. Rep. 417, reported in 7 Am. & Eng. Corp. Cas. 626. Whether this question under the Constitution is intended to be raised I cannot say. Anyhow, the data are not present, and he who asserts the invalidity of a contract by a town because of Const. art. 10, § 8, must show it to be void. *Armstrong v. County Court*, 41 W. Va. 602, 24 S. E. 993. So the question does not really arise. I think the only defense relied on is the limitation of levy made by statutes passed subsequently to the contract.

It occurred to me that we could avoid passing on the constitutionality of the statutes under the familiar rule that the statutes are to be construed as operating only on future transactions, unless they plainly disclose an intent of retroaction; but I find that the legislation since the date of the contract up in this case evidently intends the limitation of levy to apply to antecedent indebtedness, because it makes provision for additional levy for "outstanding indebtedness at the time this act goes into effect." Acts 1907, p. 254, c. 62 (Code Supp. 1907, § 1876), Acts Ex. Sess. 1908, p. 56, c. 9, § 4, and the act of 1908 make this additional levy depend on a popular vote, a condition not annexed to said con-

tract at its date. And here I note that even this additional levy applies in words to "bonded indebtedness," and does not apply to such indebtedness as is present in this case. This shows that the act retroacts on this debt in its limitation of rate of taxation. The act of 1907 applies the additional levy to "city, town or village orders or bonds," but the act of 1908 applies it only to bonded indebtedness. This additional levy power does not apply to this debt, if it would alter the case if it did. If it did, it puts it in the power of councils to limit the levy. And, as stated, this debt is denied the remedy of additional levy, as that levy is limited to bonded indebtedness. Of course, it will be understood that we do not hold the later act void as to contracts made after it went into operation. Of course, if I am wrong in regarding the act as retroactive, then the later act would not prevent levy enough to pay the plaintiff's demand. The courts "coerce against the municipality, through its officials, the levy of a tax sufficient to pay its debts, in spite of a legislative impairment of its powers subsequent to its contract." 15 Am. & Eng. Ency. L. 1048. After writing this opinion, I meet with a copious note in that most valuable late work—American and English Annotated Cases, p. 150—giving a collection of cases on the subject, which support the view above given.

So we award the mandamus to require the council to levy taxation sufficient for payment of the orders in question, so in the whole for current expenses and such payment the levy do not exceed \$1 on the \$100 valuation; in other words, a levy beyond 35 cents on the \$100 valuation sufficient to pay the plaintiff, but not in all over \$1 on the \$100 valuation.

Mandamus awarded.

#### STATE v. WYNNE. (No. 902.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

#### JUSTICES OF THE PEACE—CERTIORARI—BOND—FILING—APPROVAL.

Every petition for certiorari in a civil case must, at the time of its filing in the office of the clerk of the superior court, be accompanied either by the prescribed pauper affidavit or the statutory certiorari bond, approved by the judicial officer before whom the case was tried in the first instance. The fact of the approval of the bond must appear upon the papers themselves. No subsequent action, approving or ratifying the bond, will save the certiorari from dismissal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 789.]

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by the state of Georgia, for use, etc., against M. Wynne. Judgment for defendant, and plaintiff brings error. Reversed.

J. P. Highsmith, for plaintiff in error. W. M. Clements, for the State.

POWELL, J. The point before us may be understood from the following statement, quoted from the bill of exceptions: "Defendant in the certiorari proceedings moved to dismiss the petition for certiorari on the ground that the certiorari bond did not appear to have been approved by the presiding justice in the court below, which motion the court overruled. The court required that the following be here inserted: 'The court ruling and stating that as the bond for certiorari had been executed before the justice of the peace who tried the case, and the said justice of the peace who tried the case having officially attested the bond, as shown on the face thereof by the words "Executed in the presence of" and followed by the official signature of said justice of the peace, and which bond, so attested, had been left on file with the justice of the peace, and by said justice had been sent up to the superior court as a part of the record in the case, that this was tantamount to an approval of the bond by the justice of the peace, without the formal word "Approved" being written on the bond and signed by the justice of the peace.'"

In civil cases an approved certiorari bond (unless pauper affidavit is filed) must accompany the petition for certiorari when it is lodged in the office of the clerk of the superior court for filing; otherwise, the clerk has no power to issue the writ and the proceeding becomes nugatory. Civ. Code 1895, § 4639; *Dykes v. Twiggs County*, 115 Ga. 698, 42 S. E. 36. By the statute itself the bond is to be filed with the petition for certiorari in the office of the clerk of the superior court, and not with the magistrate whose decision is under review. If, therefore, the explanatory statement made by the judge in the bill of exceptions, that the bond was left on file with the justice of the peace and by him sent up as a part of the record, is to be taken as true, a dismissal of the certiorari was demanded. The record seems to indicate, however, that the bond was filed with the petition; and in cases of conflict between the bill of exceptions and the record, as to matters which form a part of the record, the latter controls. *Adams v. Holland*, 101 Ga. 45, 28 S. E. 434; *Dismuke v. Trammell*, 64 Ga. 428.

The bond as it appears in the record is not approved. It is merely attested. Attestation and approval are entirely different things in law and in fact. Any attesting officer may legally witness such a bond. Only the officer whose decision is to be reviewed has authority to approve it. *Hester v. Keller*, 74 Ga. 369. The bond, being unapproved at the date of its filing with the petition, was insufficient to authorize the clerk to issue the writ, and no subsequent approval, either express or implied, could cure the deficiency. *Dykes v. Twiggs County*, supra. In criminal

certiorari cases the rule is different. *Brown v. State*, 124 Ga. 411, 52 S. E. 745; *Watson v. State*, 85 Ga. 237, 11 S. E. 610. In the *Brown Case*, 124 Ga., at page 415, 52 S. E. 745, the Chief Justice points out that the practice in civil and criminal cases differs in this respect. Whether we look to the record or to the recitals of the bill of exceptions, the court erred in not dismissing the certiorari.

Judgment reversed.

### GEER v. THOMPSON. (No. 1,198.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

#### 1. MUNICIPAL CORPORATIONS—ANIMALS—POLICE POWER—PROHIBITING CATTLE RUNNING AT LARGE.

Under the general welfare clause of its charter the city council of Colquitt had authority to pass an ordinance prohibiting the running at large of cattle within its incorporated limits, without regard to whether the county of Miller, in which the city is situated, had adopted the provisions of the stock law or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1336.]

#### 2. TROVER AND CONVERSION—DEFENSES—IMPOUNDING CATTLE.

An action in trover, brought to recover possession of cattle, can be successfully resisted by proof that the cattle were legally impounded, in accordance with a proper ordinance, by the marshal of an incorporated town or city. In such a case there is in fact a failure on the part of the plaintiff to make out his case, because the maintenance of an action in trover depends as much upon showing conversion on the part of the defendant as upon proof of title in the plaintiff.

#### 3. TRIAL—VERDICT—SURPLUSAGE.

Where the verdict of a jury upon the real issues between the parties is so explicit that it is impossible to mistake their meaning, any finding upon matters not in issue which may be incorporated in the verdict may be rejected as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 789.]

(Syllabus by the Court.)

Error from City Court of Miller County;  
O. C. Bush, Judge.

Trover by W. I. Geer against J. S. Thompson. Judgment for defendant, and plaintiff brings error. Affirmed.

W. I. Geer, in pro. per. Bush & Stapleton, for defendant in error.

RUSSELL, J. Geer brought an action of trover against Thompson for the recovery of four head of cattle. Thompson was marshal of the city of Colquitt, and in his answer claimed to be holding the cattle in question by virtue of an ordinance of said city forbidding the straying of cattle, hogs, and sheep on the streets of the city. He claimed that he impounded the cattle in accordance with his duty, and that he did not return them to the plaintiff because he refused and still refuses to pay the impounding fee required by the ordinance. Upon the trial of the case the jury returned the following verdict: "We, the jury, find in favor of the defendant for \$2." The plaintiff moved for a

new trial, which was overruled, and he now excepts to the judgment refusing a new trial.

The errors assigned upon the verdict are that it is contrary to the evidence and contrary to law, and by an amended ground objection is taken to the form of the verdict, and it is especially insisted that there was no evidence before the court and jury upon which to base the verdict, and that it "is not supported by any evidence at all." Three questions are raised by the record: (1) Whether the city council of Colquitt had the authority to pass the ordinance in question; (2) whether an action of trover for the recovery of cattle can be successfully resisted by proof that they were impounded according to law; and (3) whether the verdict as rendered is void.

1. The ordinance, which the plaintiff in his petition claimed the city of Colquitt had no right to pass, is as follows: "It shall be unlawful for any hogs, cattle, sheep, goats, horses, mules or any other animals, excepting dogs and cats, found running at large, and before said animals are released from the pound the owner or owners thereof shall pay to the marshal fifty cents for each animal impounded, and ten cents for each day or fractional part thereof for which said animals shall remain in pound." We think the city of Colquitt, under the general welfare clause of its charter, had the right to prevent, by such an ordinance as appears in the record, the running at large of such domestic animals as might tend to create a nuisance or otherwise inconvenience the inhabitants of the municipality. The public streets of a town are not designed for pasturage purposes, nor does it matter that the provisions of the stock law are not applicable to the county in which the municipality is situated. The power of the incorporated town or city to control the territory within the limits of its incorporation is not affected by the fact that beyond its incorporate limits cattle are permitted to run at large. If a municipal corporation, in the exercise of its right to protect the health and comfort of its citizens, sees proper to pass an ordinance prohibiting the running at large of cattle or other live stock within its own corporate limits, this right is of full effect within those limits, regardless of what may be the regulations upon the subject of live stock in other portions of the county beyond the corporate limits. Even at common law permitting cattle to run at large upon the streets of a city is a nuisance. *Hellen v. Noe*, 25 N. C. 493.

Upon these same subjects, see *Crum v. Bray*, 121 Ga. 710, 49 S. E. 696; *Bearden v. City of Madison*, 73 Ga. 184, (3); *Mayor and Council of Cartersville v. Lanham*, 67 Ga. 753. In the latter case, Judge Crawford, speaking for the court, says: "The streets of an incorporated city or town are reserved and set apart for the public use. No individual can therefore appropriate them to his

private use. If he has the right to turn 6 hogs into the public streets, he has the right to turn 600. A legal principle is not governed by the number, but by the right. Individuals have no more legal right to claim pasturage of the public for their hogs than for swill or corn. Many of the best and highest authorities on this subject go to the extent of holding that where general police power is granted, or power to abate nuisances, etc., is given, even they confer the right to pass and enforce such an ordinance. *Dillon on Mun. Cor.* (3d Ed.) § 402; *Third Municipality of New Orleans v. Blane*, 1 La. Ann. 385; *Roberts v. Ogle*, 30 Ill. 459; *Commonwealth v. Bean*, 14 Gray (Mass.) 52; *Commonwealth v. Curtis*, 9 Allen (Mass.) 286; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *City of Waco v. Powell*, 32 Texas, 258."

2. Having determined that the city had the authority to pass the ordinance which authorized the marshal to impound the cattle in question, we come next to consider the question whether the fact that the marshal had legally impounded the cattle presented such a defense as could successfully resist the unquestioned proof that the plaintiff in trover had title to them. If the town had the right to pass the ordinance, the plaintiff failed to make a case, because it was settled as early as the case of *Smith v. Kershaw*, 1 Ga. 259, that "possession acquired fairly, under legal process, is not a wrongful conversion." And the doctrine is reiterated in *Chipstead v. Porter*, 63 Ga. 220. The question recurs, then, whether the passage of the ordinance tended to deprive the plaintiff of his property without due process of law, and this has been settled in the *Crum Case*, supra, in which Chief Justice Simmons, in behalf of the Supreme Court, approves and adopts the ruling of Mr. Justice Valentine in *Gilchrist v. Schmidling*, 12 Kan. 263.

3. It was unnecessary for the jury to have added to their verdict the words "for \$2." The amount of the impounding fee was not in issue. But the verdict was not affected by the fact that the jury passed upon the amount of the impounding fee, when the right of the possession of the property was the real issue, and the amount due for the impounding only an incident. We have already held in *Southern Ry. Co. v. Oliver*, 1 Ga. App. 734, 58 S. E. 244, that if more is found by the jury than is necessary it may be disregarded as surplusage, and that what is thus found does not vitiate the portion of the verdict which is necessary and well-founded. To grant a new trial where the finding of the jury is clear upon the real issues upon which they are to pass, merely because the jury assumed to pass upon matters not in issue, would be to grant a new trial without sufficient cause. See *Williams v. Brown, Sheriff*, 57 Ga. 304; *Worthan v. Brewster*, 30 Ga. 112, 113.

Judgment affirmed.

## CRAWFORD v. STATE. (No. 962.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

### 1. INDICTMENT AND INFORMATION—MOTION TO QUASH—GROUNDS—DEFECTIVE AFFIDAVIT.

That the affidavit upon which an accusation is based is defective, in not properly denominating or describing the offense charged, will not afford ground for quashing the accusation, if the identity of the transaction set forth in the affidavit with that charged to be a crime in the accusation is apparent.

### 2. FALSE PRETENSES—ACCUSSION—SUFFICIENCY.

That, instead of being charged with the offense of being a cheat and swindler, one is charged by accusation with "cheating and swindling," will not of itself authorize the accusation to be quashed. That the offense charged is improperly denominated in an indictment or other accusation does not necessarily vitiate such accusation. The test by which the sufficiency of the accusation, as well as the particular offense charged, against the defendant, is to be determined, is not the denomination which the pleader applies to the offense but the nature of the criminal act alleged, and the fullness with which the act is set forth.

### 3. SAME—"FRAUDULENT REPRESENTATION."

An allegation that certain representations are fraudulent is a sufficient statement that such representations were made with intent to defraud.

(a) An intent to defraud by false representations is sufficiently alleged, when such representations are charged as fraudulently made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 32.]

(b) One may be defrauded by representations, the truth or falsity of which has not been investigated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 13.]

For other definitions, see Words and Phrases, vol. 3, p. 2961.]

### 4. INDICTMENT AND INFORMATION—AMENDMENT.

The solicitor of a city court has the right to amend an accusation prior to arraignment; and, in the absence of proof to the contrary, interlineations appearing in an accusation will be presumed to have been made at the proper time and by the proper authority.

### 5. SAME—LIMITATION OF PROSECUTIONS.

Where a presentment is returned within the time required by the statute of limitations, and a nolle prosequi is thereafter entered thereon for any informality, the prosecution may be continued by an accusation in the city court having jurisdiction of the offense, provided such accusation be preferred within six months from the date of the order of nolle prosequi.

### 6. CRIMINAL LAW—NEW TRIAL—GROUNDS—REMARKS OF JUDGE.

While a new trial should be granted whenever it appears that the finding of a jury has been influenced by improper remarks of a judge, still, as some liberality of expression must be allowed the judge in ruling upon testimony, it should clearly be made to appear both that the remark was improper and that the movant's case was prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2182.]

### 7. EVIDENCE—BEST AND SECONDARY—LOST WRITING.

The contents of a writing, which has been lost or destroyed, or otherwise has become inaccessible, may be proved by a properly authenticated copy of that writing appearing in the brief of evidence, which was approved by the trial judge upon a former trial between the same parties.

**8. SAME—WRIT OF ERROR—QUESTIONS CONSIDERED—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

Assignments of error, which do not direct the attention of the court to the specific error of which complaint is made, will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2957.]

**9. SAME—DISCRETION OF LOWER COURT.**

Where a paper, containing the finding of a jury between the same parties, is admitted by the court without concealment of the former verdict, and the jury are properly cautioned by the court, it is not to be presumed that the jury were influenced in their finding by knowledge of the former verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3061-3068.]

**10. SAME—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

A new trial will not be granted upon minor inaccuracies of a court's charge, appearing in disjointed fragments, where by an examination of the charge as a whole the apparent errors are dissipated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990-1995.]

**11. FALSE PRETENSES—DEFENSES—FAILURE TO EXERCISE REASONABLE DILIGENCE.**

Where a defendant is charged with the offense of being a common cheat and swindler by means of specific false representations, which he is alleged to have made, the fact that the party alleged to have been defrauded did not exercise reasonable diligence in preventing the fraud affords no defense to the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 27.]

**12. SAME—SELLER'S BELIEF.**

Where one, either by false representations or by fraudulent concealment of material facts, deceives prospective purchasers of property and induces them to purchase, to their damage, what they otherwise would not have purchased, the belief of the seller that he is giving full value to the purchaser is immaterial, unless the evidence shows that either the seller himself or some one else has acquainted the purchaser with all of the material facts as they really exist in relation to the transaction as to which he has been deceived. One cannot be deceived by false representations which he knows to be false; but, on the other hand, it will not be presumed, in favor of one who has made false representations, that the party to whom these representations were made knows them to be untrue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 18.]

**13. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REQUESTED CHARGES COVERED BY CHARGE GIVEN.**

The requests contained in the eighteenth and nineteenth grounds of the amended motion are fully covered in the charge of the court to the jury, and hence it was not error to refuse these requests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

**14. FALSE PRETENSES—EVIDENCE—SUFFICIENCY.**

The evidence authorized the verdict.  
(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

J. R. Crawford was convicted of cheating and swindling, and he brings error. Affirmed.

T. S. Hawes, for plaintiff in error. M. E. O'Neal, Sol., for the State.

RUSSELL, J. J. R. Crawford was tried in the city court of Bainbridge upon an accusation charging him, jointly with one J. R. D. Laster, with the offense of cheating and swindling. For a former report of this case, see 117 Ga. 247, 43 S. E. 762. The jury returned a verdict of guilty, and the defendant's motion for new trial was overruled.

The accusation was based upon an affidavit made by one Thomas Chason on April 18, 1907, alleging the offense to have been committed on September 22, 1900. The accusation was as follows: "State of Georgia, Decatur County. In the City Court of Bainbridge, March Term, 1907, Held in April of Said Year. The following accusation is founded upon the foregoing affidavit of Thomas Chason, who now, in the name and behalf of the citizens of Georgia, charges and accuses J. R. D. Laster and J. R. Crawford with the offense of cheating and swindling, for that the said J. R. D. Laster and J. R. Crawford, on the 22d day of September, in the year 1900, in the county of Decatur, then and there unlawfully and with force and arms did falsely and fraudulently represent to Chason & Reynolds, a firm composed of Thomas Chason and J. F. Reynolds, that said Crawford and Laster were the owners of all the timber on a place known as the 'Harvey Place,' in said county and state, and bounded on the east by the land of Adam Rambo and Joe Collier, and on the north by the lands of A. Fort and J. R. Crawford, on the west by the river road, and on the south commencing on the east boundary, by lands of Ike McGill, Cassie Williams, and Caroline Hopkins, and thence the balance of the said south line by a road leading from what was then the mill of Chason & Reynolds to the Harvey landing on the Chattahoochee river, and did thus induce said Chason & Reynolds to purchase all of said timber on said land that measured 12 inches at the stump and 18 inches from the ground, for the sum of \$500, said leased timber estimated to be about 350 acres, when in truth and in fact about 200 acres of said land and said timber was not the property of said Laster and Crawford, which fact was well known to the said Laster and Crawford at the time they made said false and fraudulent representations, and was not known by said Chason & Reynolds, and by said deceitful means and artful practices did cheat and defraud the said Chason & Reynolds of the sum of \$400, the value of the timber that did not belong to the said Crawford and Laster, and contrary to the laws of said state, the good order, peace, and dignity thereof. And deponent aforesaid, in the name and behalf of the citizens of Georgia, further charges and accuses the said J. R. D. Laster and J. R. Crawford with having committed the offense of cheating and swindling, for that on the day aforesaid, and in the county and state aforesaid, the said defendants did execute and deliver to the said

Chason & Reynolds a lease to all the timber on the place known as the 'Harvey Place,' between the boundaries hereafter described, bounded on the east by the lands of Adam Rambo and Joe Collier, on the north by the lands of A. Fort and J. R. Crawford, on the west by the river road, on the south, commencing on the east boundary, by the lands of Ike McGill, Cassie Williams, and Caroline Hopkins, thence the balance of the said south line by road running from mill of Chason & Reynolds to the Harvey landing on the Chattahoochee river, the timber on said land to be cut down to 12 inches at the stump and 18 inches from the ground, the lease to remain operative three years from September 22, 1900; and when the description in said contract of land was being written by the prosecutor the said defendants, Laster and Crawford, allowed him (the prosecutor) to insert, 'Bounded on the west by lands of Adam Rambo and Joe Collier,' knowing at the time that this was not the proper boundary on the east, and by remaining silent and not giving the proper information did use deceitful means and artful practices, by reason of which said lease contained 350 acres of land, whereas the proper boundary was, 'Bounded on the east by lands of Adam Rambo' alone, which would have made 150 acres as the proper acreage of timber, instead of 350, whereby the said Chason & Reynolds were deceived and defrauded, and suffered loss in the sum of \$400, the same being the value of the timber that did not belong to the said Laster and Crawford, they, the said Chason & Reynolds, believing at the time that said boundary on the east was in fact by the lands of J. Collier, and they, the said Crawford and Laster, knew that the said Chason & Reynolds so believed, and thus, by using deceitful means and artful practices, did fraudulently cheat and swindle the said Chason & Reynolds, contrary to the laws of said state, the good order, peace, and dignity thereof. Deponent further alleges that a bill of indictment was regularly found by the grand jurors of said county against said defendants at the November term, 1901, of the superior court of said county, and that the case thus made has been pending in the superior court, the Supreme Court of Georgia, and the city court of Bainbridge up to this date, when said bill of indictment was for informality nolle pros'd in open court by the state, and this accusation was immediately preferred in lieu thereof. M. E. O'Neal, Solicitor City Court of Bainbridge. Thomas Chason, Prosecutor."

Upon arraignment the defendant demurred to the accusation upon the following grounds: "(1) That the affidavit on which the accusation is founded charges no crime against these defendants. (2) That the accusation filed in said case charges no crime against these defendants, and for said reasons said affidavit and said accusation should be

quashed. (3) That whatever crime, if any, was committed, was barred by the statute of limitations on the face of the accusation. For special demurrer in the above-stated case the defendants say: (1) That the affidavit is not sufficient upon which to base an accusation, for the reason that it charges defendants with no crime, nor could an accusation charging any crime be based on said affidavit, and that under the law of the city court of Bainbridge an accusation must be founded on an affidavit. (2) That there is no such offense or crime in the state of Georgia as 'cheating and swindling,' and for this reason the affidavit charges no crime. (3) That the accusation based on said affidavit accuses the defendants of committing no crime, for the reason that they are only charged with the offense of cheating and swindling, which is not a crime under the laws of Georgia. (4) Because said indictment fails to allege that the representations, if any were made, were made for the purpose of, or with the intention of, defrauding Chason & Reynolds. (5) Because said indictment in the first count thereof fails to allege that the 200 acres shortage could not, by reasonable diligence, have been discovered and known to the said Chason & Reynolds. (6) Because said indictment is indefinite and uncertain, in that it alleges that 'said leased timber estimated to be about 350 acres,' when in truth and in fact about 200 acres of said land and timber was not the property of said Laster and Crawford, and fails to state who estimated the amount to be about 350 acres, and who estimated the shortage to be about 200 acres, and for the reason that 'about 350 acres' fails to allege any definite amount of land, and for the further reason that 'about 200 acres short' fails to allege or show the amount of the shortage, because said accusation shows on its face that Chason & Reynolds only leased the timber 12 inches at the stump, 18 inches from the ground, and shows that they did not lease the land, and said indictment fails to show that any timber 12 inches at the stump, 18 inches from the ground, was situated on the land which the accusation alleges to be short, and said accusation fails to allege how much timber of the character described was situated on the land that was short. (7) Because said indictment alleges on its face that defendants offered to sell Chason & Reynolds the timber on the Harvey place, and nowhere alleges that the timber received by Chason & Reynolds was not all the timber on the Harvey place, and fails to allege that Chason & Reynolds were not thoroughly familiar with the Harvey place, and that said Chason & Reynolds did not know all the lands and timber situated on the Harvey place, or that they could not have discovered by ordinary diligence all of the lands and timber situated on the said Harvey place. (8) Because said accusation shows on its face that it has been interlined,



erased, and changed since said accusation was filed. (9) Because said accusation shows on its face that the crime, if any is charged against these defendants, is barred by the statute of limitations, for the reason that the crime is alleged to have been committed on September 22, 1900, and the accusation and the affidavit on which it is based were made and filed on the 18th day of April, 1907, and the accusation does not show that any indictment or accusation has been heretofore filed charging these defendants with the particular offense or crime with which they are now charged, and fails to show that any valid charge or crime relating to this transaction was ever made against these defendants. (10) Because said accusation shows on its face that the description of the property or timber sold to Chason & Reynolds by these defendants was reduced to writing, and because said accusation fails to set out the description contained in said writing. (11) Because said accusation fails to state that the defendants, by remaining silent at the time that it is alleged that the prosecutor inserted the words 'bounded on the east by the lands of Adam Rambo and J. Collier' in the said lease, acted fraudulently and intended to deceive the prosecutor or Chason & Reynolds, and that the defendants purposely resorted to such conduct as a means of obtaining money or other thing of value from the persons alleged to have been deceived. (12) Because said accusation fails to allege that Chason & Reynolds relied on either the statements of the defendants or the silence of the defendants and were thereby deceived. (13) Because the accusation fails to allege what deceitful means and artful practices were used by the defendants."

The points raised by the demurrer may be summarized into five heads: (1) The insufficiency of the affidavit. (2) The failure to properly denominate the crime. (3) That the offense is not sufficiently set forth to put the defendants properly upon their defense. (4) That the accusation has been interlined and changed since it was filed. (5) That it appears from the accusation that the offense charged against the defendant was barred by the statute of limitations. We shall consider these objections raised to the form of the accusation seriatim.

1. The fact that the affidavit upon which the accusation was based may or may not have been defective in describing the offense will not afford ground for quashing the accusation, if the identity of the transaction set forth in the affidavit with that charged by the accusation to be a crime is apparent. It has frequently been held that an affidavit charging merely that the defendant committed the offense of misdemeanor is ample basis for an accusation in which a criminal act referred to by the affidavit is distinctly and properly set forth and every material particular sufficiently amplified to enable the ac-

cused to prepare for his defense. The defendant in a criminal case, proceeding by accusation against him, can derive no benefit, nor does he suffer any injury, from the fact that the affidavit may be but a mere skeleton which brings him into court.

2. Another point raised by the demurrer in more than one of its subdivisions is that the offense of which the defendant was accused is denominated in the accusation as "cheating and swindling." It is true that the statute denominates that one guilty of certain acts is a common cheat and swindler, and does not refer to the offense as being cheating and swindling. That the offense is improperly denominated in an indictment or other accusation will not necessarily vitiate the accusation. The test by which the sufficiency of the accusation, as well as the particular offense which is charged against a defendant, is to be determined, is not the denomination applied to it by the pleader, but the nature of the criminal act alleged, and the fullness with which the act is set forth. We would have no hesitation in holding that, if the offense was not denominated at all, an indictment charging even a felony would be sufficient, if the accused were properly charged with the commission of such acts as rendered him guilty of a felony, and indicated beyond question the specific felony of which he would be guilty under the law, if the allegations were proved.

3. The third complaint of the demurrer is that the accusation falls in several particulars to allege enough to constitute the crime of being a common cheat and swindler, so as to call upon the defendant to defend. In the fourth ground of the demurrer it is stated that the indictment fails to allege that the representations, if any were made, were made with the intent of defrauding the prosecutor. The statement of the accusation, in each of its counts, that the representations were fraudulent, is sufficient answer to this ground of the demurrer. The usual meaning of the word "fraudulent," as applied to representations, is a representation made with the intent to defraud. The fifth ground of the demurrer complains that the indictment is insufficient because it fails to allege that the shortage of 200 acres of timber land could not have been discovered by reasonable diligence on the part of the prosecutor. Such an allegation may be proper in some cases of cheating and swindling, but it is not indispensable that it should be alleged in every accusation of that offense. In some cases, where one purports to disclose all of the facts, or is under duty to disclose them, there may be no duty on the part of another, dealing with him, to make any inquiry, or to attempt to discover whether the representations being made to him are true or untrue. To hold, for instance, that one who may have defrauded another by exhibition of written muniments of title (ostensibly genuine) cannot be prosecuted criminally unless he who is

sought to be defrauded has used all diligence to detect the fraud, and has, perhaps, in fact prevented it, would be to our minds an unnatural ruling. A citizen has the right to rely, so far as the criminal law is concerned, upon representations made to him by one with whom he deals, which are apparently reasonable and truthful; and he who falsely, fraudulently, and intentionally abuses this confidence, so absolutely necessary to the conduct of commercial transactions, must be made to know that he does so at his peril. A sufficient reply to the objections raised by the sixth and seventh grounds of the demurrer is that it is not required that the accusation should set forth all of the evidence which it may be necessary to introduce to support its statements. The accusation in the present instance is amply specific.

4. If the fact that an accusation has been interlined or changed subsequent to the filing can properly afford ground for special demurrer, the court did not in the present instance err in overruling the eighth special ground of the demurrer. Not only has the solicitor of a city court the right to amend an accusation at any time prior to the arraignment (*Goldsmith v. State*, 2 Ga. App. 283, 58 S. E. 486), but, in the absence of proof, any interlineations appearing in an accusation, or even in an indictment, would be presumed to have been made prior to its return into court.

5. There is no merit in the demurrer alleging that the accusation was barred by the statute of limitations. It is distinctly alleged in the accusation, as well as in the affidavit, that an indictment which had been returned at the November term, 1901, for the same offense, had upon the day of the filing of the accusation been "nolle pros'd by the state," and that the accusation was for the same offense and criminal act as that charged in the indictment as to which a nolle prosequi had been entered. The original indictment was found within two years from the time the offense was alleged to have been committed, and was transferred to the city court of Bainbridge. This transfer gave the city court of Bainbridge full jurisdiction to dispose of the case in its entirety, both as to matters of form and of substance. The case was not altered by reason of the fact that it originated by presentment of the grand jury, instead of by accusation in the city court. Both presentments and accusations are mere pleadings. The effect of the order of the judge of the superior court in transferring the case was to give to the city court of Bainbridge jurisdiction to dispose of, not only such pleadings as might be in existence at the time of the transfer, but any other pleadings as well, which might be necessary in the proper conclusion of the judicial investigation remitted to it. We are clear in the opinion that section 80 of the Penal Code of 1895, which provides that, "if the indictment is found within the time limited and

for any informality shall be quashed or nolle pros'd, a new indictment may be found and prosecuted within six months from the time the first is quashed or nolle pros'd," applies interchangeably to indictments, presentments, or accusations.

6. After conviction the defendant filed a motion for new trial upon the general grounds, which are thereafter amended by the addition of 22 other assignments of error. In the fourth ground of the amended motion it was insisted that the court erred in requiring the defendant's counsel in the presence of the jury to produce a postal card alleged to have been written by the defendant, which the defendant had introduced in evidence on a former trial of the case. From the colloquy between the court and the defendant's counsel, which appears in the record, it seems that the only statement by the court upon this point was: "I insist, if you have these papers, that you will have to turn them over." Mr. Hawes, the defendant's counsel, declined to answer whether he had ever seen the postal card and lease in question, upon the ground that he was not compellable to testify; and it does not appear that the court thereafter made any further ruling or any remark of any kind in regard to this matter. We would be far from sustaining a verdict in a case where it appeared that the finding of the jury was influenced by an improper remark, which could clearly be held to have been prejudicial to a party in the case; but we have several times held that some liberality of expression must be allowed the trial judge in ruling upon testimony, and at the time the judge uttered the remark of which complaint is made the state had the right to prove, and in fact was required to prove (in advance of establishing the contents of the postal card in question aliunde), that the original was either lost or destroyed, or that it was otherwise beyond the power of the state to produce it. Mr. Hawes not having, at the time of the court's statement, asserted the claim of privilege, it was not improper for the court to require the production of material written testimony, as to which no exemption had been claimed. We fail to see that the remark of the court could have been prejudicial to the defendant, and so far as appears from the record the court did not finally peremptorily order the production of the postal card, but, on the contrary, appears to have held, with Mr. Hawes, that his possession of the original postal card, if, indeed, he had it, was privileged; for later in the trial the contents of the postal card were proved by a copy contained in the record of the former trial of the case.

7. The admission of the above-stated copy of the postal card forms the basis for the fifth ground of the amended motion, and in view of what we have already said we find no merit in the objection contained in this ground of the motion. The original postal

card written by the defendant, as appears from the record, was introduced by him on a former trial of the case and returned by the jury with the other papers to the court. It is immaterial whether, as appears from some of the evidence, the postal card then passed into the possession of the former counsel for the defendant or not. If it did, it was inaccessible to the state on account of the privilege which attached to it. It was as inaccessible as if it had been in the possession of the defendant himself. If the original postal card was lost, it was likewise inaccessible. If material to the state's case as an admission on the part of the defendant, the state had the right to prove its contents, and we know no better way of doing this than by the introduction of the copy contained in the brief of the evidence at the former trial, presented by the defendant and approved by the presiding judge. It is true that the substantial contents might have been shown by any witness who remembered the contents of the writing in the original, which was inaccessible; but the exact contents would be much more likely to be ascertained from the record contained in the brief of evidence which the trial judge had officially verified. It was not an introduction of a copy in lieu of the original, but rather the authentication of the contents of the lost writing.

8. Complaint is made in the sixth ground of the amended motion that the court, in passing upon the admissibility of the record of the former trial, or some portion of it, remarked: "It appears to be in Judge Bower's handwriting. I will not allow you to introduce this record in evidence. You can take it and use it to assist you." The specific assignment of error is that this statement of the court was error, for the reason that the defendant had the right to introduce the record for the purpose of contradicting the testimony of the witness who was on the stand, as well as to show that the original record had been changed, and the word "defendant" inserted in lieu of the word "state," and that the court further erred in making the statement that the interlineation appeared to have been made in Judge Bower's handwriting. This assignment of error appears to us to be without merit for several reasons. In the first place, it is not stated in what manner the statement of the judge that the interlineation was in Judge Bower's handwriting could have hurt the defendant. Doubtless the judge was familiar with Judge Bower's handwriting, and naturally used this statement as an assertion of the presumption that the record had not been improperly interlined. But, whether the remark was spontaneous or was well considered, we are unable to say that the judge erred, because the assignment does not direct our attention to the specific error complained of. As to the contention that the defendant had the right to introduce the record approv-

ed by the court in a former trial, it is plain that the court did not err in rejecting it at the time and in the manner in which it was done. If the defendant had offered the record at a proper time, the court might have erred in rejecting it. But it appears from the assignment of error itself that the record, if offered at all and rejected, as complained of by the defendant, was offered while Dr. Chason was on the stand, and without any request that he be temporarily withdrawn to permit the introduction of other testimony. Two witnesses cannot be put upon the stand at the same time, nor is the introduction of written testimony, without the special permission of the court, permissible while a witness is upon the stand and undergoing cross-examination.

9. While we think it would perhaps have been better for the court to have concealed the verdict of the jury which had formerly convicted the defendant, and which appeared upon the indictment which was introduced in evidence, still to do this or to decline was a matter of discretion on the part of the trial judge, and we cannot say that his discretion was abused, or even that the defendant's case was prejudiced by his refusal to conceal the prior verdict of guilty. The court cautioned the jury that they were to be guided only by the evidence, and we cannot assume that the jury would be any more influenced by ascertaining from a writing that the defendant on trial had been theretofore convicted of an offense than if they had had knowledge of that fact from general rumor, or that a fair jury would be influenced by either.

10. Numerous exceptions are taken to the instructions of the court embodied in the eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth grounds of the amended motion. After a careful review of the charge as a whole, we are more than ever impressed with the statement of Judge Bleckley, in *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13 (1), that "a charge torn to pieces and scattered in disjointed fragments may seem objectionable, although when put together and considered as a whole it may be perfectly sound. The full charge being in the record, what it lacks when divided is supplied when the parts are all united. United they stand, divided they fall." A similar charge upon the subject of reasonable doubt to that complained of here was approved by this court in *Parker v. State*, 3 Ga. App. 336, 59 S. E. 823, and each of the other excerpts presented principles of law abstractly correct, and which, when considered and qualified by other instructions given in connection with them, fairly presented the law of the case to the jury.

11. In so far as the omission of the court to call the attention of the jury to a lack of reasonable diligence, by the exercise of which the persons alleged to have been defrauded might have prevented a fraud, and failing in which the defendant could not be convicted, is concerned, as we have already

intimated, a charge upon this subject was not required and would not have been correct. Frequently, from the less diligence used by the defrauded party, and even in case of his total imbecility and consequent inability to use any diligence, arises the greatest necessity that the state should protect such a citizen against those deceitful means and artful practices of which he may become the easiest prey.

12. The fifteenth, sixteenth, and seventeenth grounds of the amended motion allege error upon the court's refusal to give in charge certain instructions which were properly requested in writing. The requests set forth in the fifteenth and sixteenth grounds were made in the endeavor to have the court instruct the jury, among other things, that if the defendant believed that the amount reduced from the contract price was to cover the difference between the amount of timber represented and the true amount owned by the defendants, then the defendant could not be convicted. There was evidence to the effect that in the original negotiations the defendants endeavored to sell the property in question for \$750, but that in the consummation of the trade, the purchasers (the prosecutors) refusing to give more than \$500, the latter sum was finally accepted. The principle embodied in the request, even if it is justified by the statement of the defendant as to his belief, should not have been given in charge. If the defendant, either by false representation or fraudulent concealment of material facts in the transaction, deceived the purchasers of the property, and induced them to purchase what they otherwise would not have purchased, to their injury and damage, it would be wholly immaterial that the seller, the defendant, believed they were given full value on account of the reduction of the price, or believed that the reduction of the price was made to cover the amount of value which he had represented was being conveyed, unless he had undeceived the purchasers as to the true amount of their purchase, or unless the evidence showed that some one else had undeceived them prior to the consummation of the contract and the payment of the money. It would never do for the court to charge baldly that, if the defendant believed that the contract had been changed, he must be acquitted, no matter what were the true facts of the case. It is, of course, true that in every case where one is accused of being a common cheat and swindler the jury should be instructed that, if they believed that the intent to defraud was lacking, the defendant should be acquitted; and this was clearly stated to the jury by the court in the charge. But as the judge was not required to give the requests, unless they were in all respects legal and proper, the court did not err in refusing those contained in the fifteenth and sixteenth grounds. The court's charge upon this point was as favorable to the defendant as he had any right

to expect, when the jury was instructed: "I charge you, further, gentlemen, that if you are satisfied from the testimony in this case that either Dr. Chason or Mr. Reynolds knew at the time they made this purchase that the title to that property was not in Crawford and Laster you would not be authorized to convict the defendants."

13. The eighteenth and nineteenth grounds of the amended motion except to the refusal of the court to charge as follows:

(18) "I charge you, gentlemen, that the state is required to prove to your satisfaction, beyond a reasonable doubt, that the alleged representations were made by the defendant, and that they were known by the defendant to be false, that they were made by the defendant for the purpose of deceiving Chason & Reynolds, and that as a result thereof Chason & Reynolds were defrauded. I charge you, gentlemen, that a mistake by the defendant as to the amount of land owned, or as to the boundaries of the land, or as to the number of acres, would not make him guilty of the crime charged, and unless you are satisfied from the evidence that the representations, even if false, were not a mistake, or if you have a reasonable doubt as to whether the representations were the result of a mistake, it would be your duty to acquit the defendant."

(19) "I charge you, gentlemen, that before you would be authorized to convict the defendant you must be satisfied beyond a reasonable doubt, from the evidence, that the representations alleged in the accusation were false. If you are satisfied beyond a reasonable doubt that the representations were false, then you must go further and be satisfied from the evidence beyond a reasonable doubt that the defendant knew that each of the representations were false, and, further still, you must be satisfied beyond a reasonable doubt, from the evidence, not only that the representations were false, and were known by the accused to be false, but you must be further satisfied beyond a reasonable doubt, from the evidence, that the accused intended to deceive the parties named in the accusation, and, further, you must be satisfied beyond a reasonable doubt, from the evidence, that the accused purposely resorted to the particular means of obtaining the money or other thing of value from the person alleged to have been deceived; and you must be further satisfied beyond a reasonable doubt, from the evidence, that the parties alleged in the accusation were actually deceived and defrauded as a result of the charges alleged in the accusation—that is, the acts alleged must have been the sole and only cause which caused the parties alleged to have been deceived to have been so deceived. If you have a reasonable doubt as to any of these propositions, gentlemen, it would be your duty to acquit the defendant."

In so far as the first portion of the re-

quest, contained in the eighteenth ground of the motion, is concerned, the principle had already been given to the jury in the instruction which we have quoted above, and the law favorable to the defendant's defense, that his mistake was an honest one, was equally well presented in the general charge. The court, in the earlier portion of the charge, instructed the jury as follows: "Before you would be authorized, gentlemen, to convict either of the defendants, you would have to be satisfied beyond a reasonable doubt that at the time this trade was made the defendants, Crawford and Laster, knowingly made false representations as to the number of acres conveyed in this lease." And later on in the charge the jury were instructed upon this subject as follows: "The jury will look to all these facts and circumstances, and determine what was in the minds of the defendants at the time this lease, this trade, was made. The jury, before they could convict in this case, would have to be satisfied beyond a reasonable doubt that the defendants, Crawford and Laster, knew at the time they made this trade that they were selling more timber than they owned. If the defendants really and in truth and in good faith thought that they owned this timber, and they sold it under these circumstances, then, if you believe that, I charge you, you would find the defendants not guilty."

14. After a painstaking investigation of the very voluminous record in this case, and after an investigation of the assignments of error, which are so numerous as to satisfy us that every plausible reason for a new trial which the learning and ingenuity of the very able counsel for the plaintiff in error could suggest has been skillfully presented, we are unable to find any error which would warrant a reversal of the judgment refusing a new trial. The evidence in behalf of the state was sufficient to authorize the verdict. The finding of the jury has been approved by the trial judge who presided. Two juries have found the same verdict.

As a matter of law there is every reason why the judgment should be affirmed.

#### LASTER v. STATE. (No. 963.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

#### FRAUDULENT INTENT.—EVIDENCE—SUFFICIENCY—

The special exceptions are the same as those presented in *Crawford v. State*, 62 S. E. 501, and are without merit; but the verdict of guilty was unauthorized, and a new trial should have been granted, for the reason that the evidence upon the subject of the defendant's fraudulent intent, which was entirely circumstantial, was as consistent with the defendant's innocence as with guilt, and did not exclude a hypothesis that the defendant was innocent of a fraudulent intent, even more reasonable than that he acted with such fraudulent intent.

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

J. R. D. Laster was convicted of cheating and swindling, and he brings error. Reversed.

T. S. Hawes, for plaintiff in error. M. E. O'Neal, Sol., for the State.

RUSSELL, J. In the court below the defendant in this case was charged and tried jointly with one Crawford, and exactly the same questions are raised by both bills of exceptions. In the opinion in the Crawford Case, 4 Ga. App. —, 62 S. E. 501, we have already fully considered the special exceptions filed pendente lite and the assignments of error contained in the 19 grounds of the amended motion, and have held, as we again hold, that none of these exceptions are well taken. Having disposed of these, the only remaining question in this case, as was true in the Crawford Case, is whether the evidence is sufficient to authorize the verdict of guilty.

We are clear that the evidence adduced upon joint trial authorized the jury to find the defendant Crawford guilty, and consequently this court was without jurisdiction to set aside the finding as being contrary to law, for lack of evidence to support it. In the case of the present plaintiff in error, however, we are of the opinion that the judgment refusing a new trial should be reversed, because the evidence against the defendant Laster is insufficient to authorize a verdict of guilty against him. We waive all consideration of the fact that it is plain that Chason & Reynolds placed but little reliance on the representations of this particular defendant, that they would not consummate the lease until his codefendant, Crawford, had been consulted, that when the lease was being made Crawford assisted in giving the description of the land, by means of which Chason & Reynolds were defrauded, and the fact that they knew that Laster could not sell the timber without Crawford's consent. In a case of cheating and swindling, it must appear that he who was defrauded was so defrauded because of his reliance upon the statements made to him, and the evidence for the state upon this branch of the case is exceedingly weak so far as this defendant is concerned.

We plant our judgment, however, upon the fact that the state failed to show beyond a reasonable doubt that the defendant Laster knowingly made any false representations, or, in other words, that he made the statements he did with fraudulent intent. The evidence of fraudulent intent is necessarily circumstantial. This being true, the testimony must establish beyond any other reasonable hypothesis that the defendant knew that he did not own the timber he was proceeding to sell at the time that he was pointing out the boundaries of the land and when he signed the lease. So far as the evidence in this case is concerned, the testimony is most

susceptible to the inference that he honestly believed and had good reason to believe that he had a perfect right to sell the timber with Crawford's consent, and to sign the lease by which Chason & Reynolds were defrauded. It is undisputed in the testimony that Laster held the land under bond for title from Crawford, and that Chason & Reynolds knew this; and there is no evidence that the description of the land set forth in the bond for title did not include all of the land which Chason & Reynolds claimed to have purchased. There is no evidence that Laster, in pointing out the boundary of the land, exceeded what had been bargained to him by Crawford, and as to the timber itself Chason & Reynolds were informed that he could not sell this, except upon Crawford's assent.

Another significant difference, which tends to show that the defendant Laster was perhaps honestly mistaken as to the extent of his interest at the time that he dealt with Chason & Reynolds, is the evidence by the witnesses for the state that after the shortage was discovered the defendant Laster expressed his willingness to accede to the demand of the purchasers to rescind and restore the purchase price, while the defendant Crawford, to whom the money had been paid on a debt due him by Laster (for which he still held Laster's note), refused to rescind, and stood on the proposition that the purchasers ought themselves to have discovered the shortage before they paid their money. While this circumstance is not conclusive, it is strongly illustrative of intent, and tends to strengthen the hypothesis as to this defendant which is inconsistent with guilt. It is plainly apparent, from various circumstances detailed by witnesses for the state, that the evidence fails to exclude any other reasonable hypothesis save the guilt of the defendant, and for this reason the conviction of Laster was unauthorized.

Judgment reversed.

Appeal from Common Pleas Circuit Court, Saluda County; Ernest Gary, Judge.

Action by L. D. Riley & Son against the Southern Railway Company. Judgment of a magistrate for plaintiff was reversed by the circuit court, and plaintiff appeals. Reversed in part.

Barnard B. Evans, for appellant. Eugene W. Able, for respondent.

WOODS, J. This action was brought in the court of magistrate Allen, in Saluda county, for damages to freight shipped over defendant's railroad from Atlanta, Ga., to the plaintiffs at Silver Street, S. C., and for the statutory penalty of \$50. The plaintiffs conducted a general mercantile business in Saluda county. Silver Street is the plaintiff's point of delivery, but is in Newberry county, across the Saluda river from their store. The summons was served on the defendant's agent at Ward's in Saluda county, and was returnable on November 27, 1907. On that day the defendant presented to the court a demurrer to the summons, which thus appears in the record: "Before W. P. Allen, Esq., Magistrate, Wednesday, Nov. 27th, 1907. Special appearance of E. W. Able for Southern Railway Company. The summons served upon the Southern Railway Company therein is objected to on the grounds that it is defective, vague, indefinite, and wholly insufficient to give the court jurisdiction of the Southern Railway Company of the cause of action herein in the following particulars, to wit: (1) Because the plaintiffs in this action are not properly designated, in that, if the plaintiff is a copartnership, it is essential that all the names of the copartners appear, and, if a corporation, that fact should appear. (2) Because the defendant in the action is not properly designated, in that if the defendant is a copartnership that fact should appear, and, if a corporation, that fact should appear. (3) Because it does not appear from the summons herein upon what manner of charges or cause of action the defendant is indebted to the plaintiffs, when or where the same accrued, the items that composed the same, nor upon what account, nor whether or not demand for payment had been made. (4) Because the summons is vague, indefinite, and entirely insufficient to apprise the defendant of any facts constituting any possible cause of action upon which the said defendant might prepare to go to trial, wherefore Southern Railway Company asks that the summons herein be declared null and void and wholly insufficient in the premises, and that this action be dismissed, with costs." The magistrate overruled the demurrer, defendant withdrew, and the magistrate gave judgment by default for the damages claimed, \$21.23, and the penalty of \$50. On appeal the circuit court reversed the judgment of the magistrate, holding that a magistrate of Saluda county had no juris-

L. D. RILEY & SON v. SOUTHERN RY. CO.  
(Supreme Court of South Carolina. Oct. 5, 1908.)

#### 1. APPEAL AND ERROR—REVERSAL IN PART.

The destination of freight shipped into the state for plaintiff over defendant's road was a place in N. county. Action was brought in S. county for damages to the freight, and for the \$50 penalty, under 24 St. at Large, p. 81, for failure to adjust the claim. *Held*, that while judgment for plaintiff could not be sustained as to the penalty, Code Civ. Proc. 1902, § 145, requiring an action for a penalty to be tried in the county where the cause or some part thereof arose, it should be sustained as to the damages; the court having jurisdiction of the action therefore, and this though it deprive plaintiff of the right to sue for the penalty.

#### 2. PARTIES—NECESSITY OF GENERAL APPEARANCE—OBJECTION TO CAPACITY TO SUE.

Defendant, desiring to avail itself of objection to the capacity of plaintiff to sue, must make a general appearance.

Woods, J., dissenting.

diction because the action was for a penalty which arose at Silver Street, the point of destination, situated in Newberry county.

Code Civ. Proc. 1902, § 145, requires that actions for the recovery of a penalty or forfeiture imposed by statute "must be tried in the county where the cause or some part thereof arose." The cause of action for the penalty as well as for the damages certainly arose at Silver Street, Newberry county, and therefore it seems clear the magistrate in Saluda county, under section 145 of the Code, had no jurisdiction of a suit to collect the penalty. The claim of \$21.23 for damaging the goods in transportation though arising in Newberry county could be enforced by action in any county of the state in which the railroad company's line is located, and in which it maintains a public office for the transaction of its business. *Tobin v. Chester & L. R. R. Co.*, 47 S. C. 387, 25 S. E. 283, 58 Am. St. Rep. 890; *Boyd v. Blue Ridge Ry. Co.*, 65 S. C. 328, 43 S. E. 817. Hence the magistrate in Saluda county had jurisdiction of the cause of action for the damages. The penalty statute (24 St. at Large, p. 81) seems to require one who claims a penalty to set it up in the action for the loss or damage. As the penalty can be recovered only in the county where it or some part of the cause of action arose, and the damage and loss may be recovered in any county where the railroad company does business and has an agency for the delivery of freight, including the county where the cause of action arose, it seems to follow that the law contemplates that a suit for the loss or damage, and the penalty must be brought in the county which is the proper venue for both claims. Any other conclusion would require that the court take away from the defendant the right conferred by section 145 of the Code of Civil Procedure to have a suit against him for a penalty tried in the county where the cause of action or some part of it arose. Restating the matter, the law is that a corporation may be sued in any county in the state in which it has an office and does business, provided, when the suit is for a penalty, it shall be brought in that county where the penalty or some part of the penalty or some other part of the cause of action arose. The question involved was jurisdiction of the subject-matter, and is therefore not affected by the appearance of the defendant for the purpose of submitting a demurrer to the complaint for defect of parties, as well as want of jurisdiction. *Nixon v. Piedmont Mut. Ins. Co.*, 74 S. C. 438, 54 S. E. 657; *Silcox v. Jones*, 80 S. C. 484, 61 S. E. 948.

For these reasons, we think the conclusion of the circuit judge that the magistrate in Saluda county was without jurisdiction of the claim for the penalty was correct. If no other defect appeared in the record, the plaintiff would have the option to hold his judgment for the damages, \$21.23, or commence a new suit for the penalty, as well as

the damages in a court having adequate jurisdiction. But in the summons the complaint is called "L. D. Riley & Son," and there is nothing to indicate whether a corporation or a partnership is meant, or, if a partnership, the individuals who compose it. Such a defect was held to be fatal in *Look-out Mountain Medicine Co. v. Hare & Co.*, 56 S. C. 456, 35 S. E. 130. It is true this point was not decided in Judge Gary's decree, and it would be more regular to leave it open to be heard first by the circuit court, but, as the case above cited directly decides the question, the plaintiff should not be subjected to the needless delay, which would result from remanding the case to the circuit court.

The judgment of this court is that the judgment of the circuit court be affirmed.

**JONES, J. I dissent.** The magistrate clearly had jurisdiction of the action for damages, and the judgment of the magistrate should be affirmed to the extent of \$21.23. If this should result in depriving plaintiff of the right to sue for and recover penalty in Newberry county, plaintiff brought it about by voluntarily electing to sue for damages in Saluda county, in a court having no jurisdiction of the cause of action for penalty. If defendant desired to avail itself of objection to the capacity of plaintiff to sue, there should have been a general appearance.

**POPE, C. J. I dissent, and concur in the opinion of JONES, J.**

**GARY, A. J. I dissent.**

#### WALKER v. VENTERS.

(Supreme Court of North Carolina. Oct. 7, 1908.)

#### 1. EVIDENCE—ORAL EVIDENCE—ADMISSIBILITY TO AFFECT WRITING.

A writing cannot be contradicted by a contemporaneous oral agreement, and plaintiff, having agreed in writing to deliver 20 bales of cotton annually for 10 years in payment of land, could not show an oral agreement at the time that he could pay \$4,000 in money to discharge the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2035, 2036.]

#### 2. MORTGAGES—PAYMENT IN COTTON—DEFAULT—MEASURE OF RECOVERY.

A mortgagor having defaulted in paying cotton to discharge a debt, the mortgagee could recover the market value of the cotton when payments were due, with interest.

Appeal from Superior Court, Pitt County; W. R. Allen, Judge.

Action by A. S. Walker against Henry C. Venters. From a judgment for defendant, plaintiff appeals. Affirmed.

Julius Brown and W. O. Howard, for appellant. F. G. James and Jarvis & Blow, for appellee.

CLARK, C. J. The plaintiff bought a tract of land of the defendant, receiving a conveyance thereof, and to secure payment of the purchase money executed a mortgage back to the vendor on said land, which recites: "Whereas, A. S. Walker is justly indebted to Henry C. Venters in the sum of \$4,000, the same being the purchase money of a certain tract of land, this day deeded by said Henry C. Venters and wife to A. S. Walker and described in said deed; and whereas, it is agreed that said A. S. Walker shall pay, in lieu of said sum of \$4,000 and interest thereon, 200 bales of cotton, each weighing 500 pounds, as evidenced by 10 several cotton bonds of this date, due and payable as follows: [Here follow the recitals, and the reconveyance by way of mortgage to secure the delivery of the cotton at the several dates named.]" Said bonds are in following form: "On or before 31st Dec., 1900, for value received, I promise to pay to Henry C. Venters, or order, for value received, twenty bales of merchantable lint cotton, each weighing 500 pounds. This bond is secured by real estate mortgage of this date. Witness my hand and seal this 13th Oct., 1898. A. S. Walker. [Seal.] Attest: F. C. Harding." Some of the bonds were payable to other parties than Venters, but the aggregate quantity to be delivered was 200 bales; 20 bales deliverable each year for 10 years.

The plaintiff offered to prove an alleged parol agreement, made at the time the mortgage was executed, that in case of payment in full settlement at one time, or in event of foreclosure, the amount to be paid was to be \$4,000 in money, at plaintiff's option. This evidence the court excluded, because it contradicted the written agreement. This is the only exception requiring consideration. It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man. The mortgage duly recorded, and the 10 bonds in proof, evidence a fully considered and matured agreement to deliver 200 bales of merchantable lint cotton, weighing 500 pounds each, at the rate of 20 of such bales in each year, on dates specified in the mortgage and in the bonds. It is specified that this cotton is agreed to be delivered, without interest, in lieu of an original indebtedness of \$4,000 bearing interest. This agreement was evidently made because the purchaser was apprehensive that cotton might fall in price and preferred paying a certain fixed amount in the product of the farm. The vendor was satisfied to take such product, and evidently thought that cotton would go up in price enough to counterbalance the loss of interest, which, on payments to be made in

10 annual installments, aggregates nearly 33% per cent., and, indeed, more if the interest on the annual payments is reinvested. At any rate, the parties agreed upon this mode of payment in lieu of the indebtedness of \$4,000, and to show a contemporaneous parol agreement notwithstanding to accept \$4,000 in lieu of the cotton stipulated for would be to contradict, not to explain, the written agreement. Such evidence is never admitted, if the wording of the written contract is clear, or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract. This point is clearly discussed, with full citation of authorities, by Mr. Justice Walker in *Basnight v. Jobbing Co.* (at this term) 62 S. E. 420. Nothing more need be added.

The court further charged that the amount due on the mortgage is the value of 20 bales of cotton, at the market price when each installment fell due, with interest, subject to payments and set-offs, if any. This was correct.

The other exceptions do not require discussion.

No error.

DR. SHOOP FAMILY MEDICINE CO. v.  
J. A. MIZELL & CO.

(Supreme Court of North Carolina. Oct. 7, 1908.)

1. EVIDENCE—ORAL EVIDENCE—ADMISSIBILITY TO AFFECT WRITING.

In an action to recover the price of goods sold under a written contract stating that the order was not subject to countermand and that there was no agreement affecting the order except that specified in the contract, the buyer could not show that when the contract was made the seller's agent stated that the goods could be returned if not resold within 90 days, though the buyer did not read the contract; there being no claim that he was prevented from reading it by the agent's wrongful act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2035, 2036.]

2. PRINCIPAL AND AGENT—AGENT'S CONTRACT—AUTHORITY TO MAKE—BURDEN OF PROOF.

If a buyer of goods under a written contract could show, in an action against him for the price of the goods, that the seller's agent orally agreed when the order was given that the goods could be returned if not resold within 90 days, the burden was on him to show that the agent had authority to make such agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 392.]

Appeal from Superior Court, Martin County; Lyon, Judge.

Action by the Dr. Shoop Family Medicine Company against J. A. Mizell & Co. From a judgment for defendant, plaintiff appeals. New trial ordered.

This action was brought to recover the price of goods sold and delivered to the defendant under a written contract containing the following stipulation: "This order is not subject to countermand, and we will re-



ceive said goods promptly on arrival at the station named above. Failure to do so will make this order due on demand. There is no agreement, verbal or otherwise, affecting the terms of this order, other than is specified herein." The court, over the plaintiff's objection, permitted the defendant to testify that at the time he signed the written contract or order the agent who sold the goods said he would ship them, and the defendant could keep them for 90 days, and if at the expiration of that time they were unsold, he could ship them back to the plaintiff. The court charged the jury that if the verbal agreement was made by the agent with the defendant, and the latter made a reasonable effort to sell the goods, and, not being able to do so, he returned them to the plaintiff at the expiration of the 90 days, they should answer the issue as to the indebtedness in favor of the defendant. The plaintiff excepted to the ruling upon the evidence, and also to the charge. There was a verdict for the defendant, and a motion for a new trial by the plaintiff, which being overruled, and judgment entered for the defendant, the plaintiff appealed.

B. A. Critcher, for appellant. S. A. Newell, for appellee.

**WALKER, J.** The evidence as to the parol agreement at the time the written contract was executed was incompetent. It contradicted the plain terms of the written instrument, and it is not permissible to do this, even where there is a contemporaneous oral stipulation which was not reduced to writing, although intended to be a part of the contract. The oral must not conflict with the written part of the contract. The subject is fully discussed by us at this term in *Basnight v. Jobbing Co.*, 62 S. E. 420, where the authorities will be found. See, also, *Walker v. Venters* (at this term) 62 S. E. 510. It would be useless to point out in what cases oral evidence is competent to fill out a contract, a part of which is in writing, or to explain the contract, when ambiguous. This case is governed by the general rule that such evidence will not be received where it contradicts or varies a written contract. It is provided in the order that it is not subject to countermand, and that there is no agreement, verbal or otherwise, affecting the terms of the order, which is the con-

tract, except what is specified therein. There is no doubt as to the true meaning of those words. The jury, upon the evidence which was admitted by the court, changed that meaning radically, and substituted for the contract as written by the parties another and different one.

The defendant testified that he did not read the contract but signed it, supposing that it was drawn according to the oral understanding. If he did not read it, the fault was his own. He had the opportunity to do so, and his failure to avail himself of it was due solely to his own neglect. He must suffer the consequences of this omission to do what any prudent man would have done under the circumstances. There is no suggestion that he was prevented from reading the paper, or was put off his guard, by any fraud, artifice, deception, or other wrongful act of the agent. *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538; *Floars v. Insurance Co.*, 144 N. C. 241, 56 S. E. 915. Those cases decide that he is bound by the written instrument.

But the evidence was incompetent on another ground. It was offered and admitted to show an oral agreement with the agent, which was contrary to the express statement in the contract that there was no such oral agreement. If the agent had the authority to make the oral agreement, the burden was upon the defendant to show it, even if evidence of such agreement was otherwise competent. *Machine Co. v. Hill*, 136 N. C. 128, 48 S. E. 575. There was no evidence of such authority introduced, and if this stipulation can be regarded as one forbidding the agent to make any agreement contrary to what is expressed in the contract, and therefore one which could be waived, the principal would not be bound by what the agent did. But it is positively stated in the order, as we have said, that there is no agreement, verbal or otherwise, affecting the terms of the order, except the one expressed therein, and to this the defendant freely assented by signing the written instrument. The well-settled rule of the law forbids him now to show the contrary by oral testimony. It was, therefore, improper to admit the evidence to show that the goods were to be returned, at his option, if not sold within 90 days, as this clearly contradicts the express terms of the contract. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399.

New trial.

Ex parte CITY OF ANDERSON et al.

F. W. WAGENER & CO. v. BROWN BROS.  
(Supreme Court of South Carolina. Oct. 3, 1908.)

VENDOR AND PURCHASER—PROPERTY SUBJECT TO EXECUTION—CONVEYANCE—NOTICE.

Judgment was recovered against remaindermen during the lifetime of the life tenant, and after the execution of an unrecorded deed of the interest of one of the remaindermen, on claims arising after the execution of the deed. The grantee of the deed entered into possession on the execution thereof, and so remained. Prior to the accrual of the claims the grantee executed a mortgage in which he claimed the ownership of the premises, which mortgage was duly recorded. Held, by equally divided court, that the trial court properly found that the possession by the grantee and the recording of the mortgage did not charge the judgment creditor with notice, and the interest conveyed was subject to sale on execution. Per Woods and Jones, JJ.

Appeal from Common Pleas Circuit Court of Anderson County; G. W. Gage, Judge.

Petition by the city of Anderson and others to enjoin a sale of real estate to satisfy a judgment in favor of F. W. Wagener & Co., against Brown Bros. From an order dissolving in part an injunctive order restraining the sale, petitioners appeal. Affirmed by divided court.

This is an appeal from an order dissolving a temporary injunction against the sale of one-half interest in the tract of land, containing 27 acres, formerly belonging to G. Ernest Brown. The facts are thus stated in the decree of his honor, the circuit judge:

"F. W. Wagener & Co. secured a judgment against Brown Bros. June 24, 1897, and were proceeding in June, 1907, to enforce the same by levy of execution against two parcels of land, in or near the city of Anderson, which formerly appeared to be the property of Wm. D., J. Feaster, and G. Ernest Brown, who made up the firm of Brown Bros., merchants. Thereupon certain persons, parties hereto, filed a petition in the court, alleging that the land so sought to be sold was not subject to the Wagener judgment lien, was the property of the petitioners, and was in no way liable to pay the Wagener judgment. Thereupon Wagener & Co. answered the petitioners, and thus the issues were made up, as if the action had been started by summons and complaint. Pending a trial of the issues a consent order was made, by which the sale was enjoined until the issues could be determined. It is conceded on both sides, and it was so stated in the agreement, that the testimony has raised no issues of fact, and the cause involves practically only an application of the recording acts to the conceded facts of the case at bar. The documentary testimony, embracing deeds, agreements, receipts, etc., was taken by the master. Some of the witnesses testified, with the consent of counsel by affidavit. The plaintiffs, referred to as petitioners to enjoin the sale, assumed the burden of actors in the trial. \* \* \* The second parcel of

land I shall consider is that referred to in the pleadings and the testimony as the 27-acre tract. It, too, and more at the start, belonged to John J. Brown, the father of Feaster and Ernest. He conveyed it to trustees for his wife, Georgianna, during her lifetime, and at her death to her three children, Wm. D., J. Feaster, and G. Ernest Brown. William got partition of his part, and it is not in issue. The balance of 27 acres belonged in fee in remainder to Feaster and Ernest in equal shares. In September, 1895, Feaster's one-half was sold by the sheriff to satisfy a judgment debt due by him. It was purchased by Mrs. Beulah C. Brown, the wife of Feaster. The counsel for the Wageners admit that it is out of their reach. The only other matter then in issue is Ernest's share, which was one-half of 27 acres. It was first sold, by way of mortgage or assignment, by Ernest to Feaster February 28, 1883, recorded April 28, 1896. Thereafter, on June 3, 1887, it was conveyed by deed to Beulah, the wife of Feaster, recorded June 27, 1902. Ernest owed Feaster, and Feaster owed Beulah, and thus the transfer was made immediately to Beulah. The testimony makes it all plain, and reveals no vice, unless it be the menace of the recording acts. The subsequent devolutions of title are irrelevant. The answer of Wagener seemed to put in issue the good faith of the Browns and their kin in these transactions, but the testimony does not sustain these suggestions. Indeed, Col. Brown in his argument expressly disclaimed the charge of a fraudulent intent. His only contention was that the Browns were guilty of wrongdoing to keep the Wageners from collecting their debt, as I recall his words. In a nutshell, the Wageners contend that Beulah took title June 3, 1887; that subsequent thereto, to wit, in 1889, 1890, 1891, the Wageners became creditors and without notice of Beulah's deed, by record or otherwise, until its record in June, 1902; that as to them the deed cannot prevail. That must be so under the plain mandates of the statute, unless the testimony shows that the Wageners or their agents had other notice of the Beulah deed. I do not think that the testimony fixes such notice upon them. It is however, contended by plaintiffs that in June, 1887, when Beulah took the deed, she went into actual possession, and that possession carried notice to the Wageners; and this under the law as it was construed prior to the act of 1888. I do not think the possession by Beulah was of such a character and long enough continued to carry notice to the Wageners. Furthermore, Georgianna had a life estate in the land, which was only ended in 1902, and up to that time she was the one lawfully in possession. The plaintiffs, however, contend that Ernest Brown got a discharge in bankruptcy some time in 1904, and that such action bars Wagener's judgment. I do not concur in that view. I am of the opinion, therefore, that as to the six lots and one-half of

the 27-acre tract the injunction must continue permanently, but as against Ernest Brown's one-half interest in the 27-acre tract it must be dissolved. It is so ordered."

The record contains the following statement:

"The sources of title to this 27-acre lot are as follows: On the 23d of January, 1858, John J. Brown conveyed to Robert H. Hubbard and Elijah W. Brown a certain lot of land, situate in Anderson district of South Carolina, containing 51¼ acres, more or less, in trust for the special use and benefit of Mrs. Georgianna Brown, wife of John J. Brown, for and during the term of her natural life, and at her death then in trust for the special use and benefit of the children of the said Georgianna Brown and John J. Brown. The trustees were given power to sell said property and reinvest upon the same trust. Said deed was recorded as of January 22, 1858. The said John J. Brown and Mrs. Georgianna Brown had only three children, to wit, J. Feaster Brown, W. D. Brown, and G. Ernest Brown. In the year 1880 W. D. Brown, one of the remaindermen, asked that his portion of the land be conveyed to him in fee, in order that he might improve the same. Accordingly a division was made, by which 11½ acres of the land nearest the courthouse was allotted to him, and at his suggestion the deed thereto made to his wife, Mrs. Lou F. Brown; the same being signed by Mrs. Georgianna Brown and all the remaindermen. In consideration of this deed W. D. Brown conveyed his interest in the remaining 42 acres to G. Ernest Brown and J. Feaster Brown. In 1883 G. Ernest Brown, on the 28th day of February, in consideration of \$1,025, made an assignment of his interest to J. Feaster Brown. This assignment, however, was not recorded until April 28, 1896. In 1887, 14 acres of said land was deeded to the city of Anderson, and the deed duly placed on record. On June 3, 1887, at the request of J. Feaster Brown, and in consideration of the aforesaid assignment, G. Ernest Brown deeded to Mrs. Beulah C. Brown, wife of J. Feaster Brown, all his interest in the remainder of said land, now designated as the 27-acre tract. This deed, for the reasons stated in the testimony, was not placed on record until the year 1902. On the first Monday in September, 1895, the interest of J. Feaster Brown in said land was sold by the sheriff of Anderson county, under a judgment in favor of the bank of Anderson, and was bought by Mrs. Beulah C. Brown. A deed to her was made on the 11th day of May, 1896, and placed on record at that time. At this time Mrs. Beulah C. Brown executed a mortgage upon said premises, which was at the same time placed on record, and in which she claimed to be the owner of the premises. In 1904 Mrs. Beulah Brown sold the half interest in said premises to the appellant Mrs. Eula M. Brown. In March, 1907, she sold the other half interest to Mrs. Eula M. Brown,

executing the contract of sale; the deed to be executed later. All the members of the firm of Brown Bros. removed from Anderson and without the state of South Carolina prior to the awarding of the judgment in favor of Wagener & Co."

Bonham, Watkins & Allen, for appellants.  
Joseph N. Brown, for respondents Wagener & Co.

GARY, A. J. (after stating the facts as above). There are no issues of fact, and under the agreement of counsel (as stated in the decree of his honor, the circuit judge) the only question is whether F. W. Wagener & Co. were creditors for value without notice under the recording acts. In his decree the circuit judge gives his reasons why F. W. Wagener & Co. did not have notice as follows: "It is contended by plaintiffs that in June, 1887, when Beulah took the deed, she went into actual possession, and that possession carried notice to the Wageners. I do not think the possession by Beulah was of such a character and long enough continued to carry notice to the Wageners. Furthermore, Georgianna had a life estate in the land, which was only ended in 1902, and up to that time she was the one lawfully in possession." In determining the question whether Wagener & Co. had notice, we desire to call special attention to the following facts: On the 28th day of February, 1883, G. Ernest Brown, in consideration of \$1,050, made an assignment of his interest to J. Feaster Brown, which was recorded on the 28th of April, 1896. In September, 1895, J. Feaster Brown's one-half interest was sold by the sheriff under a judgment against him, and purchased by his wife, Beulah C. Brown, whose deed was recorded in 1896, at which time she executed a mortgage on the land, which was duly recorded, in which she claimed to be the owner of the premises. On the 3d of June, 1887, G. Ernest Brown executed a deed of conveyance of his own one-half interest in the land to Beulah C. Brown, but which was not recorded until the 27th of June, 1902. It seems to be conceded, or at least the ruling of the circuit judge was made on the hypothesis, that Beulah C. Brown, immediately after the execution of the said deed of conveyance, entered into possession of the land. This fact, taken in connection with the record of the assignment, showed that J. Feaster Brown occupied the position of a mortgagee in possession, and, taken in connection with the record of the mortgage, showed that Beulah C. Brown was exercising acts of ownership, and was in possession claiming the land as her own.

Two or more persons may be in possession at the same time. Therefore the fact that Georgianna Brown was also in possession, did not dispense with the necessity on the part of Wagener & Co. to make inquiry as to the rights of J. Feaster Brown and Beulah C.

Brown. Wagener & Co. were not in a position to claim that they were subsequent creditors for value without notice until the judgment was rendered in their favor in 1897, as the statute extending the provisions of the recording acts to simple contract creditors was not enacted until 1898. Eula M. Brown traced her title from Beulah C. Brown. Under these circumstances the only reasonable inference from the admitted facts is that there was enough to put Wagener & Co. upon inquiry, which, if pursued with due diligence, would have led to knowledge of the title under which the appellants claimed. Therefore the circuit judge erred in ruling that the possession by Beulah was not long enough continued to carry notice to the Wagensers, and that Georgianna Brown, the life tenant, up to the time of her death, was the only one lawfully in possession. Daniels v. Hester, 29 S. C. 147, 7 S. E. 65; Ellis v. Young, 31 S. C. 322, 9 S. E. 955. The question of notice under the recording acts presents a legal issue. Gregory v. Ducker, 31 S. C. 141, 9 S. E. 780; Hodges v. Kohn, 67 S. C. 69, 45 S. E. 102.

Therefore, as the court has reached the conclusion that there was error, the judgment must be reversed, and the case remanded to the circuit court for a new trial upon this issue; and it is so adjudged.

POPE, J., concurs.

WOODS, J. (dissenting). I am unable to concur in a reversal. The facts are sufficiently set out in the opinion of Mr. Justice GARY. The issue before the circuit court was one of legal title to the land in dispute, and the findings of fact on that issue made by the circuit judge are binding on this court, unless they are entirely unsupported by evidence. Johnson v. Jones, 72 S. C. 270, 51 S. E. 805. The circuit judge says in his decree: "I do not think the possession by Beulah was of such a character and long enough continued to carry notice to the Wagensers. Furthermore, Georgianna had a life estate in the land, which was only ended in 1902, and up to that time she was the one lawfully in possession." Wagener's judgment against Brown was recovered in 1897, and Mrs. Georgianna Brown, the life tenant of the land, lived until 1902. Ernest Brown conveyed the one-half interest to Beulah C. Brown by deed dated June 3, 1887, but not recorded until June 27, 1902; and there was evidence tending to show that at or about the same time Mrs. Georgianna Brown, the mother of Ernest and Feaster Brown, who was the life tenant, surrendered the land to Beulah C. Brown. The question is whether the possession acquired by Beulah C. Brown put Wagener & Co. on notice of her title before the entry of their judgment in 1897.

If the issue were whether this transfer of the land and subsequent holding of possession of it by Beulah C. Brown was sufficient to

charge a creditor or a purchaser of the life tenant with notice that the life tenant had parted with, and Beulah C. Brown had acquired, her interest, the following cases might be regarded conclusive that the possession was sufficient notice: Sheorn v. Robinson, 22 S. C. 32; Graham v. Nesmith, 24 S. C. 295; Sweatman v. Edmunds, 28 S. C. 63, 5 S. E. 165; Daniel v. Hester, 29 S. C. 149, 7 S. E. 65; Ellis v. Young, 31 S. C. 325, 9 S. E. 955. But according to the papers on record neither Ernest Brown nor Feaster Brown had any right of possession until the death of their mother, and those dealing with Ernest and Feaster Brown cannot be held to be put on notice that they had parted with their remainder from the fact that another held a possession of which they had no legal control. Such possession was notice sufficient to put the public on inquiry as to whether the life tenant had parted with her interest, but not whether the remaindermen, who had no right of possession, had parted with their interest. While recognizing fully the authority of the cases above cited, the doctrine ought not to be extended to the case here presented. Assuming, therefore, that the circuit judge was bound to accept the evidence of the parties as to the change of possession to Beulah C. Brown, such a change of possession did not charge Wagener & Co. with notice that the remaindermen had parted with their title. The record of the mortgage given by Beulah C. Brown on the land was not constructive notice to creditors or purchasers that the owners had parted with their title to her. I think the judgment should be affirmed.

The court being evenly divided, the judgment of the circuit court is affirmed.

JONES, J., concurs.

POYTHRESS v. DURHAM & S. RY. CO.  
(Supreme Court of North Carolina. Oct. 7, 1908.)

#### 1. PLEADING—ADMISSION BY DEMURRER.

For the purpose of a hearing on a demurrer to a complaint, the demurrer admits the truth of the allegations of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 625-634.]

#### 2. CARRIERS—GOODS—WHEN CARRIER BECOMES WAREHOUSEMAN.

A carrier of goods does not become a warehouseman, so as to be relieved from liability as insurer, until he has notified the consignee of the arrival of the goods, and until the consignee has had reasonable time to remove them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 316, 609.]

#### 3. SAME—NOTICE—SUFFICIENCY.

The notice of arrival of goods, which a carrier must give the consignee to relieve itself from liability as an insurer, need not be served personally on the consignee; it being sufficient to deposit written notice in the post office addressed to the consignee, as expressly provided by rule 1 of the Corporation Commission.

## 1. SAME.

What constitutes reasonable time in which a consignee of goods must remove them, as affecting the carrier's liability for their loss after their arrival, depends upon the circumstances of each particular case; it being a question of law for the court when the facts are undisputed, and one for the jury when the facts are disputed.

Appeal from Superior Court, Vance County; Cooke, Judge.

Action by J. A. Poythress against the Durham & Southern Railway Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Civil action to recover the value of a moving picture outfit alleged to have been destroyed in the warehouse of the defendant on the evening of June 6, 1907. The complaint contains two causes of action; one charging the defendant as a common carrier, and a second count charging it as a warehouseman. The defendant demurred to both causes of action.

F. L. Fuller and T. T. Hicks, for appellant. A. C. Zollcoffer and J. H. Bridgers, for appellee.

BROWN, J. The facts alleged in the first cause of action, which, for the purposes of the hearing only, are admitted by the demurrer to be true, appear to be substantially as follows: On the 6th of June, 1907, the plaintiff delivered to the defendant, in good condition, at its station in Dunn, two boxes containing a moving picture outfit, consigned to the plaintiff at Duke, N. C., a station on defendant's road, which boxes and contents the defendant agreed to safely transport and deliver to plaintiff at destination; that they arrived at Duke on the same day, late in the evening, too late for plaintiff to remove the same on that day; that soon after the arrival of the boxes at Duke, N. C., on the same evening, June 6, 1907, after deposit of the same in defendant's warehouse, and before plaintiff had been notified of their arrival, or had time to remove the same, the boxes were destroyed by fire.

The question raised by the demurrer is one which has been much debated by jurists, and about which they are not agreed, as to when the liability of a common carrier of freight ends and its liability as a warehouseman begins. Some courts hold that, when the transit is ended and the goods deposited in the warehouse of the carrier, the liability as such terminates, and the more modified liability of warehouseman begins. The leading case in this country entertaining that view is from the Massachusetts court (*Norway Plains Co. v. B. & M. R. R.*, 1 Gray, 263, 61 Am. Dec. 423), where the subject is considered at length by Chief Justice Shaw. A comprehensive note, citing many cases, is to be found to the case of *Schmidt v. Blood* (N. Y.) 24 Am. Dec. 145, citing authorities taking the same view. Another class of cases hold that

placing the goods in the warehouse alone does not discharge the company from its liability as a common carrier, until the consignee has had reasonable time after their arrival to inspect and take them away, in the ordinary course of business. The leading case holding this view was decided in a very elaborate opinion, upon almost the same state of facts as the *Norway Plains* Case, by the Supreme Court of New Hampshire. *Moses v. B. & M. Ry. Co.*, 32 N. H. 523, 64 Am. Dec. 381. *Wood v. Crocker*, 18 Wis. 845, 86 Am. Dec. 773. *Ayres v. Morris & Essex R. R.*, 29 N. J. Law, 393, 90 Am. Dec. 215, and *Blumenthal v. Brainerd*, 38 Vt. 413, 91 Am. Dec. 350, support the New Hampshire rule. And still there is another class of cases which hold that the liability of the company as carrier continues until the consignee has been notified of the arrival of the goods and has had a reasonable time in the ordinary course of business within which to remove them. This view is maintained by Judge Cooley in a most elaborate and able opinion in *McMillan v. Railroad*, 16 Mich. 100, 93 Am. Dec. 208, concurred in by his eminent associate, Judge Christianity. In that case the Michigan court was equally divided; the Chief Justice and Mr. Justice Campbell holding that notice was not necessary, and that the company was liable only as a warehouseman when the goods had been deposited in its warehouse. In 1905 the Supreme Court of Michigan unanimously adopted the views of Cooley and Christianity in the case of *Walters v. Detroit Ry.*, 139 Mich. 303, 102 N. W. 745. This view is also supported by *McDonald v. W. R. R. Corp.*, 34 N. Y. 497, where the Court of Appeals of New York says: "In those cases, according to the weight of authority in this state, notice to the owner or consignee of the arrival of goods, and a reasonable time and opportunity after notice to remove them, would come in lieu of personal delivery, so far as to change the strict liability of the carrier to that of a warehouseman." See also, 2 *Parsons on Cont.* (5th Ed.) 189; *Ang. on Carriers*, § 313; *Chitley on Carriers*, 90; *Pinney v. Railroad*, 19 Minn. 251 (Gil. 211); *Railroad v. Fuqua & Horton*, 84 Miss. 490, 36 South. 449; *Railroad v. Hatch*, 52 Ohio St. 408, 39 N. E. 1042. In the states of Alabama, California, Tennessee, and Texas the law is made to practically conform to this latter view by statute, as shown by adjudication of the courts. *Collins v. Railroad*, 104 Ala. 390, 16 South. 140; *Wilson v. Railroad*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; *Railroad v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; *Railroad v. Haynes*, 72 Tex. 175, 10 S. W. 398.

Not only does the great weight of authority in this country sustain the view of Judge Cooley, but such is the English and Canadian law. *Mitchell v. Railway Co.*, 10 L. R. Q. B. 256; *Chapman v. Great Western R. Co.*, 5 Q. B. D. 278; *Richardson v. Canadian Pac.*

Ry. Co., 10 Ont. Rep. 369. Mr. Hutchinson, referring to the English law on this subject, says: "No trace is there to be found of the distinction which has been made in this country in favor of railway companies as common carriers, which converts them into mere warehousemen, without notice to the consignee. Notice, it is there held, is necessary to effect this change of character and liability; and after such notice, if the consignee fails to call for the goods, the carrier becomes, as to them, a warehouseman merely. And it is to be gathered from the cases that it is the universal course of business there, with this class of carriers, either to deliver personally, or to send to the consignees what are there denominated 'advice notes,' informing them of the arrival of the goods, and that until this is done the company remains subject to the liability of a common carrier." 2 Hutchinson on Carriers, p. 792. See, also, 4 Elliott, p. 146, where the cases are collected, showing that most of the courts of this country follow the English precedents.

The rule subjecting common carriers to this strict responsibility as insurers is founded on broad principles of public policy and convenience, and, as said by Chancellor Kent, "it was introduced to prevent the necessity of going into circumstances impossible to be unraveled." 2 Kent, Com. 602. "It is a politic establishment," says Lord Chief Justice Holt in his celebrated judgment in *Coggs v. Bernard*, 2 Lord Raymond, 918, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust to these sort of persons, that they may be safe in their ways of dealings; for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, etc., and yet doing it in such a clandestine way as would not be possible to be discovered." Of course, the danger from loss by collusion is not near so great in these days as in the semibarbarous times; but upon this point it is well said by the Supreme Court of New Hampshire, in *Moses v. Boston & Maine R. R.*, 24 N. H. 71, 55 Am. Dec. 222, and again in 32 N. H. 523, 64 Am. Dec. 381: "The immense increase of the business, the great value of the commodities now necessarily intrusted to the charge of the common carriers, and the vast distances to which they are to be transported, have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have greatly added to the opportunities and temptations of the carrier who might be disposed to neglect or violate his trust." The reasons upon which the rule is founded continue to apply in full force to railway companies as common carriers, and any relaxation of it must be attended only with mischief.

These reasons, founded on a sound public policy, require not only that the carrier shall be held as an insurer during transit, but until he has notified the consignee of the ar-

rival of the goods at the point of destination, and until he shall have a reasonable time to effect their removal. The notice need not be served personally on the consignee. It is sufficient if deposited in the post office, addressed to him, as is provided in the regulations of the Corporation Commission, which provide: "Notice shall be given by delivering same in writing in person, or by leaving same at consignee's place of business or by depositing it in the post office." Rule 1. After service, or deposit of the notice, the consignee is allowed a reasonable time within which to take his goods away. If he fails to do so, the liability of the company as a common carrier terminates, and its less stringent liability as a warehouseman begins.

What length of time will be considered reasonable for the removal of the goods is a question not now presented. It may, however, be said that no fixed or definite rule can be laid down; but it must depend, in great measure, upon the circumstances of each case. When the facts are undisputed, it becomes a question to be determined by the court, as one of law; but where they are disputed and unsettled the question must be submitted to a jury. *Roth v. Railroad*, 34 N. Y. 548, 90 Am. Dec. 736; *Lemke v. Railroad*, 39 Wis. 449. Hutchinson on Carriers, p. 796, and cases cited in note. We do not think that this question was presented, or has heretofore been determined by this court, in the case of *Alexander v. Railroad*, 144 N. C. 98, 56 S. E. 697, or by any other case that has been called to our attention, or that we have been able to find.

Our decision renders it unnecessary that we consider the demurrer to the second cause of action. Suffice it to say that we think a cause of action is defectively stated in it, and may be easily remedied by amendment, if necessary. The defendant will answer over.

The ruling of the superior court is affirmed.

#### SOUTHERLAND v. ATLANTIC COAST LINE R. R.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. JUDGMENT—RES JUDICATA—QUESTIONS CONCLUDED.

The decision of a court of competent jurisdiction is a conclusive settlement of the questions involved in the controversy as to the parties thereto and as to any title claimed under them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1195.]

#### 2. SAME.

A judgment based on an erroneous finding of fact is, until reversed, conclusive as to the matter necessarily adjudicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1255.]

#### 3. SAME.

The rule that the decision of a court of competent jurisdiction is conclusive as to the

parties is applicable either to an entire cause or to particular facts in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 80, Judgment, § 1234.]

#### 4. SAME.

A judgment against a connecting carrier for the loss of freight is based on the finding that the freight was lost by it, and not by the initial carrier; and the connecting carrier, when sued for the penalty imposed by Revisal 1905, § 2634, for failure to settle the claim within a specified time, is bound by the finding.

Appeal from Superior Court, Wayne County; O. H. Gulon, Judge.

Action by R. J. Southerland against the Atlantic Coast Line Railroad. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action brought to recover a penalty of \$50 for failure to settle a claim within 60 days, under section 2634 of the Revisal of 1905, which was heard upon the following agreed statement of facts: A package of freight, shipped from a station of the Southern Railway, within the state of North Carolina, to Mt. Olive, in said state, which is situate on the Atlantic Coast Line Railroad, was lost. Claim therefor was filed with the agent of the Atlantic Coast Line Railroad Company at Mt. Olive, and was not paid within the 60 days prescribed by the statute (section 2634 of the Revisal of 1905). An action was brought in due time for the recovery of the value of the property against the Atlantic Coast Line Railroad Company, and judgment was rendered against said company for the value of the property, it being the exact amount of the claim filed therefor, which judgment was paid by the said railroad company. At the time of the rendition of the judgment, and at the time of the payment of the same, the defendant did not know where the loss of the property occurred, but did not inform the plaintiff that it had no such knowledge prior to the bringing of this action. Within one year from the filing of said claim this action was brought to recover the penalty of \$50 against the defendant for failure to adjust and pay the claim within 60 days, and the following fact was admitted by counsel for plaintiff and defendant, subject to its competency as evidence, to be passed on by the court, to wit: "Said freight was lost on the Southern Railway, and never came into the possession of the Atlantic Coast Line Railroad Company." The court, being of the opinion that the evidence was incompetent, refused to consider the same, and defendant excepted. Thereupon the court, upon the facts agreed, rendered judgment for the plaintiff, as set out in the record, and the defendant excepted and appealed.

Geo. M. Rose, for appellant. John D. Langston, for appellee.

WALKER, J. (after stating the facts as above). This undoubtedly is a hard case,

when viewed with reference to the facts as they now seem to be; but in the decision of all causes we must be guided by well-established legal principles, and not by our notions of what may be the general equity or justice of the particular case. The defendant is sued for not adjusting and paying a claim for the loss of property while in its possession as a common carrier, under section 2634 of the Revisal of 1905. There had formerly been a suit between the parties, in which the present plaintiff alleged that the property had been lost by the defendant as a common carrier, which was found to be true, and the plaintiff recovered a judgment for the value of the property upon that finding of fact. That is precisely one of the issues involved in this case, the other being whether the defendant adjusted and paid the claim within 60 days, as required to do by the law, and as to the latter question there is no controversy. But the defendant contends that, in this action for the recovery of the penalty, it is necessary for the plaintiff to show that the property was in its possession as a common carrier, for transportation from the place of shipment to the place of its destination, at the time of the loss. This may readily be granted, and yet the plaintiff is entitled to recover. Whether the property was thus in its possession at the time of its loss was one of the very questions directly involved in the other case, and an affirmative finding upon which was absolutely essential, in law, to the plaintiff's recovery in that case.

The doctrine of res adjudicata plainly must be that the decision of a court of competent jurisdiction is and ought to be a final and conclusive settlement of the questions involved in any particular controversy as to the parties concerned therein, and as to any title claimed through or under those parties, so that, if a fact has been once directly tried and determined by such court, the same parties cannot properly be again allowed to contest the same matter, either in that court or in any other, and also that a judgment on such question or fact in legal form is perfect evidence of its own validity. Wells on Res Adjudicata, § 5. In *Packet Co. v. Sicles*, 5 Wall. 592, 18 L. Ed. 550, it was held that, if the record of the former trial shows the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties, and, further, in cases where the record does not show that the matter was necessarily and directly involved, evidence aliunde consistent with the record may be received to prove what question was tried and determined. It can make no difference in the application of the principle that the decision of the court upon the controverted fact in the former suit was in fact erroneous. So long as the judgment in that action remains

unreversed, the finding of the court is conclusive as to all matters necessarily adjudicated, and cannot be questioned in any subsequent suit between the same parties, where the identical matter is presented for decision.

The rule is applicable either to an entire cause or to particular facts in issue and embraced by the former adjudication. If it can be applied to an entire action, then it is a bar in full; if to particular facts, it is conclusive, as evidence, so far as it goes. *Wells, Res Adjudicata*, pp. 3, 4. See, also, *Tyler v. Capehart*, 125 N. C. 64, 34 S. E. 108; *Bigelow on Estoppel* (5th Ed.) p. 99. "It is a well-established rule of law that every material fact involved in an issue must be regarded as determined by the final judgment in the action, so as not to be a subject of trial in any subsequent proceeding between the same parties." *Bigelow*, p. 97. We said in *Lumber Co. v. Lumber Co.*, 140 N. C., at page 442, 53 S. E., at page 136, that the test as to the bar of a previous decision is, not whether the cause of action and relief demanded in the two actions is the same, but whether, if they are different, the decisive question is the same in both of them, and, further, that a judicial determination of the issue in the first action is conclusive in the second, although the form of the latter, the precise question presented, and the relief which is sought may be different with respect to the matters tried in the former suit.

Applying this elementary principle to the case in hand, we find it was decided, in the former case to recover for the loss of the goods, that they were lost by the defendant, and not by the Southern Railway Company. The judgment could have been rendered upon no other finding of fact. This being so, the defendant cannot reopen that question in this suit, and have the finding reversed, but is concluded by the former adjudication. The evidence offered by the defendant, which clearly tended to contradict the former finding, was incompetent, and properly excluded. This is the only question in the case, according to the admission in the brief of defendant's counsel.

No error.

#### STATON v. GODARD.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### WILLS—CONSTRUCTION—ESTATE DEVISED.

A will gave property to M. for life, and then to "her child, or children, and issues, if any, but, if she should die without child or children or issues," to plaintiff, L., and E. during their lives, with remainder to their children. Plaintiff and M. married and had three children, who predeceased M. without issue. *Held*, that the children did not take a vested remainder, so as to pass it to plaintiff on M.'s death, but that the property passed to plaintiff, L., and E. as life tenants.

Appeal from Superior Court, Martin County; Lyon, Judge.

Action by J. G. Staton against J. G. Godard. From a judgment for plaintiff, defendant appeals. Reversed.

H. W. Stubbs, for appellee.

CLARK, C. J. The sole question is the construction of the following clause in the will of Louisa Yates:

"I lend and bequeath to my granddaughter Mary Louallie Poole, during her natural life, and then to her child or children and issues if any; but if she should die without child or children or issues, then this property to belong to James Grist Staton, Louisa Staton and Ella Staton during their natural lives, and then to their child, or children and issues thereof, the following real and personal property [describing it]."

Upon the facts agreed it appears that Mary Louallie Poole married the plaintiff, James Grist Staton; that there were born to said marriage three children, who died previous to their mother and without issue; that the mother is since dead. The plaintiff insists that the children took a vested remainder, that upon their death such vested remainder passed to him, and he is entitled to the whole.

Such is not the language of the will. It provides that, if Mary Louallie "should die without child or children or issues, then this property to belong to James Grist Staton, Louisa Staton, and Ella Staton during their natural lives," and then over. And this was exactly what happened. The first life tenant died without leaving any child or children, or issues. The devise to them was contingent upon their being alive at the death of the life tenant, and was never vested in them. At her death the property passed to James Grist Staton and his two sisters as life tenants, and then over. The intent of the will to this effect is clear. If it had been doubtful, chapter 7, p. 13, Laws 1827-28, now Revisal 1905, § 1581, provides as the rule of construction that a devise to one for life, with remainder over upon dying "without heirs," or "without issues," or "without children," shall be construed to mean dying without heirs, or children, or issues "living at the time of his death" (or born to him within ten lunar months thereafter), unless a contrary intent is "expressly and plainly declared in the face of the deed or will."

The ruling of the court below that James Grist Staton, upon the death of his wife, took a fee simple, is reversed.

#### ANDREWS et al. v. GRIMES et al.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. REFLEVIN—ISSUES AND PROOF.

In an action of claim and delivery, where the complaint alleged that tobacco, when sold, was delivered to plaintiffs, and that it was in a house on lands of defendants, and was to be hauled by them to plaintiffs' warehouse as rapidly as it could be prepared, the submission of



the issue whether defendants afterwards agreed with plaintiffs that the tobacco should remain on defendants' land as the property of plaintiffs was justified.

## 2. SAME—VARIANCE BETWEEN ALLEGATIONS AND PROOF—DEFECT OF SLIGHT VARIANCE.

In claim and delivery for tobacco sold to plaintiffs, the complaint alleged that the tobacco at the time of the sale was delivered to plaintiffs in a house on defendants' land, and was to be hauled by them to plaintiffs' warehouse. The proof showed that defendants were to finish the grading and haul the tobacco to town, where it was to be weighed and the price paid, and that the parties afterwards agreed that the tobacco should remain on defendants' land as property of plaintiffs. Held, that any variance between the allegation and proof was so slight that it should be disregarded, under Revisal 1905, § 515, providing that no variance shall be deemed material unless it has actually misled the adverse party to its prejudice in maintaining its action upon the merits.

## 3. SAME—COMPETENCY—INSURANCE OF GOODS CLAIMED BY PLAINTIFF.

In claim and delivery for tobacco sold to plaintiffs, evidence that plaintiffs had insured the tobacco immediately after the sale was competent, especially in view of their evidence that it was agreed that the tobacco, if burnt, should be plaintiffs' loss.

## 4. EVIDENCE—BEST EVIDENCE—COLLATERAL ISSUES.

It was competent to prove the fact of insurance without putting the policy in evidence, since, as there was no suit on the policy, it was collateral to the issue, and its terms were not material.

## 5. SALES—WHEN TITLE AND RIGHT TO POSSESSION PASSES.

Where plaintiffs purchased tobacco from defendants, and it was agreed that the tobacco should remain on defendants' land as plaintiffs' property, the title and right to possession passed upon the delivery and agreement, and the liability of plaintiffs accrued at that time, though the purchase money was not paid, and the fact that defendants were to prepare the tobacco and haul it away was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Sales, §§ 529-541.]

Appeal from Superior Court, Pitt County; W. R. Allen, Judge.

Action by J. C. Andrews and another against T. C. Grimes and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jarvis & Blow and Julius Brown, for appellants. J. L. Fleming, for appellees.

CLARK, C. J. Action of claim and delivery for 4,000 pounds of tobacco, a portion of a larger quantity which the plaintiffs claimed they had bought of the defendant. The jury found, in response to the issues submitted, that it was agreed between the parties that the price of said tobacco should be 6½ cents per pound; that the defendants were to finish the grading, and were to haul the tobacco to Robersonville, where it was to be weighed and the price paid; that the parties afterwards agreed that the tobacco should remain in a house on the land of the defendants, as the property of the plaintiffs; that no part of the purchase money has been paid; that the tobacco, when seized in this

action, was worth \$340—i. e., 4,000 pounds at 8½ cents—whereupon the court gave judgment for \$70, being the difference between 6½ cents and 8½ cents on 4,000 pounds.

The exception to the submission of the third issue, "Did defendants afterwards agree with the plaintiffs that said tobacco should remain on the land of the defendants, as the property of the plaintiffs?" cannot be sustained. There was allegation in the complaint that the tobacco at the time of the alleged sale was delivered to the plaintiffs, and that it was in a house on the lands of defendants, and was to be hauled by them to plaintiffs' warehouse as rapidly as it could be prepared. This justified the issue. There was evidence to support this view, and the court, after verdict even, could have permitted the complaint, if necessary, to be amended to conform "to the fact proved" (Revisal 1905, § 507); and this court can do the same (Revisal 1905, § 1545). But, in fact, if there was any variance between allegation and proof, it was so slight that it should be disregarded. Revisal 1905, § 515.

Evidence that the plaintiffs at once insured the tobacco was competent, especially in view of their evidence that it was agreed at the time that the tobacco was the plaintiffs', and, if, burnt, that it would be plaintiffs' loss. And it was competent to prove the fact of insurance, without putting the policy in evidence. There was no suit on the policy, and its terms were not material. It was collateral to the issue. *Ledford v. Emerson*, 138 N. C. 503, 51 S. E. 42, and cases cited.

Upon the issues found by the jury the title and right to possession passed under the agreement. Though the purchase money was not paid at the time, the liability of the plaintiffs accrued upon the delivery and agreement that the tobacco was to remain there as the property of the plaintiffs. Nor did the fact that the defendants were to prepare the tobacco and haul it in any wise derogate from the completion of the sale and transfer of the title, if the agreement was as found by the jury.

No error.

## HARGROVE et al. v. WILSON.

(Supreme Court of North Carolina. Oct. 14, 1908.)

## 1. JUDGMENT—EQUITABLE RELIEF—COLLATERAL ATTACK—PARTIES.

A decree of a court having jurisdiction in a proceeding regular on its face as to parties cannot be attacked collaterally, though it may be impeached for fraud in an action for that purpose; but one who has apparently, but not really, been made a party cannot bring such an action, since he has not been injured, and since he has an adequate remedy at law by proceeding in the cause to which he is apparently a party by motion therein to set aside the proceedings as to him and to correct the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 788.]

## 2. PARTITION — DECREE — CONCLUSIVENESS — COLLATERAL ATTACK.

Since under Revisal 1905, § 2513, a decree and proceedings in partition can only be attacked for fraud, mistake, or other ground by "petition in the cause," plaintiffs cannot bring an independent action to vacate partition proceedings, etc., on the ground that they were made parties without their knowledge or consent.

Appeal from Superior Court, Sampson County; W. R. Allen, Judge.

Action by Sarah A. Hargrove and others against John E. Wilson. From a judgment for plaintiffs, defendant appeals. Action dismissed.

H. A. Grady and Faison & Wright, for appellant. Geo. E. Butler and F. R. Cooper, for appellees.

BROWN, J. The record discloses that on the 24th of September, 1901, an ex parte proceeding for partition was commenced before the clerk in the name and behalf of John E. Wilson, the defendant in this case, and of Sarah A. Hargrove and the other plaintiffs in this action, for the sale for partition of the land described in the complaint. The petition is signed by certain attorneys as "Solicitors for Petitioners," and is verified by the oath of J. E. Wilson. On the same day a decree of sale was made by the clerk, and a commissioner was appointed, with authority to sell the land at either public auction or private sale. At the public sale the defendant, John E. Wilson, became the purchaser for the price of \$500, and the sale was confirmed in May, 1902, by the clerk, whose order was approved by a judge of the superior court. This action is brought to set aside the decree and sale of the land upon the ground that plaintiffs were not made parties to the proceedings with their knowledge and consent. When the case was called for trial, the defendant moved to dismiss the action upon the ground that the record in the partition was regular in form, and that it appeared on its face that the plaintiffs were parties to it, and that it could not be attacked collaterally in this action. The motion was overruled, and the defendant excepted.

It is elementary learning that a decree of a court having jurisdiction in a proceeding in all respects regular on its face as to parties cannot be attacked collaterally. It may be successfully impeached for fraud in an independent action brought for the purpose, when sufficient allegations of fraud are made, and issues framed upon such allegations are submitted to a jury, and the fraud is established by the verdict. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176; *Morris v. White*, 96 N. C. 93, 2 S. E. 254; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 718; *Rackley v. Roberts* (N. C.) 60 S. E. 975; *Simmons v. Box Co.* (at this term) 62 S. E. 435. In this case there are no sufficient allegations of fraud set out in the complaint, and no issue of fraud was tendered by the plaintiff or submitted to the jury by the court. The gravamen of plain-

tiff's complaint is that John E. Wilson, the defendant, and his attorneys, instituted the partition proceeding of their own motion, without the knowledge, consent, or authority of these plaintiffs, and that, while these plaintiffs appear on the record as parties to it, as a matter of fact they were not parties. A person who has never been made a party to a judicial proceeding cannot bring an independent action to set it aside on the ground of fraud. He has no reason whatever to invoke the equitable power of the court for any such purpose, in that he has not been injured. He has an adequate remedy at law, by proceeding in the cause to which he is apparently a party and moving therein to set aside the judgments and decrees so far as they affect him, and to correct the record so as to show in fact that he was not a party. *Carter v. Rountree*, supra. The partition proceeding under which the land was sold appears to be in all respects regular, and these plaintiffs appear on its face to be parties to it. Therefore they are apparently bound by it. If it should be established as a fact that they were made parties without their knowledge or consent, and have not ratified and assented to the proceedings and decree, then they may be set aside by motion in the cause. *Burgess v. Kirby*, 94 N. C. 575.

We have discussed only the general law, applicable to all judicial proceedings alike, in its reference to this case. But as to proceedings in partition especially the General Assembly seems to have provided that they can only be attacked, set aside, or impeached for fraud or mistake, or upon any other ground, by "petition in the cause." Revisal 1905, § 2513, after prescribing the machinery by which sales of land may be made in special proceedings, further provides "that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause." Here is a full, complete, and adequate remedy provided by law, under which the plaintiffs can seek relief, even for fraud, mistake, or other ground. His honor should have sustained the motion.

Action dismissed.

JONES v. ATLANTIC COAST LINE R. CO.  
(Supreme Court of North Carolina. Oct. 14, 1908.)

## 1. EVIDENCE—DOCUMENTARY EVIDENCE—LIVE STOCK SHIPMENT—CONDUCTOR'S RECORD—CARRIERS—INJURY TO STOCK—ADMISSIBILITY.

In an action against a carrier for injury to a live stock shipment, the record of a conductor who handled the shipment between intermediate points, showing that there was no exception to the condition of the stock at the time of its handling, was properly excluded, where the conductor did not testify, though, if he had testified, the record would have been proper to corroborate him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1489.]

## 2. CARRIERS—RES IPSA LOQUITUR.

In an action against a carrier, proof of injury to live stock while in its possession makes out a prima facie case of negligence sufficient to carry the case to the jury, and, after hearing such evidence as the carrier produces to prove how the injury occurred, it is for the jury to say whether or not it occurred through the carrier's negligence.

## 3. SAME.

That a horse died from natural causes, or was injured as an ordinary incident of handling a car of stock, rebuts the presumption of negligence of the carrier, arising from the fact of injury while in the carrier's possession; the same rule applying to stock actually delivered to the consignee in a damaged condition.

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by J. A. Jones against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages alleged to have been sustained by plaintiff in shipment of a car load of horses and mules. These issues were submitted to the jury: "(1) Was the mule in controversy delivered to the defendant? Ans. No. (2) Was the gray horse in controversy injured while in possession of the defendant? Ans. Yes. (3) Were the 23 animals delivered by defendant to plaintiff injured while in possession of defendant? Ans. Yes. (4) If so, was said injury caused by the negligence of the defendant? Ans. Yes. (5) What damage, if any, is plaintiff entitled to recover? Ans. \$313.25." From the judgment rendered the defendant appealed.

Moore & Dunn, for appellant. R. A. Nunn and W. D. McIver, for appellee.

BROWN, J. The evidence tends to prove that there was delivered to defendant a car load of horses at Augusta, Ga., for shipment to plaintiff at New Bern, N. C.; that the stock were in good condition when delivered to defendant, and that when the car arrived at New Bern the animals were in a very bad condition, much worse than stock generally are at the end of a long journey; that one horse was dead in the car, and the others badly bruised and much injured. For the purpose of proving the condition of the stock when transferred from one freight conductor to another on different parts of its system, the defendant offered in evidence "the original record of Conductor E. D. Skinner, handling this shipment from Florence to Wilmington, showing that there was no exception to the condition of the stock at the time of its handling." This was excluded, and defendant excepted. We have held that a record containing entries made in the usual course of business on the train sheets by the witness (a train dispatcher) from reports telegraphed to him by station agents as to the arrival and departure of trains is admissible for the purpose of showing the position of a train at a certain time. *Insurance Co. v. Railroad*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517.

The evidence offered by defendant is far from coming within the principle of that decision. The record was made in that case by the witness himself, who was under oath and subject to cross-examination, and the witness identified it as the record made by him, showing the movement of trains. The report of the case shows that "the record was offered by defendant in corroboration of witness Hunt, and the court admitted it for that purpose, so instructing the jury." Page 45 of 138 N. C., page 452 of 50 S. E. (107 Am. St. Rep. 517).

Waiving the confusion in the record as to the identification by proof of this "original record," it is certain that the defendant did not offer Conductor Skinner to prove the condition of the animals on his run, and then offer his train record of that run for the purpose of corroborating his evidence. It has been held by the Supreme Court of Massachusetts that train dispatchers' records, properly identified, are competent evidence to show the location of a train at a given time; but an examination of the case shows that "entries from the train sheet, with the testimony of the person who made them, were admitted to show that outward trains passed" at certain hours. *Donovan v. Railroad*, 158 Mass. 450, 33 N. E. 583. These decisions rest upon the idea that as telegraphic messages are read by sound, as well as automatically recorded in symbols, such entries stand upon the same footing as if made from oral statements, uttered at the sending station and audible in the dispatcher's office. These cases, for that reason, are to be distinguished from those holding that entries by a servant on his master's books for goods sold are incompetent, unless the servant is called to support the charges and prove the delivery. *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449.

There is nothing in the record of a train run, or the log book of a ship, which takes the case from the general rule that the entries must be identified, and, when so identified, they are competent evidence in support of the person who made them. As the appellant failed to send up the "train record," we are unable to gather exactly what it was expected to prove by it. As we understand it, the record was silent as to the condition of the stock on Conductor Skinner's run. Had he been examined as a witness, his record of the run would have been competent to corroborate and fortify his evidence. As he was not examined, the court properly excluded it.

There are a number of exceptions to the charge, which need not be considered serially. His honor properly instructed the jury that, if the stock was injured while in the possession of the defendant, this fact alone is evidence of negligence, and the defendant is called upon to rebut it. Proof of injury makes out a prima facie case of negligence sufficient to carry the case to the jury, and, after hearing such evidence as the defendant

offered to prove how the injury occurred, it is for the jury to say whether it was due to defendant's negligence, or to other causes for which defendant is not responsible. *Meredith v. Railroad*, 187 N. C. 478, 50 S. E. 1, and cases cited. The rule is based upon the inability of the shipper to produce any other evidence of negligence while his property is in transit in the carrier's possession. 1 Elliott on Evidence, 141.

In view of the possibility of injury to live stock from causes not to be attributed to the carrier's neglect, his honor instructed the jury: "If the horse in controversy died from natural causes, or was injured as an ordinary incident of handling a car of stock, then this would rebut the presumption of negligence on the part of the defendant company. This same rule would apply as to stock actually delivered to the plaintiff, if you find that it was delivered in a damaged condition." We think, taking the charge of the learned judge as a whole, he put the case to the jury fairly and fully, and that no error was committed which necessitates another trial.

No error.

#### FOY v. GRAY et al.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. APPEAL AND ERROR—DISMISSAL—APPELLEE'S RIGHT TO—LACHES.

An appeal not having been docketed seven days before the call of the cases of the district to which it belonged, as required by Supreme Court rule 5 (53 S. E. v), under rule 17 (53 S. E. vii) appellee could have obtained a dismissal at that time, or at any time before the appeal was docketed; but having deferred motion to dismiss until the call, and the appeal having been docketed by that time, the right to dismissal was lost.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3149, 3151.]

#### 2. SAME—CONCLUSIVENESS OF REFEREE'S FINDINGS.

A trial judge's ruling, sustaining a referee's findings, is conclusive on appeal if there is any evidence to support them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4015-4018.]

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by C. H. Foy against J. O. Gray and others. From a judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal. Motion denied, and judgment affirmed.

G. V. Cowper and Rouse & Land, for appellant. P. M. Pearsall, for appellees.

CLARK, C. J. The plaintiff did not docket his appeal "seven days before the call of the cases of the district to which it belongs." Rule 5 (53 S. E. v). If the appellee had moved to dismiss at that time, or at any time prior to the actual docketing of the transcript on appeal, the motion must have been allowed. Rule 17 (53 S. E. vii). But the

appellee deferred making the motion till the call of the district had begun, and before that time the appeal had been docketed. The appellee was thus himself guilty of laches, and his motion to dismiss is denied. *Craddock v. Barnes*, 140 N. C. 428, 53 S. E. 239; *Curtis v. R. R.*, 187 N. C. 308, 49 S. E. 218.

The account between the parties was heard upon a reference by consent. Both sides excepted to the referee's findings, and on appeal the judge overruled all exceptions and confirmed the report. When the judge sustains the findings of fact by the referee, his ruling is conclusive, except as to those findings of fact as to which there is no evidence to support them, and that ground is set out in the exception. *Dunavant v. Railroad*, 122 N. C. 999, 29 S. E. 837; *Collins v. Young*, 118 N. C. 265, 23 S. E. 1005. There are only two exceptions of that nature—i. e., to the seven-teenth and twenty-seventh findings of fact—and as to them we find the exceptions not well taken.

The appellant insists that we "review all the evidence and findings" in this case. But we are bound by the referee's findings of fact, when approved by the judge (if there is any evidence on the finding excepted to), fully as much as we are by the finding on an issue by a jury.

We find no error in the rulings as to the law.

Affirmed.

#### HOUSE COLD TIRE SETTER CO. v. WHITEHURST.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### EVIDENCE—EXPERTS—OPERATION OF MACHINERY.

Where defendant in an action for price pleaded breach of warranty that the machine would do work of a certain kind, experts who had used machines of the same make, identical in principle, structure, and operation, could testify that the machines would not work satisfactorily and were discarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2349.]

Appeal from Superior Court, Edgecombe County; Lyon, Judge.

Action by the House Cold Tire Setter Company against W. E. Whitehurst. Judgment for defendant on appeal from a justice of the peace, and plaintiff appeals. Affirmed.

Paul Jones and W. O. Howard, for appellant.

HOKE, J. This was an action to recover on certain notes given by defendant to plaintiff for the purchase price of one or more "cold tire setter" machines, bought by defendant of plaintiff, the manufacturer, through their agents, the Fulford Hardware Company, of Washington, N. C. It does not distinctly appear from the record whether

there were one or more of these machines, nor whether they were No. 1 or No. 2; nor does this seem to be a matter of importance. Defendant answered, by way of defense, that the notes sued on were given by him for the purchase price of certain "cold tire setter machine" manufactured by plaintiff, sold to defendant with a warranty that it would do work of a certain kind and quality, and that on trial it was found totally unfitted for the work it was guaranteed to do, and the question of defendant's liability was made to depend on whether there had been a breach of the warranty as stated.

There was evidence offered by defendant in support of his allegations, and that plaintiff manufactured machines known as cold tire setters Nos. 1 and 2, and that the Fulford Hardware Company, of Washington, were plaintiff's agent in sale of the machines, from whom defendant purchased one or more of the machines in question; and in support of his contention that the machine would not do the work it was guaranteed to do the defendant was allowed to introduce, over plaintiff's objection, the evidence of J. H. Corey and Robert Green, as follows:

J. H. Corey: "Some four or five years ago I bought a House cold tire setter No. 2, of the House Cold Tire Setter Company, of St. Louis, Mo., through the Fulford Hardware Company, of Washington, N. C., that would not do the work it was manufactured to do at all satisfactorily. I gave it a full and fair trial, and had several mechanics endeavor to operate it; but they were unable to do so with any degree of success. In using this machine it would dish and bend the spokes in certain parts of the wheel more than in others, and would crimp the tire, instead of taking up the slack, and the grip of the machine, which was to hold the tire while pressure was applied, would not hold it. We could not operate it, and discontinued its use."

Robert Green: "I am a buggy manufacturer, and have been for 25 or 30 years. Am familiar with both No. 1 and No. 2 House cold tire setter machines, same kind and make of machine in controversy. Both machines are alike in construction and in all respects, except that one is larger than the other. The principle in both machines is identical. I had a No. 1 House cold tire setter machine, manufactured by plaintiff. It would not work. It would not 'take up,' but would crimp, the iron. I tried it two years, and then threw it away. The Fulford Hardware Company, of Washington, were agents of the plaintiff."

We think the court below made a correct ruling in admitting the testimony of these witnesses. Both of them seem to have testified as experts, and the witness Green fully qualified himself as such; but, whether they were so examined or not, both of them showed that by training and special opportunity to note and observe relevant facts they were

qualified to give an opinion on the matter in question that was calculated to aid the jury to a correct conclusion. Such testimony has a recognized place in the law of evidence. McKelvey on Evidence, pp. 230-235; Lawson on Expert and Opinion Evidence, 503. This last author speaks of it as "opinion evidence from necessity," and on page 515 mentions machinery as one of the subjects which especially permits the reception of this kind of testimony, citing the cases of McCormick Co. v. Cochran, 64 Mich. 636, 31 N. W. 561, and Sievers v. Box Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; the former being a case not unlike the one we are now discussing. True it is usually required for the reception of such testimony, not in strictness expert evidence, that the witness should have observed the very machine or implement which is the subject-matter of dispute; and the witness Green seems to have done this, for he speaks as one having knowledge of this machine from personal observation. But we do not think the requirement in any event should be held to exclude this testimony, when the witness speaks to the operation of a machine of like kind and make, and there is no question or dispute but that they are all made by the same company and on the same plan, identical in "principle, structure, and operation." In such case, and certainly where there is no claim that the machines are different, while the witness in terms refers to the machine he actually tried, this is only by way of illustration, and in support of his opinion; and his testimony, as a matter of fact, bears on the machine in dispute and is directly relevant to the issue.

We are of opinion that no reversible error appears in the record, and the judgment in favor of defendant should be affirmed.

No error.

#### GILLIS v. WADE et al.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### FRAUDS, STATUTE OF—SPECIFIC PERFORMANCE—PAROL CONTRACT.

The petition for specific performance alleged: Plaintiff and defendant entered into a parol agreement "as to the purchase of" a described house and lot. "The price to be paid \* \* \* was \* \* \* \$500; [plaintiff] agreeing to said amount." The terms of the agreement were: "That, if [plaintiff] would pay \$1 as a consideration, [defendant] was to allow him 20 days to pay \$499 for [the property]. \* \* \* He [defendant], upon the payment of said amount, would make a good and sufficient title to said property, and would give possession to [plaintiff] on the 1st of January thereafter." Plaintiff paid \$1 as agreed upon, and tendered to defendant \$499 within the 20 days, and the tender has been continuing; and defendant refused, upon demand, to convey the property to plaintiff. *Held*, that the agreement set forth was a contract for the sale of land, and, not being in writing, was not enforceable (Civ. Code, 1896, § 2693, par. 4); and accordingly it was not error to dismiss the petition on general demurrer.

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by N. L. Gillis against J. A. Wade and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Saffold & Lareen, for plaintiff in error. L. C. Underwood, Graham & Graham, and Williams & Bradley, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

### BAIRD v. CITY OF ATLANTA et al.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### 1. APPEAL AND ERROR—REVIEW—IMMATERIAL QUESTIONS.

"This court will in no case undertake to pass upon questions presented by a bill of exceptions, where it affirmatively appears that, even if the judgment of the court below were reversed, the plaintiff in error would derive no benefit from the adjudication." *Davis v. Jasper*, 119 Ga. 57, 45 S. E. 724.

#### 2. SAME—DISMISSAL.

An equitable petition having been filed to enjoin the city of Atlanta from executing a contract between the municipality and the Wisconsin Engine Company for the purchase of a pumping engine, and it appearing on the call of the case, from the statement of counsel for the defendant in error made in open court, and from documents exhibited by him, that the contract, the performance of which was sought to be enjoined, had been duly rescinded and canceled by the parties, which fact was not controverted by the plaintiff in error or his counsel, and from an inspection of the record it appears that no other relief is sought by the plaintiff in error, the writ of error will be dismissed, without prejudice, at the cost of the defendant in error. *Gallagher v. Schneider*, 110 Ga. 322, 35 S. E. 321; *Garlington v. Davison & Fargo*, 122 Ga. 677, 50 S. E. 667; *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. M. Baird against the city of Atlanta and others. Judgment for defendants, and plaintiff brings error. Dismissed.

J. S. Slicer, for plaintiff in error. Jas. L. Mayson and W. P. Hill, for defendants in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur.

### WORTHINGTON v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### CARRIERS—STREET RAILWAY PASSENGER—NEGLIGENCE.

In an action for damages for personal injuries, a petition was not open to general demurrer which alleged in substance that the plaintiff, an adult, was a passenger at night on a greatly overcrowded street car of the defendant company; that after the conductor had called a given street, at which plaintiff desired to

alight, plaintiff signaled the conductor, who in turn signaled the motorman to stop the car at that street; that plaintiff, thinking that such street had practically been reached, proceeded at once, for the purpose of promptly alighting and in full view of the conductor, to work his way from the center of the car along the crowded aisle to the rear platform and onto the steps, both the platform and the steps being also crowded with passengers; that by reason of his shortness of stature and the crowded condition of the aisle, platform, and steps the plaintiff was unable to see or locate just where the car was; that, thinking that the car had stopped, relying on the call of the conductor, and being unable, on account of the crowd on the steps, to see the ground, plaintiff stepped from the platform onto the steps, when he discovered the car was in motion, but too late to recover himself on account of the passengers on the steps; and that, being unable on account of the number of such passengers to catch hold of the bars at the sides of the steps provided for the use of passengers in boarding and alighting from the car, plaintiff was violently thrown to the pavement, and injured and damaged as set forth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1273-1282.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by C. C. Worthington against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.

A. E. Wilson, for plaintiff in error. Rosser & Brandon, and W. T. Colquitt, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

### WILLIAMS v. STATE. (No. 1,396.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

#### 1. CRIMINAL LAW—MOTION IN ARREST.

A motion in arrest of judgment is not the proper mode of presenting to the attention of the court errors in overruling a motion for continuance or in allowing a separation of the jury. A motion in arrest of judgment must be predicated upon some defect appearing on the face of the record or pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2423, 2443.]

#### 2. SAME—NEW TRIAL—GROUNDS—OVERRULING DEMURRER.

The overruling of a demurrer is not a proper ground of a motion for new trial. The objection to the overruling of a demurrer to an indictment or accusation must be preserved by exceptions pendente lite, unless the main bill of exceptions containing this assignment of error be certified within 20 days after the demurrer is overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2158.]

#### 3. SAME—NEWLY DISCOVERED EVIDENCE.

It is not error to overrule a ground of a motion for new trial which is predicated upon newly discovered evidence merely impeaching in its character. Even if the affidavits in support of this ground had not been merely impeaching it does not appear but that the exercise of ordinary diligence would have secured the evidence alleged to have been newly discovered, inasmuch as the affiants had been subpoenaed by

the movant and were present in court during the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2313-2323, 2331, 2332.]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Ed Williams was convicted of crime, and brings error. Affirmed.

E. Wall and Bull & Reid, for plaintiff in error. O. H. Elkins, Sol. Gen., and McDonald & Quincey, for the State.

RUSSELL, J. Judgment affirmed.

### FULFORD v. FOUNTAIN.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### NEW TRIAL—DISMISSAL OF MOTION—BRIEF OF EVIDENCE.

Where a motion for a new trial was made, and an order passed during the term at which the case was tried, providing that movants have until the hearing to prepare and present for approval a brief of the evidence, and that the judge enter his approval thereon at any time in term or vacation, and that, if the hearing was had in vacation, such brief might be filed within 10 days after such motion was determined, and on the margin of such order was another order, signed by such judge, providing that such brief of evidence must be written out and submitted to counsel on the other side and filed, subject to approval, within 40 days from date of the orders, both of which were signed at the same time, *held*, the judgment of the court dismissing such motion at the hearing thereof during the succeeding term of the court will not be disturbed, where it appears that the brief of the evidence was not submitted or filed within 40 days from the date of the orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 313.]

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action between S. L. Fulford and W. E. Fountain. From the judgment, Fulford brings error. Affirmed.

J. B. Geiger, for plaintiff in error. A. C. Saffold, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

### WOODRUFF v. WOODRUFF.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### DIVORCE—TEMPORARY ALIMONY.

This being an application for temporary alimony and counsel fees, brought pending suit for divorce instituted by the husband on the grounds of desertion and cruel treatment, but no cruel treatment being shown on the part of the wife, and the evidence being directly conflicting as to whether the wife deserted the husband or he deserted her, this court cannot say that the judge abused his discretion in granting the temporary alimony and counsel fees, although the husband, on the hearing for temporary alimony, expressed a willingness and desire to have his wife return to and live with him, offering to treat her

well. As to the husband's offer to have his wife return, see *Nipper v. Nipper*, 129 Ga. 450, 59 S. E. 229.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 610-613.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by F. E. Woodruff against S. G. Woodruff for divorce. From an order granting temporary alimony, plaintiff brings error. Affirmed.

Harvey Hill and J. B. Ridley, for plaintiff in error. W. R. Hammond, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

### FORD et al. v. PARKER.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### 1. TRIAL—RIGHT TO OBJECT TO EVIDENCE—ESTOPPEL OR WAIVER.

Where suit was brought on a promissory note, and at the beginning of the trial the defendants admitted the execution of the note and assumed the burden of proof, when it was afterwards offered in evidence by the plaintiff in rebuttal, it could not be excluded on objection based on the ground that it was attested by a witness, and that its execution must be proved by such witness in order for it to be admitted.

#### 2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

Where to a suit on a promissory note a plea of total failure of consideration was filed, averring that it was given for the purchase of certain mules, that they did not fulfill the representations or warranty made in regard to them, and that they were utterly and totally worthless, and where the evidence for the defendant tended to support the plea, while that for the plaintiff tended to show that there was no failure of consideration, and there was no evidence to show any less value between the full purchase price and complete worthlessness, it will not require a reversal that the presiding judge charged that the jury would find on such plea for the total purchase price or nothing. *Otis Bros. & Co. v. Holmes*, 109 Ga. 775, 35 S. E. 119 (2).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

#### 3. SAME.

While some of the evidence admitted may not have had much relevancy to the issue, and while some of the charges complained of may not have been absolutely accurate in expression, there was nothing in the rulings of the judge or the charges which requires a reversal.

#### 4. BILLS AND NOTES—ACTIONS—EVIDENCE—SUFFICIENCY.

The verdict was supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by C. L. Parker against J. H. Ford and others on a note. Judgment for plaintiff, and defendants bring error. Affirmed.

Payton & Hay, for plaintiffs in error. Fulwood & Murray, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

**FRALEY v. NABORS et al.**

(Supreme Court of Georgia. Oct. 13, 1908.)

**EASEMENTS—REMOVAL OF OBSTRUCTIONS.**

Proof that a private way, which has been in use for more than a year has been obstructed without giving the 30 days' notice required by Pol. Code 1895, § 678, will not authorize the ordinary to direct the removal of such obstructions, upon an application for such removal based solely on a prescriptive right to the use of such private way.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Application to the ordinary of Dade county by F. B. and R. H. Nabors against Jesse Fraley to have obstructions removed from a private way. The ordinary required the obstructions to be removed. To this judgment Fraley sued out a writ of certiorari, and from a judgment for F. B. and R. H. Nabors he brings error. Reversed.

The defendants in error made application to the ordinary of Dade county to have certain obstructions removed from an alleged private way, which they alleged had been in their constant and uninterrupted use for seven years. Upon the trial of the case the ordinary passed an order requiring the plaintiff in error to remove the obstructions. To this judgment Fraley sued out a writ of certiorari, upon the hearing of which the judge of the superior court rendered the following judgment: "It is ordered that the within certiorari be and the same is hereby overruled, and a new trial refused, it not appearing that the notice required [by] section 673 of Code, vol. 1, was given; but the merits of the case are not passed upon, and the said Fraley has the right to give the said notice and proceed as the law directs." To this judgment the plaintiff in error filed his exceptions.

B. T. Brock and J. P. Jacoway, for plaintiff in error. W. W. Jacoway, for defendants in error.

HOLDEN, J. (after stating the facts as above). The only ground upon which the plaintiffs in the court below, in their application to the ordinary to have the obstructions removed from the alleged private way, based their claim of right to use the way in question and to have the obstructions removed therefrom was that such way had been in their constant and uninterrupted use for seven years; that it was not over 15 feet wide, and no legal steps had been taken to abolish the same. Under the allegations in the application made to the ordinary the defendants in error were seeking to have the obstructions removed under the provisions of section 678 and 679 of the Political Code of 1895, and no effort was made to have such obstructions removed, because Fraley failed to comply with Pol. Code 1895, § 673, which provides that, when a private way has been

in use for as much as a year, the owner of the land over which it passes cannot close it up without first giving the users of the way 30 days' notice in writing of his intention to obstruct it. Whether or not the ordinary has any power to direct the removal of the obstructions from a private way in any case not falling within the provisions of Pol. Code 1895, § 679, which gives him such authority "if it should appear that said private way has been in continuous, uninterrupted use for seven years or more, and no steps have been taken to prevent the enjoyment of the same," is a question not here involved, and therefore not decided; but we are clear in the opinion that he has no such authority merely because of failure to give the notice required by section 673, when acting on an application to have obstructions removed based solely on the prescriptive right set forth in sections 678 and 679.

The court, in passing upon the case made by the answer of the ordinary to the writ of certiorari, refused a new trial solely because of the failure to give the notice above referred to, and did not pass upon any other question in the case. It was error to refuse a new trial because Fraley did not give the notice of his intention to obstruct the way, for the reason that his failure to give such notice could not have affected any right which he had upon a trial of the case wherein the application to have the obstructions removed made no complaint of such failure. In this connection, see *Nugent v. Watkins*, 129 Ga. 382, 58 S. E. 888, and cases there cited. The court below should pass upon the case made by the certiorari proceedings, without reference to the failure of Fraley to give notice of his intention to close up the private way.

Judgment reversed. All the Justices concur.

**FENDER v. RAMSEY & PHILLIPS.**

(Supreme Court of Georgia. Oct. 13, 1908.)

**1. EVIDENCE—ADMISSIBILITY—EVIDENCE AT FORMER TRIAL.**

A rule of law under which the testimony of a witness, since deceased or disqualified or inaccessible for any cause, given under oath on a former trial upon substantially the same issue between substantially the same parties, may be proved by any one who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies, does not authorize the admission in evidence on the final trial of the case of an ex parte affidavit made by a witness, since deceased, for use on the hearing of an application for interlocutory injunction in the same case.

**2. MALICIOUS PROSECUTION—DAMAGES—CROSS-ACTION.**

Where a plaintiff brought an action against a defendant to enjoin interference with timber and to recover damages, the defendant could not in the same case, by way of cross-action, recover damages against the plaintiff on the ground that the suit was instituted and prosecuted without



probable cause, and that damages had resulted to him by reason thereof; and a charge by the court allowing such a recovery was erroneous.

(Syllabus by the Court.)

Error from Superior Court, Tift County;  
R. G. Mitchell, Judge.

Action by W. L. Fender against Ramsey & Phillips. Judgment for defendants, and plaintiff brings error. Reversed.

F. S. Harrell and Crawford & Wilcox, for plaintiff in error. Hendricks & Christian, for defendants in error.

ATKINSON, J. 1. On final trial an affidavit was offered in evidence containing material statements of fact bearing upon the issue. It was admitted that the affidavit was taken for use on the hearing of an application for interlocutory injunction in the same case, and that the affiant had since died. The affidavit was admitted in evidence over the objection of the plaintiff. This ruling was erroneous. The reason of the rule admitting such evidence is quite clearly stated in 1 Greenleaf on Evidence (16th Ed.) §§ 163, 163a. Among other things it is said: "The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine and was legally called upon to do so, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties. It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party." The rule as stated in Civ. Code 1895, § 5186, is a codification of the general rule of law, and not a change arising from legislative enactment. The language of that section is inapplicable to an ex parte affidavit, made for use on an interlocutory hearing and without the right of cross-examination. It speaks of testimony "given under oath on a former trial." It refers to proving the substance of the entire testimony on the particular matter by one who heard it, and altogether it is apparently not applicable to such an affidavit. Interrogatories stand on a different footing from an ex parte affidavit. There the right of cross-examination exists, and the adverse party can propound cross-interrogatories if he desires.

2. The court charged the jury as follows: "The defendants set up recoupment, claiming that the plaintiff brought his action and that he interfered with their labor, and that they, because of his acts, were damaged. If you

believe from the evidence in the case that the action of the plaintiff was groundless, that he had no probable cause for bringing it (and you are the judges of that), had no right to bring the action, you believe that it was groundless and that there was no cause for his bringing it, then I charge you the defendants would be entitled to such an amount as damages as you are satisfied from the evidence they sustained; and, if you should find any amount for the plaintiff, they should be given credit for whatever you find they were damaged by the bringing of this action by the plaintiff." "If you believe defendants sustained damage by reason of the bringing of the action against them by the plaintiff, it is for you to say how much damage they sustained." These charges were erroneous. There was no evidence on which to base them. The constitutional right to appeal to the courts (Civ. Code 1895, § 5701) authorizes a fair and legitimate testing of one's bona fide claim of right. A litigant is not subject to be penalized by the award of damages whenever he loses his case. Otherwise, every man would enter the doors of the courthouse, no matter how honestly or with what probable cause, with the danger of damages hanging over him.

Civ. Code 1895, § 3796, declares that expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. See remarks of Bleckley, J., in Tift v. Towns, 63 Ga. 242; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426; Ga. R. Co. v. Gardner, 118 Ga. 723, 726, 45 S. E. 600. The recovery of this character of damages presupposes a right on the part of the plaintiff to bring the action, and deals with the question of the measure of damages recoverable. If the defendant in this case is seeking to recover for malicious use of legal process, commonly called malicious prosecution of a civil action, there are three essential elements in such a case: (1) Malice; (2) want of probable cause; and (3) that the proceeding complained of had terminated in favor of the defendant before the suit for damages based upon it was brought. Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S. E. 222. There is no law by which every case brought by a plaintiff can be turned into a damage suit by the defendant against the plaintiff for bringing it, while it is still pending. While there was no demurrer to the defendant's pleading, yet there were essential legal elements wanting, the absence of which would show a lack of any right to recover by such defendant. Under the law, neither the pleadings nor the evidence authorized the charges quoted.

Judgment reversed. All the Justices concur.

## SAPP v. CLINE.

(Supreme Court of Georgia. Oct. 13, 1908.)

## 1. DEEDS—PERSONAL OR REPRESENTATIVE CAPACITY.

Where a deed executed in 1857 recited the grantor as a named person, "administrator of the goods and chattels, rights and credits, and which were of [another named person], deceased, of the first part," and stated that the grantor, "administrator as aforesaid," conveyed certain described lots, and that in testimony thereof the grantor, "administrator," thereunto set his hand and seal, this was sufficient to show the intention of the maker of the deed to convey as administrator of the decedent, although the maker signed his individual name, without the addition of his title as administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 276-277.]

## 2. EXECUTORS AND ADMINISTRATORS—REAL PROPERTY—SALE—PUBLIC SALE.

An order was granted by the ordinary of Chatham county, authorizing a sale by an administrator of the lands of his intestate. The exact date of the order is not shown. The administrator made a deed to certain land in Baker county. The caption was, "State of Georgia, Baldwin County," and the deed was dated "December 25, 1857." It contained no reference to the order of sale, and no recital as to any public sale or the manner of the sale, but was merely a conveyance of the property to the grantee named therein. There was no aliunde evidence of any public sale, or that it was made in pursuance of the order of the court, or any proof of possession under the deed. It was admitted as a muniment of title in behalf of a plaintiff seeking to recover the land; and the presiding judge charged in effect that the plaintiff's chain of title was sufficient to make out a prima facie case. *Held*, that the admission of the deed and the charge of the court on this subject were erroneous.

## 3. SAME—PRESUMPTION OF REGULARITY—LAPSE OF TIME.

Under the circumstances recited, lapse of time, though more than 40 years before the institution of the suit, did not raise a presumption of regularity and authority to make the deed, which would authorize its admission in evidence, without more.

## 4. DEEDS—RECORDS—VALIDITY.

Where a deed was made to land in a certain county, and under an act of the Legislature provision was made for the creation of a new county, which would include the land within its boundaries, but a time was fixed when officers for the new county should be elected and its political and official organization should be perfected, the record of the deed in the original county prior to such time was a lawful recordation.

## 5. EJECTMENT—BURDEN OF PROOF—FORGED DEED.

Where, pending an action to recover land, the plaintiff filed an affidavit alleging the forgery of a deed under which the defendant claimed title, this put the burden of proof as to the genuineness of the deed attacked on the party asserting it; and, where this issue was by consent tried together with the other issues in the case, the burden of proving the genuineness of the deed still remained upon such party, as if that issue had been tried alone. *Holland v. Carter*, 79 Ga. 139, 3 S. E. 690.

## 6. DEEDS—EFFECT OF INVALIDITY—FORGERY.

If, upon an issue of forgery made by affidavit duly filed, a deed should be found to be forged, it would not operate to convey a good title to the grantee therein or persons holding under him; nor would the good faith of a subsequent holder suffice to make such conveyance a good

transfer of title. Good faith would be immaterial, unless title by prescription was involved. (Syllabus by the Court.)

Error from Superior Court, Mitchell County: W. N. Spence, Judge.

Action by P. J. Cline against O. P. Sapp. Judgment for plaintiff, and defendant brings error. Reversed.

Russell & Hawes, for plaintiff in error. I. A. Bush & Son and Shipp & Kline, for defendant in error.

ATKINSON, J. This was a suit for the recovery of land, the cancellation of deeds, etc. The plaintiff obtained a verdict. A motion for a new trial was overruled, and the defendant excepted.

1. The plaintiff tendered in evidence a deed as follows:

"State of Georgia, Baldwin County. This indenture, made this 25th day of December, in the year of our Lord one thousand eight hundred and fifty-seven (1857), between Michael Shehan, formerly of Baldwin, but now of the county of Chatham and state of Georgia, administrator of the goods and chattels, rights and credits, and which were [of] James H. Shehan, deceased, of the first part, and John Treanor, of the county of Baldwin and state of Georgia, of the other part, witnesseth: That the said Michael Shehan, administrator as aforesaid, in consideration of the sum of eighteen hundred and seventy-five dollars (\$1,875.00) to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, and conveyed, and by these presents does bargain, sell, alien, and convey, unto the said John Treanor, his heirs and assigns, the lots of land in the 11th district, formerly of the county of Early, now of the county of Baker, in said state, known in the plan of said county of Early as follows, viz.: Lot number 67; lot number 88; lot number 113; lot number 288; lot number 343. To have and to hold the said lots of land unto him, the said John Treanor, his heirs and assigns, together with [all] and singular the rights, members, and appurtenances and reversions, rents, and profits thereof, in fee simple. In testimony whereof the said Michael Shehan, administrator, has hereunto set his hand and seal the day and year above written. [Signed] Michael Shehan. [Seal].

"Signed, sealed and delivered in the presence of And. W. Brady. J. N. Horne, Not. Pub. B. C.

"Georgia, Baker County. Clerk's Office Superior Court. Recorded in Book 18, page 248, March 1, 1858. Thomas Allen, Clerk."

Among the objections urged to the admission of this deed in evidence, it was insisted that the "deed appears to be the individual [act] of Michael Shehan, and not an administrator's deed. There was no title in Michael Shehan." This point is practically controlled by the ruling in *Tenant v. Blacker*, 27

Ga. 418, which has been followed in *Payton v. McPhaul*, 128 Ga. 517, 58 S. E. 50, and in *Garrett v. Crawford*, 128 Ga. 524, 57 S. E. 792, 119 Am. St. Rep. 398, and in full harmony with *Hart v. Lewis*, 130 Ga. 504, 61 S. E. 28. Upon an examination of the original record of file in the case first cited, the deed then under consideration was very similar to that now before the court, and the two cases are parallel.

2, 3. The plaintiff offered in evidence the deed above referred to from Michael Shehan, administrator of John Treanor, deceased, as a muniment of title. Among the grounds of objection made to its admission were that the deed did not recite that the land had been advertised, or that it had been sold at public outcry, or that there was any authority to make the sale; that at the time of its execution in 1857 there was no authority to sell wild lands at private sale; that there was no recital that the sale took place on the first Tuesday in the month, or at any other time or place than that recited in its caption and date—that is to say, in "Baldwin county" and on the 25th day of December, 1857. It being shown that there was in fact an order authorizing a sale of the lands of the decedent, the deed was not void for the sole reason that it did not recite the grant of such an order, however susceptible the deed may be to the other grounds of objection. This deed was executed before the adoption of the original Code, and its validity is to be determined by the law as it then stood. Whether the codification of certain decisions and their embodiment into the brief formulæ of certain sections of the Code as it now stands has effected any change in the law need not be considered. It was essential that the administrator should have power to make the sale which he did make. In 1857 the ordinary could not grant an order to make a private sale of land of any sort. The authority to grant an order to sell wild lands at private sale was not conferred until 1853. Acts 1858, p. 56; Civ. Code 1896, § 3448. Thus, when the deed under consideration was made the administrator had no authority to make a private sale of lands of any description, and the ordinary could not grant him any such power. The only authority which could have been granted was to make a public sale. The rule that if an administrator has an order authorizing a sale, and is apparently complying with that power, bona fide purchasers will not be affected by irregularities of which they have no notice, has reference to such matters as the mode of advertising, the length of time for which the advertisement runs, or other irregularities in the procedure, but does not mean that an administrator has authority to make any private sale of land. The deed which was made in this case did not recite that there was any public sale, or that it was made in accordance with the order of

the ordinary, or give any indication that the administrator had exercised the power to make a public sale, which could have been conferred by that order alone. On the contrary, it was headed, "State of Georgia, Baldwin County," and was dated December 25, 1857. There was nothing to show that the sale was made at any other time or place. It had every appearance of being a private sale by the administrator. The order of sale relied on was granted by the ordinary of Chatham county, which presumably was the county of the administration. Thus the order relied on authorized, and could authorize, only one thing, while the deed, standing alone, apparently consummated a different transaction. No evidence was offered to show that the land was in fact sold at public outcry.

In *Clements v. Henderson*, 4 Ga. 148, it was held that, where a party claims title to land under an administrator's deed, the authority to make the sale must be shown, and that, when this has been done, recitals in the deed of the acts required to be done by him under the statute will be considered as prima facie evidence of the truth that such acts had been done. In the opinion, Warner, J. said: "But it may be asked, if the law presumes the administrator has done his duty, why not presume he has done so without the particular acts being recited in the deed? The deed is the muniment of title delivered to the purchaser by the administrator, as the agent of the law, and should show upon its face that the requisitions of the law have been complied with, which would divest the heirs of their title and transfer the same to the purchaser." That case was one between an heir and a purchaser at the administrator's sale; but it would seem that, if a presumption of regularity arose in favor of the administrator where the deed made no recital, it would arise as well in respect to the heir as in respect to other persons. In *Roberts v. Martin*, 70 Ga. 196, the presumption referred to was that, from an order granting leave to an administrator to sell land, the law presumed that all had been done which was necessary to be done before the same was granted. In *Nutting v. Thomason*, 46 Ga. 34, decided in 1872, the proceeding was one to recover railroad stock which had been sold by an administrator at private sale and resold by his vendee to a bona fide purchaser without notice; the stock having been transferred on the books of the company in the usual manner. It was not an effort to set up a deed by an administrator as a conveyance of perfect title.

Nor does the decision in *Ardis v. Smith*, 52 Ga. 102, affect the ruling here made. There one person sought to set up in equity a contract between an administrator and another by which the latter was to pay more for the land sold at the administrator's sale than

the price at which it was bid off. If there was any irregularity in the transaction, the plaintiff was not concerned with it. In *Hamilton v. Cargile*, 127 Ga. 762, 56 S. E. 1022, a will provided that the executors named therein should have full power to sell all the real estate of the testator, and to exercise their own judgment as to the manner and terms of the sale. They as executors made a deed to a purchaser. There was an apparent power to make the sale and conveyance, and it was properly admitted in evidence. What was said in the opinion in the case of *Ardis v. Smith*, *supra*, is not to be taken to mean that if an executor sells without authority, or his conveyance indicates on its face that he has not complied with his authority, such deed will convey a perfect title to the land, and that no person can raise the point of want of authority save the heirs of the estate, when the deed is offered as a muniment of title. This case is not controlled by the ruling that in a suit by the indorsee of a promissory note against the maker thereof the defendant cannot controvert the title of the plaintiff upon the ground of an assignment by him as executor to himself as an individual. Such a sale by an executor or administrator to himself as an individual is voidable at the election of parties interested in the estate, but is not void. *Tyson v. Bray*, 117 Ga. 689, 45 S. E. 74. The plaintiff in the present case is not seeking to defend his possession of land on the ground that he was a bona fide purchaser without notice of any irregularity, but he is seeking to recover possession of land from another, and to rely on the administrator's deed as a muniment of title. The plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's. Under the facts above stated we are of the opinion that the court erred in admitting the deed in evidence without the aid of other testimony to show that the land was sold at public sale. He also charged in effect that the plaintiff had made out a prima facie case, which would entitle him to recover if the defendant's title was forged and he was not a bona fide holder, thus declaring as matter of law the sufficiency of the administrator's deed as a muniment of title. Under the ruling above made, this was error.

It was urged that because of long lapse of time a presumption would arise in favor of the regularity of the administrator's sale. Some authorities contain general statements to this effect. 1 Gr. Ev. (16th Ed.) § 20. Without entering into a discussion of the general subject, one or two remarks may be made in regard to it. Mr. Greenleaf says: "The rule itself is nothing more than the principle of the statutes of limitation, expressed in a different form, and applied to other subjects." In this state the statute of limitations has been abolished with respect to suits for land, and prescription has

taken its place. In *Osborne v. Tunis*, 25 N. J. Law, 633, it is said in the opinion (on page 663) that in every case cited by Mr. Greenleaf in support of the position it will be found that possession accompanied and followed the deed. As already stated, no possession was here shown, but the plaintiff was seeking to assert or to set up the administrator's deed as a muniment under which he claimed a perfect legal title, and on its face it indicated not that it was made under a public sale in pursuance of the order of the ordinary, but rather that it was a private transaction, consummated at a different time and place.

4. An objection was also made to the admission of the deed on the ground that it was recorded in Baker county, where the land originally was, after the creation of Mitchell county by act of the Legislature, in which new county the land was included, and that this record was not valid. The deed was dated December 25, 1857. The act providing for the creation of Mitchell county was approved December 21, 1857. Among other things, it provided that an election should be had on the first Monday in March, 1858, at which county officers should be chosen, and that managers of the election should meet on the first day thereafter to consolidate the vote, and that the Governor should issue commissions to the officers elected upon due certification thereof. The first Monday in March, 1858, was the 1st day of that month. On that very day the deed was recorded in Baker county. But under the terms of the act the organization of the new county was not complete, and could not be, at least until the next day, so that the deed could not lawfully have been recorded in Mitchell county, because at that time there was no lawful provision for making a record there. The organization of the new county was in progress, but not complete. The law does not contemplate that there shall be an interregnum during which it is impossible for necessary records to be made. It is frequently provided that certain instruments must be recorded within a limited time, and under the general law a lien or mortgage may lose its priority or right by failure to be recorded as required. The law does not contemplate that one may lose his rights because a new county is in process of organization, but has not in fact been organized. Suppose, for instance, that the very last day for recording a paper or for certifying should have fallen between the date of the act and the date of the organization of Mitchell county. There was no officer in the new county to perform the act, and if the officer in the original county could not do so the interested party would lose his rights, because there was no officer authorized to discharge the duty. Such is not the law. The recording of the deed, perhaps, ran a narrow race against time for validity, having taken place

on the very day when the election was in progress; but it was completed before the organization of the new county, and was a lawful record.

5, 6. Certain charges of the presiding judge were assigned as error. In them he appeared to consider that good faith of the defendant would operate to make the deed valid, if it were a forgery. Thus in one of them he instructed the jury as follows: "I charge you, gentlemen, if you believe that to be true, if you believe that the defendant has shown to you by the preponderance of the testimony in this case—if you should find that they are really forgeries, which is the first question you are to pass upon, if you find that they are forgeries, then I charge you that the burden is upon him to show that he had no knowledge of it, he had no reason to suspect, no good reason to suspect that they were forgeries, when he bought it and went into possession under it. The burden is upon you [him] to show by the preponderance of the testimony that he took it in good faith, that he paid his money honestly believing that he was getting good title, and went into possession bona fide, in good faith, honestly, an innocent purchaser. If he shows you that by a preponderance of the evidence, then I charge you that the title relied upon by the plaintiff would not be sufficient upon which to base a recovery for the plaintiff, and you should find for the defendant." There were also other similar charges. They apparently made the right of the plaintiff to recover turn rather upon the question of good faith and notice in the defendant than upon the strength of the plaintiff's title or the question of forgery of the deed. The question of prescription was not involved. These charges were calculated to direct the minds of the jury from the necessity on the part of the plaintiff to show a prima facie title, and to mingle that question with one of bona fides or mala fides on the part of the defendant.

Judgment reversed. All the Justices concur.

#### SOUTHLAND KNITTING MILLS v. TENNILLE YARN MILLS. (No. 1,135.)

(Court of Appeals of Georgia. Sept. 28, 1908.)

##### 1. PLEADING—CONTRADICTORY PLEAS—ESTOPPEL.

While a defendant has the privilege of filing contradictory pleas, yet his defenses may be so related to one another that a finding in favor of one of them will estop him from further asserting the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 189.]

##### 2. APPEAL AND ERROR—HARMLESS ERROR.

Where the verdict, though general in terms, appears with reasonable certainty, when construed in the light of the whole record, to be a finding in favor of a plea which is of such nature that a finding in favor of it precludes inquiry into the other defenses asserted, alleged errors in rulings upon testimony offered in support of

the other pleas are immaterial, especially as against the complaint of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Tennille Yarn Mills against the Southland Knitting Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff sued for the purchase price of a quantity of yarns sold by it to the defendant. The defendant pleaded (1) that the yarns were bought under an express warranty, and that the warranty had failed because of certain defects, and prayed a recoupment of the resultant damages; (2) that the weights of the goods delivered were short, and asked a reduction from the face of plaintiff's account therefor; (3) that subsequently to the arising of the differences set up in the foregoing two pleas, and while they were pending unsettled, the parties agreed upon a compromise whereby the plaintiff contracted to deliver to the defendant, in consideration of the settlement of all differences, in addition to the 10,054 pounds of yarn then remaining undelivered under the contract, 9,820 pounds more at the contract price, which was 3.31 cents less than the market price of yarns at that time; that the plaintiff had breached this contract by delivering only 10,487 pounds of the 19,487 pounds of yarn thus contracted to be delivered, and that of this the defendant had to return to the plaintiff 1,553 pounds, because it was too defective to be used; and therefore for the failure of the plaintiff to deliver the balance, amounting to 10,940 pounds, the defendant was damaged in the sum of \$362.11, being the difference between the contract price and the market price, and a set-off as to this sum is prayed.

The court, in charging the jury, took up these pleas in inverse order, and as to the third, the one in which the contract of settlement is pleaded, instructed the jury that if they found in favor of the defendant on this plea they should deduct from the plaintiff's recovery whatever sum the proof showed the defendant was damaged by the plaintiff's failure to deliver the yarns in accordance with the contract of settlement, and that if they found for the defendant on this issue they should not take into consideration the other pleas which the defendant had filed. The jury was also instructed as to how they should determine the issues raised by the other pleas in the event they found against the defendant on the plea of settlement. The jury returned a verdict in favor of the plaintiff, but made a deduction of \$332.78 from the amount of the account. The defendant filed a motion for a new trial, in which, besides these general grounds, it complained of certain rulings excluding testimony as to the plea numbered 1 above,

and also of the charge of the court wherein the jury were instructed that, if they found in favor of the defendant on the plea of settlement, they should not consider the other pleas.

Erwin & Callaway, for plaintiff in error.  
Hardeman, Jones & Johnston, for defendant in error.

POWELL, J. (after stating the facts as above). While by Civ. Code 1895, § 5065, the defendant may file contradictory pleas, yet even contradictory pleas may be so related to one another that a finding in favor of one of them will make a consideration of the others unnecessary, and will render alleged errors affecting only the other pleas immaterial. Compare Realty Co. v. Ellis, 4 Ga. App. 402, 61 S. E. 833 (5). If the parties have settled their differences by a new contract, the defendant, who has pleaded that settlement and has taken a set-off of damages as a benefit, is certainly precluded by every consideration of law and of equity from asserting any claim to a further diminution of the plaintiff's recovery because of the alleged damages which constituted the very consideration of the contract of settlement. *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379; *Parker v. Riley*, 21 Ga. 427 (2). There was no error in charging the jury that if this plea were determined in the defendant's favor they should not consider the other pleas. If the deduction made by the verdict from the amount of the plaintiff's account was based upon the plea of settlement and not upon the other pleas, it follows that the alleged errors in the rejection of testimony offered in support of the other pleas are immaterial and harmless; but, the verdict being general in terms, it does not expressly appear upon what plea it is founded.

We think, however, it can be asserted with reasonable certainty, in the light of the pleadings and the evidence, that it is a finding in favor of the plea of settlement. The amount deducted by it is \$332.78. It is not a finding under the first plea, for the court excluded the testimony offered in support of that defense. It does not appear to be based on the second plea, for only two witnesses testified as to this. According to one of them the shortage amounted to enough to have required a deduction of more than \$600, and according to the other there was no shortage at all. The sum allowed does not exactly correspond with the sum claimed in the third plea, nor with the proof submitted under it. Looking through the record for an explanation, we find that by multiplying 10,054 by 3.31 cents, the sum deducted by the jury, \$332.78 results. Now in the plea of settlement the words "10,054 pounds" appear, and in the context are immediately preceded by the words "amount of yarn undelivered at that time"; and in the same plea the damage per pound for failure

to deliver the yarn under the settlement is alleged at 3.31 cents. A fuller study of the context shows that the time referred to was the date of making the alleged contract of settlement, and not the later date, when the delivery should have been completed thereunder. It is plain that the jury intended to give damages upon this plea, but that they erroneously used the wrong multiplicand in making their calculation.

Making the calculation for ourselves, we find that under the testimony of the defendant's secretary and treasurer, who was its witness on this point, the undelivered balance of the 19,874 pounds of yarn was slightly less than 10,000 pounds, and that the verdict is therefore a few dollars more favorable to the defendant than the proof warranted. The error being in favor of the complaining party, the judgment will not be reversed.

Judgment affirmed.

#### ALBANY PHOSPHATE CO. v. HUGGER BROS. (No. 652.)

(Court of Appeals of Georgia. Sept. 30, 1908.)

##### 1. PLEADING—OBJECTIONS TO RULINGS ON DEMURRER—WAIVER.

The rule of the common law which forbade the filing of contradictory pleas does not prevail in this state. Under the provisions of Civ. Code 1895, § 5047, a defendant may rely at one and the same time on a demurrer, a plea in bar, and a plea in discharge. Pleas, however conflicting, do not oust each other.

(a) The admission by the defendant of a prima facie case in the plaintiff, in order to get the opening and concluding argument before the jury, whether made in the original answer or by amendment, does not estop the defendant from complaining of prior rulings on demurrer to which exceptions pendente lite have been filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1403-1405.]

##### 2. CONTRACTS—ARCHITECT'S CERTIFICATE—FORM.

Where the contract does not prescribe otherwise, the certificate of an architect as to the satisfactory completion of a building need not follow any particular form.

##### 3. DAMAGES—MEASURE—BREACH OF CONTRACT.

Where a contract has been broken, the law seeks to give such damages as will put the injured party in the same position as if the contract had been kept, subject, however, to the exception that damages which are speculative, consequential, or of a nature not reasonably within the contemplation of both parties as a natural and probable result of a breach, are not recoverable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 58.]

(a) Where a builder agrees to erect a building within a certain time, knowing that it has been leased from the time named for its completion, and breaks the stipulation as to time, he is ordinarily liable to the owner for loss of rent, but not for loss of interest on the capital invested in the building, nor for damages paid by the owner to a lessee in accordance with a stipulation of the lease contract, as to which the builder had no knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 312.]

**4. MOTIONS—VACATING OR SETTING ASIDE ORDERS—POWER AFTER TERM—NEW TRIAL—GROUNDS—HARMLESS ERROR.**

Where an amendment to pleadings has been, in term, duly allowed over objection by demurrer, it is not, after the term has expired, within the power of the court to revoke the order of allowance and on motion strike the amendment; but harmless error in this regard will not authorize the grant of a new trial.

**5. JURY—QUALIFICATIONS OF JURORS—AGE.**

A juror over 60 years old is exempt, but not disqualified to serve in a civil case. His exemption is a privilege, but not a disqualification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 264.]

**6. TRIAL—EVIDENCE—ADMISSIBILITY.**

"It has long been the rule in this state, when the admissibility of evidence is doubtful, to admit it and leave its weight and effect to be determined by the jury."

**7. TRIAL—INSTRUCTIONS.**

The charge of the court was accurate, fair, comprehensive of the issues in the case, and free from material error. The verdict is amply supported by the evidence, and no reversible error appears.

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Hugger Bros. against the Albany Phosphate Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hugger Bros. contracted with the Albany Phosphate Company to build a large plant for the manufacture of acid phosphate and fertilizers, according to certain plans and specifications made by architect and engineer P. S. Gilchrist, which contract reads as follows: "This agreement, made and entered into this 17th day of May, 1905, between the Albany Phosphate Company, of Albany, Georgia, a corporation organized and existing under the laws of the state of Georgia, hereinafter called the 'company,' party of the first part, and Hugger Bros., of Columbia, Tenn., hereinafter called the 'builder,' party of the second part, witnesseth: First. Said builder hereby agrees with said company that he will well and substantially build the fertilizer buildings near the city of Albany according to the plans and detailed specifications furnished by Peter S. Gilchrist, Charlotte, N. C.; said work to be executed in the most sound, substantial, and workmanlike manner, and with the best materials of their respective kinds, the cost of which (except the Glover tower frame), with all iron work, nails, scaffolds, ladders, and implements of every kind, is to be borne by said builder, for the sum of \$40,500, to be paid to the said builder by the said company. Second. The builder shall be paid in the following manner; that is to say: When Peter S. Gilchrist, architect and engineer, shall have certified that the work has been completed to his satisfaction, and that the builder has complied with the conditions of the aforesaid plans and specifications, then said company agrees, when said certificate shall have been presented to it, to pay the aforesaid sum of \$40,500; payments to be made as is customary during construction,

namely, 80 [sic] per cent. every 30 days, as the work progresses, the balance on completion. In no case is the payment to be made within 20 per cent. of the work and materials on the ground. Third. Any alterations or changes that the company may wish to have made during the progress of the work shall be done by said builder in accordance with the wishes of said company, and the difference in said cost, if any, shall be approved by P. S. Gilchrist, engineer, before settlement shall be made. In no case shall the charges be greater in proportion to the work done than the work according to the original plans would have cost. Fourth. The said builder further agrees with the said company that he will finish the whole of said work according to the full intent and meaning of the said plans and specifications, and to the satisfaction of P. S. Gilchrist, engineer, within 120 working days, and will have ready for said company the acid chamber building within 40 working days for the lead work to be done, and will have the fertilizer mill building ready for machinery to be placed therein within 70 working days from the time the railroad tracks are ready to receive material. The same builder will be responsible to the company for any delay caused by his failure to complete the building according to contract." (Signed by the parties.)

The builders, claiming to have finished the buildings according to contract, filed suit for an alleged balance due of \$9,366.44. The defendant, claiming that the builders had delayed the completion of the building for a period of three months, whereby it had suffered various items of damages, contended for a recoupment therefor. The items of damage claimed were as follows: (1) The estimated profit on the output of the factory during the period of delay, amounting to \$36,450; (2) the rental value of the plant during this same period, amounting to \$9,000; (3) the interest on the sum invested for the period of delay, amounting to \$3,500; and (4) the amount which the defendant had been compelled to pay the lessee of the building in accordance with its contract with said lessee, amounting to \$9,053. The court struck the portions of the answer alleging the third and fourth items of damage as above, to which rulings the defendant excepted *pendente lite*. The court also overruled general and special demurrers to the plaintiffs' petition, to which rulings the defendant likewise preserved exceptions *pendente lite*. The trial resulted in a verdict in favor of the plaintiffs for \$7,666.44. The defendant moved for a new trial, which was denied. The bill of exceptions to this court complains of the rulings *pendente lite* and also of the overruling of the motion for a new trial. The further facts necessary to an understanding of the points thus raised are stated in the opinion.

Olin J. Wimberly and Wooten & Hofmayer, for plaintiff in error. J. W. Walters & Sons, for defendants in error.

RUSSELL, J. (after stating the facts as above). 1. After the court had made the several rulings on demurrer adverse to the defendant, to which exceptions pendente lite were preserved, and before the introduction of any testimony at the trial, the defendant admitted a prima facie case in the plaintiffs in order to obtain the opening and concluding argument before the jury, and in the trial of the case it availed itself of this right. The defendants in error contend that this court should not consider any of the exceptions pendente lite, for the reason that this admission is a waiver of the defendant's right to complain thereof, estopping and precluding it from complaining of any adverse ruling made prior to such admission. So far as our investigation has gone, the exact point thus raised has never been passed upon by this court or by the Supreme Court, and its proper determination necessitates a consideration of the basis of the right to open and close and of the nature of the admission which the defendant must make in order to deprive the plaintiff thereof. The reason back of the rule which gives this right to the plaintiff in the first instance is that he has the burden of carrying the affirmative of the issue. The law recognizes that it is harder to build than it is to tear down, and so seeks to do even-handed justice by giving him who has the harder task—the burden of proof as to the issue between the litigants—the advantage of the argument. Generally the issue is the truth of the facts alleged in the plaintiff's declaration, and the right to open and close the argument belongs by right to him. But if the defendant admits those facts which show a prima facie case in the plaintiff, and seeks to avoid or defeat such prima facie case by the introduction of new facts by the way of an affirmative defense, as to such a defense he has the burden of carrying the affirmative of the issue, and the law gives him the right to open and close the argument before the jury. For example, where the defendant at common law pleaded the general issue, the right to open and close belonged to the plaintiff; but, if the defendant pleaded by way of confession and avoidance, the right to open and close belonged to him, for the issue between the parties was not then the truth of the facts alleged in the plaintiff's declaration (they being admitted), but the truth of the new matter alleged in the defendant's plea. Shipman's Common Law Pleading, 163, 181; Andrew's Stephen on Pleading, 148, 229; 15 Enc. of Plead. & Prac. 187, 190; Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838; Seymour v. Bailey, 76 Ga. 338. The admission must extend to every fact necessary to show, without proof, a right in the plaintiff to recover on his case as laid in the petition. Consequently the issue between the parties will not be as to the facts admitted, but as to new facts introduced by the defendant by way of confession and avoidance. Crankshaw v.

Schweizer Mfg. Co., 1 Ga. App. 363, 53 S. E. 222; Augusta Factory v. Barnes, supra; Abel v. Jarratt, 100 Ga. 732, 28 S. E. 453; Reid v. Sewell, 111 Ga. 880, 36 S. E. 937; Massengale v. Pounds, 100 Ga. 770, 28 S. E. 510; Brunswick R. Co. v. Wiggins, 113 Ga. 842, 846, 39 S. E. 551, 61 L. R. A. 513. The admission is conclusive upon the defendant, and he cannot thereafter deny the facts admitted, nor withdraw the admission. Fisher v. Jones, 108 Ga. 490, 34 S. E. 172; Harris v. Amoskeag Lumber Co., 101 Ga. 641, 29 S. E. 302 (1).

There is no real inconsistency in urging a general demurrer and in admitting a prima facie case for the purpose of obtaining the opening and conclusion. The one relates to the sufficiency of the pleadings as a matter of law; the other, to the establishment of the allegations of the pleadings as a matter of fact. At the demurrer stage of the case the petition must present a case which upon its admitted facts entitles the plaintiff to recover as a matter of law; on the trial the plaintiff prima facie recovers if he prove, or if the defendant admit, those facts which he has alleged in his petition, irrespective of their legal sufficiency to constitute a cause of action. Our Code expressly recognizes the right of a defendant to demur, plead in bar, and plead in discharge without legal objection. When, therefore, in the present case, the defendant pleaded in discharge by way of confession and avoidance (for that is the effect of the plea), its rights arising under the demurrer were not waived, nor was it estopped from insisting thereon. When the demurrer was overruled, the decision of the judge became the law of the case until reversed. The defendant had the right to give his case direction accordingly, and if the truth of the transaction, viewed in the light of the court's ruling, threw the burden of proof on the defendant, it was entitled to the opening and conclusion of the argument. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S. E. 222 (3); Stiles v. Shedden, 2 Ga. App. 317, 58 S. E. 515.

2. The general demurrer was based on the ground that the petition did not allege that the certificate of the architect had been obtained as prescribed by the contract, and that no reason was alleged why said certificate had not been obtained. Such an allegation is a condition precedent to an action on the contract. Elmore v. Thaggard, 130 Ga. 702 (3), 61 S. E. 726; Lloyd on the Law of Building, § 20. It will be noted, however, that the contract does not prescribe any particular form of certificate, and no particular form is made necessary by law. Lloyd, § 19; Kirk v. Bromley Union, 2 Phill. 640; 17 L. J. (N. S.) Ch. 127. "When an architect certifies that when some slight additions should be made to the work it would be acceptable, and it appears that these additions have been made, and on notice thereof no further objections are made, it will be a sufficient ac-



ceptance." *Mills v. Weeks*, 21 Ill. 561. The certificate in the present case is as follows: "I have looked over the buildings and accepted same on your behalf, with the exception of the skylights on the fertilizer building, as some of these leak. Mr. Hancock is to go over them to-morrow systematically and repair any broken putty joints and have all putty joints painted. When this is done, I think everything will be satisfactory. Peter S. Gilchrist." This certificate shows that the architect was satisfied that the builder had substantially complied with his contract, and there is no contention that the defects pointed out were not remedied. It does not appear, therefore, that the court erred in overruling the general demurrer.

3. The question presented by the striking of the defendant's answer relates to the proper measure of damages. The portions of the answer which the court struck alleged that the defendant had been damaged, because of the alleged delay of three months, (1) in a sum equivalent to the interest on the amount invested in the factory, and (2) in the sum of \$9,053, which the defendant had been forced to pay under the following circumstances: Prior to the time fixed in the building contract for its completion the defendant had leased said plant to the Tennessee Fertilizer Company, which company had a similar plant at Montgomery, Ala.; and the lease contract provided that if the building at Albany was not completed by the day named in the building contract for its completion (from which date the lease was to begin) the defendant would pay its lessee the difference in freight rates between Montgomery and Albany, to make good the deficiency in output due to the noncompletion of the building in time to manufacture a full season's output at Albany. It was further averred in this connection that at the time the building contract was entered into, and during the period of its construction, the plaintiffs knew that the plant had been leased to the Tennessee Fertilizer Company.

The law always seeks to give a remedy commensurate with the injury. "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 6 Wall. 98, 18 L. Ed. 752; *Beale's Cases on Damages*, 486. Accordingly, where a promise has been made and broken, the promisee ought to be put as near as may be in the same situation he would have been in if the promise had been kept. *Roper v. Johnson*, L. R. 8 C. P. 167; *Brown v. Muller*, L. R. 7 Exch. 319. On the other hand, where such damages are so remote, consequential, or speculative that they cannot reasonably be said to have been in the contemplation of the parties as a result of a breach of the contract, the law does not allow their recovery; for this would be unjust to the promisor. Civ. Code 1895, § 3799; *Stewart v. Lanier House Co.*, 75 Ga. 585; *Hadley v. Baxen-*

*dale*, 9 Ex. 341, 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Ex. 398. The plaintiffs can in truth say that the damages set up in the above pleas are not such as would naturally and in the usual course of things flow from a breach of their obligation; nor were they in their contemplation when the contract was made. See *Stewart v. Lanier House Co.*, 75 Ga. 583 (20); *Frye v. Maine R. Co.*, 67 Me. 414; *Fox v. Harding*, 7 Cush. (Mass.) 516, 522. It must be borne in mind that, while the plea does allege that the builder knew at the time he signed the building contract that the building had been leased to the Tennessee Fertilizer Company, it is not stated that the plaintiff had any knowledge of that stipulation in the lease contract as to the payment of freight. So far as appears from the allegations of the plea the builder was not even aware that alleged the lessee had a plant at Montgomery, Ala. "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances, so known and communicated. \* \* \* Had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them." *Hadley v. Baxendale*, supra.

Before damages are recoverable when they flow from independent contracts which the promisee has entered into on the faith of the promise being kept, it must appear that the promisor knew that a breach of his promise would result in such specific damages to the promisee. 1 *Sutherland on Damages* (3d Ed.) §§ 50-52; 1 *Sedgwick on Damages* (8th Ed.) §§ 149, 159 et seq.; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1120; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 290. The mere fact the builder had notice of the fact that the building had been leased would not be sufficient to charge him with notice of the clause of the contract as to the payment of the difference in freight rates between Montgomery and Albany. *Horne v. Midland Ry. Co.*, L. R. 7 C. P. 583; *Sedgwick*, ubi supra, § 163. Knowledge that the building has been leased makes the builder liable for the rental value of the property (as was held by the learned judge in the case at bar) during the period of delay, but for no more. 3 *Sutherland*, supra, § 2130 et seq.; *Lloyd*, supra, § 41.

What we now rule is not in conflict with the cases to which we have been cited. In *Gore v. Malsby*, 110 Ga. 894, 38 S. E. 315, it was held that damages in the nature of expenses necessarily incurred because of the breach of the contract, and so, too, prof-

its capable of exact computation, directly due to the breach, and of such nature that they must have been within the contemplation of the parties, are recoverable. To the same effect are the holdings in the cases of *Walden v. Western Union*, 106 Ga. 275, 31 S. E. 172, and *Van Winkle v. Wilkins*, 81 Ga. 93 (3), 7 S. E. 644, 12 Am. St. Rep. 299. These cases are rather in harmony than in conflict with what we have above stated. Compare *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 62, 42 Am. Dec. 38. Certainly it follows, from the rules we have discussed above, that interest on the sum invested was not a proper item of damage in this case. Such an item would not put the promisee in the position he would have been in if the promise had been kept; nor could such an item have been in the contemplation of the parties at the time they made the contract. Interest on the money invested in a building cannot be used as a measure of damage in such a case as this, for the rental value of a building is sometimes much less than the interest on the investment and sometimes far in excess of the legal rate of interest.

4. It is urged, however, that the court erred in striking the portion of the answer setting up the claim for interest during the period of delay for the following reason: Defendant filed this portion of its answer by way of amendment at the December term, 1906, at which time the court allowed the same, as shown by the following order entered thereon: "The foregoing amendment being offered by the defendant the same is hereby allowed, and demurrer thereto overruled." No exceptions pendente lite were filed by the plaintiffs. Subsequently, at the February term, 1907, the court struck the plea, as appears from the following order entered thereon: "Upon motion of plaintiffs, the foregoing plea is hereby stricken." The defendant contends that, irrespective of the legality of the damages claimed in the plea, the court having allowed it at the December term and overruled the plaintiffs' demurrer thereto at that time, the judgment could not at a subsequent term be changed into one disallowing the plea. We think that this contention is sound. An oral motion to dismiss the plaintiff's case, because no cause of action is set out in the petition, may be made at any time before verdict. *Kelly v. Strouse*, 116 Ga. 872 (1), 43 S. E. 280; *Capps v. Edwards*, 130 Ga. 149, 60 S. E. 455. But "where an amendment to pleadings has been, in term, duly allowed, it is not, after the term has expired, within the power of the court to revoke the order of allowance and strike the amendment on the ground that it was in the first instance erroneously allowed." *McCandless v. Conley*, 115 Ga. 48, 41 S. E. 256. The judgment on the demurrer is entirely without the power of the judge to review or revise after the expiration of the term at which it was granted. *Sims v. Ga. Ry. & Elec. Co.*, 123 Ga. 643,

51 S. E. 573; *Matthews v. State*, 125 Ga. 248, 54 S. E. 192; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706; *Kelly v. Strouse*, 116 Ga. 874 (7), 43 S. E. 280.

In the present case, however, the error does not authorize the grant of a new trial; for it appears that such error was harmless to the defendant. Every one of the pleas asserted that there had been an inexcusable delay of about three months in the completion of the building, and claimed damages during that time—first, loss of rent; second, loss of profits; and, third, loss of interest. The pleas as to the loss of rent and loss of profits were allowed, and evidence thereunder was presented to the jury. Now, in the first place, before allowing damages under any one of these pleas, the jury must have found that there was delay. The evidence on the issue of delay or no delay was all allowed to go before the jury under the pleas claiming loss of rent and loss of profits. Therefore the striking of the plea as to loss of interest did not preclude the defendant from introducing every particle of its evidence on the preliminary question of delay. Even if this plea had been allowed, the evidence thereunder as to this feature of the case would have been the same; and consequently the finding of the jury as to the question of delay necessarily would have been the same. In the second place, the undisputed evidence at the trial was that the rental value of the property was \$3,000 a month, and that the loss of profits was about \$12,000 a month. The highest amount claimed under the plea alleging loss of interest was about \$1,200 a month. The jury could not have assessed damages during the period of delay actually found for loss of rent, loss of profits, and loss of interest. In the nature of things the defendant could not have lost profits, rent, and interest. Therefore, under the undisputed evidence, the jury must have given the defendant the benefit of a more liberal measure than they could have given it if the plea as to interest had been allowed. It conclusively appears, therefore, that the striking of this plea could not have harmed the defendant, and therefore a new trial will not be granted. *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832; *Southland Knitting Mills v. Tennille Yarn Mills*, 62 S. E. 532.

5. This brings us to the motion for a new trial. The defendant challenged one of the jurors on the ground that he was over 60 years of age (which fact was admitted by the juror), and the challenge was overruled. By Pen. Code 1895, § 973, it is stated that it is a ground of challenge that the juror is over 60 years of age. Looking to the wording of this section and to the act from which it was codified (Acts 1855, p. 229), it is clear that it was intended to apply only to criminal cases. This is conceded to have been the original intention of the Legislature; but it is insisted that the codifiers of 1895 have

made the section alike applicable to both civil and criminal cases. In Civ. Code 1895, § 4452, it is said: "The law in reference to grand and petit jurors, to jury commissioners, to the selection, drawing, impaneling, and other matters relating to jurors being *in the main* [italics ours] applicable alike to civil and criminal cases is omitted here, but will be found in the Criminal Code." The words italicized show that there was no intention to work a change in the law relating to jurors, and the whole section clearly indicates no more than an intention on the part of the codifiers to eliminate from the Code useless repetition. By the act of 1875 (Acts 1875, p. 98), now Pen. Code 1895, § 867, it is provided that persons over 60 years of age are exempt, but not disqualified for jury service, in both civil and criminal cases. There is an apparent conflict between section 867 and section 973. The latter section is based on a law passed in 1856, and the former on a law passed in 1875. It would seem, therefore, that the later act would control. However, it is not necessary for us to rule upon this. The decision of the Supreme Court in the case of *Carter v. State*, 75 Ga. 747, has never been overruled or changed by any act of the Legislature. In that case it is held that a person over 60 years of age is exempt, but not disqualified to serve as a juror. The exemption was granted for his own benefit, and if he does not object to serving there is no reason why the law should disqualify him. This is the general rule. 17 Enc. of Pl. & Prac. 1116, 1177.

6. It was conceded that rainy days were to be excluded from the 120 working days prescribed by the contract for the completion of the buildings; but it was a sharply contested issue as to how many rainy days there were during this period. One of the defendant's witnesses testified that the entire time lost on account of rain was  $2\frac{1}{2}$  days. One of the plaintiffs' witnesses testified as follows: "I kept a calendar on the wall, and when it rained I marked that calendar. I marked it up until December, and in December the calendar disappeared, and I have got the weather bureau of Albany's reports, and they are right with that calendar, so I have got to the best of my recollection. The weather bureau verified what I had on my calendar. For some cause or other that calendar was taken away from there." The defendant objected to so much of the above evidence as refers to the report of the weather bureau on the ground that it violates the best evidence rule. A witness cannot prove the contents of a written instrument by parol, but must introduce the instrument itself, if it is in existence and accessible. On the other hand, a witness may testify to any fact which he recollects, and for the purpose of refreshing his memory he may refer to any written instrument which would aid him. Civ. Code 1895, § 5284. The only limitation

is that he must ultimately testify from his recollection as thus refreshed. *Shrouder v. State*, 121 Ga. 615 (2), 49 S. E. 702; *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317; 1 *Wigmore on Evidence*, § 758. It is often difficult to draw the line between refreshing memory from written aids, and testifying to the contents of a written instrument, because, when a witness testifies that by referring to a written instrument he recollects a fact, he is indirectly testifying that the fact is contained in such instrument, else how was his recollection refreshed by referring to it. When, therefore, in the present case the witness testified that he had verified his calendar by the report of the weather bureau, and that he remembered there were 14 rainy days, he does indirectly state that the weather bureau report shows 14 rainy days. But in such a case the recollection of the witness, and not the weather bureau report, is the evidence. When read in connection with the context, the statement of the witness is susceptible of the construction that he recollected that there were 14 rainy days; this fact having been fixed in his memory because he had kept a record on a calendar and had refreshed his memory by verifying the calendar with the report of the weather bureau. "If upon looking at any document he can so refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was not written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness." *Henry v. Lee*, 2 Chitty, 124. See *Miner v. Phillips*, 42 Ill. 123; *Huff v. Bennett*, 6 N. Y. 337; *State v. Lull*, 37 Me. 246; *Bank v. Zorn*, 14 S. O. 444, 37 Am. Rep. 733. The evidence was of that doubtful character which, in our opinion, would legalize its admission and leave its weight for the jury. "Doubtful evidence is to be admitted, rather than excluded." *Savannah R. Co. v. Flannagan*, 82 Ga. 589, 9 S. E. 472, 14 Am. St. Rep. 183; *W. & R. Co. v. Young*, 83 Ga. 512, 10 S. E. 197. "It has long been the rule in this state, when the admissibility of evidence is doubtful, to admit it and leave its weight and effect to be determined by the jury." *Goodman v. State*, 122 Ga. 111-118, 49 S. E. 922, 925.

Judgment affirmed.

#### JACKSON v. STATE. (No. 1,264.)

(Court of Appeals of Georgia. Oct. 12, 1908.)  
CRIMINAL LAW—APPEAL—REVIEW.

Where there is no error of law assigned, and the verdict is supported by the evidence, the judgment of the court below, refusing a new trial, will be affirmed.

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Lewis Jackson was convicted of crime, and brings error. Affirmed.

E. Wall and E. S. Fuller, for plaintiff in error. O. H. Elkins, Sol., for the State.

HILL, C. J. Judgment affirmed.

ROBERSON v. STATE. (No. 1,274.)  
(Court of Appeals of Georgia. Oct. 12, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS—IMPEACHMENT OF WITNESS.

The court should instruct the jury as to all the methods by which a witness may be impeached, so far as such instructions are authorized by the evidence; but his failure to do so will not require the granting of a new trial, where no written request was made to charge the jury as to the mode of impeachment omitted by him from his instructions on that subject. *Millen & Southwestern R. Co. v. Allen*, 130 Ga. 656, 61 S. E. 541 (5).

2. SAME—APPEAL—REVIEW.

Although the violation of the penal statute was not flagrant, and the accusation not strongly supported by the evidence, there being some evidence in support of the verdict, this court cannot interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

(Syllabus by the Court.)

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Lassie Roberson was convicted of crime, and brings error. Affirmed.

Williams & Bradley, for plaintiff in error, Henry R. Daniel, Sol., for the State.

HILL, C. J. Judgment affirmed.

JACKSON v. STATE. (No. 1,365.)  
(Court of Appeals of Georgia. Oct. 12, 1908.)

ASSAULT AND BATTERY—JUSTIFICATION.

This case is controlled by *Cole v. State*, 2 Ga. App. 734, 59 S. E. 24, and *Walker v. State*, 117 Ga. 323, 43 S. E. 737.

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

C. R. Jackson was convicted of assault, and brings error. Affirmed.

Kenan & Crawford, for plaintiff in error. N. J. Norman, Sol., Gen., for the State.

POWELL, J. We do not care to recite the facts. The defendant sought to justify the battery on one of those natural grounds which appeal to all honorable men, but which the law does not recognize as a defense. If we had pardoning power, instead of judicial authority only, we would incline to a different judgment; but in the light of the law as it is the judgment is affirmed.

HALL v. STATE. (No. 1,292.)  
(Court of Appeals of Georgia. Oct. 12, 1908.)

1. GRAND JURY—QUALIFICATIONS—SERVICE AT "ADJOURNED TERM."

The act of 1903 (Acts 1903, p. 83) which makes a juror who has served at any term of

the superior court ineligible to serve at the next succeeding term "relates to regular terms, and does not apply to either adjourned or special terms." "An adjourned term" is but a continuance of a regular term, and the act by its terms would not apply to jury service at such adjourned term." *Wall v. State*, 126 Ga. 86, 54 S. E. 815. A plea in abatement, therefore, reciting that the indictment was returned at an adjourned term by the same grand jury which had served at the preceding regular term of the court was properly stricken on demurrer.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 192; vol. 8, pp. 7566, 6916-6917.]

2. CRIMINAL LAW—EVIDENCE—SUFFICIENCY.

No other error of law is complained of, and the evidence supports the verdict.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

S. H. Hall was convicted of a crime, and he brings error. Affirmed.

H. J. Quincey, for plaintiff in error. W. F. George, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

DANIEL v. STATE. (No. 1,295.)  
(Court of Appeals of Georgia. Oct. 12, 1908.)

CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE—"NEGATIVE TESTIMONY"—"POSITIVE TESTIMONY."

In a criminal prosecution, when the state's witnesses have testified that in a difficulty which occurred the defendant drew a pistol from his pocket and had it out in his hand during the difficulty, and the defendant's witnesses, in whose presence and sight also the transaction occurred, have testified that they did not see him draw or have any pistol, it is error for the court to give the following charge to the jury: "I charge you, if you find some witnesses were present and had opportunity to know the facts and bring them to your consideration, and there was another class of witnesses who say they didn't know, the law requires you to believe the positive testimony. 'Positive testimony' is that of witnesses who know the facts. 'Negative testimony' is that where the witness doesn't know the facts, or didn't see it." *Hunter v. State*, 4 Ga. App. —, 62 S. E. 466.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1877, 1878.

For other definitions, see Words and Phrases, vol. 5, p. 4740; vol. 6, p. 5463.]

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

John Daniel was convicted of crime, and brings error. Reversed.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol. Gen., for the State.

POWELL, J. Judgment reversed.

MARSHALL v. STATE. (No. 1,368.)  
(Court of Appeals of Georgia. Oct. 12, 1908.)

CRIMINAL LAW—APPEAL—REVIEW.

No error of law is alleged to have been committed by the court on the trial, the evi-

dence authorized the verdict, and the motion for new trial was properly overruled.

(Syllabus by the Court.)

Error from City Court of Dawson; M. C. Edwards, Judge.

Mary Marshall was convicted of crime, and brings error. Affirmed.

Marlin & Hoyle, for plaintiff in error. M. J. Yeomans, Sol., for the State.

RUSSELL, J. Judgment affirmed.

**BASS v. STATE. (No. 1,297.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. CRIMINAL LAW—EVIDENCE—STATEMENT BY DEFENDANT—RIGHT OF COUNSEL TO ASK QUESTIONS.**

The right to make a statement in his behalf is a personal right granted to the defendant, and extends no further than to permit him personally to make to the court and jury just such statement as he deems proper in his defense. His counsel has no right to ask him questions while he is making his statement. The trial judge, however, in his discretion can permit the defendant's counsel to make suggestions to the defendant relating to his statement, while he is making it or when he has concluded it. *Walker v. State*, 116 Ga. 540, 42 S. E. 787, 67 L. R. A. 426; *Brown v. State*, 58 Ga. 214; *Echols v. State*, 109 Ga. 508, 34 S. E. 1038.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1584-1590.]

**2. SAME—REMARKS OF COURT.**

The trial judge, in refusing to allow the defendant's counsel to examine him or to call his attention to "one other matter," did not err in saying in the hearing of the jury: "I have allowed him to make a free and full statement." The use of the word "full" was not an expression relating to the credit or weight of the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1520-1533, 1584-1590.]

**3. SAME—EVIDENCE—SUFFICIENCY.**

The evidence supports the verdict.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Albert Bass, Jr., was convicted of a crime, and he brings error. Affirmed.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

HILL, C. J. Judgment affirmed.

**BRYANT v. STATE. (No. 1,359.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**LARCENY—EVIDENCE—SUFFICIENCY — EFFECT OF POSSESSION OF PROPERTY STOLEN.**

Evidence of the possession of a stolen pistol will not, without more, authorize a conviction of larceny, in the absence of any evidence that the defendant was in possession of the pistol shortly after the larceny, and where it appears that the property had passed from hand to hand before it was recovered. Especially is this true where others, who are shown to have been

in possession of the stolen property prior to its discovery by the owner, had made false and contradictory statements in regard to the manner in which they procured possession. While the possession of stolen goods is a circumstance from which guilt may be inferred, the presumption is not conclusive when that possession is not shown to be recent. *Cuthbert v. State*, 3 Ga. App. 600, 60 S. E. 322.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170-178.]

(Syllabus by the Court.)

Error from City Court of Ft. Gaines; J. D. Rambo, Judge.

Will Bryant was convicted of larceny, and he brings error. Reversed.

Ben M. Turnipseed, for plaintiff in error. P. C. King, Sol., for the State.

RUSSELL, J. Judgment reversed.

**JOHNSON v. STATE. (No. 1,327.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**CRIMINAL LAW—NEW TRIAL—SERVICE OF MOTION.**

A rule nisi granted on a motion for a new trial set the hearing for a fixed date, and directed that the motion be served on the opposite party "five days prior to the hearing." On the date fixed for the hearing the trial judge granted an order postponing the hearing of the motion for a new trial to a later date, making no other order as to service. The motion for a new trial was not served five days before the date fixed for the hearing in the first order, but it was duly served five days prior to the date as fixed in the subsequent order of postponement. *Held*, that the judgment dismissing the motion for a new trial, because the opposite party was not served therewith as required by the original rule nisi, was erroneous.

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Elijah Johnson was convicted of crime, and brings error. Reversed.

P. D. Rich and Joe H. Gilpin, for plaintiff in error. M. E. O'Neal, Sol., for the State.

HILL, C. J. Judgment reversed.

**PYLE v. STATE. (No. 1,068.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. CRIMINAL LAW—WRIT OF ERROR—ASSIGNMENT OF ERRORS—SUFFICIENCY.**

A ground of a motion for a new trial, alleging error in admitting a written statement of the deceased as a dying declaration, is without merit, unless it sets out in substance the written statement admitted. This court will not refer to the brief of evidence for the purpose of completing an incomplete assignment of error.

**2. HOMICIDE—INSTRUCTIONS—UNDUE EMPHASIS TO WEIGHT OF EVIDENCE—DYING DECLARATIONS.**

It was error to charge, on the subject of dying declarations, that "when a dissolution is approaching, and the dead man has lost hope of life, and his mind feels the full consciousness of his condition, the solemnity of the scene gives to his statement the sanctity of truth."

The instruction gives undue emphasis to the weight which the jury should give to such evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 579.]

**3. SAME—DYING DECLARATIONS—GROUNDS OF ADMISSIBILITY — CONDITION OF PERSON MAKING DECLARATION—WEIGHT.**

The written request to charge on the subject of dying declarations contains the true rules as to the admissibility of such declarations as evidence and how they should be considered and weighed when treated as evidence, and the court erred in not giving it in charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 425, 430-437.]

**4. SAME—CONTRADICTION.**

Where, on a trial upon an indictment for murder, the dying declarations of the deceased are introduced by the prosecution, it is error to exclude proof offered by the defendant of other statements made by the deceased, contradicting his dying declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 461.]

**5. CRIMINAL LAW—WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—NECESSITY OF PREJUDICE.**

When tested by the verdict, the erroneous rulings clearly appear to have been harmless. The verdict, being manifestly based on other evidence, will not be set aside for errors as to evidence on which the jury plainly did not act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Appeal and Error, §§ 3137-3143.]

**6. HOMICIDE — INSTRUCTIONS — VOLUNTARY MANSLAUGHTER.**

Where some of the evidence, and inferences fairly deducible therefrom, tend to show voluntary manslaughter, a charge on that subject is not only proper, but demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 650-655.]

(Syllabus by the Court.)

Error from Superior Court, Early County; W. C. Worrill, Judge.

John Pyle was convicted of voluntary manslaughter, and he brings error. Affirmed.

John Pyle was indicted for murder, and was convicted of voluntary manslaughter. His motion for a new trial was overruled, and the writ of error challenges the correctness of this judgment. The motion for a new trial is based upon the general grounds and the following additional assignments of error:

(1) That the court erred in admitting as evidence the paper, purporting to be the dying declaration of the deceased, dated April 20, 1906, and signed by T. W. Jackson, which is fully set out in the brief of evidence. It is insisted that the admission of this paper as a dying declaration was error because the evidence did not show that it was made by Jackson, the deceased, in the article of death, and after all hope of life had been extinguished.

(2) That the court erred in the following portion of the charge on the subject of dying declarations: "When a dissolution is approaching, and the dead man has lost hope of life, and his mind feels the full consciousness of his condition, the solemnity of the scene gives to his statement the sanctity

of truth, and such dying declaration, when made under such circumstances and conditions, may be admitted in evidence and considered by the jury." It is insisted that this is not the law as applicable to the weight of dying statements.

(3) That the court erred in refusing to give the following timely written request: (a) "Dying declarations constitute one of the exceptions to the rule of hearsay evidence; the rule being that hearsay evidence is ordinarily rejected. Their admission is founded on the necessity of the case and the reason that, being made in view of impending death and judgment, when the hope of life is extinguished and the retributions of eternity are at hand, they stand upon the same plane of solemnity as statements made under oath. They are admissible only when made by a person in the article of death, and great caution is necessary in the use of this kind of evidence." (b) "You are to pass finally from yourselves on the question of whether the declarations were as the conscious utterances of the deceased in the apprehension and immediate prospect of death, and if not so made you will not consider them." (c) "Great caution should be observed by the jury in the use of this kind of evidence. Such evidence is liable to be very incomplete, for the reason that the deceased may be disposed to give a partial account of the occurrence, although not influenced by animosity and ill will. And, furthermore, the fact cannot be concealed that animosity or resentment is not unlikely to be felt by the deceased in such a situation, and the passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is extinct. Such considerations show the necessity of caution in receiving accounts given by persons in a dying state, especially when you consider that the party making the statement cannot be subjected to the power of a cross-examination." (d) "The alleged dying statement of Jackson, the deceased, neither would be for your consideration if you believe the declarations were made at a time when he was not in the article of death or in extremis, or at a time when he had a hope of living, although that hope may have been slight."

(4) That the court erred in refusing to allow the defendant's counsel to prove by Dr. J. H. Crozier, who was then upon the stand testifying as a witness for the state, that Jackson told him that it was his purpose and intention to kill Pyle; that he would have done it if Pyle had not shot him in the mouth. Defendant now insists that this was legal and important testimony in his behalf, and that Crozier would have sworn so, if the court had not ruled it out and refused to allow him to do so. Following this ground of the motion for a new trial is this note: "When counsel for defendant offered to ask Dr. Crozier the foregoing question, counsel for the state objected, unless his statement

was offered as a dying declaration. Counsel for defendant stated that he did not offer it as a dying declaration, but as a statement made against him."

(5) That the court erred in charging the jury on the subject of voluntary manslaughter, the defendant insisting that there was no evidence upon which to predicate this charge, as under the evidence he was either guilty of murder or was entirely justifiable, and that the charge complained of gave the jury an opportunity of rendering a compromise verdict.

(6) That the court erred in the following portion of the charge: "The court charges you, further, to look into the matter and see whether or not the defendant was guilty of murder, or whether or not he was justifiable; but if you still believe that the act was done without malice, and in a heat of passion arising from a mutual quarrel and mutual intention to fight upon the part of the defendant and the deceased, the court instructs you, if you believe that such were the conditions, and you believe that both were armed at the time of the homicide, and there was a mutual intention to fight, and that under such conditions the defendant shot and killed Jackson, then you would be authorized in finding him guilty of voluntary manslaughter, and if such intention existed, both intending to fight, it would make no difference who fired the first shot. The killing under such conditions would be voluntary manslaughter." It is insisted that the above charge was illegal and not applicable to the case, the evidence failing to show any agreement or intention on the part of Pyle to engage in mutual combat, and that therefore this charge was calculated to mislead the jury and injure the defendant.

R. H. Sheffield and J. W. Walters, for plaintiff in error. J. A. Laing, Sol. Gen., Jos. E. Pottle, and Pottle & Glessner, for the State.

HILL, C. J. (after stating the facts as above). 1. A well-settled rule of practice is not complied with in the first special ground of the motion for a new trial. The written statement objected to as a dying declaration is not literally or in substance set out in the motion, nor is it attached thereto as an exhibit. This court will look alone to the motion for a new trial, and what is set out therein and made a part thereof, for the purpose of determining whether the ruling complained of is erroneous. "Under no circumstances can an incomplete ground be made complete by a reference to the brief of evidence." *Barker v. State*, 1 Ga. App. 287, 57 S. E. 989; *Seaboard Ry. v. Phillips*, 117 Ga. 106, 43 S. E. 494; *Spence v. Morrow*, 128 Ga. 722, 58 S. E. 356 (3), and citations.

2. A statement made by the deceased, although admitted by the court as a dying dec-

laration, and so found and treated by the jury, has no greater force and effect than the testimony of a living witness. Indeed, when this anomalous character of evidence is properly considered, it is doubtful if it should have equal weight with that of an unimpeached witness. As was said by Mr. Chief Justice Lumpkin in *Campbell v. State*, 11 Ga. 375: "It must be admitted that great caution should be observed in the use of this kind of evidence." And in discussing this species of evidence another great jurist has declared: "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath; but they are, nevertheless, open to observation, for, though the sanction is the same, the opportunity for investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination." Alderson, B., in *Ashton's Case*, 2 Lewins' Crown Cases, 147. This wise criticism has been quoted with approval by Mr. Justice Hall in his great opinion rendered in the case of *Mitchell v. State*, 71 Ga. 128, in discussing the unreliable and unsatisfactory character of such proof and the undue influence that juries are almost sure to give it. In the language of Sir Walter Raleigh: "A dying man is ever presumed to speak the truth." And in the words of that mighty master of the human heart, Shakespeare (*Richard II*, act 2, scene 1), "The tongues of dying men enforce attention like deep harmony."

To tell a jury, therefore, that they should give to dying declarations the "sanctity of truth" is to give undue emphasis to a kind of evidence which the human mind, whether through religious sentiment, or awe at the approach of the pallid messenger, or because the declarant, being at the point of death, "must lose the use of all deceit," is always prone to magnify. However unimpeachable might be the testimony of a living witness under oath, the court could not tell a jury that they should give it the sanctity of truth; nor should any greater weight be given to dying declarations. In the language of Mr. Justice Lumpkin, for the judge to so instruct the jury "is calculated to give undue emphasis to the weight to be attached to such evidence." *Robinson v. State*, 130 Ga. 361, 60 S. E. 1005. Nor do we think the undue emphasis thus given to the dying declarations was corrected or in any degree weakened by the remainder of the charge on the subject. *Mitchell v. State*, 71 Ga. 149.

3. The request to charge embraced in the third ground of the motion embodies the rules laid down by the Supreme Court in the *Mitchell Case*, *supra*, on the weight of dying

declarations and the cautious use which the jury should make of this kind of testimony. In short, the charge in full as given on the subject of dying declarations, falls clearly within the adverse criticism of the Supreme Court in the Mitchell Case, *supra*, and the request refused embodied substantially what the court there said should have been charged on that subject without request.

4. After the dying declaration had been admitted by the court, the defendant offered to prove contradictory statements made by the deceased after he was wounded concerning the shooting. The court sustained the objection made to this testimony, and to this ruling the defendant excepted. It does not appear from the record on what ground the court based its ruling, unless, as explained in the note to this ground in the motion for a new trial, it was because the attorney for the defendant stated that he did not offer the contradictory statement as a dying declaration, but as a statement made against himself by the deceased. The rule is general that a witness may be impeached by proof that he has made statements contrary to what he has testified. It is true there is a condition to the application of this rule which requires that the attention of the witness be previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to give him an opportunity of making any explanation of the matter which he may have. This preliminary condition cannot be complied with where the contradictory statements offered are for the purpose of discrediting the testimony as to a dying declaration. Originally at common law dying declarations were only admitted *ex necessitate rei*, and while this ancient and we think salutary rule has been greatly relaxed by modern decisions, yet, as has been well said by Justice Blandford: "It cannot be easily seen, if the dying declarations of the deceased, made *ex parte* in the presence of his own friends and relatives, and not in the presence of the accused or his friends, without a cross-examination, and testified to by his friends and relatives, are to be admitted against the accused from the necessity of the case, why the declarations of the deceased, after the mortal blow is given, to other persons and at other times, different from the dying declarations, should not be admitted in evidence to impeach the dying statement. If the one is admitted contrary to the general rule, why should not the other be likewise admitted? The former is admitted in favor of public justice; why not the latter in favor of life and liberty?" *Battle v. State*, 74 Ga. 104.

If in the one case the witness who is to be impeached cannot be given an opportunity to explain, in the other case neither can the accused have the benefit of the invaluable privilege of cross-examination, and the depri-

vation of the latter right probably works greater injustice than the deprivation of the former; for, while the loss of the one may destroy the character of the witness for veracity, the loss of the other may in many instances deprive the accused of his life or liberty. That public justice, which treats every man alike, the living as well as the dead, and which has as much concern for the protection of the innocent as it has for the punishment of the guilty, demands that, where proof of a dying declaration has been allowed against the accused, proof of a contradictory statement made by the declarant should be allowed in his favor. There can be no justice, therefore, in any rule which would deprive the accused under such circumstances of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause. The contradictory statements offered to be proved in this case and the circumstances under which they were made were substantially similar to those in the case of *Battle v. State*, *supra*, which the Supreme Court ruled should have been allowed in evidence.

5, 6. While the instructions of the court and the rulings complained of, to which we have referred in the foregoing division of this opinion, were erroneous, yet, when tested by the verdict in this particular case, these errors were all harmless. An error of law which justifies the grant of a new trial should be an error resulting in injury, and no ruling, though it be erroneous when abstractly considered, ought to be sufficient ground for setting aside a verdict, unless in some appreciable degree such error contributed to the verdict. The verdict in this case was for voluntary manslaughter. It was in direct conflict with and in the very teeth of the dying declaration, and the rulings complained of, which we have held to be erroneous, all relate to the weight which the jury should give to a dying declaration as evidence. It is clearly apparent from the verdict that the jury gave no credence whatever to the statement of the deceased submitted as a dying declaration. Whether the jury in fact found that the written statement made by the deceased came up to the full legal requirements which entitled it to have the force and effect of evidence, or whether they believed it did not speak the truth touching the homicide, is not apparent. It may have been that the jury did not find as a matter of fact that the written statement of the deceased fully measured up to the requirements of the law, so as to make it testimony.

There are some expressions in the testimony of the able lawyer who wrote down this statement which indicate that the deceased, when he made it, was not fully conscious of his condition, and at the time that he made the statement still entertained some hope of



recovery. The positive, absolute conviction that death is certain is an essential before a dying declaration is evidence—a certainty not limited by doubts or reserves. There must be a settled, hopeless expectation of death in the declarant. The deceased in this case declared, when making his statement, "he hoped to get well, but could not expect to get well, in view of his condition." But, whatever may be the real truth touching this matter, it is nevertheless perfectly clear that the jury did not consider the alleged dying declaration at all in making up their verdict; for it was impossible, legally speaking, if they gave any weight to the dying declaration as evidence, that the verdict could have been for any crime less than willful, causeless assassination. Neither did the jury give any credence to the statement of the accused, for this statement, with all reasonable deductions therefrom, made a perfect case of justifiable homicide in self-defense. We must therefore look to the evidence of the witnesses who testified in the case if we are to find any support for the verdict of voluntary manslaughter.

It is earnestly insisted by the learned counsel for the plaintiff in error that the evidence presents no middle ground; that the homicide was either murder or justifiable in self-defense. While we think, from a careful study of the evidence, that there is a very large preponderance of evidence in favor of the theory of the state that the crime of murder was committed by the accused, yet we find in this evidence some support for the conclusion at which the jury arrived. These final judges of the facts rejected alike the theory of the state and the theory of the defendant. They weighed all the evidence, accepted some portions of it as true, and discarded other portions as untrue. The jury found in the evidence the following facts: That the defendant and the deceased had been friends; that on the day of the homicide, and just shortly before the shooting took place, the deceased was at the home of the defendant on his invitation, engaged there with other friends, as the defendant's guest, in social pleasure; that the deceased, without any provocation and under the influence of intoxicants, gave to the defendant what the defendant construed to be an insult both to himself and his family, and threatened to take the defendant's life; that the deceased left the home of the defendant, but the defendant, still rankling under the supposed insult, which was greatly magnified by his intoxicated condition, in a short time sought the deceased for the avowed purpose of securing from him an apology for his conduct, and in a few minutes found the deceased, and the difficulty was renewed, and the shooting occurred; that both were armed, and both were under the influence of intoxicating liquors. Whether the insult which the deceased had given to the defendant at his house was suf-

ficient to justify the excitement of passion in the defendant, and whether the defendant had had sufficient cooling time before he again met the deceased, were all questions for the sole determination of the jury. Some of the facts show that there was a sudden quarrel, followed by a combat, in which both used deadly weapons, weapons which they already had in their possession, and which they had not procured for the purpose of using in the combat; and because of the existence of these facts in the evidence, which the jury had the right to accept as the truth of the case, we think the court properly charged the law of voluntary manslaughter, and that the verdict for that offense is not without support in the evidence. *Gann v. State*, 30 Ga. 67; *McDuffie v. State*, 90 Ga. 787, 17 S. E. 105; *Fish v. State*, 3 Ga. App. 34, 59 S. E. 192.

Judgment affirmed.

POWELL, J., disqualified.

**TOOKE v. CITY OF OGLETHORPE** (two cases). (Nos. 1,332, 1,333.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

**CRIMINAL LAW—WRIT OF ERROR—DISMISSAL.**

These cases are controlled by the decision in the case of *McDonald v. Town of Ludowici*, 3 Ga. App. 654, 60 S. E. 337 (3).

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Charlie Tooke and Eph Tooke were convicted of violating an ordinance of the city of Oglethorpe, and bring error. Affirmed.

Hixon & Greer, for plaintiffs in error. Julie Felton, for defendant in error.

PER CURIAM. Judgment affirmed.

**GAMBLE v. STATE**. (No. 1,301.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. CRIMINAL LAW—ACCOMPLICE—CORROBORATION.**

The person who buys spirituous, alcoholic, or malt liquors is not in law an accomplice of the person who sells it to him. Besides, the law does not require, in misdemeanors, that the testimony of an accomplice shall be corroborated. Pen. Code 1895, § 991, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1082-1087, 1124-1126.]

**2. INTOXICATING LIQUORS—ILLEGAL SALE.**

The evidence is sufficient to support the verdict.

(Syllabus by the Court.)

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Fault Gamble was convicted of crime, and brings error. Affirmed.

Crum & Jones, for plaintiff in error. Walter F. George, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

**MOORE v. GRIFFIN.**

(Supreme Court of South Carolina. Oct. 17, 1908.)

**ELECTIONS — PRIMARY ELECTION — FILING PLEDGE IN STATEMENT OF MONEY SPENT BY CANDIDATE—STATUTORY PROVISIONS.**

Act March 6, 1905 (Laws 1905, p. 949) § 2, provides that every candidate offering for election, shall file with the clerk of common pleas of the county a pledge not to give or spend money, or use intoxicating liquors to influence votes, and that he will, before the primary election, render to the clerk of the court an itemized statement of all moneys spent during the campaign up to that time, and that he will, after the primary election, render an itemized statement under oath, showing all further moneys spent in the election. The ninth rule of the Democratic Party embraces the same provision. A candidate filed his statement before the first primary election, and also between the first and second primary elections, and also filed a further statement of his expense account after the second primary. *Held*, that he complied with the statutes of the state and the rule of the Democratic Party.

Certiorari to review the proceedings of the State Democratic Executive Committee, in the matter of a contest between J. E. Moore and J. O. Griffin, for the nomination to the office of supervisor in Colleton county. Dismissed.

Fishburne & Fishburne and P. H. Nelson, for petitioner. J. S. Griffin and Padgett & Lemacks, for respondent.

**PER CURIAM.** Upon the petition herein a writ of certiorari was issued by Associate Justice C. A. Woods, directed to the State Democratic Executive Committee, requiring that committee to certify to this court their proceedings in the matter of the contest between J. E. Moore and J. O. Griffin, candidates for the office of supervisor in the county of Colleton. The committee having certified their proceedings to this court, the court, having heard argument thereon, is of the opinion that the contestee J. O. Griffin complied with the statute of the state, and the Constitution, and rules of the Democratic Party in filing his pledge and statement of expenses, and that no error of law was committed by the State Democratic Executive Committee.

The court, therefore, adjudges that the return to the writ is sufficient, and that the proceedings herein be dismissed.

**EDWARDS BROS. v. ERWIN et al.**

(Supreme Court of North Carolina. Oct. 14, 1908.)

**1. EVIDENCE — PRIVATE WRITINGS — TELEGRAMS.**

Telegrams, purporting to be in reply to other telegrams, and received under such circumstances as clearly to indicate that they were so sent, were prima facie admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1498.]

**2. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Error, if any, in an action against sellers for a wrongful stoppage in transitu of the car

load of horses and mules purchased, in admitting a telegram, was harmless, where it merely stated what the sellers might do in a given contingency, and other telegrams showed that the horses and mules had been stopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

**3. DAMAGES—NOMINAL DAMAGES—AWARD IRRESPECTIVE OF ACTUAL DAMAGE.**

Purchasers of a car load of horses and mules were entitled to at least nominal damages for a wrongful stoppage thereof in transitu by the sellers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 7-18.]

**4. TRIAL—NONSUIT—RIGHT TO—QUANTUM OF DAMAGES.**

The quantum of damages, beyond those which are nominal, must be determined by the jury, and is not involved in a motion to nonsuit, such a motion being addressed always to the evidence of the cause of action, which is complete where facts are alleged and shown entitling a recovery of nominal damages; any question as to the right to substantial damages being required to be raised by prayer for instructions.

**5. PLEADING—VARIANCE—METHOD OF OBJECTING.**

The question of variance, in that an affidavit for an attachment alleged a breach of contract and the testimony showed a tort, cannot be raised by motion to nonsuit, which is directed to the proof of the cause of action, and not to collateral matters.

Appeal from Superior Court, Wilson County; Lyon, Judge.

Action by Edwards Bros. against Edwin Erwin and J. M. Piper. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action brought by the plaintiffs to recover damages of the defendants. The plaintiffs alleged and introduced evidence to prove that in November, 1902, they purchased of the defendants a car load of horses and mules at the stockyard of the defendants, in Ft. Scott, Kan., and gave in payment their sight draft for the amount of the purchase price on S. A. Woodard of Wilson. This draft was accepted by the defendants in payment of the said stock, and the stock was thereupon shipped from Ft. Scott to Wilson, via Atlanta, Ga. The plaintiffs had been dealing with the defendants for several years, and had purchased from them several car loads of stock, giving in payment therefor sight drafts on S. A. Woodard. These drafts had always been paid on presentation. S. A. Woodard was solvent. The usual time taken for such shipments from Ft. Scott to Wilson was about seven days. The horses and mules were detained in Atlanta, by the unlawful action of the defendants, for six days. When they arrived in Wilson they were in bad condition, had a disease known as pink eye, were bruised, and had coughs and colds. The plaintiffs alleged that they were damaged in a large sum by reason of their detention. The defense of the defendants was that the stock was purchased from a corporation of which the defendants were members, and if the plaintiffs had any cause of action on account of the detention of the stock, it was against the corporation, and not against the

defendants as individuals. The evidence of the plaintiffs tended to show that they purchased the stock from the defendants as partners, and not as a corporation. The jury, in response to the issues, found the facts to be that the plaintiffs purchased the stock of the defendants as members of a firm doing business under the name of Erwin-Piper Horse & Mule Co., and not as a corporation, that the defendants unlawfully and without cause ordered the car load of stock to be stopped at Atlanta, that the stock was damaged by reason of being stopped, and that the plaintiffs sustained the damage assessed by reason of the stopping of the live stock in Atlanta. For the purpose of establishing the fact that the stock was unlawfully and wrongfully stopped by the defendants, the plaintiffs offered in evidence three telegrams from the defendants. The telegrams were admitted in evidence, and the defendants excepted. The testimony tended to establish the fact that the second and third telegrams were sent in response to telegrams of the plaintiffs to the defendants at Ft. Scott, Kan., and to Edwin Erwin, one of the defendants, at Atlanta, Ga. At the close of the testimony the defendants moved to nonsuit the plaintiffs. The motion was overruled, and the defendants excepted. There was a verdict for the plaintiffs. A motion for a new trial by the defendants was overruled, and judgment entered on the verdict. Defendants excepted and appealed.

Connor & Connor, for appellants. F. A. Woodard, for appellees.

WALKER, J. (after stating the facts as above). The defendants objected to the introduction of the telegrams, upon the ground that there was no evidence they had been sent to them by the plaintiffs. The last two telegrams purported to be in reply to telegrams sent by the plaintiffs to the defendants, and were received at a time and under such circumstances as clearly to indicate that they were so sent. They tended to show that the defendants had stopped the horses and mules in transitu at Atlanta. The authorities sustain the ruling of the court by which the telegrams were admitted. "A further exception to the rule requiring proof of handwriting has been admitted, in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received a reply purporting to be from the defendant, it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting, and that letters of an earlier date, in the same handwriting, might also be read without other proof." 1 Greenleaf on Evidence (10th Ed.) § 575c. The principle thus stated has been extended to telegrams. Taylor v. Steamer Robert Campbell, 20 Mo. 254. "The courts have likened telegrams to letters, and held that purported answers are

admissible as prima facie evidence. It is well settled that when a letter is received in due course of mail, purporting to be in response to a letter previously sent by the receiver, it is presumptively genuine and admissible. The principle upon which these cases rests is that there is a presumption that those in charge of receiving and transmitting mail perform the duties intrusted to them, and this, coupled with the fact that the letter received on its face purports to be a reply to the one sent, and coming from the source from which it might be expected, raises a just inference that it is in fact a reply. We see no good reason why this same presumption of the performance of duty should not obtain as to the employes of a telegraph company. A large portion of the business of the country is transacted through the medium of such agencies; and, while it is true that mistakes sometimes occur, it is also true that the postal service is not infallible. It was held in Commonwealth v. Jeffries, 7 Allen. 556, 83 Am. Dec. 712, that there is a presumption that, when a telegram has been delivered to the telegraph company, and accepted by the operator for transmission, it is duly forwarded and received by the addressee. If the presumption obtains, what is to be inferred from the receipt of an answer to such a communication? Is it any less strong than the receipt of an answer by mail to a letter? We think it is no stretch to say that a presumption arises that such answer was in either case sent by the original addressee"—citing *Armstrong v. Thresher Co.*, 5 S. D. 12, 57 N. W. 1131; *Bank v. Geisthardt*, 55 Neb. 232, 75 N. W. 582; *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; 1 Greenleaf, Ev. § 573a; 3 Wharton, Ev. § 1328. The court admitted the last two telegrams. As to the first telegram, when considered in connection with the other two, it appears to be but a part of one and the same correspondence. But if this circumstance be not sufficient to let it in, its contents are not of such a character as to warrant the granting of a new trial. It merely states what the defendants might do in a given contingency, and if it was incompetent, the error in admitting it was harmless. The other messages showed that the horses and mules had been stopped at Atlanta, and the last one was sent from that place by one of the defendants.

The defendants moved to nonsuit the plaintiff at the close of the testimony, because of the absence of evidence to show that the damage to the horses and mules was caused by the defendants' act in stopping them at Atlanta. If the defendants committed a wrong to the plaintiffs by stopping the horses and mules at Atlanta, the plaintiffs were entitled at least to nominal damages. *Chaffin v. Mfg. Co.*, 135 N. C. 95, 47 S. E. 226. The quantum of damages, beyond those which are nominal, must be determined by the jury under proper instructions from the court, and is not involved in a motion to nonsuit. The latter

motion is addressed always to the evidence of the cause of action, which is complete when the plaintiff has alleged and shown facts upon which they are entitled to nominal damages. Any question as to the right of the plaintiffs to recover substantial damages must be raised by a prayer for instructions.

The defendants also contended that the plaintiffs, in their affidavit for an attachment, had alleged a breach of contract and by the testimony had shown a tort. If there is any such variance, advantage cannot be taken of it by a motion to nonsuit. It was a proper subject, perhaps, for a special instruction to the jury, upon an issue framed with a view to ascertain the legal character of the particular wrong, so that the court, upon the finding of the jury, could render judgment accordingly. It is, though, enough to say that the question cannot be raised by a motion to nonsuit, which, as we have already stated, is directed to the proof of the cause of action, and not to collateral matters, such as ancillary proceedings, or to the question as to the amount of the damages to which the plaintiff may be entitled.

No error.

CONNOR, J., did not sit on the hearing of the case.

#### DORSEY v. TOWN OF HENDERSON.

(Supreme Court of North Carolina. Oct. 14, 1908.)

##### 1. MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREETS—RATIFICATION BY MUNICIPAL AUTHORITIES—EFFECT.

Where municipal authorities authorize and ratify the act of the street committee in changing the grade of a street, the act becomes the act of the municipality; ratification being equivalent to previous authority.

##### 2. SAME—JUDICIAL REVIEW.

Courts are precluded from inquiring into the advisability of a change of grade of streets of a municipality; the public use being the dominant interest, of which the municipal authorities are the exclusive judges.

##### 3. SAME—POWER TO CHANGE GRADE OF STREETS—STATUTES.

Under Charter of Henderson (Laws 1889, p. 1002, c. 241) § 62, giving the commissioners exclusive power to change the grade of streets, and Revisal 1905, § 2930, requiring the board of commissioners to keep and repair the streets as they deem best, etc., the town of Henderson may change the grade of its streets.

##### 4. SAME—DAMAGES TO ABUTTING PROPERTY—LIABILITY.

A municipal corporation, exercising, without negligence or wanton purpose to injure abutting property, its authority to change the grade of its streets, is not liable for consequential damages to abutting property, unless a constitutional or statutory provision allows compensation therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 925-928.]

Appeal from Superior Court, Vance County; Cooke, Judge.

Action by Melville Dorsey against the

town of Henderson. From a judgment for plaintiff, defendant appeals. Reversed.

This is a civil action to recover damages of the defendant for alleged injury to the plaintiff's property, consisting of a building used for stores, situated on Garnett street in said town, caused by the grading and lowering of the sidewalk and street in front of the same. The action was tried at May term, 1908, of the superior court of Vance county, his honor Judge Cooke presiding. The following issues were submitted to the jury: "(1) Did defendant, in grading and constructing the sidewalk in front of plaintiff's store, grade and construct the same in a negligent, unlawful, wanton, or improper manner? Ans. Yes. (2) If yes, what damage is plaintiff entitled to recover? Ans. \$1,500." At the close of the evidence the defendant moved to nonsuit the plaintiff, upon the ground (1) that the defendant had the lawful authority to grade the sidewalk and street in front of plaintiff's property; (2) that there is no evidence that the work was done in a negligent, wanton, or improper manner. The court overruled the motion, and defendant excepted. Upon the coming in of the verdict his honor rendered judgment for plaintiff, and defendant appealed.

T. T. Hicks, A. C. Zollicoffer, and T. M. Pittman, for appellant. F. S. Spruill, A. J. Harris, Bennett Perry, and J. C. Kittrell, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff during the year 1885 erected on Garnett street, in the town of Henderson, a two-story brick building abutting on the sidewalk. At that time Garnett street had been opened and, with the sidewalk, was in use by the public. In 1903 the municipal authorities, for the benefit and improvement of the town, inaugurated a scheme for the paving and improvement of the streets and the construction of a sewerage system. They employed a competent engineer, who, with his assistant engineer, drew up and submitted the plans and specifications of the work. The plans as originally submitted by the principal engineer, Mr. Ludlow, did not contemplate lowering the grade in front of plaintiff's store, but to obviate the necessity for it by means of a deep curb and a step. Upon further investigation, consideration, and advice the town authorities decided to grade the sidewalk on Garnett street on a level incline with the curbing, and do away with the step, etc., as originally called for in the Ludlow plans. This necessitated lowering the grade some 16 inches, according to plaintiff's evidence, at the door of his store, so as to require the construction of steps from the sidewalk to the doorsill, which injures the value of his building as a place of business. The question presented on this appeal, and argued with much learning and ability by counsel on both sides, is the right of a per-

son owning a building abutting on a public street to recover damages for the diminution in the value of his property caused by the change in the grade of the street, in the absence of any negligence in the construction of the work.

The learned counsel for the plaintiff, Mr. Sprull, in his argument, as well as in the brief, admitted that this question has been "apparently decided" by this court adverse to the contention of the plaintiff. The law has been so held by this court in a number of cases, and in such explicit terms that to adopt the plaintiff's theories would be to overrule a long line of well-established precedents. The question was first considered by this court in 1848, and exhaustively discussed by Judge Pearson, and the conclusion reached that, where a municipal corporation has authority to grade its streets, it is not liable for consequential damage, unless the work was done in an unskillful and incautious manner. *Meares v. Wilmington*, 31 N. C. 73, 49 Am. Dec. 412. This case has been approved and followed in many adjudications of this court in more recent years. *Sallsbury v. Railroad*, 91 N. C. 490; *Wright v. Wilmington*, 92 N. C. 160; *Tate v. Greensboro*, 114 N. C. 397, 19 S. E. 767, 24 L. R. A. 671; *Brown v. Electric Company*, 138 N. C. 537, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554; *Jones v. Henderson*, 60 S. E. 894; *Ward v. Commissioners*, 146 N. C. 538, 60 S. E. 418; *Small v. Edenton*, 146 N. C. 527, 60 S. E. 413. In *Thomassen v. Railroad* the subject is referred to as "the settled doctrine of this state." 142 N. C. 307, 55 S. E. 201. The adjudications of this court are supported by abundant authority elsewhere. Judge Dillon says: "Authority to establish grades for streets and to grade them involves the right to make changes in the surface of the ground, which may injuriously affect the adjacent property owners; but, where the power is not exceeded, there is no liability, unless created by special constitutional provision or by statute (and then only in the mode and to the extent provided), for the consequences resulting from the powers being exercised and properly carried into execution." 2 Dillon on Mun. Corp. § 1040. The law is summarized in the *Encyclopædia* as follows: "A change of grade in streets made by a municipality, if made in accordance with statute, is not such an injury to adjoining property as to require compensation to be made to owners, unless there is a statute rendering the municipality liable therefor." 10 Am. & Eng. Enc. of Law (2d Ed.) p. 1124ff, citing cases from England, Supreme Court of the United States, and 25 states. The same rule of law is recognized and asserted by the Supreme Court of the United States in *Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, and *Smith v. Corp. of Washington*, 20 How. 135, 15 L. Ed. 858. The principle upon which such adjudications rest is that in making the

improvements the municipality is the agent of the state, and that these agencies, authorized by law to make or improve public highways, are not answerable for consequential damages, if they act within their jurisdiction and with due care and skill. The doctrine is almost universally accepted by the state courts of this country. *Cooley on Const. Lim.* p. 542, and notes. The decisions in Ohio, so far as we can ascertain, appear to be the solitary exception. It is the settled doctrine of the English courts since the days of *Kenyon and Buller*. *Governor and Company of the British Cast Plate Manufacturers v. Meredith*, 4 Durn. & East (Term Rep.) 794-796; *Sutton v. Clark*, 6 Taun. 28; *Boulton v. Crowther*, 2 Barn. & Cres. 703. The Supreme Court of the United States in the above-cited case refers to this well-settled rule of law, in these terms: "The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta* and the restriction to be found in the Constitution of every state that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority."

It is contended, however, by the plaintiff that the defendant is liable, because the street committee changed the Ludlow plan, which contemplated a step, so as to avoid lowering the grade at plaintiff's store, and, instead of the step in the sidewalk, altered the grade, when such alteration was unnecessary. The record shows that the municipal authorities fully authorized and ratified the act of the committee, and consequently such act became the act of the municipality itself. Ratification is equivalent to previous authority. As said by Mr. Justice MacRae, in a strong opinion in *Wolf v. Pearson*,

"The city had the right to grade the street, and by its subsequent assent it has, in effect, commanded the act complained of to be done," and again, "This doctrine of ratification will, in some instances, apply to torts as well as contracts." 114 N. C., at page 631, 19 S. E., at page 266. Into the advisability of this change the courts are precluded from inquiring. The public use is the dominant interest, and of this the municipal authorities are the exclusive judges. As is well said by the Chief Justice in *Small v. Edenton*, 146 N. C., at page 527, 6 S. E., at page 414: "If every ordinance were subject for approval upon the verdict of juries, it would be impossible to regulate the streets and sidewalks so as to secure conformity, convenience, protection from fire, proportion, and slightness, and other necessary things incident to the growth and development of modern municipalities. These views are distinctly declared in *Tate v. Greensboro*, 114 N. C. 399, 19 S. E. 767, 24 L. R. A. 671. \* \* \* That authority has often been cited, and we adhere to it." But we will say in this connection that the advisability of the change finds support in the testimony of both the civil engineers, Ludlow and White. There is no evidence whatever that the change was induced by any hostility to plaintiff, or by a wanton purpose to injure him. Nor is there any evidence that the work was negligently or unskillfully done. The legislative authority to change the grade is ample. "Said commissioners shall have the exclusive power to open, alter or change the streets, alleys and ways of said town, and also their grade." Charter of Henderson, Laws 1889, p. 1002, c. 241, § 62. "The board of commissioners shall provide for keeping in repair the streets and bridges of the town, in such manner and to the extent they may deem best, and may cause such improvements in the town to be made as may be necessary." Revisal 1905, § 2930. There is no constitutional or statutory provision allowing compensation in this class of cases; and, in the absence of such, we must hold that the injury to the plaintiff is *damnum absque injuria*.

The motion to nonsuit is allowed.  
Error.

In re KNOWLES' ESTATE et al.  
(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. EXECUTORS AND ADMINISTRATORS—REMOVAL—INSOLVENCY.

An executor will not be removed because of insolvency, where that condition existed when the will was executed and was known to testator, unless it appears that he is wasting or misapplying the assets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 244.]

#### 2. SAME—BOND.

A bond will not be required of an executor, where it does not appear that he is wasting or misapplying the assets, and there is no well-

grounded apprehension that a devastavit will be committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 144-147.]

#### 3. WILLS—CONSTRUCTION—INTENT OF TESTATOR.

In the construction of a will, the court must ascertain and effectuate the testator's intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 955-961.]

#### 4. SAME—USE OF SPECIFIC PERSONAL PROPERTY.

A testator bequeathed to his wife all his personal property to use for life, and at her death to be divided among others. He also gave to his wife, during her lifetime, full control of his land and real property. In another item he gave all the "rest and residue" of his property to be equally divided among his children and grandchildren. His wife was, at his death, about 73 years old, and the personal property consisted of horses, cows, farm machinery, and household furniture. *Held* that, in view of the age of the wife and the character of the property bequeathed, it was the intention of the testator that she should have the use of the specific property during her life, and not merely the interest on the proceeds of its sale.

#### 5. LIFE ESTATES—POSSESSION OF PERSONAL PROPERTY—SECURITY FROM LIFE TENANT.

Where remaindermen in personal property are given permission by the court to apply for a receiver thereof, if it shall appear that the life tenant and her joint executor of decedent are wasting the property, it is not necessary to require security from the life tenant for its preservation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, § 18.]

#### 6. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST EXECUTORS—COSTS.

In an action by remaindermen of personal property against the life tenant and another, executors, charging misconduct, the remaindermen were properly charged with costs on failing to sustain the charges.

Appeal from Superior Court, Sampson County; Neal, Judge.

Petition by B. B. Knowles and others to require Margaret Knowles and another, executors of David J. Knowles, to file an inventory, and show cause why they should not give a bond, or, in default thereof be removed. From a judgment of the superior judge affirming the judgment of the clerk dismissing the petition, petitioners appealed. Affirmed.

David J. Knowles, lately domiciled in Sampson county, died on the ——— day of November, 1907, having first made and published his last will and testament, the first item of which is in the following words: "I give, devise and bequeath unto my wife, Margaret Knowles, all my personal property, to use as long as she lives and at her death to be equally divided among my children, my grandchildren Fred Knowles and Leona Knowles to share as one child. Also I give unto my wife, during her lifetime, full privilege and control of my land and real estate." In another item he gave all the "rest and residue" of his personal property or real estate to be equally divided between his children and grandchildren. He appointed his

wife, Margaret Knowles, and A. W. Knowles executors, etc. The will was duly admitted to probate on the 8th day of November, 1907, and the executors duly qualified. On December 27, 1907, the executors returned to the court an account of sale of a portion of the personal property, which came into their hands from the estate of their testator, amounting to \$121.32. On February 15, 1908, the petitioners filed in the superior court a petition, alleging that they had an interest in the real and personal property of the testator; that at the time of his death he had a large amount of cash on hand, besides notes and other solvent credits, and a great deal of personal property, which ought to have come into the hands of the executors; that they had failed to file an inventory, as required by law; that they were insolvent, etc.—praying that they be required to file an inventory, and to show cause why they should not be required to give a justified bond, and, in default thereof, that they be removed. Pursuant to the petition the clerk issued a citation to the executors to show cause, etc. In reply to said notice the executors filed their answer, admitting that certain personal property came into their hands; that they were not concerned, as executors, with any of the personal property, saving and excepting a sufficiency to pay off the debts of the testator, and that they had sold enough for that purpose, and had settled all of the debts, etc.; that under the terms of the will the widow, Margaret Knowles, was given all of the personal property. They deny the right of the petitioners to question their management of the estate. On March 9, 1908, the clerk made an order directing the executors, on or before March 19, 1908, to file an inventory, etc. On said day the executors filed an inventory of the personal property which was delivered to or retained by the widow, under the provisions of the will, consisting of 2 mules, 1 horse, 11 head of cattle, 9 hogs, 1 wagon, a lot of household and kitchen furniture, and some agricultural implements, 20 barrels of corn, 1,000 pounds shucks, 500 pounds fodder, and \$580 in money. The money was deposited in the bank to the credit of Mrs. Knowles. They also filed an account, showing the receipt of \$121.32 from sale of property, and the payment of \$168.68 on account of debts, burial expenses, tombstone, doctor's bill, taxes, attorney's fee, etc. On the hearing the clerk found, upon the evidence and exhibits, that the executors were competent to manage the estate of their testator, and that it had not been squandered or misapplied, and that no fraud had been practiced, or attempted to be practiced. He rendered judgment dismissing the petition and taxing the petitioners with the cost. From this judgment petitioners appealed to the judge, who affirmed the judgment requiring the executors to file in the clerk's office, every four months, a statement of their account, with permission to petitioners, if it

appeared that they were wasting the estate, to apply for the appointment of a receiver. From this judgment petitioners appealed.

Falson & Wright, for appellants. Fowler & Crumpler and John D. Kerr, for appellees.

CONNOR, J. We concur with the order made by his honor affirming the action of the clerk. It is settled that the court will not remove an executor by reason of insolvency, when such condition existed at the time the will was executed and was known to the testator, unless it appears that he is wasting or misapplying the assets. *Barnes v. Brown*, 79 N. C. 401; *McFadyen v. Council*, 81 N. C. 195. In the absence of any such reason, or any well-grounded apprehension that a devastavit will be committed, a bond will not be required. The clerk in this case finds that the property sold by the executors has been duly accounted for and the debts paid. The accounts filed and made a part of the record sustain the finding. The petitioners, however, insist that, by delivery to the widow of the personal property not sold, including the money on hand, the executors have committed a devastavit. They contend that it was the duty of the executors to have sold the property, and with the proceeds, together with the money on hand, created a fund, to be invested during the lifetime of the widow, paying to her the interest, to the end that, upon her death, the corpus be paid to them. The learned and diligent counsel cited to us a number of cases which he contended sustained his view. It is, of course, the duty of the court, in all cases involving the construction of a will, to ascertain and effectuate the intention of the testator. This, it has been wisely said, is the "pole star" by which the court will be guided. While this statutory proceeding is not, in a strict sense, a suit to have the will construed, it becomes necessary to do so for the purpose of ascertaining whether, in delivering the property and paying the money to the life tenant, the executors have committed a devastavit. For this purpose only, and not for the purpose of concluding the parties in interest in any other properly instituted proceeding, we proceed to consider the duty of the executors under the provisions of the will.

In *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721, *Ruffin, C. J.*, discussed the question respecting the duty of the executor when specific articles were given to one for life, with remainder over, and when, after disposing of his estate by specific bequests, the testator gives the residue to one for life with remainder over. While conceding the difficulty of carrying out the intention of the testator, in "most cases," by following the "positive and ancient rule of the common law," he concludes: "That when a residue is given as such, it is to be sold by the executor. The several things are not given, the testator supposing them not worth giving as

corpora, not knowing how much or which of them it may be absolutely necessary to sell for payment of debts and pecuniary legacies." "When there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy, and discharge himself from liability to the remainderman, by delivering it to the tenant for life, for the assent to that legacy is an assent to the one in remainder." The Chief Justice notes that it was formerly held that the executor should take from the legatee for life a bond that the article should be forthcoming at his death, but that now, unless there is collusion, the life tenant is only required to give a receipt to the executor, unless there is cause to believe that the article will be destroyed or sent away. The rule laid down in *Smith v. Barham* was followed in *Jones v. Simmons*, 42 N. C. 178. As in *Barham's Case*, there was a gift for life of the residue, subject to the payment of debts. In *Ritch v. Morris*, 78 N. C. 377, the gift for life was subject to the payment of debts and charges of administration. Judge Bynum, with his usual industry and clearness, reviews the cases which, at first glance, appear to be conflicting, and shows that they follow the distinction made, or rather pointed out, in *Smith v. Barham*, supra. Referring to the cases in which the executor was directed to deliver to the legatee for life the articles bequeathed, he says: "There being no bequest of a general residue for life, these latter cases have no application, and *Smith v. Barham* stands unopposed to any of the cases we have reviewed." We note some of the cases referred to by Judge Bynum. In *Taylor v. Bond*, 45 N. C. 5 (25), Pearson, J., referring to *Barham Case* and *Jones Case*, supra, says: "In those cases a mixed and indiscriminate fund is given as a residue to one for life with a limitation over." Enumerating the distinctive features of the several wills, he says: "The very object of the gift is that Mrs. Ashburn may be supported by the use of the property." The same conclusion was reached for the same reason in *Williams v. Cotten*, 56 N. C. 395. In *Chambers v. Bumpass*, 72 N. C. 429, the bequest was "all of the residue of my estate," etc. Pearson, C. J., finds in this language "the intention of the testator that the plaintiff should enjoy the use of his house, furniture, farming implements, specifically, during her life or single state, and not that she should have the interest, or what it should sell for." He says: "This is not a residuary legacy, but a universal legacy." The Chief Justice cites none of the authorities. It is not necessary that we shall inquire whether the decision is in harmony with *Smith v. Barham*, in any view it sustains the judgment in this appeal. In *Hodge v. Hodge*, 72 N. C. 616, there was a legacy of money for "the use and benefit" of one for life, remainder over. The court held, upon the authority of *Camp v. Smith*, 68 N. C. 537, that the executor should pay the money to the

legatee without requiring bond. Settle, J., says: "The principle seems to be that, as the testator has intrusted him with the money without requiring security, no person has authority to do so." In *Britt v. Smith*, 86 N. C. 305, the testator gave to his wife "all of my personal property" during her natural life or widowhood, and after her death or widowhood, over, etc. Ruffin, J., reviewed the authorities, saying: "So far as we have been able to inform ourselves, from a critical examination of all the adjudications upon the subject to which we have access, no operation has, in any instance, been given to the rule (in *Barham's Case*), save in the case of a residuary bequest given *eo nomine* as such." The language of the learned justice is so appropriate that we quote it as conclusive of this appeal. He says: "We are struck, at the very outset, with the strong purpose manifested by the testator to make an ample and certain provision for his wife. By one comprehensive clause he gives her all his lands for life, and, with the slight exceptions indicated, all his personality, the latter consisting, in a great degree, of articles absolutely essential to the enjoyment of the former, and indeed, we may say, necessary to her immediate comfort and support, and such as she could not supply, in the event of a sale, without incurring debt or other inconvenience." The language of the will in this appeal, the age of the wife, the inventory showing the character of the property bequeathed, all point with unerring certainty to the intention of the testator. It is the expression of the purest and highest sentiment, and manifest duty of the husband, to provide for the comfort and welfare of the wife, free from molestation or interference on the part of those whose duty it is to be her aid and comfort, after a lifetime spent in their rearing and support. It would do violence to the testator's sense of obligation and duty to so construe this provision for his widow as to strip her of the substance gathered by their joint industry and frugality, sell the household and kitchen furniture, not only necessary to her comfort, but having sacred association with her married life, its joys and sorrows. To give her land and leave her without supplies, implements, team and other necessary property to make it contribute to her support, would be most unreasonable and unjust. The property and money are hers, to use for her support and comfort. The executors properly delivered to her. They have paid the debts, funeral expenses, and, so far as this record shows, freely discharged their duty according to law. She is entitled to use the property, including the money, to supply her needs, for her support in the state and manner suited to her age, health, and condition in life. The inventory shows what she has received, and what is not consumed in the use will, at her death, go to the petitioners.

But it is said that she claims it all as her



own, to do with as she pleases, and should, therefore, be required to give security. His honor's judgment fully protects them. Complaint is made that the costs are taxed against the petitioners. The clerk's findings of fact, sustained by his honor, show that they were overanxious about the widow's legacy. Failing to sustain the charge of misconduct, it is but just that they pay the cost. The statute so directs.

The judgment is affirmed.

HOKE, J., concurs in result.

### ULLERY et al. v. GUTHRIE.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. COURTS—RULES—APPEAL AND ERROR—RECORDED—SUMMARY OF EXCEPTIONS.

Supreme Court Rule No. 21 (53 S. E. vii), providing that a case will not be heard until there shall be put in the record, as required by rule 19 (2), a summary of exceptions taken on the trial, and those taken in 10 days thereafter to the charge, and that those not so set out will be deemed abandoned, is reasonable and just.

#### 2. APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY.

An appeal is a sufficient exception to the judgment, under Revisal 1905, § 1542, providing that no exception is required as to errors appearing on the face of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1572.]

#### 3. SAME—ASSIGNMENT OF ERROR—JUDGMENT.

An appeal is a sufficient assignment of error to a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2977.]

#### 4. SAME—JUDGMENT ON DEMURRER.

Under Revisal 1905, § 475, providing that a demurrer shall be disregarded unless it specifies the grounds of objection to the complaint, an assignment of error, on appeal from a judgment on demurrer, must specify which of the grounds of demurrer is relied on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3004.]

#### 5. SAME—JURISDICTIONAL OBJECTIONS—TIME.

A demurrer for lack of facts or jurisdiction in the court may be made *ore tenus*, and, under Supreme Court Rule 27 (53 S. E. viii), exceptions to rulings thereon may be taken for the first time in the Supreme Court, and if not assigned, the court may take notice thereof of its own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1166-1172.]

#### 6. PUBLIC LANDS—LANDS OF ESTATE—ENTRY PROCEEDINGS.

Defendants made an entry on "Battery Island," claiming the same to lie in New Hanover county. Plaintiffs entered their protest under a grant for such island as lying in Brunswick county. Held that, in the absence of any controversy that the island entered by defendant was the same locus in quo of which protestants held a grant, the issue as to whether the island was located in one county or the other was determinable in the protest proceeding; it being conceded that, if the island did not lie in New Hanover, the grant defendants sought was void.

Appeal from Superior Court, New Hanover County; Neal, Judge.

Entry protest proceeding between William A. Guthrie, entryman, and F. B. Ullery and others, protestants. Judgment for entrymen, and protestants appeal. Reversed.

Guthrie & Guthrie, for appellants. C. Ed. Taylor, for appellee.

CLARK, C. J. Rule 21 of this court (53 S. E. vii) provides: "A case will not be heard until there shall be put in the record, as required in Rule 19 (2), the summary of exceptions, taken on the trial, and those taken in ten days thereafter to the charge. Those not thus set out will be deemed to be abandoned." Rule 20 prescribes the action which the court may take if this is not done. This is a reasonable and just rule, which obtains in perhaps nearly all appellate courts, and is the result of experience which has shown the benefit of thus indicating at a glance to opposing counsel, and the court as well, the propositions of law which will be debated. It imposes no burden on the appellant thus to sift out of the numerous exceptions taken, out of abundant caution, on the trial, those which he will rely upon and discuss upon appeal. We can add nothing to what has been said by this court in *Lee v. Baird*, 143 N. C. 362, 59 S. E. 876. It is indispensable, in all courts, that there should be some rules of practice, else there will be hopeless disorder and confusion. It is, for the same reason, not so important what the rules are as that the rules, whatever they may be, shall be impartially applied to all, and that changes shall be prospective by amendment to the rules, and not retroactive, by granting exemption to some which has been denied to others.

It has always been held that an appeal is itself a sufficient exception and assignment of error to the judgment; for that is a matter appearing upon the face of the record proper, and as to errors on the face of the record, no exception is required. Revisal 1905, § 1542. This is fully discussed in *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910, which has been repeatedly cited since. But if an exception and assignment of error to the judgment were necessary, the appeal itself is a sharp assignment that the facts found or admitted do not justify the judgment. *Appomattox Company v. Buffalo*, 121 N. C. 37, 27 S. E. 999; *Murray v. Southland*, 125 N. C. 176, 34 S. E. 270; *Delozier v. Bird*, 123 N. C. 692, 31 S. E. 834; *Cummings v. Hoffman*, 113 N. C. 269, 18 S. E. 170. Of course if the appeal is an exception to the judgment, it is on the ground that the facts found or admitted do not justify the judgment. And when there are no other exceptions in the case, this one exception cannot be grouped. It has been urged that, if an appeal is itself an exception to the judgment, and when it is the only exception it cannot be grouped, that therefore, when a demurrer is sustained or overruled, the ap-

peal from such judgment is a sufficient assignment. It would be, but for the fact that Revisal 1905, § 475, provides: "The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it does so, it shall be disregarded." Therefore, on appeal from a judgment on a demurrer, the assignment of error should specify which of the grounds set out in the demurrer will be relied upon on appeal. If only one, that should be specified, else the demurrer is general, and therefore "to be disregarded." Revisal, 475. A demurrer cannot state generally that a complaint is invalid, but must specify wherein. When the demurrer is on the ground that the complaint does not state a cause of action, or that the court does not have jurisdiction, it may be taken *ore tenus*, and Rule 27 (53 S. E. viii) provides that such exceptions can be taken even for the first time in this court, and indeed, if not assigned, the court should take notice of them *ex mero motu*. An appeal being of itself an exception to, and assignment of error in, the judgment, and when there is (as in this case) no other assignment of error incapable of being grouped, the motion to dismiss for non-compliance with rule 21 must be denied.

The defendant made an entry of "Battery Island," which it claims is in New Hanover. The plaintiffs entered their protest, on the ground that they held the grant for said "Battery Island" as lying in Brunswick county. It is not controverted that the protestants hold such grant, and that it is valid if "Battery Island" lies in Brunswick. Nor is it controverted that "Battery Island" entered by the defendant is the same locus in quo for which the protestants hold a grant. The defendant contends that the protest should be dismissed, because, though it is the same locus in quo, his entry describes it as being in New Hanover, and that he should be allowed to go on and take out his grant, leaving the question whether the island lies in New Hanover or Brunswick to be tested in another action. The protestants contend that, the locus in quo being the same "Battery Island," Revisal 1905, § 1709, provides, "if any person shall claim title to, or an interest in land covered by the entry," he can file protest and proceed as the plaintiffs have done. If it be conceded, as the defendant contends, that the validity of his entry and of protestants' grant depends upon whether "Battery Island" lies in New Hanover or Brunswick, we can conceive of no reason why that fact cannot be determined upon an issue submitted to the jury in this case, fully as well as it could be if the defendant were permitted to go on to perfect his grant and test the question in an action of ejectment. The law does not love multiplicity of suits nor circuity of action, but will give relief, when it can be done, without prejudice, in a pending action. It is true, as defendant contends, that, if the island does not lie in New Hanover, the grant he seeks will be void,

but there is no reason why that question should not be determined in this proceeding. We are not inadvertent that the plaintiffs contend, by virtue of Revisal 1905, § 1737, that, if "not knowing the county line," even if they hold under a grant describing the land as lying in Brunswick when in truth it lies in New Hanover their grant is good and valid. The defendant relies upon *Harris v. Norman*, 96 N. C. 62, 2 S. E. 72. But that point was not passed on, and indeed cannot arise, unless and until it is found as a fact that "Battery Island" lies in New Hanover. For all that now appears it may lie in Brunswick. The defendant, in the language of Revisal 1905, § 1709, is claiming to lay an entry, and is asking a grant for the identical land named and described in the grant held by the plaintiffs. The protest having been dismissed on the ground that the complaint did not state a cause of action, that is the only point presented, and that ruling is reversed.

#### HARPER et al. v. HARPER.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. WILLS — HOLOGRAPHIC WILL — CUSTODY DURING LIFETIME OF TESTATOR—EVIDENCE.

In determining whether an instrument found in decedent's safe was his will, a witness could state that he had seen decedent use the safe for books, notes, etc., and that, some time before decedent's death, witness had "had papers there himself," as tending to show that the safe was used for valuable papers.

#### 2. WITNESSES — COMPETENCY — TRANSACTION WITH DECEDENT—NATURE OF TRANSACTION.

Revisal 1905, § 1631, prohibiting one interested in the event of an action adversely to the decedent's personal representative from testifying to a transaction with decedent, did not prevent a witness, in an action to determine whether an instrument found in decedent's safe was his will, from testifying that witness had papers in the safe himself, on the ground that witness was interested as one of an advisory committee named in the purported will, an as yet unaccepted trust without compensation; the testimony merely serving to show, from the witness' own conduct, that the safe was a proper depository for a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 611.]

#### 3. WILLS — HOLOGRAPHIC WILL — CUSTODY DURING TESTATOR'S LIFETIME.

The fact that an instrument in decedent's handwriting, purporting to be his will, was found a few days after his death in a locked safe in which he kept his valuable papers, etc., meets the requirement of the statute that a holographic will must have been found "among the valuable papers" of the decedent, regardless of whether there was any other paper in that particular drawer of the safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 346.]

#### 4. SAME—CONSTRUCTION — INTENT OF TESTATOR.

In construing a will, testator's intent should be sought from the whole instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 983.]

# 5. SAME—DEVISEES AND LEGATEES—EXCLUSION OF SON FROM SHARE IN ESTATE.

A holographic will, written on an envelope containing two one-year accident insurance policies which expired long before testator's death, read: "In case of my death the enclosed insurance is for my three daughters [naming them]. H. [one of testator's sons] has had his full share out of mine and his mother's estate." The remaining provisions appointed a trustee "of my children," requesting that, "if any of the children" should show a reckless disposition, "only a part of my estate be given them," gave directions as to education, etc., and disposed of testator's entire estate. *Held*, that H. was excluded from any share thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1157, 1157½.]

# 6. SAME—CREATION OF TESTAMENTARY TRUSTS—WORDS IMPORTING TRUST.

A holographic will contained a request by testator to a certain bank "to be trustee of my children, advised by [four persons named]," followed by directions as to the disposition of his entire estate, that his daughters be placed under certain persons named, and that other things, as education, be given entirely to the advisors named. *Held*, that the request to the bank was an appointment to administer the estate as executor, and, after payment of debts, to hold the surplus as trustee till the minor children should become of age.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1579-1581.]

# 7. SAME—DESCRIPTION OF PROPERTY—ENTIRE ESTATE.

A holographic will, written on an envelope containing two one-year accident insurance policies which expired long before testator's death, began with the provision: "In case of my death the enclosed insurance is for my three daughters [naming them]." It declared that one of the testator's sons "has had his full share out of mine and his mother's estate." The remaining provisions appointed a trustee, with the request that, if any of the children should show a reckless disposition, "only a part of my estate" be given them, gave directions as to education, etc., and provided, "personal property to be disposed of." *Held* that, in view of the reference to personal property, showing that it was not the sole object of the will, and the use of the word "estate," the will was not restricted to the policies, but disposed of all testator's property.

# 8. SAME—PRESUMPTION AGAINST INTENT.

A testator is presumed to intend to dispose of all of his property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 965.]

# 9. SAME—"ESTATE."

A testator's "estate" includes both realty and personalty.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653, 7654.]

# 10. SAME—ACTION TO ESTABLISH AND TO CONSTRUCT WILL.

An action, including an issue of devisavit vel non and a proceeding to construe the will, though unusual, presents no jurisdictional irregularity, since the clerk by whom the alleged will was probated is part of the superior court.

# 11. APPEAL AND ERROR—JURISDICTION—DEFECTS—DISMISSAL ON COURT'S OWN MOTION.

The Supreme Court must notice, of its own motion, jurisdictional defects in actions before it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1166-1178.]

Appeal from Superior Court, Lenoir County; Neal, Judge.

Action by Carl C. Harper and others

against H. D. Harper, Jr. From the judgment, defendant appeals. Affirmed.

Loftin, Varner & Dawson, for appellant.  
Rouse & Land, for appellees.

CLARK, C. J. Action by children of deceased and the executor to determine whether the paper writing, which had been previously probated by the clerk, is the will of the deceased, and, if so, for its construction. The paper, it is admitted, was wholly in the handwriting of the deceased, and was found in his iron safe, in the dental office which he occupied. The safe was locked. The combination to the safe was in possession of the son of deceased. It was in evidence that the safe was used by the deceased for keeping money, book of accounts, relics, material for teeth, and notes for money loaned. When the safe was opened this paper was found in one of the drawers with some other papers, but it does not appear whether they were valuable or not. There was a small amount of money in the safe. The other drawers were not examined when this paper writing was found. J. W. Grainger testified that he knew the handwriting of the deceased; also that he had seen the deceased use the safe for books, notes, etc., some time before he died, cannot say how long; that he (witness) "has had papers there himself." The above evidence was excepted to, but was competent to show that the safe was used for the purpose of keeping valuable papers.

The last paragraph of the evidence of J. W. Grainger was further excepted to, because he was one of the "advisory committee" named in the alleged will, and this was a transaction with the deceased and incompetent under Revisal 1905, § 1631. If it be conceded that being "one of the advisory committee"—an as yet unaccepted trust, and without compensation—made the witness, "interested in the event of the action," his "having papers in the safe himself" was not a "transaction" with the deceased, certainly not within the meaning of the statute. It was not to show any dealing with the deceased, but merely evidence that the witness considered the safe a suitable place in which to deposit papers for safe-keeping. He does not say that the deceased gave him permission, presumably he did, but the evidence is not for that purpose, but to show from the witness' own conduct that the safe was a proper depository for a will. The court charged the jury that, "if they should find from the greater weight of the evidence that the deceased had at his place of business an iron safe in which he usually kept his books, accounts, and valuable material he used in the practice of his profession, his money, and notes he had taken for money loaned, and that he used the said safe for keeping his valuable papers and effects, and if you further find from the greater weight of the evidence that, a few days after the interment

of the deceased, the paper writing here presented to you was found in a drawer in the said safe with the combination locked, why that would meet the requirements of a reasonably just and fair construction of the terms of the statute 'among his valuable papers'; and this would be so whether there was or was not any other paper in that particular drawer of the safe." This was excepted to, but we find no error therein. In Sheppard's Will, 128 N. C. 56, 38 S. E. 28, it is said: "The intention of the statute is that it shall appear to be a will, whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will." This paper was found, not only in the iron safe where the deceased was shown to have kept valuables, but (though the nature of other papers in that drawer was not shown) it was written on the outside of the envelope which contained the accident insurance policies referred to and disposed of in the paper writing, and therefore deemed valuable papers by the testator. The jury found that the paper writing was the will of the deceased.

The will, entirely in the handwriting of the deceased, was written, as above stated, upon the outside of the envelope containing two accident insurance policies of \$3,000 each. One of said policies bore the same date as the will, April 7, 1903, the other was issued subsequently, and bears date October 13, 1903. Said will reads as follows: "In case of my death the enclosed insurance is for my three daughters, Edith, Fay and Mildred. Henry D. Harper, Jr., has had his full share out of mine and his mother's estate. I request the Citizens Bank of Kinston to be trustee of my children, advised by J. J. Harper, C. W. Howard, J. W. Grainger and N. J. Rouse. This request that if any of the children show a reckless disposition to spend money, that only a part of my estate be given them and that in such sum as the trustee and advisory board may agree on. My daughters to be placed entirely under J. W. Grainger, Mrs. Capitola Edwards or Mrs. C. W. Howard. Personal property to be disposed of. Other things, as education, when, where and how are given entirely to the advisors named above. God bless them all. Signed and sealed this 7th day of April, 1903. H. D. Harper. [Seal.]" The testator left surviving him three daughters and two sons, who are plaintiffs in this action, besides his son H. D. Harper, Jr., who is named in the will as having "had his full share of mine and his mother's estate." The construction of the will is not free from difficulty, but the intent of the testator, as derived from "the four corners" of the will, is what is to be sought for. We think the intent of the testator was, (1) by declaring that "Henry D. Harper has had his full share out of mine and his mother's estate," to exclude him from any further share—it could

have no other purpose; (2) the request to the Bank of Kinston "to be trustee of my children" (advised by the committee) was an appointment to administer the estate as executor, and, after payment of debts, to hold the surplus as trustee till the minors became of age. The daughters were to be placed with the ladies named, and the education of the children was intrusted to the board of advisors; (3) the expression "personal property to be disposed of" means simply that it is to be converted into money. This incidental reference to it shows that the personal property was not the sole object of the will. Indeed it is a wise and well-settled rule that, wherever there is a will, the presumption is that the testator intended to dispose of all his property. *Brown v. Hamilton*, 135 N. C. 10, 47 S. E. 128, 102 Am. St. Rep. 526; *Cox v. Lumber Co.*, 124 N. C. 78, 32 S. E. 381; *Blue v. Ritter*, 118 N. C. 580, 24 S. E. 356; 30 A. & E. Enc. Law (2d Ed.) 667. There is nowhere any intention indicated to restrict this will to either kind of property. On the contrary, the intent seems to be (after excluding the son, who had been already fully advanced) to provide that the trustee shall hold the entire "estate" for the other children, and the testator even provides for the restriction in the advances to be made the extravagant, for the custody of his daughters by ladies named, and for supervision of the education of all the children by a board of gentlemen. There was nothing indicative of a "partial intestacy," but rather to dispose of everything and to provide for everything. Twice in this short will the testator uses the word "estate," which includes both real and personal property. *Foll v. Newsome*, 138 N. C. 115, 50 S. E. 597; *Glasscock v. Gray*, 148 N. C. —, 62 S. E. 433; *Morgan v. Huggins* (C. C.) 42 Fed. 869, 9 L. R. A. 540; *Webster's Dictionary*; *Bouvier's Law Dictionary*.

So far from the will being restricted to the policies, found in the envelope, the only reference made to them is the single sentence, "In case of my death, the enclosed insurance is for my three daughters, Edith, Fay and Mildred," while the rest of the will is taken up with the care of his "estate," out of which all five of the children not "fully advanced" are to have allowances and be educated, and with provision for the custody of the girls, and supervision by an advisory board of all. It may be further noted that these were not life insurance policies, but merely one-year accident policies, long since expired, and to restrict the will to disposition of them alone would be impossible. The judgment of the court below is in exact accordance with these views.

We note that this proceeding brought to term includes both the issue of devisavit vel non and proceedings for the construction of the will. This is certainly unusual, but all the parties are before us, and ask that the whole matter be determined in this action.

It is not a question of jurisdiction (which we would be compelled to notice *ex mero motu*), for the clerk is part of the superior court. No exception is taken, and the whole matter, under the consent and request of parties, is disposed of. We find no error.

### TAYLOR v. F. T. MILLS & SON.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. REPLEVIN—SURRENDER—EVIDENCE.

Defendant, having learned that plaintiff had purchased personal property on which defendant held an unrecorded mortgage, told plaintiff that the articles were his property, whereupon plaintiff replied that, if they were defendant's property, he could come and get them. Defendant took the property in plaintiff's absence, and without his authority, the servant falsely representing to plaintiff's wife that plaintiff had sent him for them. *Held*, that plaintiff had not voluntarily surrendered the property, so as to preclude him from maintaining claim and delivery to recover it.

#### 2. CHATTEL MORTGAGES—RECORD—DILIGENCE.

Where a mortgagee of personal property surrendered it to the mortgagor, who sold it to plaintiff before the mortgage was recorded, plaintiff's rights were superior to those of the mortgagee, though the latter used due diligence in recording the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 235-262, 267, 268.]

#### 3. REPLEVIN—MEASURE OF DAMAGES.

Where plaintiff purchased personal property on which defendants held an unrecorded mortgage, and, defendants having wrongfully obtained possession thereof, plaintiff brought claim and delivery, the measure of his damages was the value of the property at the time of defendants' wrongful taking with interest and not the amount plaintiff paid the mortgagor for the property with interest.

Appeal from Superior Court, New Hanover County; Biggs, Judge.

Claim and delivery by S. D. Taylor against F. T. Mills & Son. Judgment for plaintiff, and defendants appeal. Affirmed.

Herbert McClammy, for appellants. B. G. Emple, for appellee.

CLARK, C. J. The defendant sold a horse, buggy, and harness to one Fisher on June 10th, and took a mortgage thereon. The next day Fisher sold them to the plaintiff for \$125. On June 12th the defendant learned that the plaintiff had bought them, and told plaintiff that they were his property. The plaintiff replied that, if they were defendant's property, he could come and get them. The defendant sent and got them in plaintiff's absence, the messenger telling the plaintiff's wife her husband had sent him for them, which was not true. Learning that defendant's claim was based on an unregistered mortgage, the plaintiff demanded possession of the property, and on refusal began this action, on June 14th, for claim and delivery of the property, and the papers were served the same day. The mortgage was registered thereafter on June 18th. The jury found that the plaintiff was owner of

the property, that it was worth \$150, and that the plaintiff was entitled to recover, as damages for the detention, interest on said sum from June 12th, the date when defendant took the horse. The horse was replevied by the defendant, and has been since sold by him.

The defendant appealed from the verdict and judgment, assigning as error:

(1) That, the plaintiff having admitted the horse was the property of the defendant, and authorized the defendant to get it, there was a surrender in law. Such is not the evidence. The plaintiff said, on defendant's statement, that if it was defendant's property, he could get it. The horse was taken in his absence, and without his authority, according to the testimony.

(2) That if the defendant used due diligence in recording the mortgage, and there was not time to record it before Fisher sold the property to the plaintiff, there was no laches, and the defendant was entitled to the property. This cannot be sustained. It was the defendant's own fault that he did not retain possession of the property until his mortgage was recorded. The doctrine of due diligence and absence of laches has no application.

(3) That the plaintiff was entitled to recover only the sum paid for the property; i. e., \$125 and interest. The plaintiff was entitled to recover the value of the property at the time it was wrongfully taken (which the jury have assessed at \$150), with interest on that amount from the taking. His honor told the jury that in arriving at the value of the property they could take into consideration that the plaintiff had paid \$125 for it, and all the other evidence as to value, and find what it was worth at the time of the taking. The defendant testified that it had cost him \$212.

No error.

### COX v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 14, 1908.)

#### 1. STATUTES—CONSTRUCTION—PENAL STATUTES.

The rule is well established and applicable to corporations and individuals alike that penal statutes will be strictly construed; and one suing for a penalty must bring himself clearly within the language and meaning of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

#### 2. CARRIERS—CARRIAGE OF GOODS—ACTION FOR FAILURE TO RECEIVE GOODS—SUFFICIENCY OF TENDER.

In an action for the statutory penalty for a carrier's failure to accept meat for shipment, the evidence *held* to show that the meat arrived too late for shipment, and was voluntarily taken away by the shipper, so as not to be a general tender for shipment.

#### 3. SAME—TIME OF SHIPMENT.

Since Revisal 1905, § 2632, allows the carrier two days at the initial point of shipment in which to ship freight, it incurred no penalty un-

der Revisal, § 2631, imposing a penalty upon railroads for failure to receive goods for shipment, for not shipping by the train which was being loaded when the goods were offered for shipment, even though the carrier's employé used discourteous and unwarranted language in refusing to ship on that train.

Appeal from Superior Court, Lenoir County; Neal, Judge.

Action by W. H. Cox against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss.

The evidence upon which plaintiff relies to establish a general tender for shipment is as follows: L. D. Dixon testified: "Mr. W. H. Cox gave me the meat to be carried to the A. C. L. depot on the morning of January 8, 1907, at about 8 o'clock. Mr. Fulton was with me on the wagon. We got to the depot at about 8:10 a. m., and I went up to a man who was delivering freight in the A. C. L. warehouse, told him that I had some meat there for shipment to Greenville, and that I wanted to get it off on that morning train. He said it was too late to get it on that train; that he did not have time to fool with it, as the train was made up. I told him that it was weighed and tagged, and that I would put it on the train myself. He said, 'Wait a minute,' and went in the ticket office, and in a few minutes came back with another man, and they came to the wagon and said it was too late to get it off on that train. I did not know the names of either of the men, or that they worked there at the time, but I now think that one of them was Mr. Marrow. I made no further effort or offer to leave the meat there, but in a few minutes drove back down town with it. I carried the meat back to the station the next morning, and it was shipped to Greenville. It was fresh pork." W. J. Fulton, for the plaintiff, testifies: "I was with Mr. Dixon on the morning of January 8, 1907, and went with him on the wagon to the A. C. L. depot. I did not leave the wagon, but saw Mr. Dixon say something to a man in the warehouse. I did not know who it was. This man and Dixon came back to the wagon, and the man stated that it was too late to get the meat off on that train. This was about 10 minutes after 8. We waited there a few minutes, and then drove back down town to Mr. W. H. Cox. I did not offer to leave the meat at the depot, nor did I hear Mr. Dixon offer to leave it there." There were motions to nonsuit in apt time, which were overruled, and defendant excepted. There was a verdict for plaintiff, and from the judgment rendered thereon, the defendant appealed.

Rouse & Land, for appellant. Wooten & Clark and E. R. Wooten, for appellee.

BROWN, J. It is a well-established principle of law, applicable to corporations and individuals alike, that penal statutes are strictly construed, and that he who sues to

recover a penalty awarded by the law must bring his case clearly within the language and meaning of the law. *Sears v. Whitaker*, 136 N. C. 37, 48 S. E. 517; *Railroad v. Oppenheimer*, 64 Ark. 271; 43 S. W. 150, 44 L. R. A. 353; 26 Am. & Eng. Enc. (2d Ed.) p. 658. It is clear from a perusal of the evidence that no general tender of the meat for shipment was made by plaintiff's agent. Taking it in its best aspect for plaintiff, the evidence shows that the meat arrived too late for the morning train, and, finding that it could not be shipped by that train, plaintiff's employés voluntarily and purposely carried it back to plaintiff's market, and returned with it and shipped it next morning. The defendant incurred no penalty for not shipping by that particular train, for by section 2632, Revisal 1905, the carrier is allowed two days at the initial point in which to begin the transportation of freight.

If the evidence is true, the language of the defendant's employé refusing to accept the meat for shipment by that particular train was discourteous and unwarranted, but it does not subject the company to punishment on that account.

We think the judge below should have allowed the motion to nonsuit and have dismissed the action. It is so ordered.

Error.

## ACME PAPER BOX FACTORY et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 14, 1908.)

### 1. SALES—TIME WHEN TITLE PASSES.

When a seller delivers goods to a carrier consigned to the buyer, both title and possession vest in the buyer, in the absence of an agreement to the contrary, or in case of stoppage in transit; but, where the seller contracts to deliver the goods to the buyer, the title remains in the seller until actual delivery to the buyer, and the seller can recover their value from any person converting them while in transit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 535.]

### 2. CARRIERS—CARRIAGE OF GOODS—DELAY—ACTION.

In an action by a seller to recover the value of goods against a carrier to whom they were delivered for transportation to the buyer, but which were not accepted because of delay in delivery, whether the contract of sale provided that the goods were to be delivered into the actual possession of the buyer, or whether they were to be delivered free on board cars, *held* to be for the jury.

Appeal from Superior Court, Lenoir County; Neal, Judge.

Action by the Acme Paper Box Factory and others against the Atlantic Coast Line Railroad Company. There was a judgment of nonsuit, and plaintiffs appealed. Reversed and remanded for a new trial.

Wooten & Wooten, for appellants. Rouse & Land, for appellee.

**BROWN, J.** The ruling of the court below was evidently based upon the general doctrine that, when the vendor delivers the goods to the carrier consigned to the vendee, both title and possession pass from the vendor and vest in the vendee, the common carrier becoming the agent of the vendee. And the vendor has no further interest in or control over the goods thus shipped, in the absence of an agreement of the parties varying this rule or in case of stoppage in transitu where its principles apply. In this case there is some evidence which takes it out of that general rule, and which tends to prove that the plaintiff contracted to deliver the goods to the consignee the Hamlin Company. If that be true, the title remained in the plaintiff until actual delivery to consignee, and plaintiff could not only stop the goods, but could recover their value from any person who converted them while in transit. There is some evidence tending to prove that the goods were received by defendant and retained in its warehouse without notice to consignee. The plaintiff Lindsey testifies that the goods were to be delivered by the plaintiff, and that he was the owner of the goods. If these facts be true, the plaintiff would be entitled to recover the identical goods from defendant, and, if it has converted them, or they are lost, their value and interest. *Davis v. Railroad* (N. C.) 60 S. E. 722; *Summers v. Railroad*, 138 N. C. 295, 50 S. E. 714; *Cardwell v. Railroad*, 146 N. C. 219, 59 S. E. 873. If the transaction was an ordinary sale on 60 days' credit, and the contract of the plaintiff was to deliver them "free on board"—that is, to the carrier at the initial point of shipment—then plaintiff could not recover. We think his honor should have submitted the issue to the jury with appropriate instructions.

New trial.

#### YOUNG v. STATE. (No. 1,215.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

##### 1. APPEAL AND ERROR—CERTIFICATION OF QUESTIONS.

All the objections made by the plaintiff in error to the act of the General Assembly approved August 15, 1903 (Acts 1903, p. 90), making criminal the fraudulent obtaining of money or other thing of value under a labor contract, on the ground that the act is repugnant to certain provisions of the federal and state Constitutions, having been fully settled by the decisions of the Supreme Court, this court refuses to certify any of the questions to the Supreme Court, especially where there is no request made to have any of these decisions reviewed. *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *Vance v. State*, 128 Ga. 861, 57 S. E. 889; *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.

##### 2. WORDS AND PHRASES—"PEONAGE"—MASTER AND SERVANT—CRIMINAL PROSECUTIONS FOR FRAUDULENT BREACH OF CONTRACT—VALIDITY OF ACT.

"Peonage" is a status or condition of compulsory service, based upon the indebtedness of

the peon to the master. The basal fact is indebtedness." *Clyatt v. United States*, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. A state statute which makes criminal the procurement of money upon a fraudulent contract to perform service and the fraudulent abandonment of the contract after having so procured the money, is not a violation of the federal statutes (Rev. St. §§ 1990, 5528 [U. S. Comp. St. 1901, pp. 1266, 3715]), prohibiting involuntary service or labor.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5281, 5282.]

##### 3. MASTER AND SERVANT—CRIMINAL PROSECUTIONS FOR FRAUDULENT BREACH OF CONTRACT—VALIDITY OF STATUTE.

The fraudulent act of the promisor in procuring the money on his contract does more than make a debt. It also constitutes a crime; and the purpose of the act of 1903, supra, is not to create a remedy for the collection of the debt, but to provide punishment for the fraudulent and successful intent to cheat and defraud. *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.

##### 4. INDICTMENT AND INFORMATION—DUPLICITY.

It is permissible, in an accusation or indictment for a violation of the act of 1903 (Acts 1903, p. 90), to embrace in a single count various sums of money as having been fraudulently procured by the promisor from the promisee at different times; the various amounts so procured making up the aggregate sum charged to have been fraudulently obtained by the accused. Such a count does not charge separate offenses, but includes only one offense. *Jackson v. State*, 76 Ga. 551 (7).

##### 5. SAME.

The accusation sets out in apt and sufficient language the offense as defined by the statute, and the evidence proves the offense as charged.

(Syllabus by the Court.)

Error from City Court of Moultrie; J. D. McKenzie, Judge.

Joe Young was convicted of fraudulently obtaining money on a contract to perform services, in violation of Act Aug. 15, 1903 (Acts 1903, p. 90), and he brings error. Affirmed.

James Humphreys and Alfred R. Kline, for plaintiff in error. W. F. Way, Sol., for the State.

HILL, C. J. No opinion. Judgment affirmed.

#### WESTFALL v. STATE. (No. 1,281.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

##### 1. INDICTMENT AND INFORMATION—DUPLICITY.

An indictment which charges in one count a violation of section 420, Pen. Code 1895, in running six freight trains on a railroad in the county on Sunday, is not demurrable on the ground that it charges six distinct and separate offenses in one count.

##### 2. SUNDAY—OPERATION OF TRAINS—INDICTMENT—OFFICER SUBJECT.

Where a railroad company operates a railroad through several states, with separate divisions of transportation and a different superintendent of transportation for each division, the superintendent of transportation having charge of the transportation for the division which embraces that part of the railroad on which a freight train is run on the Sabbath day in

violation of the statute is the officer designated by the statute to be indicted for such violation.

**3. SAME—EVIDENCE.**

Where a freight train which is running on a bona fide, practicable schedule, leaving the starting point before Sunday, scheduled to reach its destination before 8 o'clock Sunday morning, is detained by unavoidable circumstances, so that it cannot reach its destination before 8 o'clock Sunday morning, it can nevertheless continue to run after 8 o'clock Sunday morning until it reaches its destination without violating the law.

**4. SAME.**

Where a freight train has left its starting point upon a schedule giving it ample time to reach its destination within the time allowed by the statute relating to the running of trains on Sunday, the right to continue to destination when prevented by unavoidable delays from completing its trip within the time required by the regular schedule is not affected by the fact that the unavoidable delay has lasted such a length of time as, in railroad parlance, to "kill" that schedule and require that the delayed train be ordered to run to its destination on an extra schedule.

**5. SAME.**

The verdict is without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Price Edwards, Judge.

A. H. Westfall was convicted of violation of the Sunday law, and brings error. Reversed.

Westfall was tried and convicted in the superior court of Douglas county for a violation of section 420, Pen. Code 1895, relating to the running of freight trains on the Sabbath day through any county in this state. The charging part of the indictment is in the following language: "He, the said A. H. Westfall, being then and there superintendent of transportation of the Southern Railway Company, and as such officer having charge of the business of the transportation department of that portion of the Southern Railway Company embracing the railroad running from Atlanta in the state of Georgia, through Douglas county, to the city of Birmingham, in the state of Alabama, did, on the 14th day of April, 1907, said day being the Sabbath day, unlawfully run and cause to be run in and through Douglas county, over said railroad, six freight trains of the Southern Railway Company, all going east, and each drawn by an engine pulling a train of freight cars, all of said freight trains arriving and departing from the city of Douglasville during the afternoon of said date." The defendant demurred to this indictment, on the grounds (1) that six different offenses are charged in one count of the indictment, to wit, the running of six freight trains; and (2) that the indictment does not charge the defendant with being the superintendent of transportation of the Southern Railway Company, but only of that portion thereof between the city of Atlanta and Birmingham. The court overruled this demurrer, and the defendant excepted pendente lite.

The material part of the evidence is as follows: The defendant was the superintendent of a division of the Southern Railway, known as the "Atlanta Division," extending from Weems, Ala., to the city of Atlanta, and the movement of the trains of this division were under his supervision and management; he being the officer in charge of the transportation of trains in that division. There was a general superintendent of transportation of all the divisions of the Southern Railway Company, who had supervisory charge of all the division superintendents of transportation. The six freight trains in question ran through Douglas county after 8 o'clock a. m. on the Sunday charged in the indictment, arriving at their destination, Atlanta, at different hours in the afternoon and evening of that Sunday. The six freight trains left their initial points in the state of Alabama on Saturday, running on a schedule which would have allowed each one of them time to reach its destination before 8 o'clock Sunday morning, if not detained by unavoidable delays. These trains were all prevented from making their trips in schedule time, and were delayed at Waco by the fact that there was no water in the tank at that place to supply the engines, and the tank was not supplied with water at Waco until about noon on Sunday. The water tank at Waco was empty Saturday night because the pool from which water was pumped into the tank was pumped dry on Saturday night about 6 o'clock, and there was not sufficient water in the pool to pump into the tank until Sunday morning, when the employé of the company in charge of the pumping station began to pump, and filled the tank as rapidly as could be done, for the purpose of supplying the engines. The failure to keep water at Waco prevented the freight trains from complying with their regular schedule, and caused them to be delayed more than 12 hours; and when they left Waco on Sunday, about noon, they were ordered to make the run to Atlanta on what was known as an "extra schedule." The employé of the company at Waco whose duty it was to keep the tank supplied with water did not notify any one connected with the movements of the trains of the fact that the supply of water had failed, and those in charge of the freight trains did not know of the failure of water until they had arrived at Waco. There was another water tank between Atlanta and Waco, 41 miles west of Villa Rica, but the engineers, when they arrived at Waco, did not have sufficient water to continue the run to this water tank. The train dispatchers were directed by the superintendent of transportation not to start any freight trains on Sunday, and not to start them on a schedule unless they had schedule time to reach their destination by 8 o'clock Sunday morning, and when these trains were started from their initial points on their regular schedule the railroad authorities did not know that the



water supply was insufficient at Waco, and they did not find it out until the next Sunday morning, when the freight trains were at Waco.

Besides the general grounds in the motion for a new trial, there are three grounds assigning error in certain excepts from the charge of the court to the jury, the first of which is as follows: "A freight train running over a road on Saturday night, if the time of its arrival at destination, according to schedule by which it started on the trip, be not later than 8 o'clock Sunday morning, this will be a justification for the running of the train on the railroad up to 8 o'clock Sunday morning. And if it is shown that a train starts on a schedule which would put [it] into the place of destination by or before 8 o'clock Sunday morning, or not later than 8 o'clock Sunday morning, and the train starting on such schedule runs up till that time, then the defendant would not be guilty." The error assigned in this charge is that it "limited the right to run a freight train up to 8 o'clock Sunday morning," and it is contended that "the court should have further charged the jury that if the train would have reached its destination by 8 o'clock Sunday morning, if run on schedule time, yet if the same was unavoidably delayed it could still be run to its destination, although to do so would require its movement later than 8 o'clock Sunday morning." The second ground assigning error in the charge of the court is covered by the demurrer as to the defendant not being the proper official designated as liable to an indictment for a violation of its terms. The third ground is that the court erred in charging as follows: "In reference to schedules, I charge you that, if a train is started from Birmingham that will put it into Atlanta, the place of destination, before 8 o'clock, and on account of delays that arose along the line that schedule was annulled by the superintendent of transportation, or the officer having charge of the business of that department of the railway company, if that schedule was annulled, and said train was started in this state on a new schedule, or by orders running it extra, then it would have no right to run any distance after midnight Saturday night, would have no right to run up till 8 o'clock, and would have no right to run after 8 o'clock; and if you find in this case that these trains named in the bill of indictment were run on a schedule made up after midnight Saturday night, and they were started on such schedule in this state after midnight Saturday night, then they would have no right to run any distance, and, if the other elements of the offense are made out, that A. H. Westfall is the officer named in the statute, and he is not justified in one of the two ways that I have called your attention to, then he would be guilty." The objections made to this charge are that "it was not properly adjusted to the evidence

in this case," and "under the evidence in this case it is not the law."

Maddox, McCarny & Shumate, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

HILL, C. J. (after stating the facts as above). 1. It is entirely proper and in conformity with good pleading to charge in one count that the defendant violated the penal statute in running six freight trains through the county on the same Sunday. While, strictly speaking, the running of each train may have been a violation of the law, yet we think the running on the same day of six trains may have been well treated as but one offense. Certainly this did not embarrass the defendant in making his defense or deprive him of any right. In fact, this method of pleading could not be otherwise than beneficial to the defendant. *Wingard v. State*, 13 Ga. 396; *Walker v. State*, 118 Ga. 772, 45 S. E. 621; *Jackson v. State*, 76 Ga. 551 (7); *Young v. State* (No. 1215, Ga. App.; this day decided) 62 S. E. 558.

2. The superintendent of transportation having charge of the business of the transportation department of that portion of the Southern Railway Company over which the freight trains were alleged to have been run in violation of the statute was the proper person to be indicted. Where a railroad system runs through several states, has separate divisions, and has a separate superintendent of transportation for each division, we think the superintendent of transportation of the division in which the law is claimed to have been violated is the proper officer to be indicted under the terms of the statute (*Pen. Code* 1895, § 420). The court, in considering a demurrer on this ground, could judicially recognize that the Southern Railway Company was such a system, and the demurrer admits that the defendant was its superintendent of transportation having charge of the business of transportation of that portion or division of its road over which the freight trains were alleged to have run in violation of the law on the day specified in the indictment. The section of the Code defining this offense designates as the officer to be indicted the one who is primarily responsible for the running of freight trains, and it cannot be doubted that the superintendent of transportation of the division embracing that part of the railroad where the alleged violation of law occurred fits the designation made by the statute. *Vaughan v. State*, 116 Ga. 841, 43 S. E. 249.

3. The charge of the court complained of in the first ground of the amended motion for a new trial was error. If a freight train leaves its starting point upon a practicable schedule which would bring it to its destination before 8 o'clock on Sunday morning, of course, the justification provided by the statute for the running of a train up to 8 o'clock Sunday morning would be complete.

The preamble to this act of the Legislature shows that the intention was to allow a train running on such schedule as above stated, when unavoidably detained or delayed by accidents or other circumstances, to continue running to its destination, although to do so might require the running of the train on Sunday morning after 8 o'clock. In other words, a complete defense is established when the evidence shows that the freight train left its initial point within the time provided by the statute, and on a schedule that was practicable and could reasonably be complied with, and in the particular instance was prevented from being run according to schedule and within the time provided by the statute because of unavoidable delays not due to bad faith of those who had charge of the movement of the train in question. The charge complained of instructed the jury that they could find the defendant guilty if it appeared from the evidence that the train ran after 8 o'clock on Sunday morning, regardless of the time of departure from its starting point, and regardless of all unavoidable delays that may have prevented the train from making its regular schedule, although in other respects it had fully conformed to the requirements of the statute. See Acts of 1874, p. 97, *Brand v. State*, 3 Ga. App. 628, 60 S. E. 339.

4. The charge complained of in the third ground of the amended motion for a new trial was, in our opinion, erroneous for both the reasons stated. It was not adjusted to the evidence, because there was no evidence whatever that the regular schedules on which the trains started from their initial points were annulled by the superintendent of transportation, or by any officer who had charge of the business of that department of the railroad. The evidence was that the delay of over 12 hours at Waco of the trains in question temporarily displaced the regular schedules, and made it necessary for the trains not to leave Waco, except under special orders. But the fact that such delay, under the rules of the company, amounted to a temporary displacement of the regular schedule, and the substitution therefor of an extra schedule, adjusted to the situation made necessary by such delay, did not amount to an annulment by the superintendent of transportation of the regular schedule. If the freight trains in question started from their initial points on a schedule which was practicable, and which could be reasonably run within the terms of the statute, and were unavoidably delayed in making such schedule, they would have the right to run to their destination, regardless of the length of such unavoidable delays. The fact that according to railroad technicalities the regular schedule was "killed" by delays lasting longer than 12 hours, and that the freight trains, after such unavoidable delays, started under new orders, does not affect in any manner the question. Of course, a freight

train cannot start from its initial point on Sunday; but if it starts from its initial point before Sunday, and on a schedule which gives it ample time to reach its destination in this state before 8 o'clock Sunday morning, it has a right to do so, and if, after starting from its initial point before Sunday, it meets with unavoidable delay, and is thus prevented from making its regular schedule on which it started, it nevertheless has a right to continue its run to its destination after 8 o'clock Sunday morning, and any delays that are unavoidable and not caused by bad faith of the officers of the company having charge of the movements of such trains, whatever may be the length of such delays, do not destroy this right. The court in the charge excepted to considered the start from Waco after the delays as a start from the initial point, and that a start made on Sunday constituted a violation of the statute. We think this construction of the law was, for the reasons stated, erroneous.

5. We have examined the evidence in this case very carefully, and we have concluded that it fails to show any violation of the statute in question. There is no dispute that the schedules upon which these trains started from their initial points gave them ample time to reach their destination within the limitations of the law. There is no dispute that the trains were delayed at Waco by a failure to get water at that point, which was the customary place for getting water, or that those in charge of the movements of the trains did not know that the water could not be obtained at this regular place until the trains reached there. It may be that the employé of the company at Waco whose duty it was to keep the tank supplied with water could have notified the officers in charge of the movements of the trains that the water could not be procured at Waco; but this he did not do, and the trains went to Waco, the employés in charge of them reasonably relying upon the fact that at that point they would be able to get water. Under all the circumstances of this case we think the delay was unavoidable, and was not caused by bad faith of the defendant or of those who were in charge of the running of the trains, so as to render the defendant amenable to the penal statute, and that the verdict in this case is without any evidence to support it, and should be set aside as contrary to law.

Judgment reversed.

VEASY v. STATE. (No. 1,299.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

1. CRIMINAL LAW — FORMER JEOPARDY — DEMURRER TO PLEA.

A demurrer to a plea of former jeopardy, filed in a prosecution for carrying a concealed pistol, is properly sustained, when the plea sets up the former conviction of the defendant for carrying the pistol to a church, though it is al-

leged that both transactions were one and the same. As a matter of law the two transactions were not the same. In legal contemplation a person who carries a concealed pistol to a church commits two offenses, and neither is inclusive of the other. *Blair v. State*, 81 Ga. 629, 7 S. E. 855; *McIntosh v. State*, 116 Ga. 543, 42 S. E. 793.

## 2. SAME—EVIDENCE.

The evidence is sufficient to support the verdict.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Pryor Veasy was convicted of carrying concealed weapons, and brings error. Affirmed.

Wm. N. Maltre, for plaintiff in error. R. W. Moore, Sol., for the State.

POWELL, J. Judgment affirmed.

## CHRISTOPHULOS CAFÉ CO. v. PHILLIPS. (No. 1,111.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

### 1. DAMAGES—BREACH OF CONTRACT—PLEADING—SPECIAL DAMAGES.

Where the plaintiff sues for special damages alone for breach of contract, and such special damages are not recoverable under the allegations of his petition, considered in connection with the contract, which is made a part of the petition, he is limited in his recovery to the special damages alleged, and there can be no recovery for general or nominal damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 429-436.]

### 2. SAME.

The allegations of the petition, in connection with the contract, made a part of the petition, clearly showing that the special damages sued for were not such as could be recovered by the plaintiff for the breach of the contract, the trial court did right on demurrer in dismissing the petition.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Christophulos Café Company against John Phillips. Judgment for defendant, and plaintiff brings error. Affirmed.

The Christophulos Café Company, a corporation, brought suit against John Phillips to recover damages for breach of contract. By the contract, which was made a part of the petition, the defendant agreed to build for the plaintiff a counter and a refrigerator of certain dimensions, for specified sums, the job to be completed on September 15, 1907. The contract was executed on August 2, 1907. The petition alleges that the defendant failed to comply with this contract, and did not furnish to the plaintiff by the day agreed upon, or at any other time, either the counter or the refrigerator. It is alleged that the counter and the refrigerator were to be installed in a café which the petitioner was to open in the city of Americus, Ga., and that both parties to the contract understood that time was of the essence of the contract,

and that the counter and the refrigerator were to be furnished and delivered on September 15, 1907; that, relying upon the promises and agreement of the defendant as contained in the contract, the plaintiff employed skilled cooks and waiters to report for work at Americus, Ga., at the time the defendant agreed to furnish said counter and refrigerator; and that, on account of the unsatisfactory labor condition prevailing and the plaintiff's agreement to pay its help, the plaintiff was compelled to pay them their salaries for the period of one month, as well as the board of one of them for one month, in order to retain them, besides the rent of the store for one month, during which time the store was unused, awaiting the completion of the contract by the defendant; that after the neglect of one month on the part of the defendant to complete his contract it became necessary for the plaintiff to have the two articles set out in the contract constructed by another person; and that by this breach of the contract the plaintiff was damaged in the sum of \$206, as shown by an itemized statement of the amounts the plaintiff was compelled to pay out by reason of the breach, as follows: "Tom Jones, unemployed, for one month, \$40; Jim Mitchell, unemployed, for one month, \$40; board of Jim Mitchell for one month, \$38; George Adams, manager, unemployed, one month, \$48; rent of store unused, \$40—total, \$206."

The defendant filed a general and special demurrer to the petition on the following grounds: (1) That the items of damages alleged are too remote, and are not such as were contemplated when the contract was made, and are not such as the defendant can be made liable for; (2) that the petition sets out matter not within the terms of the contract, in that by the contract there was no agreement concerning the delivery of the counter or the refrigerator in Americus, Ga., or elsewhere, and the contract does not state that time is of the essence of the contract; (3) that the petition sets up matter of labor between the plaintiff and third persons, outside of the contract, and concerning which no notice is alleged to have been given the defendant by the plaintiff, and that the defendant has no concern with the employment of cooks and waiters, and is not in any wise responsible for the alleged unsatisfactory condition of labor, and is not liable for the salaries or board of such laborers, or for the rent of the store; (4) that the allegations of the petition are not sufficiently specific to enable the defendant to investigate and ascertain the truth or falsity of the claim, as it is not stated in what capacity the laborers were employed, or whether they were white or colored, or when they were employed, or what contract was made between them and the plaintiff, or what store the plaintiff rented, or from whom he rented it, or the amount of rent that should have been paid for it, or the

length of time for which it should have been paid.

The court sustained the demurrer and dismissed the petition, and this judgment is the error assigned.

Glawson & Fowler, for plaintiff in error.  
Arthur L. Dasher, for defendant in error.

HILL, C. J. (after stating the facts as above). The plaintiff must stand or fall by the terms of the contract which he sets out, and can only recover such damages as arise naturally and according to the usual course of things from the breach of the terms of the contract, and such as the parties contemplated when the contract was made as a probable result of its breach. By the terms of his contract the defendant agreed to build for the plaintiff a counter and a refrigerator according to specified dimensions and for a stipulated price, and agreed that the job should be completed on the 15th day of September, 1907. It is insisted by the defendant that the contract is in two distinct paragraphs, the first of which refers to the counter, and fails to specify at what time it was to be completed, and that the second paragraph, relating to the refrigerator, contains the agreement as to completion by the 15th day of September, 1907, and is limited, therefore, to the time when the refrigerator was to be completed. We think, taking the contract as a whole, that the reasonable interpretation on this point is that both the counter and the refrigerator were to be completed by the 15th day of September, 1907; that the word "this job," occurring at the end of the contract, refer to the entire contract, and not to a separate part of it.

There is nothing in the contract however, that indicates for what purpose the plaintiff needed the articles in question, or where they were to be used, and there is no allegation that the defendant was informed or knew anything as to these facts. There is no allegation that the defendant knew that the plaintiff was going to rent a store for the purpose of operating a restaurant, that it was to use either the counter or the refrigerator in such restaurant, or that it was going to employ laborers to carry on the restaurant in which the counter and the refrigerator were to be installed. There are many places where counters and refrigerators are used, other than restaurants. Neither is it alleged that the restaurant of the plaintiff could not have been operated without the counter and the refrigerator, and that this fact was known to the defendant when he made the contract. Under the contract and the allegations of the petition, we think the only measure of damages resulting from a breach of the contract was the difference between the cost of the counter and the refrigerator in the market and the contract price. It certainly would be unreasonable to hold that the defendant, as the result of such

breach, was liable to pay as damages to the plaintiff the items of damages sued for. The amounts paid out for the hire of two skilled laborers, a manager for the restaurant, and the rent of the store, cannot be said to have been contemplated by the defendant as a probable result of a breach of a contract which only bound him to build for the plaintiff a counter and a refrigerator. It would be as reasonable to claim that the plaintiff could have rented a hotel in which the counter and refrigerator were to be used, and have hired 50 or 100 waiters to work therein, and that, because the defendant failed to furnish the counter and the refrigerator by the time specified, he should pay as damages the rent of the hotel and the hire of all these laborers. Especially so, when there is no allegation that the defendant knew, when the contract was made, that the counter and the refrigerator were to be used in the hotel, and that the hotel could not be carried on without them. Certainly the defendant was not responsible for the unsatisfactory condition of labor prevailing, which the plaintiff said made it necessary for him to pay the salaries and board of the laborers for the space of one month who were to be employed in his restaurant.

We conclude that the defendant was in no wise liable for the items of special damages claimed by the defendant. There is no claim for general damages, and the judgment sustaining the demurrer and dismissing the petition must be affirmed. Civ. Code 1895, §§ 3799, 3802; *Wright v. Smith*, 128 Ga. 432, 57 S. E. 684.

Judgment affirmed.

#### RUSHING v. MEDICAL COLLEGE OF GEORGIA. (No. 1,114.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

##### DEAD BODIES—CIVIL LIABILITIES.

A husband is entitled to the dead body of his wife for burial, and in the condition in which death leaves it; but a slight incision by the attendant surgeon in a hospital to ascertain the cause of death, authorized by the board of health of the city in which the hospital is located, and in obedience to the requirements of a city ordinance, in order that a certificate of burial may be obtained not otherwise obtainable, where there is no cutting or removal of any limb or organ, and the incision is properly closed and not visible when the body is clothed, does not infringe this right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, *Dead Bodies*, § 13.]

(Syllabus by the Court.)

Error from City Court of Richmond County; H. C. Hammond, Judge.

Action by J. L. Rushing against the Medical College of Georgia. Judgment for defendant, and plaintiff brings error. Affirmed.

T. W. Capers, for plaintiff in error. Wm. H. Fleming, for defendant in error.

HILL, C. J. This case has been reviewed by this court before, and certain questions of law raised by demurrer decided in favor of the plaintiff. 1 Ga. App. 468, 57 S. E. 1083. It is now before us after a trial on the merits and a verdict in behalf of the defendant, and on an assignment of error to the judgment overruling the plaintiff's motion for a new trial.

Two material questions are presented by the record: (1) Whether the Medical College of Georgia, the defendant in the court below, is responsible for the tort, if such was committed; and (2) whether a tort is shown to have been committed. The view that we take of the second question makes the first question purely an abstract one and unnecessary to be determined. The evidence, briefly stated, is as follows: Plaintiff's wife, during his absence from home, was taken sick. The family physician was called in. He decided that it was necessary to take the patient to the city hospital for treatment and attention. He so informed the members of the family, and was permitted by them to take the patient to the hospital. He delivered her to what was known as the "charity ward" of the hospital, taking her to this ward because he had no instructions to the contrary, and had, on three previous occasions, taken the plaintiff himself and two of his children to the charity ward of this hospital. He had no authority under the rules of the hospital to minister to the patient in that ward of the hospital and she was taken in charge by the regular physician or surgeon of the hospital. This surgeon found the patient in a moribund condition, past help from either medical or surgical assistance. She died in the hospital in a few hours after she had been entered. The physician in charge communicated with the family physician, who brought her there, requesting that he make a burial certificate. The family physician declined to do so, stating that he was not able to make a burial certificate, as he did not know the cause of death. The physician in charge at the hospital could not make a burial certificate, because he did not know and could not determine without an autopsy the cause of death. It was necessary, under an ordinance of the city which was in evidence, to have a burial certificate by an attending physician as to the cause of death before the body of the deceased could be interred in any of the cemeteries of the city. In this situation the physician at the hospital communicated with the chairman of the board of health of the city, stating to him the facts and asking for his directions. The chairman of the board of health directed him to have an autopsy made for the purpose of determining the cause of death. In pursuance of this direction and authority a surgeon of the hospital made a slight incision into the cavity of the abdomen and discovered that the cause of death was uremic poison.

No limb or organ was cut or removed, the body was in no way mutilated, and the slight incision was sewed up, and was not discoverable except by an examination. A certificate of burial was made by the surgeon who performed the autopsy, and the body was delivered to the undertaker for the family, and was buried in one of the city cemeteries.

These facts are not disputed, and, we think, utterly refute the gravamen of the complaint made by the plaintiff in his petition that there was an unauthorized and unlawful mutilation of the body of his wife, "to gratify professional curiosity, or for some other unlawful purpose." This court decided, when the case was here before, that the husband was entitled to the corpse of his wife for burial, and in the condition in which death left it. But where a necessary incision is made by an attendant surgeon in a hospital, by authority of the board of health of the city in which the hospital is situated, in order to ascertain the cause of death, so that a certificate of burial can be made in obedience to the requirements of a city ordinance, where there is no removal of any limb or organ, or cutting or mutilating of either, and where such slight and necessary incision is not visible except by an inspection, and not visible at all when the body is clothed, this right of the husband is not infringed. *Farley v. Carson*, 8 Ohio Dec. (Reprint) 119, 5 Cin. Law Bul. 786. "A physician who performs an autopsy upon a dead body with ordinary care and skill, and in pursuance of the authority of the coroner or a city ordinance, is not liable in an action by the family of the deceased for the mutilation of the body without their consent." *Cook v. Walley*, 1 Colo. App. 163, 27 Pac. 950; *Young v. College of Physicians, etc.*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

Whether the hospital where the autopsy was performed was controlled by and under the management of the defendant, or whether it was under the control and management of the city of Augusta, it is manifest that no tort was committed by the surgeon who performed the autopsy. It appears that he did his duty, under the facts of the case, decently and with due regard for the rights of the husband and tenderly toward the dead. The jury so found, and the evidence fully justifies the finding. While we fully share in the sentiment eloquently expressed by counsel for plaintiff in error that the body of the dead, when the soul has departed, is still sacred to the loved ones, and that they alone are entitled to it for the last tender ministrations of love, yet we cannot lose sight of the fact that the laws of health, duly enacted by municipal authority in order that the living may be protected, are salutary and should be observed.

Judgment affirmed.

**EDWARDS v. STATE. (No. 1,318.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**ASSAULT AND BATTERY—ACTS CONSTITUTING ASSAULT.**

One who shoots with a pistol in the direction of another, situated within the range of the pistol, not intending to hit him, but intending to frighten him, is guilty of an assault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 82.]

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

George Edwards was convicted of an assault, and he brings error. Affirmed.

G. H. Aubrey and T. J. Lyon, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for the State.

**POWELL, J.** This case has been to this court previously, and the facts are reported, with the former opinion, in 4 Ga. App. 167, 60 S. E. 1033. The court in the trial now under review instructed the jury as follows: "I further charge you that if you find the defendant, without justification, shot a pistol in the direction of the witness, within carrying distance of the pistol, not intending to hit him, but intending to scare him, he would be guilty of an assault." In the former decision of the case Chief Judge Hill, speaking for the majority of the court, said: "We do not doubt that the firing of a pistol in the direction of another within a distance in which it might do execution, although with the intention of frightening only, might amount to an assault. And if one should recklessly fire a pistol in the direction of another, it might constitute an assault; for the offense may consist in putting another in fear of violence." The writer, specially concurring, said: "I think that fright is such bodily harm that to shoot in the general direction of a person, with intent to 'bluff or scare' him, is an assault." It seems, therefore, that the instruction sub judice is directly in accord with the views of the entire court as expressed in the former decision.

Judgment affirmed.

**IVEY v. STATE. (No. 1,231.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. WITNESSES—SUBPENA—REQUISITES—NON-RESIDENT WITNESSES—COUNTERSIGNING BY JUDGE OR SOLICITOR GENERAL—NECESSITY.**

An ordinary subpoena, signed by the clerk and issued on behalf of the defendant in a criminal case, is sufficient to compel the attendance of a witness from any portion of the state. It is not required that subpoenas for the defendant's witnesses residing out of the county of the prosecution shall be countersigned either by the presiding judge or the solicitor general.

**2. JURY—INCOMPLETE PANEL—WAIVER.**

If a panel of less than 48 jurors is put upon the prisoner, and he does not challenge the array, but proceeds with the selection of the jury,

he cannot thereafter, as a matter of right, demand the filling of the panel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 513.]

**3. CRIMINAL LAW—EVIDENCE—CONFESSION MADE PENDING ILLEGAL ARREST.**

A voluntary confession or incriminatory statement is not inadmissible merely because it was made pending an illegal arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Appeal and Error, § 1170.]

(Syllabus by the Court.)

Error from Superior Court, Warren County; J. N. Worley, Judge.

Tutt Ivey was convicted of knowingly uttering a forged check, and he brings error. Reversed.

M. L. Felts, for plaintiff in error. David W. Meadow, Sol. Gen., and E. P. Davis, for the State.

**POWELL, J.** Tutt Ivey was prosecuted for knowingly uttering a forged check. He presented at the Citizens' Bank of Warrenton a forged check, purporting to be signed by one of its customers, payable to Will Smith, and indorsed in blank in the name of Will Smith. There was evidence from which the jury might have found that the defendant himself committed the forgery, as well as uttered it; but he set up that he got the check innocently from Will Smith at Macon, Ga., in the presence of John Ivey, and that Will Smith had gone on to Tampa, Fla., but John Ivey was still at Macon. He made a motion for continuance on the ground that he had placed a subpoena in the hands of the sheriff of Warren county for John Ivey, and that by reason of the fact that the sheriff had not served the subpoena the witness was absent. It appears from the note of the presiding judge that this motion for continuance was overruled on the ground that the subpoena was not countersigned by the judge or by the solicitor general. If the judge had placed the exercise of his discretion on the ground that the showing was otherwise deficient, we might not reverse his judgment; but the reason given for refusing to grant the continuance is entirely insufficient. There is no law requiring the signature of the judge or of the solicitor general to a subpoena for the attendance of a nonresident witness for the defendant. Pen. Code 1895, § 1114, provides that "no subpoena for a nonresident witness for the state shall be issued, unless signed by the clerk of the court and the solicitor general of the circuit." As to nonresident witnesses for the state this is mandatory. *Harris v. Early County*, 96 Ga. 186, 22 S. E. 704. Pen. Code 1895, §§ 1115 to 1117, inclusive, relate to the method of computing and collecting the fees of nonresident witnesses subpoenaed on behalf of the state. Section 1118 is as follows: "The foregoing provisions of this article shall apply to the defendant's witnesses when, in the discretion of the presiding judge, the end of justice may demand it."

An examination of the statutes and the amendments to statutes on which these code sections are based will disclose that the words "foregoing provisions," found in section 1118, apply only to the three sections immediately preceding, and not also to section 1114 (compare the act approved August 1, 1879 [Laws Ga. 1878-79, p. 66], with the act approved October 8, 1879 [Laws Ga. 1878-79, p. 47]); that is to say, it simply provides that the judge may require the fees of nonresident witnesses for the defendant to be paid by the county at the rate and in the manner prescribed as to state's witnesses. This is in general done by an order, passed by the judge after the witness has attended and he has satisfied himself from an investigation into the facts that there has been no collusion between the witness and the party to have the former subpoenaed for the purpose of making a claim for fees, and that the defendant is unable to pay the fees (or under the particular circumstances should not be put to the injustice or hardship of doing so), and that the substantial justice of the whole situation requires that the county, and not the witness or the defendant, should pay the amount of expense thus incurred. In some cases, for instance, where the judge has information in advance that the witness is too poor to pay his expenses in coming to the trial and his testimony is important, it is expedient and altogether legal for the court to order that the witness be subpoenaed for the defendant at the expense of the county. Primarily, of course, the defendant is chargeable with the fees of his own witnesses. He is not chargeable, however, unless he is convicted. *Howell v. Blackwell*, 7 Ga. 443; *Roberts v. State*, 72 Ga. 677; Const. art. 1, § 1, par. 10 (Civ. Code 1895, § 5707). It must be remembered that the Constitution guarantees that every person charged with an offense against the laws of this state "shall have compulsory process to obtain the testimony of his own witnesses." Civ. Code 1895, § 5702. The ordinary process is a subpoena signed by the clerk. Certain rare cases, as where the witness is a prisoner or a convict, are the exceptions. A subpoena in a criminal case is sufficient to compel the attendance of a witness from any part of the state.

The requirement that the solicitor general shall countersign subpoenas for nonresident witnesses for the state is a salutary provision for he is the state's counsel and is informed as to what witnesses are essential to the establishment of the state's case. As to the prisoner's defense this officer, however, has an adverse relation. Not he, but the prisoner and his counsel, should determine what witnesses will be needed in the defense. It would be unreasonable to hold, in the absence of clearest legislative declaration to the contrary, that the defendant, in order to enjoy his constitutional right of compulsory process

for the attendance of such of his witnesses as live out of the county, should inform the state's counsel of the names of these witnesses and disclose to him the materiality of their testimony, and that even the very privilege of compulsory process itself should be dependent upon the state's counsel's liberality, or even discretion, in approving the subpoenas. We seriously doubt that such a limitation upon the guaranteed compulsory process could be upheld as against proper constitutional attack. In the language of an old-time lawyer, not a solicitor general: "The state has vested rights; but the defendant has some rights."

2. A panel of 25 jurors was put upon the prisoner. So far as the record discloses he made no objection—in no wise challenged the array. The record being silent on the question, it will be presumed that the panel was put upon the prisoner with the ordinary formality. *Ruden v. State*, 73 Ga. 567. Just before the panel was exhausted he demanded the full panel of 48. The court refused this demand and put the subsequent jurors upon him in small panels. Certainly the prisoner is entitled to have every panel put upon him in the manner prescribed by law, unless he waives the formality; and the first panel should consist in a felony case of 48 jurors. This is a valuable right, and will be enforced by the courts. *Cochran v. State*, 62 Ga. 731. We digress to say that the opinion by Judge Bleckley in the case just cited should be read periodically by every judge and lawyer. We sometimes become impatient with what we call the technicalities of the law. To read this opinion brings us back to a true appreciation of what a noble thing it is to obey the law as it is written.

To return to the discussion: The putting on of the panel may be waived expressly or by implication. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64. If the panel does not contain the requisite number of jurors when it is put upon the defendant, the law prescribes, in Pen. Code 1895, § 972, his sole remedy. He may challenge the array. If he does not challenge the array, no other method of complaint as to the deficiency of the panel is open to him. *Jordan v. State*, 22 Ga. 546; *Thomas v. State*, 27 Ga. 287; *Moon v. State*, 68 Ga. 695. If the jury cannot be made up from the first panel, "the court shall continue to furnish panels of such number of jurors as the court in its discretion may think proper, until a jury is obtained." Pen. Code 1895, § 858.

3. A voluntary confession or incriminating statement is not inadmissible merely because it was made pending an illegal arrest. *Eaker v. State*, 4 Ga. App. —, 62 S. E. 99.

Solely for the error dealt with in the first division of this opinion, the judgment is reversed.

Judgment reversed.

**SANDERS v. STATE. (No. 1,820.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**CRIMINAL LAW—CONSENT OF INJURED PARTY.**

The decision in this case is controlled by the ruling in *Holsey v. State*, 4 Ga. App. 453, 61 S. E. 836. The evidence did not authorize the verdict of guilty.

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Gordon Sanders was convicted of crime, and brings error. Reversed.

Smith & Foy, for plaintiff in error. W. J. Wallace, Sol., for the State.

**RUSSELL, J.** Judgment reversed.

**DANIEL v. STATE. (No. 1,296.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**DISTURBANCE OF PUBLIC ASSEMBLAGE—PUBLIC WORSHIP.**

No reversible error appears.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

John Daniel was convicted of disturbing public worship, and brings error. Affirmed.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

**POWELL, J.** The only exception is to an instruction of the court to the jury in the following language: "It is not necessary for a defendant, charged with an offense like this, to go into the church to disturb it, or even to go on the church grounds to disturb the congregation. If, either in the church or outside of it, he is guilty of any of the conduct defined in the section I have just read to you (section 418 [of the Penal Code of 1895]), which actually does disturb a congregation from the very beginning of their assembling until they are finally dispersed, any member of the congregation, whether one, or two, or ten, or five hundred, or a thousand, if he is guilty of such conduct as disturbs people who are assembled to worship, then this offense is made out." While we cannot approve the instruction as altogether suitable for a model, yet, when it is carefully analyzed, it shows no reversible error as applied to the facts of the present case.

Judgment affirmed.

**GRAHAM v. MASSENGALE ADVERTISING AGENCY. (No. 1,182.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING.**

It is not error to strike a plea in abatement which is filed to an action brought upon an unconditional contract in writing and is based upon the pendency of a suit on an open account between the same parties. Especially is this

true where it appears that the account, the subject-matter of the prior suit, has been settled by the defendant without any agreement as to the costs, and where, in the absence of an agreement as to the payment of costs, the plaintiff's liability for the costs, if any, ended, and the defendant became by law liable therefor.

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by the Massengale Advertising Agency against F. R. Graham. Judgment for plaintiff, and defendant brings error. Affirmed.

E. S. Longley, for plaintiff in error. Donaldson & Donaldson, for defendant in error.

**RUSSELL, J.** All of the questions raised by the writ of error are abandoned by the plaintiff in error in his brief, except the assignment of error which insists that the court erred in striking the defendant's plea in abatement. In addition to what we have said in the headnote, it is only necessary to state that the Massengale Advertising Agency, having brought an action against the plaintiff in error to recover upon an open account, effected a settlement with him, by the terms of which he paid \$100 in cash and gave certain promissory notes in settlement of the remainder of the account. These promissory notes were the basis of the second suit. It appears that both suits were open upon the docket at the time that the plea in abatement was filed, but it is uncontroverted that the second suit was upon the notes given in settlement of the first. It is clear, where one settles an action instituted against him, that, in the absence of any agreement between the parties to the contrary, the costs in the case become chargeable against him. The case, therefore, does not fall within the provisions of section 5043 of the Civil Code of 1895, which provides that, where there is a dismissal or nonsuit, the plaintiff cannot recommence his action without paying costs. In this case the plaintiff did not dismiss his action, and his right was to have a judgment for the costs against the defendant, which the court properly allowed entered *nunc pro tunc*. This being true, there was no merit in the plea in abatement.

Judgment affirmed.

**CRIBE v. STATE. (No. 1,269.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. INDICTMENT AND INFORMATION—ISSUES—EVIDENCE—DATE OF OFFENSE.**

The state in its proof is not restricted to the date alleged in the indictment; and a conviction for crime is authorized, where the offense is shown to have been committed on any day, prior to the indictment, which is within the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 548.]

**2. WITNESSES—CREDIBILITY—EVIDENCE.**

Proof of reputation for lewdness may be offered to discredit the testimony of a female wit-



ness; but the jury may believe such a witness to be truthful, although not virtuous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1121.]

### 3. CRIMINAL LAW—JUDICIAL NOTICE.

The courts may take judicial cognizance of the fact that lager beer is an intoxicating malt liquor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Appeal and Error, § 716.]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

I. M. Cripe was convicted of an illegal sale of liquor, and brings error. Affirmed.

E. S. Fuller, for plaintiff in error. O. H. Elkins, Sol., for the State.

RUSSELL, J. Cripe was convicted, on a special presentment, for selling intoxicating liquor. He excepts to the judgment overruling his motion for new trial. The arguments presented in support of the general grounds of the motion are that the presentment charged the offense to have been committed on the 3d of July, 1907, whereas all of the evidence shows that the sale, if any, was made on the 4th of July, and that the only evidence of the sale of whisky is from two women, whom the evidence shows to be of lewd character.

1, 2. These points are so well settled by authorities that we deem even the reference to them which we have made in the headnotes almost unnecessary.

3. Another point which is presented is that the evidence fails to show that the beer which was sold was intoxicating. The authorities differ much as to whether judicial notice shall be taken of the fact that beer is intoxicating. The stronger current of authority is that, where the allegation and the proof are confined to beer, evidence must be adduced to show that such beer is intoxicating. This is due to the fact that there are many beers, such as persimmon beer, ginger beer, spruce beer, and others, which are not generally supposed to be intoxicating. However, one of the witnesses in this case testified that the beer in question was lager beer. Lager beer is so generally known to be an intoxicating malt liquor that the courts can as well take judicial notice of its qualities in that regard as of any other fact of common notoriety which the courts, in common with every other well-informed person, can be presumed to know. See *Black on Intoxicating Liquors*, § 17; *Enc. of Evidence*, 675, D; *Tinker v. State*, 90 Ala. 647, 8 South. 855; *Waller v. State*, 38 Ark. 656; *Netso v. State*, 24 Fla. 363, 5 South. 8, 1 L. R. A. 825; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193; *State v. Goyette*, 11 R. I. 592; *State v. Gravelin*, 16 R. I. 40, 16 Atl. 914; *State v. Kibling*, 63 Vt. 636, 22 Atl. 613; *State v. Church*, 6 S. D. 89, 60 N. W. 143.

We are aware that the Supreme Court of New York takes the contrary view, holding

that the question should be left with the jury. In our own state, in *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350, the question as to whether the court should take judicial notice that beer was an intoxicating liquor was not before the court, nor was lager beer involved. The liquor there under consideration was pure alcohol. We think, however, that from the reasoning in the *Snider Case*, we can safely deduce that the court may take judicial cognizance of the fact that lager beer is intoxicating, because it is a fact, known to every man of common understanding, that what is ordinarily known as lager beer will intoxicate, and also the further rule that, where a beer is not well known and recognized as an intoxicant, proof that it will intoxicate should be required.

The verdict against this defendant can stand upon proof of the sale of whisky, though the date of the sale is not more definitely stated than that it took place in the last two years; but the verdict is equally as well supported by proof of the sale of lager beer on the 4th of July, because we conceive that judicial knowledge of the intoxicating quality extends as much to lager beer as to whisky.

Judgment affirmed.

### THOMPSON v. STATE. (No. 1,308.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

MASTER AND SERVANT—CRIMINAL PROSECUTIONS FOR FRAUDULENT BREACH OF CONTRACT—INTENT TO DEFRAUD.

The evidence affirmatively shows that there was no fraudulent intention on the part of the defendant when he obtained from the prosecutor the money on his labor contract. Consequently there was no violation of the act of the General Assembly of 1903 (Acts 1903, p. 90), and the verdict of guilty was contrary to law. *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 75.]

(Syllabus by the Court.)

Error from City Court of Quitman; Jno. G. McCall, Judge.

P. Thompson was convicted of obtaining money upon a fraudulent promise to perform services, in violation of the act of 1903 (Acts 1903, p. 90), and he brings error. Reversed.

J. D. Wade, Jr., for plaintiff in error. J. W. Edmondson, Sol. Gen., for the State.

HILL, C. J. Thompson was convicted of a violation of Acts 1903, p. 90, making criminal the obtaining of money or other thing of value upon a fraudulent promise to perform services. He made a motion for a new trial on the general grounds, and the judgment overruling the same is the error assigned.

The evidence clearly shows the contract and the obtaining of the money by the accused. It is equally clear from the state's evidence that the accused, at the time he ob-

tained the money from the prosecutor on his promise to perform the service according to his contract, did not have any criminal intention. A witness for the state, who employed the defendant subsequently to his contract with the prosecutor, testified that the defendant stated to him that he owed the prosecutor the amount of money which the prosecutor had advanced to him, and refused to accept employment until this money was repaid. The witness loaned him the money to repay the prosecutor, and the accused went to the home of the prosecutor for that purpose, but, failing to find the prosecutor, returned to the witness, and, stating that fact, gave the money to the witness on his express promise to deliver it to the prosecutor. The witness did not perform his promise, but the defendant did not know that he had not done so until his arrest. The subsequent conduct of the defendant, as above stated, fairly and reasonably construed, refutes the existence of an intention to defraud when he obtained the money from the prosecutor on his contract to perform services, and for this reason the verdict against him was contrary to law, and a new trial should have been granted.

Judgment reversed.

#### STRINGFIELD v. STATE. (No. 1,294.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

##### 1. CRIMINAL LAW—VENUE—EVIDENCE.

Proof that an alleged offense was committed in a designated town or city will not suffice to establish the fact of venue and consequent jurisdiction in a court whose jurisdiction is coextensive with a county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1281.]

##### 2. DRUNKARDS—CRIMINAL PROSECUTION—EVIDENCE.

(Per Russell, J.) In a prosecution for drunkenness upon a public street or highway, the evidence must show that the street or highway in question had been laid out by the city or used by the public as such, and had become such by legislative enactment or enactment of a city council under its charter powers, or by dedication, prescription, or otherwise.

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Charlie Stringfield was convicted of drunkenness, and brings error. Reversed.

W. W. Bennett and H. L. Williams, for plaintiff in error. V. E. Padgett, Sol. Gen., for the State.

RUSSELL, J. Two points are raised by the present writ of error. The plaintiff in error insists, first, that his conviction was unsupported by the evidence, because there was no proof of the venue. The first witness for the state testified that the accused was

drunk in the city of Baxley. To our minds this would seem to be sufficient proof of the venue, for it would seem that the court could take judicial knowledge of the fact that the city of Baxley is in Appling county, especially when the trial is proceeding in that city and in that county. The very act of incorporation of the city of Baxley declares it to be in Appling county, and all of Appling county is within the jurisdiction of the city court of Baxley. In a previous case we have suggested the propriety of the passage of an act which would preclude any question as to the jurisdiction of the trial court being raised in an appellate court unless it were first raised upon the trial in the lower court. Until the passage, however, of some such law, this court must be controlled, upon the subject of the venue, by the rulings in *Moye v. State*, 65 Ga. 754 (in which it was held that proof that the crime was committed in the city of Americus was not sufficient to establish the fact that the alleged crime was committed in Sumter county), in *Cooper v. State*, 106 Ga. 119, 32 S. E. 23 (in which it was held that proof that an act was committed in Lawrenceville did not establish that it was done in Gwinnett county), and in *Murphy v. State*, 121 Ga. 142, 48 S. E. 909 (in which it was held that like proof that the defendant did a criminal act in the city of Atlanta did not establish the fact that the offense was committed in Fulton county). All of these cases, as well as our decision in *Smith v. State*, 2 Ga. App. 418, 58 S. E. 549, are exactly parallel with the case at bar.

2. It is also insisted that the evidence was insufficient because it failed to show that the public place where the defendant was alleged to have been intoxicated was a public street or highway. The evidence upon this subject was that the defendant was drunk "on the public streets in the city of Baxley, on Comas street and on Railroad street." The majority of the court think this proof sufficient. In the opinion of the writer, however, this opinionative evidence is insufficient to authorize a jury to reach the conclusion that the place in question was really a public street or a public highway. In *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 235, we considered at some length the different methods in which public highways may be established; but we held, as I think we should again hold, that the evidence must disclose that the character of the street or road as a public highway is to be determined, not by the mere opinion of witnesses as to its publicity or continuous use, but by the methods by which the public highway was created. For the reason first stated, we are unanimous that we should reverse the judgment refusing a new trial.

Judgment reversed.

**HOOD v. STATE. (No. 1,315.)**

(Court of Appeals of Georgia. Oct. 12, 1908.)

**1. CRIMINAL LAW—CERTIORARI—REFUSAL TO GRANT.**

It is error to refuse to sanction a petition for certiorari properly verified, when according to the statement of the evidence contained in the petition the finding sought to be reviewed is, for want of sufficient evidence, unwarranted.

**2. SAME—VERIFICATION OF PETITION.**

A petition for certiorari to correct errors of the criminal court of Atlanta is properly verified by an affidavit in the form contained in section 4638 of the Civil Code of 1895. In the absence of express legislation to that effect, the affidavit provided in section 765 of the Penal Code of 1895 has no reference to certioraries brought to review errors alleged to have been committed in the criminal court of Atlanta, for the reason that such right of review is dependent upon general and not special provisions of law. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Howard Hood was convicted of vagrancy, and petition for certiorari was denied by the superior court, and he brings error. Reversed.

Eugene Dickey, for plaintiff in error. Lowry Arnold, Sol., C. D. Hill, Sol. Gen., and D. K. Johnston, for the State.

**RUSSELL, J.** The plaintiff in error was convicted in the criminal court of Atlanta upon an accusation charging him with the offense of vagrancy. A petition for certiorari was presented by him to the judge of the superior court, who refused to sanction the same; and he excepts to this refusal.

1. As related in the petition for certiorari, the conviction was wholly unauthorized by the evidence submitted, and under the previous rulings of this court, when a petition for certiorari is presented to the judge of the superior court, the statements therein contained must be assumed to be true. If they be untrue, that fact is to be ascertained from the contents of the answer. The evidence in this case, as stated in the petition, shows merely that the defendant was passing through Hapeville, walking to his home at Molena, and, because one of the witnesses suspected that he might be "planning some deviltry," and two witnesses, who had never seen him before, swore that they did not know the defendant had any property and they had never seen him at work, the jury returned a verdict of guilty against the accused. No witness swore that he did not work, or that he did not have any property, and, in fact, no witness was introduced who knew or claimed to know anything about the defendant, his habits, or his financial condition.

2. The conviction being so manifestly unsupported by any evidence, we apprehend that the real reason why the learned judge of the superior court declined to sanction the petition for certiorari lay in the fact

that the defendant had not complied with the requirements of section 765 of the Penal Code of 1895, which declares that the writ of certiorari shall not be granted unless the accused shall file his affidavit stating that he has not had a fair trial and has been wrongfully and illegally convicted. It appears from the record that the petitioner for certiorari did not present the affidavit required by this Code section, and the point is insisted upon by the counsel for the State in his brief. The plaintiff in error did attach to his petition for certiorari, however, the affidavit required in section 4638 of the Civil Code of 1895, and we think that this was sufficient. The trial of which the defendant was complaining occurred in the criminal court of Atlanta. Section 765 of the Penal Code of 1895 is taken from Acts 1871-72, p. 296, § 14, and it is strictly applicable only to certioraries brought for the correction of errors committed by judges of county courts. The act creating the criminal court of Atlanta (Acts of 1890-91, p. 935) creates a court *sui generis*. It is neither a county nor a city court, and the subject of certiorari is not mentioned in the act. The right of certiorari, however, is a constitutional right, and a defendant tried in the criminal court of Atlanta certainly could not be deprived of that right by reason merely of the fact that the act constituting that court is silent upon the subject. If, then, one convicted of crime in the criminal court of Atlanta desires to bring a certiorari to correct errors in that court, as his right depends upon the general law, he must proceed to pursue his remedy under the general law upon the subject of certiorari, which prevailed prior to the passage of the act of 1871, and must file the affidavit provided in section 4638 of the Civil Code of 1895, which was taken from the act of 1857 (Laws 1857, p. 104), and which was applicable to all certioraries, whether civil or criminal. The act of 1871 provided an exception in cases arising from the county courts, and as the criminal court of Atlanta is not within that exception, and there is no special provision made therein for certioraries, the mode of procedure in applying for the certioraries must be controlled, not by the exception, but by the general law.

Many of the acts creating city courts enact that the procedure applicable to certioraries from the county courts shall be applied to writs brought to correct errors in these judicatories, and, of course, petitions for certiorari from such courts must be verified by the affidavit prescribed in section 765 of the Penal Code of 1895; but in the absence of an express enactment to this effect petitions for certiorari, even in criminal cases, unless from the county courts, are to be verified in the terms of section 4638 of the Civil Code of 1895. We are clear, therefore, that the affidavits filed by the plaintiff in error in this case were sufficient to verify his

petition for certiorari from the criminal court of Atlanta, and that to withhold sanction of the petition for certiorari upon that ground would be erroneous.

Judgment reversed.

#### KIMBERLY v. STATE. (No. 1,380.)

(Court of Appeals of Georgia. Oct. 12, 1908.)

##### 1. CRIMINAL LAW—CONTINUANCE—POWER OF COURT—DENIAL—REVIEW.

The trial judge may properly overrule a motion for a continuance, even where all the statutory requirements for procuring the presence of a witness who is absent have apparently been complied with, if a counter showing has been made by which it is satisfactorily made to appear to him that the real purpose of the continuance is merely to secure delay. The credibility of witnesses introduced in support of a motion for continuance, and upon a counter showing thereto, respectively, is to be determined by the trial judge; and his discretion in refusing a continuance, where a counter showing is made, will not be controlled, unless manifestly abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045-3049.]

##### 2. ASSAULT AND BATTERY—INSTRUCTIONS—JUSTIFICATION—DEFENSE OF CHILD.

In a case in which it appeared that the accused relied for his defense upon the right of a parent to protect his child, and in which it appeared from the evidence that his son and another young man were quarreling, it was not reversible error to charge the jury that, "in order for the parent to be justified in taking the part of his child, the child would have to be justified in what it was doing; in other words, if the child was justified in it the parent would be justified, but if the contrary appear he would not be justified," where this instruction was immediately qualified by the statement, "provided the parent knew of the want of justification in the child." As a general rule, a parent has the right to protect his child from any assault; but under the evidence in this case even the instruction given was as favorable as the defendant was entitled to receive.

##### 3. SAME—MATTERS NOT SUPPORTED BY EVIDENCE—OPPROBRIOUS WORDS.

The charge upon the subject of opprobrious words as a justification was erroneous, because not justified by evidence that opprobrious words were used. Threats of personal violence are not necessarily opprobrious or abusive, and the language used by the court, though inappropriate, suggested a defense to which the defendant was not entitled.

##### 4. CRIMINAL LAW—REQUEST FOR FURTHER INSTRUCTION BY JURY.

Where the jury, after having been charged by the court, returns into court and requests an instruction upon a specific question, it is not error for the judge to confine his instruction to the specific point suggested by the jury's inquiry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2065-2067.]

(Syllabus by the Court.)

Error from City Court of Eastman; Chas. W. Griffin, Judge.

L. C. Kimberly was convicted of assault and battery, and he brings error. Affirmed.

J. F. De Lacy, for plaintiff in error. W. M. Morrison, Sol., for the State.

RUSSELL, J. Judgment affirmed.

#### THOMPSON v. STATE. (No. 1,819.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

##### CRIMINAL LAW—NEW TRIAL—ADULTERY—EVIDENCE.

The verdict is without any evidence to support it, and is therefore contrary to law, and a new trial should have been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2298.]

(Syllabus by the Court.)

Error from Superior Court, Glascock County; J. N. Worley, Judge.

Jesse Thompson was convicted of crime, and brings error. Reversed.

B. F. Walker and F. C. Walker, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

HILL, C. J. The plaintiff in error was convicted of the offense of adultery and fornication. His motion for a new trial, based on the general grounds only, being overruled, he brings error to this court.

There was only one witness for the prosecution, and the material portion of his testimony may be summarized as follows: At the time of the alleged offense, the plaintiff in error was a married man, and was living separately from his wife; she having left him at home with four small children, offspring of a previous marriage. He was a very poor man, and was compelled to labor daily in the field, assisted in his labor alone by such of his children as were old enough to work. These children were small, the oldest a boy of 12 years of age. They were too small to keep house, and the plaintiff in error had no one to take charge of his house and give proper care and attention to his children, and the children were too young to care for themselves or each other. Under this domestic exigency he hired the woman in question to keep his house and to take care of his children. She lived in this house alone with him and the children for two or three years. Before she came to the house she had one bastard child, and while living in the house gave birth to another, and remained in the house about one year after the birth of the last child. The house was a large country house having several bedrooms, and men were in the habit of visiting at the house. The foregoing may be denominated the incriminatory circumstances; and, as modifying the force of these circumstances, whatever that may be, this witness makes the following additional statement: "I don't know anything about the crime of adultery and fornication between Jesse Thompson and Hattie Johnson. \* \* \* In the time of my visits there I never saw anything improper or wrong between these folks. All I know or saw is that they just lived there." This is all the evidence for the state. The woman in the case, as a witness in behalf of the defendant, denied his guilt. The jury of the vicinage thought that the testimony was suf-

ficient to prove beyond a reasonable doubt the truth of the accusation made against the defendant.

This court willingly bows in obedience to the voice of the jury on all questions of fact, where, after a careful search of the brief of the evidence, there is found any fact or circumstance sufficient to support the verdict. We are constrained to differ from the conclusion arrived at by the jury in this case. Giving to all the circumstances sworn to by the one witness their strongest inculpatory coloring, we unhesitatingly conclude that it falls far short of the legal standard necessary to show guilt, and that the presumption of innocence which is applicable to a case of adultery and fornication, as well as to all other criminal cases, was not overcome. The fact that the woman was of lewd character when she was employed by the defendant as his housekeeper, and that she continued her immoral conduct while an inmate of his house, and that he nevertheless retained her in his household, furnished ground for suspicion. It is probable, however, that on account of the extreme poverty of this man, and the care of four little children, his range of selection was limited. The foregoing facts, in connection with the additional fact that there was opportunity for the commission of the offense charged, probably led the jury to the conclusion of guilt; but when the evidence also shows that other men visited the house, and probably other men resided in the community who knew of the woman's character, the value of these circumstances, indicating improper relations between the defendant and the woman, is greatly diminished. Certainly there is no evidence whatever to indicate that the woman was exclusive in the bestowal of her favors on the defendant. The fact that she gave birth to an illegitimate child while living in the house with the defendant was probably regarded by the jury as a strong circumstance indicating his guilt; but, in view of her social intercourse with other men who came to the house, the inculpatory force of this circumstance in locating the guilty man must be considered as inconclusive. Added to this rational view of these facts, we have the further declaration by the only witness for the state that he had never seen anything improper or wrong "between these folks."

In cases where circumstantial evidence is relied upon to prove the fact of guilt, the law, in its wisdom and humanity, demands that this evidence and these circumstances shall be sufficient to exclude every other reasonable hypothesis than that of guilt; and under all the facts of this case, and all the inferences fairly deducible therefrom, the evidence falls far short of this mandatory requirement of the law. We therefore feel constrained to set aside this verdict, notwithstanding its approval by the trial court, because a careful examination of the evidence satisfies us that the conclusion of the

jury is wholly without evidence to support it and is based alone on suspicion, which while not entirely without foundation, is insufficient and unsafe, when considered as proof.

Judgment reversed.

# ATLANTIC COAST LINE R. CO. v. A. COHN & CO. (No. 1,112.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

## 1. CERTIORARI — REVIEW — REFUSAL OF CONTINUANCE.

An exception in a petition for certiorari that the lower court erred in refusing to continue the trial of the cause presents nothing for the consideration of the reviewing court, when it appears that no motion was made at the trial to continue the case; and, should the petition for certiorari contain no other assignment of error, it should be dismissed.

## 2. JUSTICES OF THE PEACE — AGREEMENT FOR CONTINUANCE — EFFECT.

The fact that a magistrate or a judge has extrajudicially granted a party's sole counsel leave of absence, or has personally agreed to continue the trial of the case, does not require the grant of a continuance; and especially is there no abuse of discretion in proceeding to try the cause, where the personal extrajudicial statement or promise that the cause would be continued is made, not by the judge presiding at the time of the trial, but by his predecessor in office, and no motion for a continuance is presented to the court.

## 3. SAME.

A magistrate, when not presiding in court, does not act judicially; and one who absents himself from court upon a promise, made by the magistrate when not actually presiding, that a leave of absence will be granted, or that the cause will be continued, does so at his own risk.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action in a justice's court by A. Cohn & Co. against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and the railroad company filed its petition for certiorari. Certiorari dismissed, and the railroad company brings error. Affirmed.

Pope & Bennet and R. G. Hartsfield, for plaintiff in error. Russell & Hawes, for defendant in error.

RUSSELL, J. The plaintiff in error excepts to the dismissal of its certiorari. It appears from the allegations of the petition for certiorari, as admitted in the answer to be true, that Cohn & Co. filed a suit in the justice's court against the Atlantic Coast Line Railroad Company, returnable to the February term, 1907. The suit was filed and the summons was issued by W. G. D. Tonge, notary public and ex officio justice of the peace. The defendant filed its defense at the first term, and the case was appealed by consent to a jury in the justice's court. Thereafter the case seems to have been continued at the March, April, May, and June terms of the court. At the May term, 1907, of the superior court of Decatur county, J. H. Boyett was, upon the recommendation of the grand

jury, appointed notary public and ex officio justice of the peace in place of W. G. D. Tonge. Boyett was commissioned prior to the July term, 1907, of the justice's court, and presided at the trial and at the rendition of the verdict sought to be reviewed and set aside by the certiorari. The case was tried and verdict rendered in favor of the plaintiff on July 22, 1907. On that day, before the call of the docket, Boyett, the notary public and ex officio justice of the peace, was informed that R. G. Hartsfield, Esq., the counsel for the Atlantic Coast Line Railroad Company, was sick and under treatment; that he was not to be present on that day; and that he had leave of absence, applying to the case of Cohn & Co. v. Atlantic Coast Line Railroad Company. To this statement, made by Perry, an assistant in Hartsfield's office, Boyett replied that, as Hartsfield had no leave of absence from him, he would call the case and have it tried, and thereafter, in the absence of petitioner's attorney and of its witnesses, the magistrate did call the case for trial, and had a jury impaneled and sworn, who, after hearing the testimony in behalf of the plaintiff, returned a verdict against the petitioner in certiorari.

It is uncontradicted that on the 8th of July, two weeks before the July term, 1907, of the justice's court at which the verdict was rendered, Hartsfield, who was the sole attorney for the defendant, the petitioner in certiorari, went to W. G. D. Tonge, who was still holding the position of notary public and ex officio justice of the peace (Boyett not having been qualified), and stated to him that he was in bad health, that his physician had advised him to leave his business and go away for a while, and that his physical condition was such that he would not be able to attend the trial of the case, and for this reason he asked a leave of absence from the July term of the court, to apply to said case, and that the case be continued for the term. Tonge granted the attorney the leave of absence requested, and agreed to continue the case. Upon the hearing in the superior court the judge dismissed the certiorari upon the ground that "the leave of absence granted by W. G. D. Tonge was not binding on the plaintiffs in this case, for the reason that said magistrate, Tonge, was without any authority to grant leave of absence from the term of the justice's court after his term of office had expired."

1, 2. We think the judge properly dismissed the certiorari. Even if Tonge, by reason of Boyett's failure to be qualified, had still been presiding justice at the July term of the justice court, the party to whom leave of absence had been granted could have relied upon it only at his peril, and certainly Boyett, the magistrate who succeeded Tonge, was not bound by the extrajudicial leave of absence granted by his predecessor. Furthermore, the judge of the superior court could not review the exercise of judicial discretion by the magistrate, Boyett, because no motion had

been made to continue the case when it was called in its order for trial. Boyett's statement that he had not given Mr. Hartsfield any leave of absence, and that thereafter the case would be tried, was itself an extrajudicial utterance; but the party who gave Boyett the information that Mr. Hartsfield was relying upon a leave of absence was thereby at least put upon notice of the necessity of making a legal showing for the continuance of the case, if such showing really existed. If after Boyett's statement that the case, when called, would be tried, a showing had been made when the case was called that Mr. Hartsfield was absent, that his absence was due to providential causes, and that he was sole counsel for the defendant company, and if, after this showing, the justice's court had overruled the motion for continuance, the superior court would have had something to review. Nothing is better settled than that a reviewing court can only review actual occurrences in the lower court, and therefore a motion for continuance must have been made in the justice's court, before the judge of the superior court could determine whether there was an abuse of discretion in refusing a continuance.

The assignment of error in the petition for certiorari assumes that what transpired between Magistrate Tonge and Mr. Hartsfield, and between Magistrate Boyett and Mr. Perry was equivalent to a motion for continuance, and that, therefore, the trial of the case in Mr. Hartsfield's absence, after Tonge had granted the leave of absence on account of sickness, and after Magistrate Boyett had been informed of that fact, was equivalent to the overruling of a motion for continuance actually presented to the justice's court. All of the authorities forbid our concurring in this view. In the first place, as we have stated above, the superior court, in hearing certioraries, is restricted to the errors alleged to have been committed on the trial in the lower court, and the record fails to show that (even after the expression made by Boyett of his individual views) any motion was made to continue the case. See *Marchman v. Todd*, 15 Ga. 25 (6); *Knowles v. Coachman*, 109 Ga. 356, 34 S. E. 607; *Harrison v. State*, 83 Ga. 129, 9 S. E. 542; *Camp v. Morgan*, 81 Ga. 740, 8 S. E. 422. Furthermore, neither the fact that Tonge, out of court, had granted the attorney leave of absence, or that that fact was communicated to his successor, Boyett, afforded legal ground for continuance of the case. An exception in a petition for certiorari that the lower court erred in refusing to continue the trial of the cause presents nothing for the consideration of the reviewing court, when it appears that no motion was made at the trial to continue the case; and should the petition for certiorari contain no other assignment of error it should be dismissed. The violation of a leave of absence extrajudicially granted before court is not, however, such an abuse of discretion as could

be reviewed by the superior court or by this court, even if a showing had been made and a motion for continuance had been predicated upon this ground.

3. A magistrate, when not presiding in court, does not act judicially, and one who absents himself from court upon a promise made by the magistrate, when not actually presiding, that a leave of absence will be granted, or that the cause will be continued, does so at his own risk. Civ. Code 1895, § 4133. In *Ballard Transfer Co. v. Clark*, 91 Ga. 234, 18 S. E. 138, it appears that the magistrate, while seated on the bench, informed counsel that his case had not been called and set for hearing for a named day. As a matter of fact the case had been called and set for the 12th of September. The defendant's counsel was misled by the statement of the magistrate, and stayed away from court on the 12th of September, when the case was tried and disposed of. Passing upon this state of facts, Chief Justice Bleckley says: "A magistrate, when not presiding in court, does not act judicially in answering questions put by a counsel, on court day, whether or not a given case has that day been called, and counsel, shaping his conduct by such answer, must take the risk of its being correct." In *Watkins v. Ellis*, 105 Ga. 797, 32 S. E. 181, the party contended that the magistrate had actually told him that he need not attend court, but that the case would be continued, and he relied on this statement and did not attend, and judgment was rendered against him. The only difference between the *Watkins* case and this case, even conceding that Tonge had the right to bind the conduct of his successor, Boyett, is that in the *Watkins* case the magistrate did not admit, as is done in this case, all of the allegations of the petition, and a traverse was filed to his answer. In regard to this difference, however, Judge Cobb, delivering the opinion, says: "It is unnecessary to determine whether the traverse was properly stricken on demurrer, as we propose to deal with the case just as if the answer of the justice had contained what was contended by the defendant to be the truth of the case. Dealing thus with the case, we are clear that no other judgment than the one overruling the certiorari should have been reached. The Code declares that 'all cases before a justice of the peace stand for trial at the time and place designated in the summons, and shall be then and there tried unless continued according to law.'" He then cites the cases of *Ballard v. Clark*, supra, and *Bostain v. Morris*, 93 Ga. 224, 18 S. E. 649, and says: "It would seem, therefore, that for a stronger reason a statement made by a magistrate when not actually presiding in court, and not even on a court day, would not be such a judicial act as would authorize a party to absent himself from a term of the court thereafter held, and that, if he relied upon the statement of the magistrate, he would do so

at his peril. The plaintiff would have a right to insist upon the trial of his case at the term at which it was returnable, notwithstanding the statement by the justice, made out of court, on a day other than a court day, that a continuance would be allowed the defendant." The fact that in the *Watkins* case the promise to continue was made to a party and leave of absence was granted him, and that in the case at bar the leave of absence was granted to the counsel, cannot in any wise affect the principle.

There was no error in overruling the certiorari, and the judgment is affirmed.

#### BARLOW v. STATE. (No. 1,369.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

#### INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

This case is controlled by the cases of *Billups v. State*, 107 Ga. 766, 33 S. E. 659, *Grant v. State*, 87 Ga. 285, 13 S. E. 554, *Paschal v. State*, 84 Ga. 326, 10 S. E. 821, and *Tompkins v. State*, 2 Ga. App. 639, 58 S. E. 1111.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Ben Barlow was convicted of illegal sale of liquor, and he brings error. Affirmed.

Marlin & Hoyl, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

POWELL, J. Judgment affirmed.

#### JENKINS v. STATE. (No. 1,273.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

#### 1. INTOXICATING LIQUORS—KEEPING LIQUOR AT "PLACE OF BUSINESS"—"AT"—"BUSINESS."

The phrase "at their place of business," appearing in the general prohibition statute of 1907 (Acts 1907, p. 81, § 1), includes in its meaning the immediate room or place in which the business in question is conducted, also any nearby room or place used by the proprietor in connection with the business, or in such a relation to the actual place of business as to indicate that the nearby room, compartment, etc., is a convenient place which the proprietor would probably use for keeping therein such liquors as he might desire to furnish others for the purpose of inducing trade, or for keeping therein liquors intended for unlawful sale under cover of the business carried on in the main place.

(a) The preposition "at" has a great relativity of meaning, conforming readily to the nature of the thing which constitutes its grammatical object and to the principal notion in the mind of the person using it. It generally includes in its meaning all that "in" would, but not quite as much as "in and near" would (citing *Words and Phrases*, vol. 1, p. 595; vol. 8, p. 7585).

(b) A "place of business," within the purview of the state prohibition law (Acts 1907, p. 81, § 1), means a place devoted by the proprietor to

the carrying on of some form of trade or commerce.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 915-923; vol. 8, pp. 7593, 7594; vol. 6, pp. 5390-5392.]

**2. ARREST—NECESSITY OF WARRANT—EVIDENCE—SEIZURE OF LIQUORS.**

An officer, who discovers a person keeping intoxicating liquor at his place of business, may arrest him without a warrant, and may seize the liquor for the purpose of using it as evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 151.]

**3. INDICTMENT AND INFORMATION—INDICTMENT UNDER TWO NAMES—EVIDENCE.**

Where a defendant is indicted under two names, alleged by an *alias dictus*, it is necessary only that the state should show that he is commonly known by either of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 539.]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Henry Jenkins, alias Henry Jinks, was convicted of violation of the prohibition law, and brings error. Affirmed.

M. U. Mooty and Gaffney & Greer, for plaintiff in error. Henry Reeves, for the State.

POWELL, J. Jenkins, by his friends familiarly called "Jinks," had a little store in La Grange, and to the rear partially cut off by a partition wall, was a smaller room, in which no goods were usually bought and sold, but in which he kept coca-cola and stored "plunder." For some reason—he does not explain why; but, then, some officers are naturally suspicious of some folks—the chief of police of the city suspected that Jinks was occasionally selling a little liquor. So on a certain Saturday afternoon the chief of police, sauntering leisurely in the neighborhood of the store, was "given the wink" by some one who had been stationed to watch, and immediately thereafter, going into the store and into the back room, found a man and two women standing in the presence of a two-gallon jug and some whisky glasses. The jug was empty; but the mouth of it was still wet, and smelled of the corn whisky which had just passed through it. The glasses, too, were moist, and in the bottom of one of them remained about a teaspoonful of corn whisky. Upon the interruption of the policeman, the party explained that they were drinking cider. The suspicious gaze of the officer fell also upon a closed box, the contents of which were guarded with a lock; so he asked Jinks if he might see inside the box, to which Jinks replied that he might. When Jinks unlocked the box, another small bottle of whisky was found therein. There was also in the store a trap-door, leading into a cellar. In the cellar was found a number of empty jugs. The officer had no warrant for the defendant's arrest and no search warrant for his premises. The testimony of

the defendant's witnesses was to the effect that he, together with a party of friends, had ordered some whisky on joint account; that on the night before it had arrived in the defendant's absence, and they had divided it, and had left the defendant's share in his back room. The defendant himself explained the presence of the liquor in the box by saying it was a little he was keeping for his wife. We may say, in passing, that the wives of this country must be hard drinkers, if all the explanations of husbands as to their possession of liquors is to be taken as true. The defendant was put on trial for violating the prohibition act of 1907, by having and keeping liquor on hand at his place of business.

1. Counsel for the plaintiff in error contends that the having of the liquor in the back room, especially so far as it was kept in the locked box, did not constitute a having or keeping on hand of liquor at the defendant's place of business. Indeed, to quote directly from his brief, he says: "The jury evidently proceeded upon the idea that to keep on hand at one's place of business means simply to have at one's place of business, or around one's place of business, or near one's place of business, which is not the law." He further contends that the law is not violated unless the keeping is a public keeping at a public place of business, and that to have it locked in a box is not so to keep it; that, before the law is violated, the liquor must be accessible to the customers of the place of business. The definition of what is a place of business is a matter of law, for the determination of the court; the finding as to whether any particular place falls within the definition is a matter of fact, for the determination of the jury, except in those cases where the facts necessary to constitute the particular place a place of business are conceded to exist. *Tooke v. State*, 61 S. E. 917, 4 Ga. App. 495; *Roberts v. State*, 60 S. E. 1082, 4 Ga. App. 207. The same is true of the word "at," as employed in the phrase of the prohibition act, "keep on hand at their place of business." "At" is not a word of precise and accurate meaning, or of clean, clear-cut definition. It has a great relativity of meaning, shaping itself easily to varying contexts. The standard authorities say that it sometimes means "in" or "within," and sometimes "in and near." See Words & Phrases, vol. 1, pp. 595 et seq.; vol. 8, p. 7585. The Supreme Court in *Minter v. State*, 104 Ga. 753, 30 S. E. 992, said: "The word 'at' is somewhat indefinite. It may mean 'in' or 'within,' or it may mean 'near.' Its primary idea is nearness, and it is less definite than 'in' or 'on.' 'At' the house may be 'in or near' the house. *Webst. Dic.* The word 'at' is used 'to denote near approach, nearness, or proximity.' *Richardson's Eng. Dict.* It is a relative term, and its signification depends largely upon the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it



to surrounding objects. 3 Am. & Eng. Enc. of L. 168, and cases cited in note 1."

We think that in the context before us it means more than "in" and less than "in and near." It includes all that "in" would include, and includes less than all that "in and near" would include. That which would be designated if the word "near" were used is not designated by the word "at," unless it is associated in some relationship with that which would be thought of if the word "in" were used; but where between what is "near" and what is "in" there is an association and a relationship to the principal notion in the mind of the user of the language, the things so associated and related are properly referred to by the use of the word "at." The phrase "at their place of business," as used in the prohibition statute, includes the immediate room or place in which the business is conducted; also all the nearby surroundings, so far as they are connected with that room or place in any of those associations or relationships which have reference to the principal notion which was in the legislative mind. One of the notions in the legislative mind was that to allow persons to keep liquors at their places of business would afford them the opportunity of using the liquors to induce trade—a thing already forbidden by law. Another notion, we infer, was that the maintenance of an apparently legitimate business might be used as a cloak to conceal the carrying on of an unlawful traffic in liquors. Of course, a place of business is also a quasi public place; and those considerations which led the Legislature to forbid the having of liquors in other public places, and which were referred to in *Tooke's Case*, supra, were likewise presumably in contemplation when the phrase in question was employed. So that, to progress further toward a practical definition, we may say that the phrase "at their place of business," as used in the prohibition statute, includes in its meaning the immediate room or place in which the business is conducted; also any nearby room or place owned or used by the proprietor in connection with the business, or in such a relationship to the actual place of business as to make the nearby room, apartment, etc., a convenient place which the proprietor would probably use for keeping such liquors therein as he might desire to furnish others to induce trade, or for keeping therein liquors intended for unlawful sale under cover of the business carried on in the main place. The reasonableness and the probability of the nearby room or place being used for either or both of the purposes indicated is to be judged (usually by the jury) from all the surrounding circumstances, and especially from the manner in which it is actually used, if that fact be shown.

That the foregoing definition is not evolved factitiously, or by refining beyond due and legitimate refinement, will be apparent to any

one who takes the pains to call to mind a few examples of the use of the word "at." As showing how this preposition varies in range of meaning according to the nature of the thing which constitutes its grammatical object and of the principal notion in the speaker's mind, we give the following examples. It is correct to speak of a young man as being "at" the University of Georgia, not only when he is in the buildings or on the campus, but when he is in or near Athens, the seat of the University, and is connected with the school in any of the usual relations. It would not be correct to speak of one having no relationship to the school as being "at" the University of Georgia, unless he were at least upon the campus. The word "at" in the statement, "The view at Mt. Yonah is magnificent," is broad enough to compass a wide range of territory. We say he lives "at New Hope Church" of a man who lives, not in the church, but somewhere in the community in which the church is located. But, if we say, "He took communion at New Hope Church," we mean in the very church house itself, unless something else, known or assumed to be contained in the principal notion in connection with which the statement is made, otherwise limits its meaning. So we conclude that it would be unnatural and unreasonable for us to catch in the phrase "at their place of business," found in the prohibition statute, no other meaning than we would catch if the phrase "within their place of business" had been used.

We wish to say, further, that the foregoing approach to a definition is provisional only. It may need future extension or limitation. The law is of too recent enactment, and the illustrative cases have been too few, for us to believe that our judicial comprehension of the many new questions naturally arising under it has become sufficiently developed to compass the whole field and to evolve a final definition. It is our whole desire to arrive at an open-minded, unbiased interpretation of the law, and of every part of it; such an interpretation as will be judicial and intelligent, and as will give legitimate effect to the legislative will, without either limitation or extension on account of the personal views of ourselves, or of anybody else, or of any class of persons. Lawyers and trial judges, in making application of the definition announced, should be careful to remember that it is to be taken in connection with the other provisions of the prohibition law itself and with the previous decisions of this court on the same and cognate subjects. It should be kept in mind that we are now dealing with the phrase "at their place of business," and not with the other phrase found in the act, "at any other public place." The underlying considerations for prohibiting the keeping of liquors at places of business are broader than the reasons for prohibiting their being kept or had at other public places. It must be

remembered, too, that the "business" referred to in the phrase now under contemplation means, as its context shows, trade or some form of commerce. The Roberts Case, *supra*, makes this distinction clear.

The present defendant was clearly guilty of keeping the intoxicating liquors at his place of business. It was not necessary for the state to show as he contends it should have shown, that the liquor was publicly kept. Usually less harm is likely to result from a public than from a secret keeping of liquor at a place of business.

2. Exception is taken to the admission in evidence of the testimony of the chief of police as to finding the liquor in the locked box, on the ground that the arrest, search, and seizure were unlawful. The arrest and seizure were legal, though made without warrant. *Smith v. State*, 3 Ga. App. 326, 59 S. E. 934. At least as to the liquor which was in the jug and in the glasses, the crime was committed in the officer's presence. Besides, evidence is not rendered inadmissible merely because it is obtained by an unlawful search. *Ivey v. State* (decided Oct. 12, 1908) 62 S. E. 565; *Eaker, alias Thompson, v. State*, 4 Ga. App. 649, 62 S. E. 99; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269.

3 The third headline needs no elaboration. See *Stinchcomb v. State*, 119 Ga. 442, 45 S. E. 639.

Judgment affirmed.

#### BASHINSKI v. STATE. (No. 1303.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

##### 1. INTOXICATING LIQUORS—"AT HIS PLACE OF BUSINESS."

Upon the question as to whether the rooms in which the defendant kept intoxicating liquors were "at his place of business," the decision rendered by the court this day in the case of *Jenkins v. State*, 62 S. E. 574, is controlling.

##### 2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

The trial judge may, without invading the province of the jury, define to them what a place of business is, if he leaves to the jury the determination of whether the particular place in question is, under the facts, within the definition. Such places as merchandising establishments, stores, restaurants, soft drink dispensaries, etc., are judicially recognized as places of business, and the court may legally so inform the jury.

##### 3. SAME—"PLACE OF BUSINESS."

A nearby room, which a person uses in connection with the business conducted by him in his regular place of business, is a part of his "place of business," within the purview of the general prohibition statute.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5390-5392.]

##### 4. INTOXICATING LIQUORS—SINGLE SALE—"PLACE OF BUSINESS."

If a person should make a common practice of selling liquor illegally at a fixed place, that place would thereby become his place of business; but a single sale of liquor, or even sporadic sales, will not ipso facto convert the place where the sale occurs into the seller's "place of business," in accordance with the meaning of

that phrase as found in the prohibition act of 1907 (Acts 1907, p. 81).

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Ike Bashinski was convicted of violation of the prohibitory law, and brings error. Reversed.

Bashinski was tried and convicted on an accusation charging that he did "keep on hand at the place of business of said I. Bashinski alcoholic, spirituous, malt, and intoxicating liquors." It appears from the record that prior to the date when the general prohibition law went into effect the defendant ran a saloon in Macon. After that date he opened up, in the place formerly occupied by the saloon, a restaurant and soft drink dispensary. From the room in which the restaurant was conducted a door led into a passageway or closed hall. Opening into this hall was a door leading into another suite of rooms and the landing of a stairway. At the end of the passageway and hall another door led into a room which we will call the "downstairs storage room." Upstairs was a bedroom, and back of it another room, which we will call the "upstairs storage room." The approach to all these rooms was through the restaurant and the passageway we have mentioned. On the night of April 29, 1908, the police made a raid upon the place. In the downstairs storage room were found portions of two barrels containing a whisky compound, a quantity of *crème de menthe*, *absinthe*, and wines, and several barrels of whisky. In the bedroom upstairs were several open cases of whisky and nine bottles of "Malthale." In the adjoining storage room were 41 unopened cases of different sorts of whisky; also a number of empty cartons and whisky wrappers. In the downstairs storage room there was nothing but whisky, wines, and other intoxicating liquors. A policeman testified to having seen packages delivered to persons from that room at frequent intervals prior to the raid; but, so far as his knowledge went, no one but Bashinski himself actually entered the room. The doors to all the rooms where whisky was found were locked. The policeman was able to state that at least one of the packages delivered by Bashinski from the downstairs storage room was whisky. He gave the money to a man named Snipes, who bought it while he watched. Snipes, however, testified that this was not true. There was testimony as to other individual sales of liquor being made by the defendant from this room, but this testimony was also contradicted. The defendant's contention, as gleaned from his statement to the jury, was that when he closed his barroom on December 31, 1907, he had a quantity of liquors left on hand, and that he put them into these rooms, which were not connected with his place of business; that two of the rooms in which the liquors

were found were storage rooms only, and that the other was his private bedroom; that he had never sold or delivered whisky or other intoxicants from these rooms, nor had he ever had any intoxicating liquors in his place of business, conducted by him as a restaurant and soft drink dispensary.

Minter Wimberly, Jesse Harris, and John R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., and Roland Ellis, for the State.

POWELL, J. (after stating the facts as above). 1. Under the opinion this day filed in the case of *Jenkins v. State*, 62 S. E. 574, it is plain that the jury would have been authorized, but not required, to find that the rooms in which the defendant kept the liquors were within the legal definition of the phrase "at his place of business."

2. Exceptions are taken to several instructions of the court to the jury, of which the following is fairly illustrative: "I charge you, gentlemen of the jury, that if you believe, from a consideration of the evidence adduced upon the trial of this case, that the defendant, at the time alleged in this accusation or any time after the 1st of January, 1908, to April 29, 1908, was engaged as a restaurant keeper and soft drink dispenser, and that to the establishment wherein he operated the public was impliedly or expressly invited to come and trade, such a restaurant and soft drink establishment did constitute, in law, a place of business, and it would be a violation of the law of Georgia for him to keep on hand, in connection with such restaurant or soft drink dispensary, alcoholic, spirituous, malt or intoxicating liquors for any purpose whatever." We approve this instruction. The court did not invade the province of the jury by telling them what use would constitute a room a place of business. *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917; *Jenkins v. State*, supra.

3. Exception is also taken to the following charge: "If you believe, from a consideration of the evidence adduced on the trial of this case, that he did keep such restaurant, that he did keep such soft drink dispensary, and that on the premises of this establishment conducted by him and connected therewith in said business there was a room wherein he had stored alcoholic, spirituous, malt or intoxicating liquors in any quantity, I charge you that, if such storage room was connected with that place of business, the prisoner at the bar would be guilty of a violation of the law of Georgia." We cannot condemn this instruction. It is contended that the use of the phrases "connected therewith in said business" and "connected with that place of business" were misleading and required special explanation and definition to the jury. We do not think so. We cannot believe that the jury were misled into believing that the judge spoke of a physical connection.

4. There is an instruction excepted to, however which we find to be erroneous. It is as follows: "I charge you, further, that if you believe, from a consideration of the evidence adduced upon the trial of this case, that the defendant, in any place whatever in the county of Bibb, after the 1st of January, 1908, to the 29th of April, 1908, inclusive, kept on hand in any place for the purpose of selling, and did sell in any quantity whatever, alcoholic, spirituous, malt, or intoxicating liquors, he would be guilty of keeping unlawfully on hand at his place of business alcoholic, spirituous, malt, and intoxicating liquors." The defendant, it must be remembered, was not charged with selling liquor, but only with keeping it on hand at his place of business. If he also sold, the present prosecution is no bar to a separate prosecution for that offense. *Tooke's Case*, supra. The effect of the charge now under consideration is to declare that every place at which a person keeps on hand and sells any quantity of liquor, even to the small extent of a single sale, thereby becomes his place of business. We do not so construe the law.

Without citing examples from the large number of cases which have undertaken to say what constitutes a given place a place of business, we may say that where the words are not otherwise limited by the context—as, for example, in our burglary statute—the phrase "place of business" means a place where a person carries on some regular commercial occupation; not where he makes some single bargain, or even where he engages in sporadic transactions. "The buying [or selling] of a single vessel containing whisky certainly cannot properly be regarded as an occupation or business." *Henderson v. Heyward*, 109 Ga. 375, 34 S. E. 590, 47 L. R. A. 386, 77 Am. St. Rep. 384. We think that a person might set up a regular establishment for the illegal sale of liquor and go regularly into that business, in which event the place he should so set up would be a place of business. In some contexts "business" means lawful business. *Walsch v. Call*, 32 Wis. 159, 161. There is, however, nothing in the prohibition statute to indicate such a contextual restriction. It would not be a fair construction of the language of the law to say that one who, in the privacy of his home, made a single sale, thereby ipso facto converted his home into a place of business. For this erroneous charge alone the judgment is reversed. *Bashinski* was doubtless guilty, but his guilt was not shown absolutely beyond question. If the witnesses against him are trustworthy, he will doubtless be convicted again. At any rate, we cannot say that so direct and serious an error upon one of the very fundamental propositions in the case was harmless. To quote from our great Judge Bleckley (*Cochran v. State*, 62 Ga. 732): "Those who are impatient with the forms of law ought to reflect that it is through form that all organization is

reached. Matter without form is chaos; power without form is anarchy. The state, were it to disregard forms, would not be a government, but a mob. Its action would not be administration, but violence. The public authority has a formal embodiment in the state, and, when it moves, it moves as it has said by its laws it will move. It proceeds orderly and according to pre-established regulations. The state, though sovereign, cannot act upon a citizen in a different manner from that which the laws have ordained. It cannot inflict punishment without first trying the prisoner according to the law. There is no dispensing power. Courts have none. Courts are bound by the law, no less than the prisoner at the bar."

There are other errors assigned, but they are not meritorious.

Judgment reversed.

### STINSON v. STINSON.

(Supreme Court of Georgia. Oct. 14, 1908.)

#### DIVORCE—ALIMONY—ATTORNEY'S FEES.

Under the conflicting evidence, there was no abuse of discretion in awarding the temporary alimony and attorney's fees.

(Syllabus by the Court.)

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action by Ada Stinson against W. M. Stinson. From a decree awarding temporary alimony and attorney's fees, defendant brings error. Affirmed.

P. D. Rich, for plaintiff in error. Pottle & Glessner, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

### MORRIS v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia. Oct. 14, 1908.)

#### RAILROADS—INJURIES TO TRESPASSER.

One riding on the engine of a passenger train by invitation of the conductor, engineer, and fireman, and without paying or intending to pay fare, it not appearing that there was any rule or custom permitting persons to so ride, was a trespasser; and his widow had no cause of action against the railroad company for his homicide, resulting from the derailment of the train caused by the defective condition of the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 884.]

(Syllabus by the Court.)

Error from Superior Court, Warren County; Jos. N. Worley, Judge.

Action by Hallie Morris against the Georgia Railroad & Banking Company. From a judgment dismissing the petition on general demurrer, plaintiff brings error. Affirmed.

G. L. Callaway and Samuel H. Sibley, for plaintiff in error. Jos. B. & Bryan Cumming and E. P. Davis, for defendant in error.

FISH, C. J. Hallie Morris brought an action against the Georgia Railroad & Banking Company for damages from the homicide of her husband, Booth S. Morris, by the alleged negligence of the defendant company. The petition was dismissed on general demurrer, and the plaintiff excepted.

The substance of the petition, so far as material to the points presented for adjudication, was: The plaintiff's husband was riding on the engine of a passenger train of the defendant, with the knowledge and by the consent and on the invitation of the conductor, engineer, and fireman of such train. As the train was running around a curve, at the speed of 60 miles an hour, it was derailed, because the cross-ties were rotten and the outer rail was not sufficiently elevated, and plaintiff's husband was thereby killed. It was alleged that he was lawfully on the train, that he was 26 years old, and "as a railroad fireman was earning a sum of \$80 per month," and that "said rate of speed \* \* \* was reckless, and the negligence aforesaid causing said catastrophe was gross, and said persons running said train knew full well of the presence of the deceased on said engine." The decedent, for whose homicide the action was brought, was at the time he was killed riding on the engine of a passenger train of the defendant, on the invitation and with the knowledge of the conductor and the engineer and fireman on the engine. His death was the result of the derailment of the train, caused by the defective track. It is not alleged in the petition that he was a passenger or employé of the defendant. There is, however, an allegation that he "was lawfully being carried upon a passenger train of said railroad company"; but manifestly this is the statement of a mere conclusion from the allegation that the decedent was riding on the engine on the invitation and with the knowledge of the conductor, engineer, and fireman, and therefore cannot be properly treated as an averment of fact.

Whether the decedent was a passenger, and the defendant owed him the extraordinary care required of railroad companies for the safety of passengers, or was a mere trespasser, to whom the only duty of the defendant was to abstain from wantonly or willfully injuring him, is dependent upon whether the conductor, engineer, or fireman, under the facts of the case, was authorized to invite and permit him to ride upon the engine. While a principal is bound by the acts of his agent within the actual or apparent authority conferred upon the agent it is equally elementary that a principal is not bound by the act of his agent, whether general or special, though it be apparently connected with his employment, when the person dealing with him knows or has reasonable cause to believe that he is acting beyond his authority. It has been held by many courts and in numerous cases that, in the absence of any

rule or practice to the contrary, section foreman, track superintendents, locomotive engineers, firemen, and conductors of freight trains have no authority to permit a person to ride on a car, engine, or train obviously not intended for the use of passengers, and thus transform into a passenger one who would otherwise be regarded as a trespasser. 7 Thomp. Neg. § 3321; 4 Elliott on Railroads, § 1580; 2 Hutch. Car. §§ 964, 1000; 6 Cyc. 540; 5 Am. & Eng. Enc. L. 509 et seq. In an action against a railroad company for damages from personal injuries sustained while riding, by permission or upon the invitation of an employé, on a conveyance of the company palpably not designed for the transportation of passengers, the onus is on the plaintiff to show that the employé had authority from the company to permit him to so ride, or that it was the custom for persons to so ride, known to the officials of the company having charge or supervision of the matter; the presumption, in the absence of such proof, being that the plaintiff had no right to be there and that he was, therefore, a trespasser. *Robertson v. Railroad Co.*, 22 Barb. (N. Y.) 91; *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, and cases cited; *Dysart v. Missouri, K. & T. R. Co.*, 122 Fed. 228 (3), 58 C. C. A. 592. In *Purple's Case*, supra, it was held: "One who enters and rides upon a car or train which he knows or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him." It was also held. "In the absence of any rule or practice permitting freight trains to carry passengers the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser." In *Higgins v. Cherokee Railroad Co.*, 73 Ga. 149 (9), the facts and the ruling of this court thereon are stated as follows: "The plaintiff was voluntarily on the train, where he was injured, by the invitation of the conductor, made at his own request. He paid no fare, and none was expected from him. He selected an open flat car, on which he rode, rather than in the passenger coach, and was in a position where he was more exposed to accident from sparks and cinders than he would have been, had he taken a seat in the closed coach. Held, that he was entitled to look only for such security as that mode of conveyance was reasonably expected to afford, and, having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault. (a) It is doubtful if, under the circumstances, he was a passenger at all in the full legal sense of that

term. At most he was so only sub modo and to a limited extent."

The underlying principle of the authorities cited is applicable to and controlling in the case now under consideration; for, whatever may be the presumption as to one riding in a passenger coach or other conveyance of a railroad company evidently designed for the transportation of passengers, by invitation or permission of the employés of the company in charge of such conveyance, there can be no doubt, in our opinion, that a conductor of a passenger train, though he has charge thereof and represents the company in determining what persons are entitled to ride upon the train committed to his charge, has no authority, in the absence of any rule or known custom to the contrary, to permit persons to ride free on the engine of his train, because a passenger train is obviously operated by the company for the transportation of passengers for hire, suitable provision being made in the way of coaches for their accommodation, and it must be perfectly apparent to all persons of average intelligence, who have reached the years of discretion, that the engine is not designed for carrying passengers. It is not alleged that plaintiff's husband paid any fare, or that he intended to pay any. He was 26 years of age, was a locomotive fireman (but apparently not in defendant's employment), and presumably a man of ordinary intelligence, and, therefore, must have certainly known, no rule or custom appearing to the contrary, that the conductor had no authority to invite or allow him to ride free on the engine. His death was not caused by any wanton or willful act on the part of the defendant's employés, and we are clear that his widow was not entitled to recover, and that the court properly dismissed the petition on general demurrer.

Judgment affirmed. All the Justices concur, except HOLDEN, J., disqualified.

#### GLORE et al. v. AKIN.

(Supreme Court of Georgia. Oct. 14, 1908.)

##### 1. TRIAL—VERDICT—LEGALITY.

Where suit was brought jointly against two defendants for malicious prosecution, and a verdict was rendered against them for a stated amount, "to be equally divided between them," this was in effect a several verdict for one-half the amount stated against each of the defendants, and was not legal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 788.]

##### 2. SAME—CORRECTION.

The illegality of such a verdict could not be cured by writing off one half of the finding and entering up judgment for the other half jointly against both defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 799.]

##### 3. JUDGMENT—MOTION IN ARREST.

A verdict having been returned and a judgment entered as indicated in the preceding headnotes, on motion duly made the judgment should

have been arrested and the verdict have been set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment §§ 484-487.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action by Luther Akin, by his next friend, against W. H. Walters and H. A. Glore. Judgment for plaintiff, and defendants bring error. Reversed.

J. Z. Foster and J. E. Mozley, for plaintiffs in error. Griffin & Attaway, for defendant in error.

LUMPKIN, J. Luther Akin, by his next friend, brought an action for malicious prosecution against W. H. Walters and H. A. Glore jointly, alleging a conspiracy and concert of action on their part. On the trial the jury found the following verdict: "We, the jury, find for the plaintiff against the defendants, Glore and Walters, \$300.00, to be equally divided between them." A motion was made to arrest the judgment and set aside the verdict. Plaintiff's counsel wrote off from it the sum of \$150, and agreed that the verdict and judgment should be for \$150 against the defendants jointly. The court thereupon overruled the motion, and judgment was entered according to the agreement. To this exception was taken.

The suit was brought jointly against two persons, seeking to recover damages for malicious prosecution, the joint action of both. The rule allowing the jury to apportion damages among trespassers (Civ. Code 1895, § 5915) has been held to apply to cases of trespass on property, and not to cases of the character of this one. *McCalla v. Shaw*, 72 Ga. 458; *Hunter v. Wakefield*, 97 Ga. 543, 25 S. E. 347, 54 Am. St. Rep. 438; *Hay v. Collins*, 118 Ga. 243, 44 S. E. 1002.

The several verdict found against the defendants could not be cured by reducing it to one-half the amount and changing it to a joint verdict. It may be said that the defendant was not hurt, because the verdict found against him in the sum of \$150, and under the change made by counsel and allowed by the court no more was adjudged against him. Verdicts for excessive amounts are sometimes corrected by writing off the excess, where there is a legal mode of arriving at the amount to be deducted. But this is an entirely different thing from deducting one-half of a verdict for damages in a case of malicious prosecution, and changing an illegal several verdict into a joint one. The jury did not find a joint verdict, and counsel and the court could not make one for them. It is not enough to say that the judgment was for no more than the jury found against the defendant Glore severally. The effort to correct the verdict not only changed it in amount, but it changed the whole character of the finding.

In *Hay v. Collins*, 118 Ga. 243, 44 S. E. 1002, a decision in which five justices concurred, there was one count in the petition on which the verdict could be upheld, and one on which this could not be done. It was held that a motion in arrest of judgment would not be sustained. Here there was a single count, on which a several verdict could not be lawfully returned.

Judgment reversed. All the Justices concur.

TILLMAN et al. v. GRIFFIN et al.

(Supreme Court of Georgia. Oct. 14, 1908.)

PARTITION—NONSUIT.

This being a proceeding in which a partition of land was prayed, and upon the hearing the evidence submitted in behalf of the plaintiffs failing to show what, if any, interest the plaintiffs owned in common with the defendants in the land in question, the court did not err in granting a nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by E. L. Tillman and others against James Griffin and others. From a judgment of nonsuit, plaintiffs brings error. Affirmed.

L. W. Branch, for plaintiffs in error. W. E. Thomas and S. S. Bennet, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

GASKINS et al. v. DAVIS.

(Supreme Court of Georgia. Oct. 14, 1908.)

CANCELLATION OF INSTRUMENTS — ISSUES, PROOF, AND VARIANCE.

Where an equitable petition was filed solely for the purpose of cancelling a deed made by the plaintiff and certain deeds and a mortgage made by persons claiming under the plaintiff's conveyance, and to have the title decreed to be in her, on the ground that the plaintiff was a minor at the time when the conveyance was executed, which was known to the grantee, that she received none of the consideration, but it was paid to her husband, and that she had not ratified the conveyance, but repudiated it, upon becoming of age, and that such instruments operated as a cloud upon her title, it was error to admit in evidence a quitclaim deed made to her by one who held as the last taker under the chain of conveyances attacked and sought to be canceled, and to charge in effect that, even if the plaintiff was not a minor when she made the deed, she might be entitled to a verdict on the strength of such quitclaim deed. Under pleadings and prayers of the character above indicated, the plaintiff cannot seek to have a cancellation of instruments as a cloud on her title because of the alleged invalidity or voidable character of such conveyances, and obtain the relief sought by showing that, if the ground on which her suit was based was not true, nevertheless she would be entitled to the relief, because she had obtained a reconveyance by quitclaim deed from one claiming under such instruments.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Equitable petition by Rhoda Davis against H. E. Gaskins and others. Judgment for plaintiff, and defendants bring error. Reversed.

Alexander & Gary, for plaintiffs in error. Hendricks & Christian, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

### KINDERLAND v. KIRK.

(Supreme Court of Georgia. Oct. 13, 1908.)

#### 1. FRAUDS, STATUTE OF—SALE OF REALTY—SUFFICIENCY OF MEMORANDUM.

A writing, signed by an owner of land or his authorized agent, acknowledging the receipt of a part of the purchase money, but entirely omitting any reference to the purchase price, does not comply with the statute of frauds relating to contracts for the sale of land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 288.]

#### 2. SAME—POSSESSION BY VENDEE—PARTIAL PAYMENT.

Where partial payment, accompanied by possession, is relied upon to take a parol contract for the sale of land out of the operation of the statute of frauds, the possession of the vendee must be actual, definite, and exclusive of the vendor, and with the express or implied consent of the vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 318, 319.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action by T. J. Kirk against Anna Kinderland. Judgment for plaintiff. Defendant brings error. Reversed.

J. P. Brooke, for plaintiff in error. Griffin Attaway, for defendant in error.

EVANS, P. J. T. J. Kirk brought his petition against Anna Kinderland, praying specific performance of a parol contract for the sale of land and that the defendant be enjoined from interfering with the plaintiff's possession. It appeared from the allegations of the petition that the defendant was the owner of a small parcel of land, which she agreed to sell to the plaintiff for \$200. By the terms of the contract of sale the plaintiff was to pay \$50 cash, \$50 as soon as the defendant presented a bond for title, and \$100 on November 20, 1907. The contract of sale was made on November 20, 1906, and, as neither party could write, defendant instructed plaintiff to make the cash payment of \$50 to C. H. Griffin and take his receipt. Accordingly the plaintiff paid \$50 to Griffin and took from him the following receipt: "Received from T. J. Kirk fifty dollars for Anna Kinderland, and being the first payment on five acres of land sold to said Kirk, being five acres of the property known as

the Gary Kinderland home place. This Nov. 20th, 1906. [Signed] C. H. Griffin." After making this payment the plaintiff went into possession of the land. On January 19, 1907, plaintiff tendered the defendant \$100, with a request that she execute a bond for title, according to the terms of the contract of sale. The defendant declined the tender and refused to execute a bond for title. It was alleged that plaintiff had made improvements on the land, and that the defendant was insolvent and was interfering with the plaintiff's possession.

The suit was filed January 12, 1907. At the appearance term a demurrer was filed on the grounds that no cause of action was stated, that the alleged contract was in parol, that there was no such part performance as would except the contract from the operation of the statute of frauds, and that the suit was prematurely brought. After hearing the demurrer the court passed an order adjudging "that the same be sustained, and that the case, so far as it seeks specific performance, be stricken, but that plaintiff has the right to go to trial on the issue of injunction." No exception was taken to this judgment. Afterwards the case was tried on its merits, and the jury returned the following verdict: "We, the jury, find in favor of the injunction"—upon which verdict a decree was entered. A motion for new trial was made and overruled, and exception is taken to the refusal of the motion for new trial, and also to the decree.

The right of the plaintiff to an injunction depends on the validity of the contract of sale. The statute of frauds (Civ. Code 1895, § 2693, par. 4) requires that a contract for the sale of land shall be in writing, signed by the vendor or some person by him lawfully authorized. The original negotiation for the sale of the land between these parties was verbal. There was a sharp conflict between the plaintiff and defendant as to what really occurred. The plaintiff testified that the defendant sold him the land upon the terms stated in the petition and directed him to pay the cash installment to Mr. Griffin and to take his receipt. The defendant denied this. Conceding that the verdict decided this issue adversely to the defendant, and that the receipt given by Griffin to the plaintiff was executed by the authority of the defendant, the receipt was ineffectual to take the contract out of the statute of frauds, because of the omission of the purchase price. *Corbin v. Durden*, 126 Ga. 429, 55 S. E. 30. The evidence, therefore, must bring the case within one of the exceptions contained in Civ. Code 1895, § 4037, in order to render the contract valid.

The plaintiff contends that the proof at the trial was sufficient to authorize the jury to find that he had made a partial payment of the purchase money and had entered into possession of the land under the contract. The undisputed evidence was that at the

time of the alleged sale the defendant had a tenant upon the land, occupying the dwelling house thereon, and that his tenant never surrendered possession of the house, and was in possession at the time of the trial. It also appeared in evidence that soon after the alleged purchase the plaintiff paid the \$50 cash installment to Griffin, and a short time thereafter cut some wood from the land and cleared up some of the woodland; but the extent of the clearing does not appear. The whole lot of land only embraced five acres, so it must have been inconsiderable. The plaintiff testified in a general way that he was in possession of the land, but admitted that he had never been in possession of the house. The defendant maintained that the plaintiff's entry on her land was without authority, and was but a trespass.

Was the plaintiff's possession such possession as, when coupled with a partial payment of the purchase price, will amount to such performance as will uphold and render enforceable the parol contract of sale? Mr. Pomeroy, in his treatise on Contracts, says that the possession of the vendee must not only be with the consent of the vendor, but it must be actual, definite, and exclusive; that the proof must unequivocally show which land is possessed, and that it is possessed by the purchaser exclusively, and not concurrently with the vendor; that the possession must indicate the commencement of a new interest or estate. Sections 119-121. The exception that partial payment of the purchase price, accompanied by possession, is such part performance as will take a parol contract for the sale of land out of the statute of frauds, rests upon the principle of equitable estoppel that the vendor has so dealt with the purchaser, in receiving a part of the purchase money and putting him in actual possession of the land in part execution of the contract of sale, that it would be a fraud upon the vendor's part to repudiate the contract and stop short of its complete execution. It is the acts of the vendor which raise the estoppel. It is the vendor's receiving some part of the purchase price, and his consent, express or implied, to the complete and exclusive occupation of the land by the vendee. Where the vendor manifests his intention to withhold possession of the land by a positive assertion of his actual occupancy, and the vendee, with a purpose of enforcing his invalid parol contract, enters upon other portions of the land, it cannot be urged that the forced possession of the purchaser is a fraudulent act of the vendor. The change of possession from the vendor to the vendee comprehends the joint action of both. That change can never become complete until the vendor relinquishes and the vendee assumes exclusive possession of the land agreed to be sold. So long as the vendor asserts his possession by actual occupancy of the land, he cannot be said to have surrendered possession to his vendee. Until the vendee shows

that his possession is exclusive, and by the express or implied consent of the vendor, he is not in a position to urge that the vendor committed a fraud upon him. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391.

A fundamental requisite for the validity of a contract for the sale of land is that it must be definitely described; and, where the contract is oral, this essential element can only be supplied by the actual and exclusive possession of the land by the vendee. Looking to the evidence, we discover that the vendor refused to give possession of the house in the occupancy of her tenant. She has resolutely and persistently kept possession of the house. The plaintiff does not contend that he was placed in possession of any part of the land by the defendant. His contention is that by virtue of his purchase he was entitled to possession, and did take possession, of some of the land, and cut timber thereon. His possession has never been exclusive of the defendant, and he does not claim that the defendant ever delivered to him the actual possession of the land. We therefore conclude that under the undisputed evidence the plaintiff has not taken his case without the statute of frauds, and that the verdict in his favor is without evidence to support it.

We are also supported in our construction of the evidence by the terms of the decree, to which exception is taken. One clause provides "that the petitioner do recover of the defendant the possession of the premises in dispute." The judgment for the recovery of the possession of the premises is utterly inconsistent with the basal idea of his claim for injunction to restrain interference with his possession.

Judgment reversed. All the Justices concur.

LOUISVILLE & N. R. CO. v. CHAPMAN.  
(Supreme Court of Georgia. Oct. 14, 1908.)

RAILROADS — CONSTRUCTION — INJURIES — ACTIONS — EVIDENCE.

The verdict in this case was not supported by the evidence, and the refusal of a new trial was error.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by J. E. Chapman against the Louisville & Nashville Railroad Company and another. Judgment for plaintiff. Defendant above named brings error. Reversed.

D. W. Blair, F. A. Cantrell, and Tye, Peeples, Bryan & Jordan, for plaintiff in error. R. J. & J. McCarny, for defendant in error.

LUMPKIN, J. Chapman brought suit against the Louisville & Nashville Railroad Company and the Atlanta, Knoxville & Northern Railway Company for damages



arising to his land from the construction of the railroad of the latter company. Pending the trial, the plaintiff dismissed the case against the Atlanta, Knoxville & Northern Railway Company, proceeding only against the other defendant. The jury found a verdict for \$175. A motion was made for a new trial, which was overruled, and the defendant excepted.

The evidence showed that the Atlanta, Knoxville & Northern Railway Company entered into a contract with Wright, Williams & Wadley to construct a portion of the road, including that part involved in the controversy, and that the work of that place was done by a subcontractor under them. While one of the witnesses spoke of it as the "construction of the Louisville & Nashville Railroad," this was probably an inadvertence, as the entire evidence showed without conflict that it was a portion of the Atlanta, Knoxville & Northern Railway which was being built. No connection was shown between the Louisville & Nashville Railroad Company and the other company; nor did the evidence in any way connect the defendant against whom the verdict was rendered with the work, except that a witness stated that "Mr. Thomas was there as resident engineer of the Louisville & Nashville Railroad, and afterwards Mr. Gough. I don't think there was any work done on Mr. Chapman's place while Mr. Thomas was there. Mr. Gough was in charge of it at that time. I was well acquainted with him." Also: "They started according to directions. It was done according to instructions as long as I stayed there; but I was prohibited to finish it by the written notice. My instructions were to finish it just as they had told me." Again he said: "I was there in the construction of that road for the contractor, who was constructing the same for the railroad company. The original contractors were Wright, Williams & Wadley." Another witness said that "Mr. Crow, or Wright, Williams & Wadley, were instructed to cut that ditch." He also said: "Some one in the chief engineer's office made that blue print. I made the original survey, and the blue print was made from that." There were also one or two other stray references to the contractors doing work as ordered. But there was nothing whatever which would authorize a finding that the Louisville & Nashville Railroad Company made the contracts with the contractors, caused the work to be done, had control of it, or gave direction as to it. So far as the record discloses, a different railroad company was constructing its road through the medium of contractors. The contract provided for certain supervision and direction by the engineer of that road. The mere casual reference, on the part of a witness, to one of the engineers as a "resident engineer of the Louisville & Nashville road," did not authorize the verdict found against the company. There was not suffi-

cient evidence to support the verdict, and a new trial should have been granted.

This being so, it is unnecessary to discuss the effect of the contract between the Atlanta, Knoxville & Northern Railway Company and the contractors for the construction of that portion of the road, or to consider whether there was, or not, any liability on the part of the last-named company, which was dismissed from the suit.

Judgment reversed. All the Justices concur.

#### MAYOR, ETC., OF CITY OF BRUNSWICK v. DAVENPORT.

(Supreme Court of Georgia. Oct. 14, 1908.)

#### NEW TRIAL—BRIEF OF EVIDENCE—FILING— WAIVER.

Where a motion for a new trial is made in term, and an order is taken fixing a hearing thereof on a particular day, without any provision for filing a brief of evidence, and more than 30 days after the filing of the motion a written consent is entered into by both sides, providing for a continuance of the hearing to a future time, and agreeing that the brief of evidence be submitted for approval at the final hearing, which consent is ratified and approved by a formal order of the judge, passed on the day appointed in the original order for a hearing, the respondent has waived strict compliance with the statute as to the filing of the brief of evidence, and will be estopped from insisting on a dismissal of the motion for new trial on the final hearing, where the movant presents for approval a brief of the evidence pursuant to the consent order. It is error under these circumstances to dismiss the motion for new trial at the instance of the respondent solely because the statute has not been strictly followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 275.]

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by M. R. Davenport against the mayor and council of the city of Brunswick. Judgment for plaintiff, and defendant brings error. Reversed.

On December 4, 1906, during the regular term of Glynn superior court, the case of Malle R. Davenport against the mayor and council of the city of Brunswick was tried, resulting in a verdict and judgment for the plaintiff. On December 5, 1906, while the term was still in session, the defendant filed its motion for a new trial, which was regularly filed, and the following order taken thereon: "Read and considered. It is ordered that the plaintiff, Malle R. Davenport, show cause before me at Brunswick, Ga., at 10 o'clock a. m. on the 15th day of January, 1907, why the foregoing motion should not be granted. It is further ordered that the plaintiff or her counsel be served with a copy of this motion and order, and that this order act as a supersedeas until the further order of the court." This order was signed by the judge, and service of the motion and order

duly acknowledged on December 6, 1906. On January 14, 1907, the following written consent was entered into and signed by the attorneys for movant and respondent: "The motion for new trial in the above-stated cause having been set for a hearing before Hon. T. A. Parker, judge of said court, at Brunswick, Ga., on January 15, 1907, and it appearing that Judge Parker will not be at Brunswick on that day, and that the stenographer has not completed a brief of the testimony, or written out the charge of the court in said case, it is thereupon consented to by counsel for both parties above named that the time for hearing said motion be extended, and that said motion shall be heard at any time and at any place in the Brunswick circuit, upon five days' notice in advance of the day of hearing being given by either party or their counsel to the other, or upon such notice being given counsel for both parties by the judge, the brief of evidence and charge of the court to be submitted for approval at said hearing when the same takes place, whether in term or vacation, and to be filed in the office of the clerk of the superior court within ten days after such hearing." On January 15, 1907, this agreement was approved by the judge and made the order of the court. Nothing further was done relative to a hearing of the motion until five days before the regular December term, 1907, of Glynn superior court, which convened on December 24, when counsel for respondent served a written notice on counsel for the movant, in compliance with the stipulation contained in the consent order above quoted, notifying him that the motion for a new trial would be called up for a hearing during the first week of the December term. The motion was called for a hearing on December 5, 1907, at which time counsel for the movant presented a brief of the oral and documentary evidence had on the trial and the charge of the court for consideration and approval. Counsel for respondent objected to the filing of the same, and moved to dismiss the motion, upon the ground that the brief of the evidence and charge of the court had not been filed within the time allowed by law, and because no motion for a new trial, with a brief of the evidence had upon the trial, had been filed in the court within the time required by law. The court granted the motion to dismiss, and movant excepted.

R. D. Meader and Francis H. Harris, for plaintiff in error. Bennet & Conyers and L. J. Brown, for defendant in error.

EVANS, P. J. (after stating the facts as above). We think the court erred in dismissing the motion for new trial under the circumstances appearing in the statement of facts. The statute requires a motion for new trial to be filed during the term at which the trial was had, and after the term has

ended it is too late to file the motion. A brief of evidence is an indispensable part of the motion for new trial, and must be filed either during the term at which the motion was made, or it may be filed in vacation, if a term order is taken granting this privilege. A failure to file the brief of evidence in term, or within the time limited by the term order, is ordinarily a good ground for dismissing the motion. *Taliaferro v. Columbus R. Co.*, 130 Ga. 570, 61 S. E. 228. But the filing of the motion and the filing of the brief of evidence stand upon very different footings. As was observed in *Hilt v. Young*, 116 Ga. 712, 43 S. E. 78: "The requirement that a motion for a new trial shall be deposited with the clerk, so that it may be put upon record and be subject to examination, is one in which others than the litigant may be interested. The judgment under review may be one affecting title to property. One having no notice of the pendency of the motion might purchase the execution and suffer loss thereby." It is the pendency of the motion which affects third parties with notice. The brief of the evidence in the case is a necessary accompaniment of the motion. The motion is not complete without it. The essential office of the brief of evidence is to illustrate the merit of the grounds of the motion. The movant is required to present to the court a substantial photograph of the case, in order that the judge may determine whether the grounds of the motion show errors of such a character that a new trial should be had. The public are not interested or concerned with the merits of the motion. The filing of a brief of the evidence has never been recognized by this court as a jurisdictional fact. Thus it has been ruled that, when a motion for a new trial has been fully argued, it is too late to move to dismiss it because the order fixing the time for the hearing has run out. *Davis v. Howard*, 57 Ga. 607. Again it has been held that "by arguing the motion for a new trial, without moving to dismiss the same for failure to file a brief of evidence in due time, the respondent in the motion waived this matter of objection, and consequently it is not good as a ground of exception to the judgment granting a new trial." *Cook v. Childers*, 94 Ga. 713, 19 S. E. 819.

A respondent in a motion may insist upon a strict compliance with the law in respect to the filing of the brief of evidence, and, after the time limit for filing the same has expired, is entitled to move for a dismissal of the motion, unless he has expressly or impliedly waived the filing of the brief of evidence at an earlier time. But where both parties enter into an express written agreement that the brief of evidence may be filed by the movant at the final hearing, and this agreement has been approved by the court, and the movant, relying on this consent order, has gone to the trouble and expense of

preparing the brief, and presents it to the court pursuant to the terms of such order, the respondent will be estopped from insisting on time as of the essence of the filing of the brief of evidence. In *Moxley v. Kinloch*, 80 Ga. 48, 7 S. E. 123, a consent order was taken extending to the movant the privilege of filing a brief of evidence by a specified day in vacation. After that day had passed counsel for both parties agreed in writing that the brief of evidence prepared by the movant was correct, and counsel for respondent in the motion for new trial, at the request of counsel for movant, filed the brief with the clerk of the superior court. On the hearing of the motion for a new trial, counsel for the respondent moved to dismiss the same because the brief of evidence had not been filed within the time limited in the order. After reviewing many cases bearing upon the subject it was held that the conduct of the respondent amounted to a waiver of his right to insist upon the filing and approval of the brief of evidence within the time limited in the order, and that the filing of the brief, "together with the subsequent approval of the judge, will suffice as a substantial compliance with the order." The judge is not required to approve a brief of the evidence where such a length of time has elapsed that he is unable to call to mind what transpired at the trial, and many cases will be found affirming the action of the judge in dismissing a motion for new trial where counsel has been in laches. In the case at bar the judge did not predicate his judgment of dismissal upon the ground that counsel for movant was in laches, or from the lapse of time he was unable to recall the evidence, but sustained the motion to dismiss solely because there had not been a literal compliance with the statute respecting the filing of the brief of the evidence. We think respondent's attorneys were estopped from insisting that the brief of evidence was not duly filed.

Judgment reversed. All the Justices concur.

#### MOORE et al. v. HOOD.

(Supreme Court of Georgia. Oct. 14, 1908.)

##### 1. BOUNDARIES — ESTABLISHMENT BETWEEN ADJOINING OWNERS—PROTEST—FILING.

Under Act Dec. 17, 1901 (Acts 1901, p. 39), amending section 3249 of the Civil Code of 1895, any owner of adjoining land, who may be dissatisfied with the lines as run and marked by processioners and the surveyor, may file his protest thereto with the ordinary within 30 days after the processioners have filed their returns, specifying therein the lines objected to and the true lines as claimed by him, and the ordinary is required to return the papers to the clerk of the superior court.

##### 2. SAME.

The requirement of filing a protest with the ordinary within 30 days after the processioners had filed their returns was not complied with by filing such a protest with the clerk of the

superior court, although the ordinary may have told the dissatisfied landowner to file it with the clerk if the ordinary should be busy in connection with the road work of the county. A protest so filed, and which was never filed with the ordinary, should have been dismissed on motion.

(Syllabus by the Court.)

Error from Superior Court, Milton County; A. W. Fite, Judge.

Application by E. P. Moore and others to have the processioners of the district survey and mark the lines between their lands and those of adjoining owners. The processioning was had, and a return made, and M. D. Hood filed a protest. Judgment for protestant, and Moore and others bring error. Reversed.

J. P. Brooke, for plaintiffs in error. A. H. Burtz and C. H. Griffin, for defendant in error.

LUMPKIN, J. Moore and others applied to have the processioners of the district survey and mark the lines between their lands and those of adjoining owners. The processioning was had and a return made. An owner of adjoining land, being dissatisfied, sought to file a protest. When the case was called in the superior court, a motion was made to dismiss the protest, on the ground that it had never been filed with the ordinary, or in his office, before it came into the hands of the clerk of the superior court. The motion was overruled, and this was assigned as error. A verdict was rendered in favor of "the defendant," apparently meaning the protestant. The applicants for processioning made a motion for a new trial, which was overruled, and they excepted.

It is only necessary to notice one of the assignments of error. Under Civ. Code 1895, § 3249, it was provided that any owner of adjoining lands, who might be dissatisfied with the lines as run and marked with the processioners and surveyor, might file his protest thereto with the processioners, within 30 days after such lines were run and marked. Upon the filing of such a protest, the processioners were required to return all the papers to the clerk of the superior court of the county where the land lay. This was amended by the act of 1901, by requiring that the protest should be filed with the ordinary within 30 days after the processioners had filed their returns, and by requiring the ordinary to return all the papers, including the protest so filed, to the clerk of the superior court, who should then enter the case on the issue docket for trial. Under Civ. Code 1895, § 3251, it is the duty of the processioners to make a return of their acts, together with the plat of the surveyor, to the ordinary of the county. Thus the method prescribed by the law, as it now stands, is that the processioners shall make a return to the ordinary, and, if a dissatisfied landowner desires to protest, he shall file his protest with

the ordinary. When this is done, that official transmits the papers to the clerk of the superior court, and the latter enters the case upon the issue docket.

In the present case it appears that the protest was not filed with the ordinary, but with the clerk of the superior court, and that it had never been in the office of the ordinary at all. The protestant sought to excuse this defection from the legal requirement by testifying that the ordinary had stated that he was "road working and busy, and he might be gone, and, if I did, to file it with the clerk, and this I did. I did not know Mr. Seals [the ordinary] was here when I filed the paper. I did not find him. \* \* \* He ordered me to file it with the clerk, if I did not find him, and I did not find him, though I passed his house and did not inquire there or ask for him at all. I went under his directions." The law requires that the protest shall be filed with the ordinary, and that officer has no authority to direct that it be filed elsewhere. The filing with the clerk of the superior court will not answer. It does not appear that the paper ever found its way into the hands of the ordinary, or into his office. It was not filed as provided by law, and should have been dismissed on motion.

Judgment reversed. All the Justices concur.

#### TURNER et al. v. BARBER et al.

(Supreme Court of Georgia. Oct. 13, 1908.)

##### 1. TRUSTS—EXPRESS TRUSTS.

A deed to one as trustee for "the heirs of his body," he having three children, all of whom were minors, created a trust estate for such children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 167.]

##### 2. SAME—TRUSTS FOR MINORS—MERGER OF LEGAL AND EQUITABLE TITLE.

A trust estate may be created for minors, and the legal title will not merge into the equitable interest during their minority, so as to vest in them, although the deed does not in terms provide for any duties to be discharged by the trustee.

##### 3. INFANTS—SALE OF PROPERTY—SERVICE OF ORDER ON MINORS—NECESSITY.

Since the passage of Acts 1878, p. 103 (Civ. Code 1895, § 4987), an order granted at chambers, authorizing a trustee for minors to sell the trust property, was not binding on them, where they were not served, although a guardian ad litem was appointed for them; and a deed made by the trustee in pursuance of such an order did not convey a valid title.

##### 4. QUIETING TITLE—TITLE OF PLAINTIFF.

The general rule that one must be the owner of property in order to remove a cloud from the title cannot be applied so as to defeat a proceeding by minor beneficiaries of a trust to cancel a deed executed by their trustee without lawful authority. The grantee in such a deed cannot retain it, and claim under it, and yet defeat an effort to cancel it by setting up an outstanding title in a third person.

##### 5. SAME—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to authorize the verdict, and none of the rulings of which com-

plaint was made were such as to require a new trial.

##### 6. NEW TRIAL — GROUNDS — REJECTION OF AMENDMENT TO PLEADING.

The rejection of a proposed amendment to an answer of a defendant does not furnish a proper ground of a motion for a new trial. To such a ruling a bill of exceptions pendente lite may be filed, and error assigned thereon when the case is ultimately brought to this court by bill of exceptions, or if the case is brought to this court by bill of exceptions to a final judgment, or to a judgment which would have been final if rendered as the complaining party contends it should have been; and if such bill of exceptions is tendered within the time limited by law after the ruling on the rejection of the amendment the plaintiff in error may include in such main bill of exceptions an exception to such ruling and an assignment of error thereon.

(Syllabus by the Court.)

Error from Superior Court, Telfair County; J. H. Martin, Judge.

Action by Eva A. Barber and others against Julia A. Turner and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

De Lacy & Bishop and D. M. Roberts & Son, for plaintiffs in error. Graham & Graham, for defendants in error.

LUMPKIN, J. Eva A. Barber and others brought an equitable action against Mrs. Julia A. Turner and T. H. Barber for the purpose of canceling a deed executed by the latter, as their trustee, to the former, and obtaining an injunction against interference with their possession. On January 13, 1894, the grandmother of the plaintiffs executed to their father, T. H. Barber, a deed to the land in dispute, "in trust for the heirs of his body." At that time T. H. Barber had three children living, all of whom were minors. In 1903 he applied to the judge of the superior court, alleging that by the deed the land had been conveyed to him in trust for the heirs of his body; that he then had three children living, who at the date of the filing of the petition were respectively 15, 12, and 10 years of age, and that three other children were born to him after the making of such trust deed; "that by a decree lately rendered in the United States court sitting at Macon, Ga., in a proceeding to which the said J. F. Barber [the grandmother] was a party, the title to such land was adjudged and decreed to be in Norman W. Dodge. Your petitioner further shows that it is desirable and necessary to sell and convey said lot of land, and that a suitable purchaser has been found for the same, but that, in order to protect said purchaser against any claim that might hereafter be set up by his heirs against said purchaser for said lot, an order is necessary, your honor, authorizing your petitioner to sell and convey the same." It was further alleged that an agreement had been made between the petitioner and Dodge, whereby the latter agreed "to make a quitclaim deed as to his interest in said lot, upon the payment to him of the balance of the purchase money due on said

lot, when the order herein sought shall have been granted, and the deed from the petitioners to said purchaser shall have been executed and delivered in pursuance of said order." It was prayed that an order be granted authorizing and empowering the trustee to sell and convey the land and to execute a deed therefor. No service was made upon the minors, but a guardian ad litem was appointed. An order was granted at chambers, on March 5, 1903, by which the trustee was authorized to sell and convey, and to execute a deed to, the property described in said petition. The defendant, Mrs. Turner, set up various reasons why no decree of cancellation or injunction should be granted. Upon the trial the jury found in favor of the plaintiffs a verdict which is more fully stated below. A motion was made for a new trial, which was overruled, and Mrs. Turner excepted.

1. The first question which arises is as to the estate which was created by the deed from the grandmother to the father of the plaintiffs. It conveyed the land to the latter "as trustee for the heirs of his body." He then had the three living children, all of whom were, and still are, minors. The legal effect of the conveyance was to create a trust estate in Barber for the use of his children then living. *Vinson v. Vinson*, 33 Ga. 454; *Tharp v. Yarbrough*, 79 Ga. 382, 4 S. E. 915, 11 Am. St. Rep. 439; *Hollis v. Lawton*, 107 Ga. 102, 32 S. E. 846, 73 Am. St. Rep. 114.

2. A trust estate may be created for the benefit of minors. Civ. Code 1895, § 3149. The fact that the deed does not provide for any specific duties to be discharged or acts to be done by the trustee is not sufficient to cause the legal title to pass at once to minor beneficiaries. In an executed trust for the benefit of a person capable of taking and managing property in his own right, the legal title is merged immediately into the equitable interest. Civ. Code 1895, § 3157. But minor beneficiaries under a trust deed are not sui juris and capable of taking and managing property in their own right. *Askew v. Patterson*, 53 Ga. 209; *Knorr v. Raymond*, 73 Ga. 749 (11d); *Bolles v. Munnerlyn*, 83 Ga. 727-734, 10 S. E. 365. This is different from the question with which courts of equity have sometimes dealt as to allowing the sole beneficiary of trust property to have possession of it, as in *Wade v. Powell*, 20 Ga. 645.

3. Prior to Acts 1876, p. 103 (Civ. Code 1895, § 4987), it was held that service on minors personally was not required, upon an application to sell property held in trust for them, but that the appointment of a guardian ad litem and service on him was in accordance with the practice of the courts of equity at the time, and was sufficient. But that act has been held to have wrought a change, and to require service to be made upon the minors. *Morehead v. Allen*, 127 Ga. 510 (3), 515, 56 S. E. 745, and citations. In the case

now before us there was no entry of service upon the minors in the record of the application to sell their trust estate, and the extraneous evidence conclusively shows that there was in fact no service. This being so, the presiding judge could not, by the order which he granted at chambers, authorize the trustee to divest them of their interest. Accordingly the order which was passed did not affect their rights, and the deed made under it did not pass a title to the grantee therein.

4. The rule was invoked, on behalf of the defendant who took the conveyance from the trustee, that only the true owner could cancel a cloud on his title; and it was urged that there was a title superior to that of the trustee or his beneficiaries outstanding in Dodge. The general rule is that one must have a title before he can have a cloud on his title. But this rule has no application to a case where one unlawfully obtains a deed from a trustee as a purchaser from him, holds to such deed as a muniment of his title, and nevertheless resists the effort of the cestuis que trust to have the illegal deed canceled, by attempting to set up outstanding title in a third person. A purchaser from a trustee cannot both hold fast to the deed as a conveyance to him and at the same time successfully resist an attack upon it by the beneficiaries of the trust, on the ground that some third person has a better title. It appears that the trustee for the children took a bond for title in his individual name from Dodge, by which the latter agreed to make a quitclaim deed to him as an individual upon the payment of \$50 cash and \$150 in installments. In connection with the making of the trust deed, Barber, in his individual name, transferred this bond to Turner, the husband of the grantee to whom the deed was made, and he testified that he assumed the indebtedness of Barber to Dodge, and that he gave his purchase to his wife, though no transfer of the bond to her appears to have been made, nor was the balance ever paid to Dodge and a deed taken from him. It was contended that Barber, if he ever held as trustee for the children, ceased to do so upon taking this bond for title in his individual name, and held in his own right. There was ample evidence that he accepted the trust and held the property as trustee, and the deed to the defendant, Mrs. Turner, was an effort to convey the trust estate. If he had sought to claim that he ceased to hold as trustee but continued to hold as an individual under his bond, he could not have thus changed the nature of his holding so as to be adverse to the cestuis que trust. Civ. Code 1895, § 3190; *Freeman v. Brown*, 115 Ga. 31, 32, 41 S. E. 385 and citations; *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639; *Bridger v. Exchange Bank*, 126 Ga. 821 (11), 833, 56 S. E. 97, 115 Am. St. Rep. 118, 8 L. R. A. (N. S.) 463.

5. The evidence was sufficient to authorize the verdict, and none of the rulings of the

presiding judge of which complaint is made require a new trial. The jury found that the deed from Barber, trustee, to Mrs. Turner should be canceled, and that she should be enjoined from interfering with plaintiffs "under said deed," and the judge entered a decree accordingly, canceling the deed of the trustee and enjoining Mrs. Turner from interfering with the premises "under said deed, and the title to said premises, to wit [describing them], in so far as the same may be affected by the deed made by said trustee as aforesaid to said Mrs. Turner, is hereby adjudged and decreed to be in the plaintiffs." This would seem to leave open any question as to the rights of the parties which may grow out of the bond for title and its transfer to Turner, or any title which he may derive from Dodge. But no question is made by any specific assignment of error as to the effect of the verdict and decree on that subject, and we do not decide the point.

6. On October 18, 1906, an amendment to the answer of the defendant was offered and rejected by the judge. The verdict was found on that date, and on the same day a motion for a new trial was made on the general grounds that the verdict was contrary to law and evidence and against the weight of the evidence and the principles of equity and justice. No exception pendente lite was filed to the rulings rejecting the amendment offered. On July 10, 1907, an amendment was made to the motion for a new trial, and in one ground error was assigned on the rejection of the amendment. The motion for a new trial was overruled on September 14, 1907, and the bill of exceptions was certified on October 5th, assigning error in the overruling of the motion. Rulings of the presiding judge in regard to the sufficiency of pleadings, and the allowance or the refusal to allow an amendment, should be attacked by exceptions filed pendente lite, with proper assignment of error thereon when the case is finally brought up, or by direct exception, if the bill of exceptions to the final judgment (or judgment which would have been final, if rendered as the complaining party contends it should have been) is tendered within time to make exceptions to the rulings in regard to the pleadings. Such a ruling furnishes no proper ground of a motion for a new trial. *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51; *Raleigh R. Co. v. Pullman Co.*, 122 Ga. 700, 704, 50 S. E. 1008; *Daniel v. State*, 115 Ga. 205, 41 S. E. 695; *Central of Ga. Ry. Co. v. Trammell & McCowan*, 114 Ga. 313, 40 S. E. 259; *Bullock & Co. v. Cordele Sash, Door & Lumber Co.*, 114 Ga. 627, 40 S. E. 734; *Johnson v. Thrower*, 123 Ga. 706, 51 S. E. 636.

We have not discussed each of the grounds of the motion for new trial in detail, but what has been said substantially disposes of them all. Upon a careful consideration of them, there is nothing requiring a new trial.

Judgment affirmed. All the Justices concur.

# ST. AMAND v. NUNNALLY.

(Supreme Court of Georgia. Oct. 14, 1908.)

## JUDGMENT — CONCLUSIVENESS — FINALITY OF DETERMINATION.

A legatee under a will filed an equitable petition against the executors of the estate, to which they made answer. Another legatee intervened, and was made a party. She attacked the managing executor for mismanagement of the estate, and sought to recover a judgment against him. A receiver was appointed. In addition to setting up a right to regular and extra compensation in an answer to certain pleadings filed by some of the legatees, the executor referred to filed an "intervention," or petition, in which he claimed both the regular compensation of an executor and extra compensation on account of special facts, which he set out. An auditor was appointed, to whom was referred all issues in the case. The "intervention," or petition, last referred to was allowed, and the executor was "allowed to intervene in said case for the purpose of setting up his claim against the estate." This petition was required to be served on the receiver, and was referred to the auditor for hearing and report. The intervening legatee first mentioned filed before the auditor an amendment to her intervention, attacking the conduct of the executor, and denying that he was entitled to any compensation whatever. The auditor made a report, which was re-referred, and a second report made, in which he allowed commissions and also special compensation to the executor. To all the material findings in the original and supplemental reports in favor of the executor for commissions and special compensation, exceptions of law and fact were filed by two of the legatees. They were heard by the court and approved (except certain exceptions, which were overruled); no motion being made to dismiss or strike such exceptions. Afterwards, without excepting to the order referred to, the executor filed another petition, reciting the history of the case, asserting that no exceptions were filed to the finding of the auditor by the receiver, or by any one in his name for the estate of the decedent, and that therefore the finding of the auditor became a binding judgment, and a decree should be rendered accordingly, and praying that the court should decree that the receiver pay to petitioner the amount found to be due him by the auditor, with interest. On the hearing the court overruled the motion "to enter up final decree as prayed for," holding that the exceptions which had been filed by the legatees were properly filed and were still undisposed of. *Held*, that under the facts recited the executor could not disregard the existence and pendency of the exceptions and the approval of them by the court after a hearing, and that the case stood undisposed of for final determination upon them; nor was he entitled in such a motion as made by him, in spite of such facts, to have a decree entered in his favor against the receiver directing payment of the amount of compensation which had been found by the auditor.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between J. G. St. Amand and J. H. Nunnally, receiver. From the judgment, St. Amand brings error. Affirmed.

Hamilton Douglas and Westmoreland Bros., for plaintiff in error. J. L. Hopkins & Sons and Rosser & Brandon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

# WHITE & CORBITT v. W. W. STEWART & CO.

(Supreme Court of Georgia. Oct. 14, 1908.)

## 1. COVENANTS—WARRANTY OF TITLE—PLEADING.

In an action on a general warranty of title to land against the claims of all persons, an eviction or equivalent disturbance by an outstanding paramount title must be alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 197, 198.]

## 2. SAME—CONSTRUCTION.

If a deed purports to convey the right, title, and interest of the grantor in and to certain described realty, instead of conveying the realty itself, the covenants in the deed will be limited to the right or interest which the grantor has in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 38.]

## 3. SAME.

Covenants of title do not apply to land not included in the conveyance.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by W. W. Stewart & Co. against White & Corbitt. Judgment for plaintiffs, and defendants bring error. Reversed.

Lankford & Dickerson, for plaintiffs in error. C. T. Roan and F. Willis Dart, for defendants in error.

FISH, O. J. Stewart & Co. brought an action against White & Corbitt on an alleged breach of warranty of title to land. A demurrer to the petition was overruled, and the defendants excepted. The allegations of the petition, taken in connection with the copy of the deed annexed thereto as an exhibit, material to the consideration of the points raised by the demurrer, were: Defendants in October, 1905, in consideration of a given sum, sold and assigned their interest in certain turpentine leases, and sold and conveyed the timber suitable for turpentine purposes on other described lands, to plaintiffs, who entered into possession of all of such property "under said deed and conveyance, and spent large sums of money thereon." Defendants did not have good and sufficient title to any of the property when they executed the conveyance, or when the suit was instituted; but the real and genuine title to a given portion of the property was outstanding in a named third person, and that to the balance of the property in another designated person, and defendants knew this when they sold and conveyed to plaintiffs. The deed contained a general warranty of title against the claims of all persons. It was alleged "that the title warranted to [plaintiffs] by defendants as aforesaid has utterly failed, to their injury and damage in the sum of \$2,750, for which this suit is brought to recover."

1. One point made by the demurrer was to the effect that the petition did not allege that plaintiffs had been evicted or that their

possession had been in any way disturbed. This point was well taken. Civ. Code 1895, § 3614, provides: "A general warranty of title against the claims of all persons includes in itself covenants of a right to sell, and of a quiet enjoyment and freedom from incumbrances." The language of section 3617 is: "In suits for breach of warranty the burden is on the plaintiff, except in cases where outstanding incumbrances have been paid off, or possession has been yielded in consequence of legal proceedings of which the warrantor had notice and an opportunity to defend." These sections of the Code clearly indicate that the distinction between the covenants of right to convey and of warranty, usually recognized in most jurisdictions, no longer exists in this state, in so far as to what is necessary to constitute a breach of such covenants. Under the Code the general warranty of title against the claims of all persons practically stands for the covenant of warranty at common law, and includes in itself what was there known as the covenant of good right to convey. This court has frequently held that, "in an action for the breach of a covenant of warranty of title, the burden is upon the plaintiff to show eviction under a paramount outstanding title." *McMullen v. Butler*, 117 Ga. 845, 45 S. E. 258, and cases cited. A case not there cited is *Clements v. Collins*, 59 Ga. 124, wherein it was held: "In a suit upon warranty of title to land, unless it can be ascertained from the evidence that title paramount has been asserted against the warrantee, or some person claiming under him, and that he has yielded to it, or is in a situation requiring him to yield presently, as matter of legal duty, no breach is established." If an eviction, or its equivalent, must be proved in such an action, then, of course, it must be alleged; for a recovery can only be had *secundum allegata et probata*. In the case under consideration there was not only the mere failure to allege an eviction or an equivalent disturbance of the plaintiffs' possession, but it appears that plaintiffs entered into possession under the conveyance made to them by the defendants, and in the absence of any averment to the contrary the presumption is that plaintiffs have since remained in possession, and therefore were in possession when this action was begun. *Mallard v. Allred*, 106 Ga. 503, 32 S. E. 588. Non constat but that they have worked the timber for turpentine purposes from the date of their entry. Manifestly it would be wrong to allow plaintiffs to thus get the benefits of turpentine the timber, of keeping the possession of the same, and of recovering the purchase price paid for it. Generally damages for the breach of a covenant must be measured by the actual loss to the covenantee. In this case it does not appear from the petition that plaintiffs have suffered any loss whatever. The rule seems to be everywhere recognized that to constitute a breach

of the covenant of warranty, or for quiet enjoyment, an eviction or equivalent disturbance by title paramount must occur, and that the mere existence of an outstanding paramount title will not constitute a breach. 11 Cyc. 1125; 8 Am. & Eng. Enc. L. (2d Ed.) 98, 99, 101. It is consequently held that, in actions for the breach of these covenants, such an eviction, or something tantamount thereto, must be alleged. 11 Cyc. 1144; 5 Enc. P. & P. 371.

2. Another ground of the demurrer, which should have been sustained, was that the general warranty of title against the claims of all persons did not cover the title to the leases of the timber for turpentine purposes on lots of land Nos. 185, 248, and 249, as described in the deed. From the exhibited copy deed, it appears that the first portion of the instrument was devoted to the conveyance to the plaintiffs by the defendants of certain described personalty sold by them to the plaintiffs. Then follows this language: "Also, for the above-stated consideration, the parties of the first part do hereby grant, bargain, sell, assign, transfer, and set over unto the said parties of the second part, their heirs and assigns, all of the right, title, leasehold interest, and property right of the parties of the first part in and to the following described leases, to wit, together with the privileges described therein, together with any benefit to be derived therefrom." Then follows a descriptive list of a number of leases from named third persons to the defendants, conveying the right to work the timber for turpentine purposes on given lots of land in Coffee county, Ga., among them lots 248 and 249, as to which the petition alleged there had been a breach of the warranty of title. After the enumeration of the leases comes this: "Also, for the above-stated consideration, the said parties of the first part have granted, bargained, and conveyed unto the said parties of the second part, their heirs and assigns, and by these presents do grant, bargain, lease, and convey unto the said parties of the second part, their heirs and assigns, all of the timber suitable for turpentine purposes located on the following described tracts of land, to wit," which is followed by a description of various lots, among them Nos. 187 and 211, as to which the petition alleged there had also been a breach of the warranty of title. The habendum clause is as follows: "To have and to hold, the above-described property herein conveyed, leasehold interest and property rights, together with all and singular the rights, members, and appurtenances thereto in any wise appertaining and belonging, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns." Then comes the following warranty: "And the said parties of the first part, their heirs, executors, administrators, and assigns, will forever warrant and defend the title to the

above-described property and property rights unto the said parties of the second part, their heirs, executors, administrators, and assigns, against the claims of any and all persons whomsoever claiming or to claim the same."

The operative words used in the instrument as to the leases of the timber on lots 248 and 249 clearly indicate that the intention of the parties was that only the right, title, and interest which the defendants had in and to such leases were sold and assigned to the plaintiffs. This being true, the general warranty of title will be applied to the personalty and to the timber on other lots than those referred to in the leases, which personalty and timber were themselves conveyed to the plaintiffs, and not merely the defendants' interest therein. The rule, as stated in 8 Am. & Eng. Enc. of Law (2d Ed.) 71, seems to be generally accepted that, "if a deed purport to convey merely the right, title, and interest of the grantor in and to the land described, instead of conveying the land itself, the covenants in the deed will be limited to the right or interest which the grantor then has in the premises, and will not be broken, even though the grantee be ousted by a paramount title." To the same effect are 11 Cyc. 1059; Rawle on Covenants (5th Ed.) § 298; 3 Washburn on Real Property (6th Ed.) § 2400; Tiedeman on Real Property (3d Ed.) § 420. In *McDonough v. Martin*, 88 Ga. 675, 679, 16 S. E. 59, 60, 18 L. R. A. 343, the rule is thus stated: "If the conveyance is only of the grantor's right, title, and interest in the land, the scope of it is not enlarged by a general covenant; but such covenant must be limited to fit the subject conveyed"—citing many cases. Another case directly in point is *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800, 808, wherein it is held: "Where a deed conveys the grantor's right, title, and interest, though it contains in general terms a general covenant of warranty, the covenant is regarded as a restricted one, limited to the estate conveyed, and not one defending generally the land described. The covenant of warranty is intended to defend only what is conveyed, and cannot enlarge the estate conveyed"—citing numerous cases. We have not overlooked the ruling in *Burk v. Burk*, 64 Ga. 632, to the effect that, where one conveyed his interest in certain described lots of land, "said interest containing 83½ acres, more or less," with a general warranty of title against the claims of all persons, such warranty amounted to a covenant that there were no incumbrances on the interest of the grantor in such lands when the conveyance was executed. In that case the grantor did not convey merely his interest in the lands, but conveyed "83½ acres, more or less," of land itself.

3. Lot No. 185 was not referred to in any way in the copy of the conveyance attached to the petition, and the rule is elementary



that covenants for title cannot apply to land not included in the conveyance. 8 Am. & Eng. Enc. L. (2d Ed.) 66 (bb).

In view of the foregoing rulings, it is unnecessary to pass on the special demurrer, raising the point as to whether it should have been specifically set forth wherein and how the alleged outstanding titles in the named third persons were paramount or better than the title which defendants had when they conveyed to plaintiffs.

Judgment reversed. All the Justices concur.

## STONE v. TOWN OF TALLULAH FALLS et al.

(Supreme Court of Georgia. Oct. 13, 1908.)

### 1. MUNICIPAL CORPORATIONS—POLICE POWERS—PROHIBITING RUNNING AT LARGE OF HOGS.

Under the general welfare clause of the charter of the town of Tallulah Falls (Acts 1889, p. 1003), that municipality has power to enact an ordinance prohibiting the running at large of hogs within the corporate limits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1336.]

### 2. SAME—ORDINANCES—PROOF OF.

In a suit against a municipality to enjoin the enforcement of an ordinance, where the plaintiff serves the municipality with notice to produce its book of ordinances, and the book is produced under notice, inspected by the plaintiff, and so much of the book as contains a certain ordinance is offered in evidence by the plaintiff, it is the right of the defendant to offer in evidence the book to prove any other ordinance therein which may be relevant. The inclusion of the ordinance in the book of ordinances is prima facie evidence of its proper passage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 287-289; vol. 20, Evidence, § 453.]

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Petition for injunction by Althea G. Stone against the town of Tallulah Falls and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. E. A. Hamby, T. L. Bynum, and Payne & Jones, for plaintiff in error. W. S. Paris and H. H. Dean, for defendants in error.

EVANS, P. J. Althea G. Stone filed her petition against the town of Tallulah Falls, and the mayor, councilmen, and marshal of the town, to enjoin the defendants from impounding certain hogs belonging to her. In her petition she averred that the town of Tallulah Falls had no authority under its charter to

pass an ordinance for the impounding of hogs running at large on its streets. At the interlocutory hearing the court refused to grant the writ of injunction, and exception is taken to that order.

1. In the act incorporating the town of Tallulah Falls it is provided that the municipality "shall have power to pass and enact all laws and ordinances which may seem to them proper and just, not repugnant to the laws of this state and the United States." Acts 1889, p. 1003, § 5. Under the broad powers of this general welfare clause of its charter, the mayor and council of the town of Tallulah Falls have authority to pass an ordinance providing that hogs shall not be allowed to run at large within the corporate limits. Mayor of Cartersville v. Lanham, 67 Ga. 753; Crum v. Bray, 121 Ga. 709, 49 S. E. 689.

2. The plaintiff served the defendants with notice to produce its book of ordinances at the interlocutory hearing. The book of ordinances was produced under this notice, and the plaintiff introduced so much thereof as contained the following ordinances: "All ordinances or part of ordinances passed or amended by the board must be approved by the mayor, but he shall not withhold his approval and signature to any ordinance or amendment that the full board may pass upon." When the defendant offered so much of the book of ordinances as contained the ordinance providing for impounding hogs running at large on the streets of the town, objection was made to this evidence, on the ground that it did not affirmatively appear that the ordinance had been approved by any officer of the town. The objection was overruled, and exception is taken to this ruling. The book of ordinances kept by a municipal corporation, containing a particular ordinance, is prima facie evidence of its passage. McQuillan's Munc. Ord. § 383. A municipal ordinance may be proved by the production of the original book of ordinances, identified by the clerk of the corporation, and shown to have come from his custody. Met. St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. In the present instance the book of ordinances was produced by the municipality under notice, it was inspected by the plaintiff, and a part of it introduced in evidence; and under Civ. Code 1895, § 5243, which provides that a notice to produce dispenses with proof as against the party giving the notice, further identification by the clerk of the corporation was unnecessary.

The foregoing rulings control the case, and the questions raised in the other assignments of error are immaterial.

Judgment affirmed. All the Justices concur.

**WILSON v. GORDON et al.**

(Supreme Court of South Carolina. Oct. 27, 1908.)

On petition for rehearing. Denied.

For former report, see 61 S. E. 85.

M. P. De Bruhl and W. P. Greene, for appellants. Wm. N. Graydon and H. J. Haynsworth, for respondent.

**PER CURIAM.** After a careful consideration of the petition herein, this court is satisfied that no question of law has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and the order heretofore granted staying the remittitur be revoked.

**STATE ex rel. RAY v. MURRAY et al.**

(Supreme Court of South Carolina. Oct. 30, 1908.)

**MANDAMUS (§ 154\*)—PLEADINGS—AMENDMENTS.**

Where the state consents to the use of its name in mandamus proceedings instituted in the name of the petitioner, the pleadings will be amended, so as to read in the name of the state on the relation of petitioner.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 815; Dec. Dig. § 154.\*]

Petition by A. W. Ray, trustee, against W. J. Murray and others, as State Dispensary Commission, to require respondents to pay a judgment. Pleadings ordered amended.

D. C. Ray, for petitioner. W. F. Stevenson, for respondents. J. Fraser Lyon, Atty. Gen., for the State.

**PER CURIAM.** It is ordered that the petition for mandamus and other pleadings in the cause be amended, by inserting in the captions thereof the words "State ex rel.," so that said pleadings as amended shall read in the name of the "State ex rel. A. W. Ray, Trustee, against W. J. Murray, John McSween, and Avery Patton, as State Dispensary Commission, Respondents."

**STATE ex rel. RAY v. MURRAY et al.**

(Supreme Court of South Carolina. Oct. 30, 1908.)

Application for mandamus by the state, on the relation of A. W. Ray, trustee, against W. J. Murray and others. Peremptory writ of mandamus awarded.

D. C. Ray, for petitioner. W. F. Stevenson, for respondents. J. Fraser Lyon, Atty. Gen., for the State.

**PER CURIAM.** It appearing that the questions raised in this proceeding have been adjudicated by the case of State ex rel. J. F. Lyon v. W. J. Murray and Others, 60 S. E. 928, and that the return of the respondents is insufficient, for the reason set forth in the opinion in the

said case, now, on motion of D. C. Ray, attorney for petitioner, it is ordered that a peremptory writ of mandamus do issue, requiring the respondents to pay the money due the petitioner, as set forth in the petition.

The reasons for said judgment are stated in the opinion in the case of Lyon v. Murray, above referred to, which opinion is to be made a part of this decree, and the court reserves the right to file a further opinion in case it deem it necessary.

**SUTTLE v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of North Carolina. Oct. 21, 1908.)

**1. TELEGRAPHS AND TELEPHONES (§ 38\*)—CONTRACTS FOR DELIVERY OF MESSAGES—OFFICE HOURS.**

A telegraph company, receiving a message and undertaking to deliver it at a time not within its office hours, must do so because of the special undertaking which constituted a waiver by it of the benefit of office hours.

[Ed. Note.—For other cases, see Telegraphs & Telephones, Cent. Dig. § 33; Dec. Dig. § 38.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 31\*).**

A telegraph company may prescribe reasonable office hours, but may waive them.

[Ed. Note.—For other cases, see Telegraphs & Telephones, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 68\*)—NONDELIVERY OF MESSAGES—DAMAGES—MENTAL ANGUISH.**

Where a telegraph company, receiving a message for delivery the same day, was informed of the necessity of such delivery and knew that, if it was delayed until the following day, the object of the message would be defeated and that the sendee would suffer mental anguish, and agreed to deliver the message on the day it received it, the sendee could recover for mental anguish suffered from failure to deliver the message until the following day.

[Ed. Note.—For other cases, see Telegraphs & Telephones, Cent. Dig. §§ 69-70; Dec. Dig. § 68.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 68\*).**

Where a husband, delayed in reaching home by a railroad wreck, gave a message to a telegraph company for delivery to the wife, announcing the cause of the delay and falsely stating that he was not injured, and the company negligently delayed the delivery of the message to the wife, who suffered mental anguish in consequence thereof, the negligence of the company was the proximate cause of her injury, authorizing a recovery.

[Ed. Note.—For other cases, see Telegraphs & Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 37\*).**

A telegraph company, receiving a message for delivery, cannot disregard the knowledge of the facts which are apparent, and plead its own ignorance as an excuse for its failure to deliver the message.

[Ed. Note.—For other cases, see Telegraphs & Telephones, Cent. Dig. § 32; Dec. Dig. § 37.\*]

Appeal from Superior Court, Johnston County; Long, Judge.

Action by Mrs. Bettie L. Suttle against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This action was brought to recover damages for failing to deliver a telegram, and was heard below on a case agreed, which is as follows:

"It is admitted by counsel on both sides that the telegram set out in the complaint was delivered to the agent of the defendant at Raleigh, N. C., at 7:27 o'clock p. m., May 19, 1903, and it was received by the operator at Smithfield, agent of defendant, at 8:25 p. m. on the same night; that the message was delivered to Mrs. Suttle at 9 o'clock a. m. the next day, to wit, May 20, 1903; and that the business hours of the Western Union Telegraph Company at Smithfield are from 8 a. m. to 8 p. m."

The court by consent of the parties, found the following facts from the depositions submitted:

"(1) The plaintiff, J. W. Suttle, left Smithfield on the morning of May 19th to spend the day in Raleigh, expecting to return to Smithfield on the afternoon train, and he so told his wife before leaving home that morning.

"(2) The plaintiff, J. W. Suttle, did not return to Smithfield on the afternoon of May 19th, because the train on which he was returning to Selma was wrecked; but he returned to Raleigh from the wreck, and at 7:27 filed with the defendant's agent at Raleigh the telegram set out in the complaint and addressed to his wife, Mrs. J. W. Suttle, Smithfield, N. C., which was as follows: 'Esta and I were in wreck, not hurt, will be home to-morrow.'

"(3) In addition to the notice of the importance of the prompt delivery of said telegram appearing from the face of the message, the said J. W. Suttle, at the time of delivering the message, asked the operator if the message would be delivered to his wife that evening, and was told by the operator that it would. J. W. Suttle said to the operator that, if he thought it would not reach her that evening, he would be compelled to drive home through the country, because he knew his wife would hear of the wreck and would spend a miserable night, not knowing whether he was hurt or not in the wreck.

"(4) By reason of the failure to deliver the telegram promptly on the evening of May 19, 1903, the plaintiff, Mrs. Suttle, suffered great mental anguish as described by her. If the telegram had been promptly delivered upon its receipt at Smithfield, to wit, 8:30 o'clock p. m., May 19, 1903, the feme plaintiff would not have suffered the mental anguish as testified to by her.

"(5) Notwithstanding the facts set out in the telegram, Mr. Suttle did receive certain hurts by the wreck, which are set forth in the evidence.

"Upon the admission of counsel for plaintiff and defendant, and the finding of facts by the court, it is considered by the court that the defendant was guilty of negligence in failing to promptly deliver the telegram

set out in the complaint to the feme plaintiff, and that the plaintiff recover of the defendant the sum of \$175, together with the costs of this action, to be taxed by the clerk."

It was agreed that, if the plaintiff is entitled in law to recover, the damages should be assessed at \$175. The defendant excepted to the judgment of the court, and appealed.

R. C. Strong, for appellant. Pou & Brooks, for appellee.

WALKER, J. (after stating the facts as above). It is too late now to question the proposition that, if a telegraph company receives a message from the sender and undertakes to deliver it to the sendee at a time not within its office hours, it is its legal duty to do so, because of the special undertaking, which constitutes a waiver by it of the benefit of office hours. It may prescribe office hours, when they are reasonable; but it may also waive them, if it sees fit to do so. *Bright v. Telegraph Co.*, 132 N. C. 317, 43 S. E. 841; *Kernodle v. Telegraph Co.*, 141 N. C. 436, 54 S. E. 423; *Carter v. Telegraph Co.*, 141 N. C. 374, 54 S. E. 274; *Dowdy v. Telegraph Co.*, 124 N. C. 522, 32 S. E. 802. In this case the company, by its operator and agent, expressly agreed that the message would be delivered to Mrs. Suttle that evening, and he was specially and fully advised of the importance of a speedy delivery to her. There could hardly be more detailed information of the nature and importance of the message, or of the reason why an early delivery to the sendee was desired. The company was fully aware of the fact that, if the delivery of the message was delayed until the next morning, the object for sending it would be defeated, and, too, that the sendee, Mrs. Suttle, would suffer mental anguish. The sender informed the operator that he would drive to his home that evening if the message could not be delivered at once, and thereby relieve his wife's anxiety, as she would be sure to hear of the accident. He expected to return home that afternoon, and his failure to do so, together with the knowledge of the accident by his wife, would be sure to cause her mental distress. The case is a plain one for the application of the rule laid down in the cases cited. Indeed, it is much stronger against the company than were the facts in any one of them.

The defendant's counsel contend that, as the information contained in the message was false, the delayed delivery was not the proximate cause of the injury, and that the meaning or import of the message did not appear on its face and was not communicated to the operator. He reasons from this that the damage to the feme plaintiff was not within the contemplation of the company and the plaintiff, when they entered into the contract for the transmission of the message. We have held, it is true, that the company must be notified in some way that

mental anguish will naturally and reasonably follow as a result of its negligence, and this information must be imparted to it by the contents of the message itself, or by facts within its knowledge at the time, or brought to its attention at the time of receiving the message for transmission. *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559; *Cranford v. Telegraph Co.*, 138 N. C. 162, 50 S. E. 585; *Bowers v. Telegraph Co.*, 135 N. C. 504, 47 S. E. 597. But in this case the evidence is plenary that the company was fully informed as to the nature of the message, and its meaning and import, and could easily have inferred, if it was not directly and explicitly told, what the consequence of delaying the delivery until the next morning would be. It cannot close its mind to the knowledge of facts which are apparent, and thus plead its own ignorance as an excuse for its failure to deliver the message. If it carelessly disregarded the information it received and its evident import, its fault in this respect is not to be imputed to the plaintiff, so as to bar her right to damages. The operator was told by Mr. Suttle what his purpose was in sending the message and in asking for a prompt delivery that evening. It was to avoid the very thing that has occurred, and which every reasonable man, mindful of his obligation to others, should have known would occur. The delay of the company was clearly the proximate cause of the injury. The case of *Dayvis v. Telegraph Company*, 139 N. C. 79, 51 S. E. 898, seems to be a direct authority sustaining the ruling of the court. In that case it is said by Justice Hoke: "This message was sent to prevent anxiety in the plaintiff's mind, and, but for the defendant's default, would have fulfilled its mission."

We have carefully examined the objections to the testimony, and find no error in the rulings of the court upon them. They seem to be fully answered by what we have said on the merits of the case. There is no error in the decision upon the admissions of counsel and the facts found by the court.

Affirmed.

## RALEIGH IRON WORKS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Oct. 14, 1908.)

### 1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—CARRIERS—FAILURE TO ADJUST CLAIM—PENALTY—STATUTORY REGULATION.

Revisal 1905, § 2634, subjecting a carrier to a penalty for failure to adjust and pay a claim for loss of or damage to property within the time prescribed, does not deny the carrier the equal protection of the law, in violation of Const. U. S. Amend. 14.

### 2. COMMERCE—POWER TO REGULATE—CARRIERS—LOSS OF GOODS—PENALTY—STATUTORY REGULATION.

Revisal 1905, § 2634, subjecting a carrier to a penalty for failure to adjust and pay a claim for loss of or damage to property within

the time prescribed, does not impose an unlawful burden on interstate commerce, in violation of Const. U. S. art. 1, § 8, conferring on Congress the right to regulate interstate commerce.

### 3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—CARRIERS—OVERCHARGE—PENALTY—STATUTORY REGULATION.

Revisal 1905, § 2644, subjecting a carrier to a penalty for failure to refund an overcharge within the time prescribed, does not deny the carrier the equal protection of the law, in violation of Const. U. S. Amend. 14.

### 4. COMMERCE—POWER TO REGULATE—CARRIERS—OVERCHARGE—STATUTORY REGULATION.

Revisal 1905, § 2644, subjecting a carrier to a penalty for failure to refund an overcharge within the time prescribed, does not impose an unlawful burden on interstate commerce, in violation of Const. U. S. art. 1, § 8, conferring on Congress the right to regulate interstate commerce.

Appeal from Superior Court, Wake County; Bliggs, Judge.

Action by the Raleigh Iron Works against the Southern Railway Company, tried on appeal from a justice of the peace. Judgment for plaintiff, and defendant appeals. Affirmed.

A jury trial having been waived, and the cause tried by the court, recovery was had by plaintiff for an amount demanded as damages and for certain penalties claimed as arising under sections 2634, 2644, Revisal 1905. From judgment rendered the defendant excepted and appealed, assigning errors as follows: "The defendant contends that the statute is unconstitutional and void in that (1) it is in violation of article 1, § 8, of the Constitution of the United States, commonly known as the 'interstate commerce clause'; (2) that it is in violation of the fourteenth amendment to the Constitution of the United States, in that it is class legislation, and it is the taking of the property of the defendant without due process of law, and it denies to the defendant the equal protection of the laws; (3) that, if the statutes be constitutional, they have no application to interstate shipments of goods, and therefore do not apply to this case; (4) that said act is inoperative and void, because in conflict with Act Cong. June 15, 1866, c. 124, 14 Stat. 66; (5) that the said act, prescribing a penalty for an overcharge, if the same be applicable to this case, is void because it conflicts with the provisions of the act of Congress known as the 'Interstate Commerce Act' (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), known as the 'Hepburn Act,' and various other amendments."

A. B. Andrews, Jr., for appellant. J. W. Hinsdale, Jr., for appellee.

PER CURIAM. It was chiefly urged for error, on the part of the defendant, that the state legislation in question, imposing certain penalties for alleged default on the part of defendant, is unconstitutional: (1) In

denying said defendant the equal protection of the law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States; (2) in imposing unlawful burdens and restrictions upon interstate commerce, contrary to article 1, § 8, of said Constitution.

The questions thus raised have been recently presented in several cases on appeal before this court, and have been decided adversely to defendant's position, notably in *Efland v. Railroad* (Defendant's Appeal) 146 N. C. 135, 59 S. E. 355; *Morris & Co. v. Express Co.*, 146 N. C. 187, 59 S. E. 687; *Harrill v. Railroad*, 144 N. C. 532, 57 S. E. 383; *Cottrell v. Railroad*, 141 N. C. 383, 54 S. E. 288. The constitutionality of these penalty statutes was so fully discussed in those cases that the court does not consider that further statement on the subject is required. For the reasons given in those opinions, and on the authorities there cited, the exceptions of defendant are overruled, and the judgment below affirmed.

Judgment affirmed.

#### STATON v. STATON et al.

(Supreme Court of North Carolina. Oct. 21, 1908.)

##### 1. DRAINS (§ 50\*) — ESTABLISHMENT — JUDGMENT.

A judgment in a proceeding under the drainage act (Revisal 1905, §§ 3983-4028) for the right to drain into a canal, which confirms the report of commissioners determining the rights and duties of the parties and the amount each should pay, is not a final judgment, conclusive for all time, for the proceeding is in rem, which may be brought forward from time to time, on notice to all the parties affected, for orders dividing the amount to be paid by each of new tracts into which a former tract has been divided, for repairs, and for extending the canal and bringing in other parties.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 50.\*]

##### 2. DRAINS (§ 50\*) — ESTABLISHMENT — JUDGMENT—AMENDMENT.

It is not necessary to keep a proceeding under the drainage act (Revisal 1905, §§ 3983-4028) on the docket; but proceedings may be brought forward on notice to the parties on supplementary petition filed therein.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 50.\*]

##### 3. DRAINS (§ 52\*) — ESTABLISHMENT — JUDGMENT—AMENDMENT—PETITION.

A supplementary petition in proceedings under the drainage act (Revisal 1905, §§ 3983-4028), which sets out that repairs are needed and that a tract has been partitioned, etc., is not uncertain for not restating the termini of the canal, where that sufficiently appears in the original proceeding.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 52.\*]

##### 4. DRAINS (§ 50\*) — ESTABLISHMENT — JUDGMENT—AMENDMENT OF PETITION.

A supplementary petition in proceedings under the drainage act (Revisal 1905, §§ 3983-4028) for the right to drain into a canal, which is uncertain for failing to state the termini

of the canal, may be amended, where the termini do not sufficiently appear in the original proceeding.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 50.\*]

Appeal from Superior Court, Edgecombe County; Lyon, Judge.

Supplementary proceedings by Cornellus Staton against L. L. Staton and others in proceedings under the drainage act (Revisal 1905, §§ 3983-4028). From a judgment of dismissal, plaintiff appeals. Reversed.

G. M. T. Fountain, for appellant. W. W. Clark and H. A. Gilliam, for appellees.

CLARK, C. J. The plaintiff herein instituted a proceeding in 1885, under the drainage act, now Revisal 1905, c. 88, §§ 3983-4028, for the right to drain into Barnes Canal. Commissioners were appointed, the rights and duties of the several parties determined, and the amount each should pay assessed. The report was confirmed January 30, 1886. This is a supplemental proceeding, begun in the clerk's court, which sets out that repairs to the canal are needed, that some of the tracts have changed hands, and that one tract in particular has been partitioned, and asking that the amount assessed against that tract be divided and assessed, in proper proportions, against each of the partitioners. This is in effect a motion in the cause. From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding in rem, which can be brought forward from time to time, upon notice to all the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging and deepening the canal, or for other purposes; or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified and molded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court.

It is not necessary, however, to keep such cases on the docket; but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise. There is no uncertainty in not restating in this petition the termini of the canal. That sufficiently appears in the original proceeding, and, if it did not, the petitioner should be allowed to amend. *Porter v. Armstrong*, 134 N. C. 449, 46 S. E. 997; *Id.*, 139 N. C. 179, 51 S. E. 926. These proceedings are not highly technical, but are intend-

ed to be inexpensive, and to be molded from time to time by the orders of the court as may best promote the beneficial results contemplated by the statute.

The judgment dismissing the proceeding is reversed.

### STATE v. ALLEN.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### ARSON (§ 37\*)—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* sufficient to warrant a conviction for burning a barn.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-73; Dec. Dig. § 37.\*]

Appeal from Superior Court, Union County; E. B. Jones, Judge.

Ed. Allen was convicted of burning a barn, and appeals. No error.

Adams, Jerome & Armfield, for appellant. Assistant Attorney General Clement, for the State.

**BROWN, J.** The record presents two exceptions to the rulings of the trial court, one of which has been abandoned here. The remaining exception is to the refusal of the judge to charge the jury that the evidence is insufficient to convict. The evidence is circumstantial in its nature, but amply sufficient in its probative force to justify the court in submitting the guilt of the accused to the determination of the jury.

The evidence tends to prove that the defendant had "bad blood" for the prosecutor, Jim Bivins, whose barn was burned at night on November 6, 1907, as well as against one Crowder, growing out of the destruction of defendant's crop of corn in July or August of that year; that defendant made threats against both Crowder and Bivins. It appeared, upon cross-examination of defendant, that Crowder's barn was burned two weeks before the burning of Bivins' barn. The latter's barn was burned about 4 o'clock in the morning, destroying two mules and other valuable property, within 875 yards of defendant's house and in plain sight. The fire attracted to it the entire neighborhood, except defendant, who was in his house at the time. In the morning well-defined tracks were followed direct from the burned barn to defendant's house. The tracks as they left the barn appeared to be "running tracks." The witnesses examined the other side of defendant's house and could find no tracks. Witnesses testified that tracks were made by a party wearing a brogan shoe of rather large size—larger than Mr. Austin, who wore a No. 8. Defendant testified that he wore a No. 9; also wore brogan shoes. When witnesses followed these tracks to defendant's house, they saw defendant on the other side of the house, leaving, with a gun on his shoulder;

that they called him, and told him they had followed the tracks there, and that the tracks went no farther, and asked defendant to go with them over to the burning barn; that the defendant at first declined to go, but later followed them over there.

The evidence further showed that when defendant arrived Mack Bivins asked him to let him measure his shoe, in order to see if it corresponded with the footprints. Defendant refused to do so, and walked off some 60 or 75 yards; then called witness and told him to come and measure the track, but witness did not go to defendant. Defendant stated to these witnesses that he did not know the barn was burning until they came over there, between 9 and 10 o'clock, and told him of it. This statement is highly suspicious, because defendant's house was in plain sight of the barn, and prosecutor saw the fire three miles off. Defendant's wife testified that defendant arose that morning between 4 and 5 o'clock, built a fire, and sat by the fire until it was light enough to feed. All these facts and circumstances are not only some evidence, but amply warrant the finding of the jury that the defendant is guilty as charged.

No error.

### B. F. D. ALBRITTON & CO. v. ATLANTIC COAST LINE R. R.

(Supreme Court of North Carolina. Oct. 21, 1908.)

#### 1. CARRIERS (§ 20\*)—GOODS—CLAIMS FOR LOSS—DELAYED ADJUSTMENT—VOLUNTARY PAYMENT—EFFECT.

Revisal 1905, § 2634, requires carriers to adjust claims for lost goods, etc., within prescribed periods, and prescribes a penalty for failing to adjust the claims within such periods, recoverable by the consignee, "provided that unless such consignee recover in such action" the full amount claimed, no penalty shall lie. *Held*, that a consignee can recover the penalty, where the carrier voluntarily pays the claim after the limited time, the quoted phrase referring to an action in which causes for the claim and for the penalty are joined.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.\*]

#### 2. ACTION (§ 48\*)—SEPARATE ACTION—RIGHT TO MAINTAIN.

Under Revisal 1905, § 2634, prescribing a penalty for a carrier's failure to adjust a claim for lost goods within prescribed periods, where no adjustment is made, a consignee can sue on the claim, and afterwards recover the penalty in a separate action, or he may join the two actions; his right to the penalty depending upon the recovery of the full amount of his claim.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 48.\*]

#### 3. CARRIERS (§ 20\*).

Under Revisal 1905, § 2634, prescribing a penalty for a carrier's failure to adjust a claim for lost goods within specified periods, consignee does not waive the penalty by receiving the amount of the claim after the time limited.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.\*]

Appeal from Superior Court, Lenoir County; Neal, Judge.

Action by B. F. D. Albritton & Co. against the Atlantic Coast Line Railroad. From a judgment of nonsuit, plaintiff appeals. Nonsuit vacated, and new trial ordered.

This action was brought to recover the penalty given by section 2634 of the Revisal of 1905, for failing to adjust and pay a claim for loss of property shipped over the defendant's road. B. F. D. Albritton testified: That he is a member of the partnership of B. F. D. Albritton & Co. J. J. Edwards and J. E. Albritton are the only other partners. That he filed with the agent of the defendant company at Ayden, N. C., on the 15th day of September, 1906, a claim against the defendant for the sum of \$25.75 for loss of and damage to goods shipped over the road of defendant. The claim was not paid, and, on the 16th day of October, 1907, action was instituted before W. F. Stanley, J. P., for the amount of the claim, the summons in said action being returnable on the 23d day of October, 1907. That the action was not tried, but the defendant, after the action was brought, offered to pay to plaintiff the amount claimed, with interest and costs of the action, which was accepted, and the action dismissed by a consent judgment on the 4th day of November, 1907, at which time the plaintiffs accepted in full for the claim. The summons and judgment in the previous action and the receipt of plaintiff to defendant were all in evidence. Upon the evidence of the plaintiffs the court intimated that they could not recover, whereupon they submitted to a nonsuit and appealed.

Y. T. Ormond, for appellant. Rouse & Land, for appellee.

WALKER, J. The only question presented in this case is whether the plaintiff is entitled to recover the penalty of \$50, given by section 2634 of the Revisal of 1905 for a failure by a common carrier to adjust and pay a claim for loss of or damage to property intrusted to it for transportation, when the carrier has voluntarily paid the claim in full, after the time limited in the statute for its payment. The section is as follows: "Every claim for loss of or damage to property, while in possession of a common carrier, shall be adjusted and paid within sixty days in case of shipments wholly within this state, and within ninety days, in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or point of delivery to another common carrier: Provided that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or dam-

age, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: Provided, that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalty herein provided for, may be united in the same complaint." Revisal 1905, section 2634. It will be observed that the penalty is given for a failure to adjust and pay within 60 days after the claim is filed. The defendant contends that the payment described in the section is one which is enforced by judgment and execution, in an action brought to recover the amount of the claim, and that if the carrier pays voluntarily, however long the payment may have been delayed beyond the time fixed by the statute, there is no liability for the penalty. We cannot assent to this construction of the section, for it contravenes its plain meaning. The penalty is given for a failure to adjust and pay within 60 days after the claim is filed, whether the payment is voluntary or not. If it is voluntarily made, no suit is necessary to recover the amount due, but only to recover the penalty, but if it is not made voluntarily, the plaintiff can sue for the amount of the claim, and afterwards, in a separate action, recover the penalty, or at his election he may join the two causes of action in one suit. It is to the action in which the two causes are joined that reference is made by the use of the words "unless such consignee recover in such action," the idea being that if the claim has not been previously adjusted and paid, whether voluntarily or involuntarily, then the plaintiff must join the two causes in one action, in order that he may have his right to the full amount claimed by him adjudicated, before any judgment is rendered for the penalty; it being necessary to establish that he is entitled to the full amount he claims, as a condition precedent to his right to recover the penalty, if there has been a delay in adjustment and payment. The reason for this is that it must be known first that the plaintiff has not made an excessive demand of the defendant, for, if he has, the refusal of the latter to pay would be rightful, and the penalty would not accrue. Any other construction would enable the carrier, by its own wrong in refusing to pay a just claim for loss or damage, to compel the plaintiff to sue, and then by settling to avoid the penalty, or by delaying to pay ever so long

beyond the time fixed by the statute, and then finally settling, produce the same result. This would be contrary to the plain words of the section, and would enable the carrier, by evasion, to defeat the clearly expressed intention of the Legislature.

We were referred by counsel for the defendant to the case of *Best v. Railway*, 72 S. C. 479, 52 S. E. 223, which seems to sustain his position, but we are unable to follow that decision. The reasoning of Justice Gary, in his dissenting opinion, commends itself most favorably to us, and we concur in what he says, as follows: "The proper construction of the act is that, when a common carrier fails to adjust and pay the consignee's claim within the time specified by the act, it subjects itself to liability: First, for the amount of the loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof; second, for a penalty of \$50 for failure to adjust and pay the claim within the period prescribed by the statute, provided the consignee recovers the full amount claimed, whether in an action when necessary, or by voluntary payment on the part of the common carrier. The mode of determining whether the consignee was entitled to recover the full amount of his claim is a mere incident, and not a condition precedent to his right to recover the penalty. The adjustment and payment of the claim for loss of the property was not intended as satisfaction of the liability incurred as a penalty, nor did it have such effect by operation of the law." There is no valid reason for holding that the adjustment and payment of the plaintiff's claim is a waiver of the penalty. If the carrier delays the adjustment and payment of the loss or damage more than 60 days after the claim for the same is filed, the penalty accrues, and the plaintiff is then entitled to recover the amount of his claim, as well as the penalty, and he may do so in one action or in separate suits; the right to the penalty depending upon his recovery of the full amount of his claim. We do not see why the plaintiff should wait until he has recovered the penalty before receiving the amount of his claim, or forfeit the penalty. There is no provision in the statute to that effect. The penalty is given for the delay in adjusting and paying, and it cannot, therefore, be that paying after the time fixed by the statute works a forfeiture of the penalty.

It was contended that the receipt of the amount of the claim is a waiver of the penalty, because the plaintiff can have but one recovery for the claim and penalty, there being but one wrong, and the case of *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225, was cited in support of the contention, but the case is not applicable. Here there are two separable causes of ac-

tion, one for the claim, and the other for the penalty, while in *Eller's Case* there was but one wrong, for which the plaintiff was entitled to recover only damages which were necessarily indivisible. We held that he must recover all his damages in one action, as there was but one cause of action for the one wrong, and for the reason that there could be only one compensation for the single wrong or breach of duty. The distinction between the two cases seems to be clear.

There was error in the ruling of the court. The nonsuit is set aside, and a new trial ordered.

New trial.

### JOHN SLAUGHTER CO. v. STANDARD SEWING MACH. CO.

(Supreme Court of North Carolina. Oct. 21, 1908.)

#### 1. CONTRACTS (§ 312\*)—PERFORMANCE—ACTS CONSTITUTING BREACH—DAMAGES.

A defendant, recommending an agent to plaintiff pursuant to an agreement to furnish an experienced and successful sales agent to sell machines bought of defendant for resale, is not liable to plaintiff for a loss occasioned by the dishonesty of the agent recommended, unless defendant acted knowingly, negligently, or fraudulently.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 312.\*]

#### 2. PRINCIPAL AND AGENT (§ 8\*)—EXISTENCE OF RELATION.

Where plaintiff bought goods from defendant for resale, and defendant recommended the employment by plaintiff of an agent to sell, the agent employed was the agent of plaintiff.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 8.\*]

#### 3. SET-OFF AND COUNTERCLAIM (§ 28\*)—CLAIMS AVAILABLE—STATUTES.

In an action for a loss occasioned by the dishonesty of an agent employed by plaintiff on the recommendation of defendant, who had agreed to furnish plaintiff with an experienced and successful sales agent to sell machines bought from defendant for resale, a counterclaim for the price of the machines is admissible, under *Revisal 1905*, § 481, subsecs. 1, 2, authorizing counterclaims.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 48; Dec. Dig. § 28.\*]

#### 4. PLEADING (§ 345\*)—MOTIONS—JUDGMENT.

Where, in an action for a loss occasioned by the dishonesty of an agent recommended to plaintiff by defendant to sell machines bought from defendant for resale, defendant set up a counterclaim for the price of the machines, and plaintiff admitted the purchase and the price of the machines, and denied liability solely on the ground that the agent recommended by defendant was dishonest, and had embezzled plaintiff's property, a judgment on the pleadings for defendant was proper, on it appearing that plaintiff had no cause of action against defendant.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 345.\*]

#### 5. SET-OFF AND COUNTERCLAIM (§ 40\*)—CLAIMS AVAILABLE.

In an action for a loss by the dishonesty of an agent recommended to plaintiff by de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



defendant, under an agreement to furnish to plaintiff an agent to sell machines bought from defendant for resale, an installment of the price of the machines falling due after the commencement of the action, and before the trial, is available as a counterclaim, under Revisal 1905, § 481, subsec. 1, providing that a cause of action arising out of the contract set forth in the complaint may be set up as a counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 73; Dec. Dig. § 40.\*]

Appeal from Superior Court, Wayne County; Gulon, Judge.

Action by the John Slaughter Company against the Standard Sewing Machine Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. L. Barham, W. T. Dortch, and W. C. Munroe, for appellant. Isaac F. Dortch and Aycock & Daniels, for appellee.

CLARK, C. J. The court rendered judgment upon the pleadings. It appears therefrom that the plaintiff admits the purchase of the sewing machines at the price stated, but seeks to recover damages because, as it alleges, the defendant agreed to furnish the plaintiff an experienced and successful agent to sell the machines, and that said agent embezzled the horse and buggy furnished him, and ran away with certain collections made by him. The defendant denies agreeing to furnish the agent, but, the judgment being rendered on the pleadings, this must be taken as true. When furnished the agent became the agent of the plaintiff, and any loss from his misconduct falls upon the plaintiff. The defendant is not liable unless the defendant knowingly or negligently or fraudulently imposed a bad servant upon the plaintiff, and this is not alleged in the complaint. It does not appear that the agent had not been successful and was not experienced. It is alleged that the agent proved to be dishonest, but it is not averred that his character was known by the defendant to be bad. The complaint avers that the said agent committed the acts of dishonesty "while so engaged in the employment of the plaintiff." He could not be the agent of both the plaintiff and defendant in selling machines for the plaintiff. The plaintiff bought the machines to resell. It could not be that the defendant agreed through its own agent to sell them for plaintiff. The defendant was a manufacturer of sewing machines. The plaintiff company was engaged in the business of buying and retailing them. The allegations in the complaint taken as true do not impose any liability upon the defendant for the dishonesty of the agent it sent to the plaintiff and the latter employed.

The counterclaim for the price of the sewing machines is admissible under both divisions of Revisal 1905, § 481. (1) It is a cause of action connected with the subject of the

action. Indeed it arises out of the same transaction. In such case it is immaterial whether plaintiff's claim arises in tort or contract. *Bitting v. Thaxton*, 72 N. C. 541; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 518; *Branch v. Chappell*, 119 N. C. 81, 25 S. E. 870. (2) In an action on contract any other cause of action arising on contract and existing at the commencement of the action. It is true the reply denies that the plaintiff owes the sum set up in the counterclaim, but that is a conclusion of law, for the purchase and price of the sewing machines are admitted, and the liability therefor is denied solely on the ground that the agent recommended by the defendant and employed by plaintiff proved to be dishonest. The second installment of purchase money of the machines fell due after beginning of this action, but before the trial. "Arising out of the same transaction," it was available. It is only when the counterclaim is "another cause of action" arising on contract that it must "exist at the commencement of the action." Revisal 1905, § 481 (2). This is not required under subsection 1, Revisal 1905, § 481. *Smith v. French*, 141 N. C. 8, 53 S. E. 435. While the counterclaim is for a second purchase of machines, section 3 of the reply alleges that such second purchase was made upon the inducement that the defendant was to send plaintiff a successful and experienced agent. This was a part of the same transaction. The subsequent conduct of the agent was not, but for that, as we have seen, the defendant is not liable, upon the allegations pleaded.

Affirmed.

#### BRISCOE v. HENDERSON LIGHTING & POWER CO.

(Supreme Court of North Carolina. Oct. 14, 1908.)

##### 1. NEGLIGENCE—CONDITION OF LAND—DEDICATION—"ALLEYWAY"—PLEADING.

The use of the term "alleyway," in a complaint for injuries, does not of itself imply that the strip has been dedicated to the public use; for one may use a part of his land as an alleyway for his business without subjecting it to a public use.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 341-343; vol. 8, p. 7573.]

##### 2. SAME—CARE AS TO EMPLOYEES AND LICENSEES.

Where one uses a part of his land for an alleyway for his business, his servants and others invited or entitled to pass over it may recover for injuries from pitfalls thereon; the liability of the owner arising out of a duty imposed by his relation to his employees or licensees.

##### 3. SAME—TRESPASSERS.

A complaint in an action for injuries by falling into a hot water well maintained by a light and power company on an alley owned and used by it for its business, which alleges that plaintiff, a boy of 13 years, on passing

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

through the alley, fell into the well because of the insufficiency of the covering thereon, but which does not allege the purpose for which he entered on the premises, nor show any relation between himself and the company entitling him to enter thereon, and which alleges that the machinery maintained by the company was calculated to attract boys, etc., shows that plaintiff was a trespasser on the premises, and the liability of the company depends on the measure of duty which it owed to trespassers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 46, 47.]

#### 4. SAME.

An owner of cultivated lands or lots in a town is not as a general rule required to guard every pathway or alleyway used for his own convenience against the intrusion of trespassers, and is not, in default thereof, liable for every injury sustained in passing over the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 45.]

#### 5. SAME—"ACTIONABLE NEGLIGENCE."

Actionable negligence exists only where one whose acts occasion injury to another owes to the latter a duty created either by contract or operation of law, which he has failed to discharge, and, when no right has been invaded, though one may have injured another, no liability exists.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 1.

For other definitions, see Words and Phrases, vol. 1, p. 149.]

#### 6. SAME—LICENSEES.

The inducement to one to enter on the premises of another which will render the latter liable for injuries from pitfalls thereon must be equivalent to an invitation, and mere permission is neither inducement, allurement, or enticement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 43.]

#### 7. SAME—TRESPASSERS.

An infant entering on premises without a legal right to do so, either by permission, invitation, or license, or relation to the premises or to its owner, is a trespasser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 47.]

#### 8. SAME—CARE TOWARDS CHILDREN.

Where, to gratify a childish curiosity excited by the character of a structure or other conditions, a child goes on the premises of another, and is injured by the failure of the owner to properly guard dangerous conditions, which he has created, he is liable, provided he should have contemplated that children would be attracted to his premises and sustain injury, though the child was a trespasser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 56.]

#### 9. SAME.

A light and power company maintained machinery in an attractive building calculated to attract children, and also maintained on an adjacent private alleyway, extending from a street, hot water wells. It was not shown that children had been attracted to the building to see the machinery. On the opposite side of the alley there was a theater, but there was nothing to show that children were attracted by things therein, and resorted to the alleyway for that purpose. A well in the alleyway was insecurely covered, and a boy 13 years old trespassing thereon fell into it. *Held*, that the company was not liable for the injury sustained; it having not violated any legal duty to children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 55.]

Appeal from Superior Court, Vance County; Cooke, Judge.

Action by Walter H. Briscoe, by his next friend, against the Henderson Lighting & Power Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

The plaintiff, suing by his next friend, alleges: That the defendant is a duly chartered corporation engaged in supplying light to the inhabitants of Henderson, N. C., and heat and power to some of them. That the defendant has and operates its light and power and heating plant on Spring street, very near the Main street, of the town of Henderson, in a populous part of the said town, where there is much passing. That the defendant has and operates a large, attractive brick building, very large dynamos, shaftings, and pulleys, engines and boilers, and by means of large doors and windows these machines may be seen from the street, the railway tracks, and the alley near by. That Spring street crosses Main street at a point 114 feet from defendant's said plant. That defendant's manager, Mr. Woodworth, lives on the corner made by the intersection of said streets, his residence lot being 61½ feet on Main street and 114 on Spring street. That next to his lot is the Grand Theater on a lot 54 feet on Main street and running back 110 feet. That the light and power plant extends from Spring street across or along the rear of these two lots, and the space between the power plant building and the rear of Mr. Woodworth's lot, which is inclosed by a high fence, and the rear wall of the Grand Theater, forms an alleyway about ——— feet wide, extending from Spring street, at a point near the Southern Depot, to an open lot which extends around the north side of the theater building to Main street. This open alleyway is the property of or in the possession and control of the defendant. The said theater building and the residence of the said manager are heated or warmed by hot air, or steam or hot water, supplied by pipes extending underground from engines in defendant's power plant across said alley into said buildings. That just on the edge of said alleyway and next to the manager's fence and the theater building are three small wells or receptacles several feet deep, into which the hot water from the heating pipes of said plant escapes. These wells are filled or nearly filled all of the time with very hot water. This condition existed at the time hereinafter referred to. The defendant in the month of October, 1907, unlawfully, negligently, carelessly, and wrongfully permitted said alleyway to remain open in immediate proximity to Spring street, and did unlawfully, wrongfully, and negligently fail to cover up securely or in any manner guard one of said hot water wells, but unlawfully covered or permitted to be covered the said well with a thin and weak covering, which the plaintiff

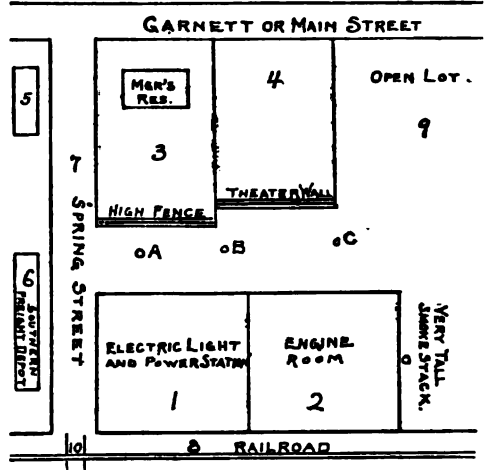
believes was a banana case. That the plaintiff being only a small boy, with the intelligence usual in boys of his age, in passing through said alleyway at said time, did not and could not see the well or hole of hot water aforesaid, or know that it was under the thin, weak piece of wood, and, not having been guarded or cautioned against it, stepped upon the thin wood covering, which instantly gave way, and precipitated plaintiff into said hole or well of hot water, which instantly, before he could extricate himself, burned and scalded the plaintiff's right foot and leg so that the skin and parts of the flesh came off, and the remaining flesh was lacerated and wounded and made dangerously sore from the bottom of the foot to three inches above the knee, and the plaintiff suffered great pain and anguish of body for a long time, and was put to great cost and expense for nursing and for medicines, and for attendance and services of a physician, to the plaintiff's damage of \$2,000. The entrances to the engine rooms and the power house and the theater were in said alley, and the machinery being constantly in motion is calculated to attract and allure boys and others to see the machinery and what may be seen in the theater, and the defendant was negligent and at fault in permitting said wells to remain in said alleyway uncovered or defectively covered, and such negligence was the direct and proximate cause of the plaintiff's great injury and suffering. Wherefore the plaintiff demands judgment.

The defendant demurred to the complaint for that it does not state facts sufficient to constitute a cause of action, in that it does not allege or appear: (1) That the defendant owed the plaintiff or the public the duty of keeping said alleyway (so-called) on or across its own premises open or free from obstruction so as to be used by the public, or that defendant owed the plaintiff any special duty whatsoever. (2) That the plaintiff or the public had any right to go upon the premises of the defendant or upon the alleyway, or to use the same for any purpose whatsoever. (3) That the alleyway was used by the plaintiff or the public, or that defendant knew that the plaintiff was in the habit of going on said premises, or had ever invited him there. (4) That the defendant knew that the alleged alleyway was a common resort of children of tender years in which to congregate and play, or that defendant was guilty of any act constituting negligence. For that it does not appear from the allegations of the complaint: (5) That the open alleyway where the plaintiff alleges he was injured was the private property of the defendant, and that defendant was in the possession and control thereof, and was using the same for the purposes permitted in its charter. (6) That the plaintiff was a trespasser upon the premises of the defendant, and was of such age as to be guilty of contributory negligence, and that the injury of which he complains

was due to his own negligence, and not to the negligence of defendant.

His honor overruled the demurrer, and gave defendant time to file answer. Defendant excepted and appealed.

T. T. Hicks and J. C. Kittrell, for plaintiff.  
A. C. Zollicoffer and J. H. Bridgers, for defendant.



CONNOR, J. The diagram attached to the complaint shows that the defendant's power house and engine room is located on Spring street, which intersects with Main street. The manager's residence fronts on Main street. At its intersection with Spring street, adjacent to the dwelling fronting on Main street, is the theater, and adjacent thereto is an open or vacant lot. In the rear of the dwelling there is a high fence. Between this fence and the power and engine house is a vacant space, called, in the complaint, an "alleyway," opening on Spring street and extending the distance of the width of the power and engine house on one side and the dwelling and theater on the other, and finding an outlet into the vacant lot. The width of this "alleyway" is not given, but the depth of the lot upon which the dwelling is located is 114 feet from the corner of Main street. In the space, or alleyway, the defendant has dug three small wells or receptacles several feet deep, into which the hot water from the heating pipes escapes. "The dwelling and the theater are heated by hot air or steam, supplied by pipes extending underground from defendant's engines, across said alleyway into said buildings." The wells are usually full of hot water. The distance of the wells from Spring street is not given, but from the map it appears that the one into which plaintiff fell is about 62 feet from said street, and just back of the rear wall of the theater. For the purpose of operating its business of supplying light to the city of Henderson, the defendant has erected "a large, attractive, brick building, very large dynamos, shaftings, and pulleys, engines and boilers, and by means of large doors and windows these

machines may be seen from the streets, the railway tracks, and the alley near by." It is further alleged that the entrance to the power and engine rooms are in the said "alleyway," and "the machine, being constantly in motion, is calculated to attract and allure boys and others to see the machinery and what may be seen in the theater." Plaintiff, a boy of 13, "with the intelligence usual in boys of said age," passing through said alleyway on October —, 1907, not knowing or being warned of the existence of said wells, and the one in controversy not being securely covered, stepped into it and was injured. The negligence alleged is not covering up securely or in any guarding "one of said wells," but permitting it to be covered with a thin, weak covering, etc. The demurrer is based upon the failure of the plaintiff to allege any facts showing that it owed him any duty in respect to placing, using, or covering the wells upon its premises. The plaintiff does not allege that the space called an "alleyway" was ever used, or intended to be used, either as a public or private way for passing upon or over its premises, nor does he allege that he ever so used it. He does not allege the purpose for which he entered upon the premises, or that any relation existed between defendant and himself entitling him to enter upon the alleyway. For the purpose of bringing himself within a class of cases decided by the courts imposing a higher degree of care upon persons having upon their premises structures or other things which are calculated to attract children, he says that "the machinery, being constantly in motion, is calculated to attract and allure boys, etc., to see the machinery and what may be in the theater." He does not allege that boys were ever, in fact, allowed to go into the alleyway for either purpose, or that he was so attracted or allowed. It appears from the complaint that the alleyway belonged to and was under the control of defendant, and that the premises were being used for a lawful purpose, and that the wells were useful and necessary for such purpose.

The liability of owners of premises adjacent to the public highways for injuries sustained by persons using such highways by reason of obstructions or pits placed so near thereto as to render them dangerous is well settled. *Bunch v. Edenton*, 90 N. C. 431; *Walker v. Reidsville*, 98 N. C. 382, 2 S. E. 74. No question of that kind is presented by the complaint, because it is not alleged that plaintiff, while using the highway fell into the well. He expressly negatives this suggestion by saying that "in passing through said alleyway" he was injured. The well was 62 feet from the street. While the term "alleyway" is used to describe the space upon which the wells were dug, plaintiff does not allege that it was used by the public, or that the public were, either expressly or impliedly, invited to use it as a public passway, or that any persons so used it. The use of the term "alleyway" does not of itself imply that the

strip of land was dedicated to the public use. *Milliken v. Denny*, 135 N. C. 19, 47 S. E. 132. One may well use a portion of his private lot as an alley for domestic purposes, or a manufacturing establishment, or, as in this case, an electric light plant, for uses connected with his or its business, without subjecting it to a public use. Of course, if, so used, its servants or others who are invited or entitled to pass over it are injured by pitfalls or obstructions placed there, the owner of the premises is liable. This liability arises out of the duty imposed upon the owner by reason of his relation to his employé or licensee. As we construe the language of the complaint, the defendant did not, by leaving the space on Spring street open, invite or grant any license to the public or to the plaintiff to enter upon, or pass over the open space or alleyway. He was a trespasser upon the defendant's premises. The liability to him for injuries sustained, therefore, depends upon the measure of duty which it owed to him. We had occasion at the last term to consider this question in *McGhee v. Railroad*, 148 N. C. —, 60 S. E. 912. After a careful re-examination of the question in the light of numerous well-considered authorities, we see no reason to change our opinion, as expressed in that case. In view of the adoption of the "stock law" in this state, and the custom generally prevailing in our towns, of dispensing with fences around lots, the question becomes of more practical importance with us than heretofore. It would impose an unreasonable burden upon the owners of cultivated lands and of lots in towns to require them to guard every pathway or alley used for their own convenience against the intrusion of trespassers, or, in default thereof, be held liable for every injury sustained in passing over their premises or through their property. We do not find that any court has so held. In *Sweeney v. Railroad Co.*, 10 Allen (Mass.) 363, it is said: "The owner of land is not bound to protect or provide safeguards for wrongdoers. \* \* \* No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place, for the use of customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." In *U. S. Y. & T. Co. v. Rourke*, 10 Ill. App. 474, Bailey, J., says: "It is a general rule of law that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, either express or implied, but for their own convenience or pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." In this case the deceased

while passing over defendant's premises, "without any invitation from the defendant, express or implied, and without any legal right," was injured. There was evidence that other persons were in the habit of passing over the premises for their own convenience without any objection on the part of defendant. It was held that defendant was not liable. In *Cooper v. Overton*, 102 Tenn. 211, 52 S. W. 183, 45 L. R. A. 591, 73 Am. St. Rep. 864, the court said: "There can be no liability unless it was the defendant's duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who have no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold."

In *Moran v. Pul. Palace Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 542, *Sherwood, J.*, after discussing the allegations of the complaint, says: "The petition, we think, fails to state a cause of action against defendants, and that the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity"—citing *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, and many others, sustained a demurrer. In that case it appeared that boys had been in the habit of bathing in the pond. There was "a sudden depression, making the water some 15 feet deep." A boy of nine years was drowned by going into the depression. In *Railroad Co. v. Bingham*, 29 Ohio St. 364, *Boynton, J.*, after reviewing the authorities, thus sums up his conclusion: "The principle underlying the case above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition when the person receiving the injury was not in or near the place of danger by lawful right, and when such owner assumed no responsibility for his safety by inviting him there without giving him notice of the existence or imminence of the peril to be avoided." In such cases the maxim, "*sic utere ut alienum non lædas*," is in no sense infringed. In its just sense it means: "So use your own property as not to injure the rights of another." When no right has been invaded, although one may have injured another, no liability has been incurred. "Actionable negligence exists only when the one whose act causes or occasions the injury owes to the injured party a duty, created either by contract or operation of law, which he has failed to discharge." The inducement to enter must be equivalent to an invitation.

Mere permission is neither inducement, allurement, or enticement. *Carleton v. Iron & Steel Co.*, 99 Mass. 216. The principle with its limitations is clearly stated by *Martin, B.*, in *Hardcastle v. South Yorkshire R. R. Co.*, 4 Hurl. & N. 67: "When an excavation is made adjoining to a public highway, so that a man walking on it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different." *Gramlich v. Warst*, 86 Pa. 74, 27 Am. Rep. 684. These and many other cases which might be cited recognize certain well-established exceptions to the general rule. The plaintiff seeks to bring himself in the exception which imposes a duty upon the owner of premises who creates or permits conditions calculated to attract children to enter and expose themselves to danger to properly guard them against danger. He says that "the machinery, being constantly in motion, is calculated to attract and allure boys to see the machinery and what may be seen in the theater," and for this reason he says the defendant owed him the duty to securely cover the well, and that his failure to do so was the proximate cause of his injury. It will be noted that he does not say that he was, in fact, allured or attracted by the moving machinery, or by what might be seen in the theater, but was injured "in passing through the alleyway."

In *Lynch v. Nordin*, 41 E. C. L. 422, it was held that when the defendant's servant left a horse harnessed to a cart standing unhitched in the public streets, and some children near by, being attracted to it, climbed upon the cart, and the horse, moving off, injured plaintiff, defendant was liable. This was put upon the ground that it was negligence to leave the horse unhitched upon the street, and was calculated to attract the attention of children, which fact should have been anticipated by the owner or his servant in charge of the horse. It was conceded that the children were trespassers in getting upon the cart, but that the conditions were such as imposed upon the defendant the duty of prevision. The case was recognized as "sound law" and cited by the Supreme Court of the United States in *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, generally referred to in the books as the "turntable case." It was there said that the turntable, although on the right of way or land of the company, was calculated to attract children, and that their childish propensity to play upon such a structure was, or should have been, anticipated by the company imposing the duty to the children of locking or otherwise securing it when not in use. In *Kravier v. Railway Co.*, 127 N. C. 330, 37 S. E. 468, 52

L. R. A. 359, this court held the defendant liable for injuries sustained by a child while playing upon cross-ties piled in the street of the town of Marion. Montgomery, J., said: "If the cross-ties had been piled upon defendant's own premises, instead of in the street, and the defendant had no actual knowledge that children were in the habit of playing on the ties, the law would have imposed no duty upon the defendant to look out for their safety by having the ties piled with that end in view." After noting the Stout Case, *supra*, the learned justice says: "These cases are exceptions to the general rule, and went to the very limit of the law. Mere attractiveness of premises to children will not bring a case within that exceptional doctrine." In *Stendal v. Boyd*, 73 Minn. 53, 73 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, the defendant, the owner of an uninclosed lot, had made an excavation which was a dangerous place for children who were accustomed to go there to play, and had been notified that a child had fallen into the pond. Plaintiff's intestate, a child of about five years of age, while playing with other children, at a place 12 or 15 feet from the street, fell in the pond and was drowned. The court said that, while it had in a former case followed the "turntable cases," the doctrine was an exception to the rule of nonliability for accidents from visible causes to trespassers upon his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child-proof. If the owner must guard an artificial pond on his premises so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond, etc. The courts which have adopted the doctrine of the "turntable cases" have uniformly held that it was not to be extended to other structures or conditions. A number of highly respectable courts have rejected it as unsound.

In *Turess v. Railroad*, 61 N. J. Law, 814, 40 Atl. 614, Magie, C. J., in a well-considered opinion, reviews the cases and examines the doctrine upon the reason of the thing. After stating the doctrine and the basis upon which it is placed, he says: "It is obvious that the principle on which it rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings, he who maintains a pond in which boys may swim in summer, or on which they may skate in winter, would seem to be amenable to this rule of duty.

\* \* \* In all of them the doctrine of the turntable cases, if correct, would charge the landowner or occupier with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it." The illustration given by the learned Chief Justice shows that he has had experience with towers constructed to support windmills, with ladders leading to the tank, and with boys. He further says that the only rational ground upon which the doctrine can be founded is that having a thing attractive to children on his land is an implied invitation to children to come upon his premises and play upon them, in, around, and upon such thing. After showing conclusively that the liability cannot rest upon an implied invitation, he says: "A turntable, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults; \* \* \* for it is not a question of the child's negligence, but a question of the duty of the railroad company towards the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it, which is, of course, absurd." The Supreme Court of New Hampshire in *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396, expressly rejects the doctrine, saying: "We are not prepared to adopt the doctrine of Stout's Case, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of infant trespassers." In *Daniels v. Railroad*, 154 Mass. 849, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253, the same conclusion is reached after a careful examination of the authorities by Lathrop, J. In *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615, Peckham, J., reviews the cases, and for a unanimous court holds that defendant is not liable. *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114. In *Union Pac. Ry. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the court adheres to the doctrine of the Stout Case. In *Keffe v. Railway Co.*, 21 Minn. 207, 18 Am. Rep. 393, the complainant alleged that "the defendant knew also that many children were in the habit of going upon the turntable to play." The latest discussion of the subject is to be found in *Walker v. Railroad Co.*, 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80,

115 Am. St. Rep. 871, by Buchanan, J. After a careful examination of the decided cases, the learned justice rejects the doctrine of the "turntable cases," conceding that "there is a remarkable conflict of authority upon the subject." We have noticed this line of cases, not for the purpose of closing the question, as applied to turntables, in this court, but to ascertain the basic principle upon which it was originally founded, and the basis of the criticism made of it by other courts. If liable in this particular class of cases, it must be because of some principle of the common law applicable to other cases governed by the same reason. Courts, guided by the principles of the common law, will not arbitrarily select one special object, like a turntable, and fix liability for injuries to children upon it, and refuse to carry the principle to its logical result in other cases. The court in *Stout's Case* failed to state the principle upon which it held the defendant liable, but was content to rely largely upon "the well-known case of *Lynch v. Nordin*." As has been pointed out by several courts, in that case the horse and cart were left in the street unhitched. This was negligent per se. Lord Denman rested his opinion upon the ground that the defendant should have foreseen that children would be attracted to the horse and cart, etc. There was no suggestion that leaving it unhitched was an implied invitation to drive it away. On the contrary, it was conceded that the children were trespassers. It is manifest that if the liability rests upon the theory that a turntable or other dangerous machinery, or ponds, excavations, structures, etc., on one's own premises, attractive to children, constitutes an implied invitation to them to enter and play with or upon them, the children are not trespassers or mere licensees, but come upon the premises with all of the rights on their part and duties on the part of the owner of the premises attaching to that relation. Again, if this be the principle, it is impossible to put any limit upon it, other than to include such things as either the child, the court, or the jury may regard as attractive or alluring. "The viciousness of the reasoning which fixes liability upon the landowner, because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted." Gummere, J., in *Railroad Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. The difference between a temptation to commit a trespass and an invitation to come upon one's premises is pointed out by Mr. Justice Holmes in *Holbrook v. Aldrich*, 163 Mass. 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364. These cases are cited with approval by Buchanan, J., in *Walker's Case*, supra. The present case illustrates the fallacy of the theory of implied invitation. Would it ever occur to any reasonable mind

that constructing the building with large windows and doors, placing in it the engines, dynamos, and other machinery, and keeping them constantly in motion, for the purpose of discharging its corporate functions and duties, however attractive to small boys, was an invitation to them to make the premises a playground? To adopt the suggestion carries us too far afield for the practical affairs of life, and violates manifest truth. Judge Buchanan thus clearly and forcibly illustrates the fallacy of it: "No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attractiveness, is by that act alone inviting them upon his premises. The doctrine of implied invitation is not sustained by the English cases and has been utterly rejected by the highest courts" of a number of states.

It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This, we think, sound in principle and humane in policy. We have no disposition to deny it, or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult, but if, to gratify a childish curiosity or in obedience to a childish propensity, excited by the character of the structure or other conditions, he goes thereon, and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or provision; that is, whether, under all of the circumstances, he should have contemplated that children would be attracted or allured to go upon his premises, and sustain injury. The principle is well stated in 21 Am. & Eng. Enc. 473, and was cited with approval in *McGhee's Case*, supra. "A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises, and the probability of injuries from contact with conditions existing thereon." Immediately following this language, the editor says: "The doctrine that the owner of premises may be

liable in negligence to trespassers whose presence on the premises was either known, or might reasonably have been anticipated, is well applied in the rule of numerous cases that one who maintains dangerous implements or appliances on uninclosed premises, of a nature likely to attract children in play, or permits dangerous conditions to exist thereon, is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and, with stronger reason, when the presence of a child trespasser is actually known to a party, or when such presence would have been known, had reasonable care been exercised. \* \* \* But when, under the circumstances, the presence of children on the premises was not reasonably to have been anticipated, there is of course, no duty as to such persons to have the premises safe. And, likewise, when, though children might have been expected to come upon the property, no injuries to them should reasonably have been contemplated under the circumstances, there is no negligence, and consequently no liability." Cases are cited which sustain these propositions. We think this the correct principle upon which the liability should rest. As said in *Kramer's Case*, supra: "Mere attractiveness of premises will not bring a case within the exceptional doctrine." To allege simply that the machinery, including dynamos, engines, etc., in an attractive building, in the populous portion of a city, "is calculated to attract and allure boys and others to see the machinery," does not bring the case within the exception to the general principle. There is no suggestion that any boys had been "attracted or allured," nor is it even averred that the plaintiff was on the premises to see the machinery. On the contrary, the map shows the location of the well into which he fell was on the side of the alleyway, opposite the machinery. It is not easy to see how at that place the plaintiff could have seen the machinery. Again, there could be no possible danger in looking at the machinery. The "attractive building" had large windows and doors through which "those machines may be seen from the street" and other points. The case is in some respects similar to *Schmidt v. Distilling Co.*, 90 Mo. 284, 1 S. W. 888, 2 S. W. 417, 59 Am. Rep. 16, in which a child was scalded by falling into a pit or well into which pipes carrying hot water emptied. The court, after stating the general principle, says: "The evidence in this case does not show that the escape pipe at its outlet on defendant's premises, or the place into which it discharged the boiling water, was attractive to children. \* \* \* There is no evidence that children were in the habit of resorting to this place for amusement or otherwise." We have not overlooked the allegation that the moving machinery was calculated to attract and allure boys to see the machinery, and "what may be seen in the theater." The theater

fronts on Main street. Its rear wall abuts on the alleyway. Just how the machinery, 114 feet from the front of the theater, is calculated to allure boys to see "what may be seen" therein, is not made clear by the complaint. We do not suppose that the learned counsel seriously contends that the defendant invited the plaintiff, a boy, of 13 years, to look in the back windows of a theater, or that it could reasonably have anticipated that he would do so, when he falls to even suggest that in truth he was doing so when he fell into the well. We have no disposition to narrow the limits of liability of owners of premises for injuries sustained by a breach of duty to young children, but, as in all other cases of alleged negligence, it must appear that a duty is imposed upon the defendant, and that, by reason of its breach, plaintiff was injured. Legal rights and liabilities must rest upon some reasonably settled basis fixed either by the common law or by statute. As was well said by Judge Buchanan: "While the courts should, and do, extend the application of the common law to the new conditions of advancing civilization, they may not create new principles or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of needed laws is the province of the Legislature, and not the judicial department of the government." The complaint fails to show that defendant has violated any legal duty to plaintiff imposed by the law. Again in the numerous cases which we have examined we do not find any in which a boy of 13 years, "with the usual intelligence of boys of that age," has been permitted to rely upon the attractive allurements of machinery to children. It is not stated whether the injury was sustained at night or in the daytime. If, as suggested on the argument, the plaintiff was allured by the desire to see what was going on in the rear end of the theater, it would be carrying the doctrine of "reasonable anticipation" far beyond any case found in the books to hold defendant liable. Theaters are to be "seen into" from the front door. We have not overlooked the authorities cited by plaintiff's counsel. Those in which liability is fixed upon the authority of the "spring gun" cases are obviously distinguished from this. We have discussed the "turntable cases." There is, undoubtedly, some conflict in the numerous cases found in the reports. We have not overlooked the fact that the well was insecurely covered. In our view the defendant did not owe any duty to plaintiff to cover the well at all, as it was under no obligation to anticipate that he would come upon its premises. If, as we hold, he was an unexpected trespasser and not within the exception to the general rule, it was his duty to look out for danger, and not the duty of defendant to provide against danger. We are of the opinion that the demurrer should have been sustained. It is, of



course, understood that we are discussing the defendant's liability upon the principles of the common law. If, as is frequently done, the municipal authorities deem the conditions described as dangerous to the public, they may, by appropriate ordinances, require the owners to guard or fence the premises. In this way the conditions are met without imposing unreasonable burdens upon property owners. In the majority of the large towns in the state the residential and business lots are open. Fences have been removed. Probably in a large majority of them at times conditions exist, woodpiles, coal bins, flower pits, barrels for receiving sewage, and many others, which are dangerous to persons passing over them at night. To impose upon the owners the burden of provision, in the absence of any suggestion, that, by acquiescence or otherwise, they had given a license to trespassers, would imperil the property of innocent persons. We have discussed the case at more than usual length because of its importance to the public, and because the questions presented have not heretofore been decided by this court.

This decision will be certified to the superior court of Vance, to the end that further proceedings may be had in accordance with the course and practice of the court.

Error.

#### PERRY et al. v. COMMISSIONERS OF FRANKLIN COUNTY.

(Supreme Court of North Carolina. Oct. 21, 1908.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS—SCHOOL TAXES—AMOUNT OF TAX—"MUNICIPAL CORPORATIONS."

Const. art. 5, § 1, directing the General Assembly to levy a poll tax equal to the tax on property valued at \$300, but providing that the state and county poll tax combined shall not exceed \$2 a head, does not apply, as to such limitation, to a special school district created pursuant to Revisal 1905, § 4115, but such district is a public quasi corporation included within the term "municipal corporations," as used in Const. art. 7, and subject only to the limitations contained in that article, forbidding a municipal corporation to contract any debt or to levy any tax, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters, and requiring all taxes levied to be uniform and ad valorem.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 234.

For other definitions, see Words and Phrases, vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

#### 2. ELECTIONS—QUALIFICATION OF VOTERS—PAYMENT OF TAXES.

Const. art. 5, § 1, directing the General Assembly to levy a poll tax equal to the tax on property valued at \$300, not to exceed \$2 a head, though it does not apply, as to such limitation, to a special school district, does not make it possible, by the levy of an exorbitant poll tax, to deprive a citizen within a special district of the right to vote, by reason of Const. art. 6, § 4, denying the right to vote unless a person shall have paid his poll tax, since that section in addition provides, "as prescribed by article 5, § 1, of the Constitution."

Appeal from Superior Court, Franklin County; W. R. Allen, Judge.

Action by John R. Perry and others against the commissioners of Franklin county. Judgment for defendants, and plaintiffs appeal. Affirmed.

From the facts stated in the complaint and admitted in the answer it appears that, under the provisions of Revisal 1905, § 4115, a special school district was created in the township of Lounsburg, Franklin county, with power to levy a special tax of 20 cents on the \$100 worth of property, and 60 cents on each taxable poll, to supplement the public school fund apportioned to such district, provided that such tax levy was first submitted to the qualified voters within the boundaries of said special school district, and approved by them in an election held pursuant to law; that said proposition for a special tax was ratified and approved by the majority of the qualified voters of the district, and the tax levied by the commissioners as provided by the law; that the board of commissioners on the first Monday in June, 1908, levied throughout the county of Franklin a poll tax of \$2 upon each taxable poll in said county for state and county purposes, and in addition to this the commissioners are proceeding to levy and collect, from the taxpayers of said district, the property tax of 20 cents on the \$100, and 60 cents on the poll, making the entire poll tax levied on the taxable polls in said district \$2.60. And the complaint charges that such levy to the extent of this 60 cents is unconstitutional and void, as being levied in violation of article 5, § 1, of the state Constitution. The plaintiff, John R. Perry, a resident and taxpayer of said district, in behalf of himself and other like taxpayers in said district instituted this action to restrain the defendants from levying tax, alleged to be illegal, on the ground indicated. On the hearing the restraining order was dissolved, and the plaintiffs excepted and appealed.

Wm. H. Ruffin, for appellants. Bickett & White and Hayden Clement, for appellees.

HOKE, J. While the question presented in this appeal is one of commanding interest and far-reaching importance to the entire state, its correct solution, in our opinion, is readily deducible from decisions of this court heretofore made, and which bear upon the subject with more or less directness. Article 5, § 1, of the Constitution, after directing that the General Assembly shall levy a capitation tax on every male inhabitant of the state over 21, and under 50, years of age and that this poll tax on each shall be equal to the tax on property valued at \$300, provides that the state and county capitation tax combined shall never exceed \$2 on the head. Section 2 of the article provides that the state and county capitation tax shall be ap-

plied to the purposes of education and the support of the poor, and that not more than 25 per cent. of such tax in any one year shall be appropriated to the support of the poor. Section 6 of the same article provides that the taxes levied by the board of commissioners for county purposes shall be levied in like manner as the state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the General Assembly. Construing these sections, the Supreme Court at the last term, in *Railway v. Board of Commissioners of Mecklenburg County*, 61 S. E. 690, and *Railway v. Board of Commissioners of Buncombe County* (N. C.) reported in 61 S. E. 700, has held that this restriction on the amount of the poll tax, contained in section 1, shall be given the significance which its terms clearly import, that the state and county capitation tax combined shall never exceed \$2 on the head, and that this limit fixed on the poll tax for the purposes indicated—that is, for the state and county—shall be always observed, notwithstanding that a given tax may be for some special purpose, and with the special approval of the General Assembly. And in *Wingate v. Parker*, 136 N. C. 369, 48 S. E. 774, this court has held that the equation of taxation established by article 5, § 1, only applied to state and county taxation, and did not extend to municipal corporations or public quasi corporations other than counties, but that in reference to these the regulations and restrictions in regard to taxation were contained in article 7 of the Constitution, supplemented by section 4 of article 8, a section which by inadvertence seems to have been given an improper placing in article 8, instead of article 7. In the opinion, Chief Justice Clark, for the court, speaking to the question, said: "It is clear that this section applies solely to state and county taxation. It requires (1) that the General Assembly shall levy a capitation tax on every male between 21 and 50 years of age; (2) that it shall be equal to the tax laid on \$300 of property at cash valuation; (3) that the county commissioners may exempt from capitation tax in special cases, on account of poverty and infirmity; and (4) that the state and county capitation tax shall never exceed \$2 on the head. If this section embraces municipal taxation, such taxation could very rarely be levied at all, for in most, if not all, the counties this limit has been reached."

The opinion further quotes with approval from that of *Merrimon, C. J.*, in *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69, as follows: "In *Jones v. Com'rs*, 107 N. C. 248, 12 S. E. 69, *Merrimon, C. J.*, for a unanimous court holds that the equation prescribed by article 5, § 1, does not apply to municipal corporations. On page 258 of 107 N. C., on page 72 of 12 S. E., he says: 'But it is settled by many decisions of this court that it (article 5, § 1) does not establish an exclusive system or scheme of taxation, applicable and

to be observed in all cases and for all purposes; that on the contrary, it applies only to the revenue and taxation necessary for the ordinary purposes of the state and the several counties thereof. \* \* \* The article does not provide or declare that the equation so established shall be of universal and exclusive application; it expressly mentions only the state and counties in connection with the subjects of revenue and taxation, and does not mention cities, towns, and other municipal corporations, or make any reference thereto, or provide for or as to them. \* \* \* And it is singular that it fails to make some reference to municipal corporations in such respect if it was intended to embrace them. That it does not so intend is more manifest in that they are expressly provided for in such respects in another distinct article of the Constitution. \* \* \* Article 7 of the Constitution is entitled "Municipal Corporations," and is exclusively devoted to that subject.' This article, in section 9, provides that 'all taxes levied by any city or town must be uniform and ad valorem upon all property in the same,' and nowhere is there any provision requiring the equation of taxation between property and polls to be observed. And in concluding the opinion, he further says, on page 263 of 107 N. C., on page 73 of 12 S. E.: 'We are therefore of opinion that the equation and limitation of taxation established by the Constitution (article 5, § 1) applies only to taxes levied for the ordinary purposes of the state and counties.' And again, at bottom of page 264 of 107 N. C., on page 74 of 12 S. E.: 'We know that it has been said obiter in several cases that the equation and limitation of taxation referred to above must be observed in levying taxes for municipal purposes, but it has not been so decided, certainly not expressly decided, nor can it be, in our judgment, without defeating the true intent reasonably appearing.'" True, these decisions are directly on the question of the equation of taxation established by article 5, but every reason for the ruling on the question of the equation bears with full force on the subject of this restriction on the amount of the poll tax, with the additional and conclusive reason that such restriction in express terms is confined to the "state and county capitation tax." Again in *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524, this court, after most careful consideration, decided as follows: "(2) Chapter 204, p. 581, *Priv. Acts 1905*, creating a graded school district, and authorizing its trustees to levy a tax and issue bonds when the act is approved by a majority of the qualified voters, is a valid exercise of legislative authority. (3) The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers; and, when accepted and sanctioned by a vote of the qualified electors within the prescribed territory, as required by our Constitution (ar-

ticle 7, § 7), may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose. (4) School districts are public quasi corporations, included in the term 'municipal corporations,' as used in article 7, § 7, of our Constitution, and so come within the express provisions of section 7 that 'no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc.; nor shall any tax be levied, etc., unless by a vote of the majority of the qualified voters therein.' And the principle of uniformity is established and required by section 9 of this article."

In the case of *Smith v. Trustees*, the taxing district was created by special act of the Legislature, and the officers of the quasi public corporation were given authority to levy and collect the special tax provided for; while in the present case, the district was established, as stated, pursuant to the general Law (Revisal 1905, c. 89, § 4115), and the taxes specified are to be collected by the board of commissioners. But the main purpose of the incorporation is the levying of a special tax, for a definite purpose, within certain restricted portions of a given county or township, and levying it only where sanctioned by a majority of the qualified voters of the district, and bringing such levy within the other provisions and restrictions of article 7 of the Constitution—that addressed more especially to municipal and other corporations of a quasi public nature, as contemplated by that article—and, whether the collection of the tax was done by specified local agencies or by the general authorities of county, this was only a ministerial matter, a question of method simply, which was not of the substance, and should in no way affect the result.

From these authorities it is clear that the tax in question, the 60 cents in excess of the \$2 already levied for state and county purposes, is not within the restriction of article 5, § 1, of the Constitution, but that the same is a tax imposed for a definite purpose by a special taxing district, coming as a public quasi corporation, under the provisions of article 7 of the Constitution, and subject only to the limitations and restrictions contained in that article, notably in section 7, that no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. And of section 9, to the effect that all taxes levied shall be uniform and ad valorem. In aid of the construction we place upon the provision of the Constitution bearing upon this question, good reasons could be suggested for the distinction in the two classes of taxation. Anticipating, as the result has proved, that the general state and county taxation would very

generally reach the limit of \$2, the framers of the Constitution did not deem it well to place an arbitrary restriction on all local effort in communities whose enterprise might suggest, and financial condition justify, a greater amount of taxation than that allowed by the general law. And it was no doubt further considered that the restriction contained in section 7, forbidding the levy of any unusual tax, except when sanctioned by a majority of the qualified voters of a given district, would operate as a wholesome check against excessive taxation or extravagant expenditure. Certain it is that, with the exception of the restraints indicated, the matter is not further affected by the Constitution, but is referred entirely to the legislative will. As to taxation within these special districts, it is theirs to observe or disregard the equation established by article 5 in reference to state and county taxes, and to exceed or abide by the limit established in said article in reference to general taxation. And this is, no doubt, the reason that the convention in framing the Constitution considered it especially pertinent and desirable to insert section 4, art. 8, containing an admonition that the Legislature should take special care to restrain these local taxing districts, cities, towns, and other municipal corporations, from excessive levies or extravagance and waste in municipal expenditure. To establish such restraints as "will prevent abuses" in these matters is the language of the organic law. It is suggested that the construction we give to the Constitution will, in certain instances, make it possible, by the levy of an exorbitant poll tax, to deprive many citizens within a special district of the right to vote, and this, by reason of the provision of the Constitution "that no person shall be allowed to vote unless he shall have paid his poll tax for the previous year." But not so. The language of article 6, § 4, of the Constitution, being the article relating to, and regulating the right of, suffrage, provides that no one shall be entitled to vote unless he has paid his poll tax for the previous year," as prescribed by article 5, § 1, of the Constitution," thus providing that, on payment of the poll tax allowed and established in article 5, the right of suffrage in this respect is established, and this poll tax, as we have seen, can never exceed \$2.

There is no error in dissolving the restraining order, and the judgment to that effect rendered below is affirmed.

Affirmed.

CONNOR, J. (concurring). Appreciating the reasons upon which the well-considered opinion of Mr. Justice HOKE is based, I am constrained to concur in the conclusion reached. My investigation, however, in *Railroad v. Commissioners*, 148 N. C. —, 61 S. E. 690, impressed upon my mind the conviction that the framers of the Constitution of 1863 did not anticipate that any poll tax should be

levied for other than "state and county purposes," and for those it should not exceed \$2, and should be applied only to the purpose of education and the support of the poor. I was strengthened in that opinion by the fact that an examination of the Constitution of every other state in the Union showed that no poll tax is levied except for those purposes. In a large majority of states the poll tax is limited to a certain sum, and in none can the limit fixed be exceeded. Unfortunately the convention of 1868 dealt with the subject of taxation in two separate and distinct articles of the Constitution, thus giving foundation for the construction now adopted that the equation and limitation do not apply to municipal or quasi municipal corporations; that they are subject to such poll taxation as the Legislature may see fit to impose. I do not think that the subject of poll tax for other than general taxation "for state and county purposes" was considered by the members of the convention. No such tax has ever been levied other than by the state, and this was required "to be uniform throughout the state." Amendment 1835. The history of the struggle in this country between those who, with Judge Coolcy, regard all poll taxation, except in a few cases, as both unjust and impolitic, and therefore not "of common resort in modern times," and those who have sought to impose upon the privilege of citizenship a tax justifies the conclusion that, as in other states, the poll tax was to be expressly limited, both in respect to its amount and the purpose to which it should be applied. I cannot but think that the failure to do so is unfortunate. While I sympathize with the tendency in this state to encourage the spirit of local self-government by the establishment, by legislation, of special districts for the purpose of providing for and stimulating public schools, good roads, and other matters of local interests, I regret to be compelled to leave the question of the amount of poll tax which may be levied open to the changes and chances of legislation and local elections. I fear that confusion and uncertainty will follow. If, by establishing these local divisions of our counties and townships called, for want of a better term, quasi municipal corporations, the poll tax may be enlarged to any amount is conceded, the constitutional restriction, made for the protection of the wage-earner, may be largely legislated away. Prof. Holland, in his work *Studies of State Taxation*, gives some valuable information and reflections on the subject of capitation taxation. He refers to the North Carolina system as "a dead weight, which hangs so heavily over the small property owner." Of course we have no other duty or power than to declare the law as the people, in the exercise of their sovereignty, have made it. Speaking, however, for myself alone, I cannot but regard the conclusion to which we

are brought as unfortunate. The amount of the tax upon the man, the citizen, should be fixed by the Constitution, and not left open to legislative action or local elections. The extent to which the poll tax may be increased through the medium of quasi municipal corporations will be difficult to fix upon a substantial and satisfactory basis. Fortunately, in this case, the tax goes to the support of the public school, but there is nothing in the Constitution, as we interpret it, by which such taxation may be confined to this purpose. I fear that a way has been opened by which the question, which should be removed from the domain of discussion and uncertainty, will become a vexatious and disturbing element of discord. Like the right of suffrage, the capitation tax should be disturbed only by the people, in the exercise of their sovereign power, by amending their Constitution.

#### DUFFY v. WILLIAMS.

(Supreme Court of North Carolina. Oct. 21, 1908.)

#### GUARDIAN AND WARD (§ 64\*) — MIXING WARD'S AND GUARDIAN'S FUNDS—LOSS ON LOAN.

Where a guardian did not keep the funds of his wards separate from his own, but charged each item, as he received it, against himself, placing it in his personal fund, his loan, when on a balance struck he owed them \$589, of \$700 in his personal fund, taking a note and mortgage to himself as guardian, was not a payment to them, but a personal loan, so that, in the absence of ratification by them on becoming of age, loss on the loan was his, and not theirs.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 294-299; Dec. Dig. § 64.\*]

Appeal from Superior Court, Duplin County; Neal, Judge.

Proceedings, on the relation of R. Duffy, solicitor, in behalf of Annie R. Williams and others, against W. H. Williams. Judgment for plaintiff. Defendant appeals. Affirmed.

This cause was before the court at the fall term, 1903 (133 N. C. 195, 45 S. E. 548), when all matters in controversy were disposed of, except the rents and the Bradham loan. It was sent back to the referee for the purpose of passing upon these items in the account. Upon the hearing the plaintiffs abandoned their claim for rents. The referee found, as a conclusion of fact, largely upon defendant's own evidence, that he did not keep the funds of his wards separate from his own, but charged each item, upon its receipt, against himself, with compound interest, and placed such money in his personal funds. That, as appears by his account, he owed his wards, January 1, 1889, \$589.19. On January 10, 1889, he loaned to Bradham \$700, taking a note payable to himself as guardian, and taking mortgage on real estate, in same ca-

capacity, to secure the loan. The money was not paid, and in his efforts, under the advice of counsel, to foreclose the mortgage, he made a compromise, and bought the real estate in for \$565.10, taking deed to his wards. He also paid out several amounts, for counsel fees and costs, amounting to \$122.65. By reason of a defect or mistake in the description of the real estate, upon which defendant supposed he was getting a mortgage, a loss was sustained. The referee, upon this conclusion of fact, found as a conclusion of law; "that the transactions between W. H. Williams and Geo. W. Bradham were the personal transactions of W. H. Williams, and not transactions by him as guardian." He held that defendant was not entitled to credit for the amount paid out for the purchase of lot and expenses. Exceptions were duly filed to the referee's conclusions of fact and law. His honor overruled the exceptions and confirmed the report, rendering judgment accordingly. Defendant excepted, assigned error, and appealed.

Rountree & Carr, for appellant. Stevens, Beasley & Weeks, for appellee.

CONNOR, J. No question affecting the bona fides of defendant's conduct, in regard to the Bradham loan, or his action in regard to it, is made. It is found that in his action regarding the property he acted under advice of counsel. The difficulty which defendant encounters, in his application to have the amounts claimed by him allowed as credits, grows out of the finding of fact, which is supported by his own evidence, that on January 10, 1889, he had no funds, in the sense of notes, bonds, or money, on hand belonging to his wards. He owed them, on a balance struck, \$589.19. He loaned Bradham \$700 of his own money, and in perfect good faith, intending thereby to secure to his wards the amount due them, taking a note and mortgage to himself as guardian. He could not loan his wards' funds, because he had none. He was simply their debtor to the amount of \$589.19. He could not pay this debt by investing his money in a note and mortgage for \$700, payable to himself as guardian. If the investment resulted in a loss of the money, it was his misfortune, and not theirs. If he had, upon stating his account, paid to himself, in money, the balance due, by depositing in bank or setting apart the specific amount, separate from his own money, the money with which alone he could pay the debt would have become the property of his wards. If he had, as was his duty, loaned out this amount, using that degree of prudence in regard to security imposed upon him, he would, in the event of loss, have been absolved from liability. The learned counsel for defendant are entirely correct in their contention that only good faith and due dili-

gence are required of a guardian in dealing with his ward's money. The authority cited by them, and many others, sustain this position. *Covington v. Leak*, 87 N. C. 365; *Luton v. Wilcox*, 88 N. C. 26. The difficulty is that he was not dealing with his wards' estate, but with his own money. If, upon coming of age, the wards had, as they were entitled to do, ratified the transaction and accepted the property, there would have been no further liability on the guardian, but they were not compelled to do so. They rejected it, and demanded the money due them. This they were entitled to do. The only safe rule to be observed in dealing with trust funds is that prescribed by the law—to keep them separated from the personal funds of the trustee.

We find no reason for disturbing the judgment. It must be affirmed.

#### OLDHAM v. RIEGER et al.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### 1. JUSTICES OF THE PEACE (§ 134\*)—JUDGMENTS—ACTIONS ON—TIME TO SUE.

A judgment of a justice of the peace docketed in the superior court, as authorized by *Revisal 1905*, § 1479, continues a judgment of the justice for every purpose save those of lien and execution, and as such, subject to the limitation prescribed for such judgments; and an action on the judgment itself is barred after seven years.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 420; Dec. Dig. § 134.\*]

#### 2. JUSTICES OF THE PEACE (§ 134\*)—JUDGMENTS—ACTIONS ON—TIME TO SUE.

*Revisal 1905*, § 87, providing that, in the administration of an estate, judgments docketed and in force shall have priority to the extent to which they were a lien on decedent's property at his death, does not fix the right of a judgment creditor as of that time and revive a judgment barred by limitations at his death.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 134.\*]

Appeal from Superior Court, Brunswick County; Long, Judge.

Action by W. P. Oldham against Sarah M. Rieger and another, administratrix and administrator, respectively, of the estate of A. W. Rieger, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 145 N. C. 254, 58 S. E. 1091.

This is an action in the nature of a creditor's bill, brought by the plaintiff in behalf of himself and all other creditors of A. W. Rieger, deceased, against the defendants, his administrator and administratrix. The plaintiff, W. P. Oldham, alleges that he recovered a judgment against A. W. Rieger before a justice of the peace on December 14, 1895, which was docketed in the superior court the same day, and that he requested the defendants to pay the same, which they refused to do; that the judgment has not been paid. He asks for an accounting by the defendants

of their administration, and the payment of the said judgment, or its ratable proportion, out of the assets in the possession of the defendants. The defendants answered, and averred that they had duly notified creditors of their intestate, by advertisement, to present their claims, and that no claim has ever been presented to them. They also pleaded the statute of limitations. The case was heard in the court below upon a case agreed, which is as follows: (1) A. W. Rieger, of Brunswick county, died intestate on the 3d day of December, 1903, and on the 8th day of December, 1903, the defendants duly qualified according to law as his administrator and administratrix. (2) On the 14th day of December, A. D. 1895, the plaintiff brought suit before a justice of the peace of New Hanover county against A. W. Rieger, and obtained judgment against him on said date, and on the 16th day of December, 1895, the plaintiff caused a transcript of said judgment to be docketed on the judgment docket of the superior court of New Hanover county, and on the same date caused a transcript of said judgment from the superior court of New Hanover county to be docketed on the judgment docket of the superior court of Brunswick county, which judgment has not been paid. (3) The summons in this action was issued on the 16th day of June, 1906. (4) There has been no final account filed by the defendants in settlement of their intestate's estate. It is agreed that, if upon the foregoing facts the court should be of the opinion that the claim of the plaintiff is barred by the statute of limitations, judgment is to be entered for the defendants, and if not, then for the plaintiff. Upon the facts admitted, the court being of the opinion that the plaintiff's judgment is barred by the statute of limitations, rendered judgment in favor of the defendants, according to the agreement of the parties. The plaintiff excepted and appealed.

Emple & Emple and Meares & Ruark, for appellant.

WALKER, J. (after stating the facts as above). This court has held in numerous cases that the judgment of a justice of the peace, which has been duly docketed in the superior court, becomes a judgment of the latter court, under the statute (Revisal 1905, § 1479), for the purpose only of creating a lien and of having execution issued thereon, within the same time as is limited for judgments originally recovered in that court. *Ledbetter v. Osborne*, 66 N. C. 379; *Hutchinson v. Symons*, 67 N. C. 156; *Birdsey v. Harris*, 68 N. C. 92; *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535; *Morton v. Rippy*, 84 N. C. 611; *McIlhenny v. Trust Co.*, 108 N. C. 311, 12 S. E. 1001. The subject is fully discussed by Justice Dillard in *Broyles v. Young*, 81 N. C. 315, which has been considered, in the more recent decisions of this court, as settling

the true construction of the statute. The plaintiff in the judgment may move at any time within the 10 years after the docketing of the judgment in the superior court, for the issuing of executions thereon, upon notice to the adverse party, where execution has not issued within three years. But this is not a motion for execution to be issued, but an action upon the judgment itself. An action cannot be brought upon the judgment docketed in the superior court, for that is a judgment only for the purpose of lien and execution. It is not a new and independent *causa litis*. When it becomes necessary to sue upon the judgment, the action must be brought upon the judgment of the justice. In *McIlhenny v. Trust Co.*, 108 N. C., at page 314, 12 S. E., at page 1002, the court, after reviewing the authorities, says: "At the time this action began more than 10 years had elapsed next after the judgment was docketed. The judgment was barred after the lapse of 7 years from its date, and the right to enforce it by execution (issuing from the superior court) or otherwise, was barred after the lapse of 10 years next after the time it was docketed."

But the case of *Daniel v. Laughlin*, 87 N. C. 433, is decisive of this case; it being a decision upon the very question presented by the facts which have been admitted by the parties. It was a creditors' suit, as this action is, and one of the plaintiffs declared upon two judgments of a justice of the peace, which had been rendered more than 7 years before the action was commenced, and also docketed in the superior court. The court held that, as it was an action upon the judgments, and not merely a motion for executions, the 7-year statute applied, and barred a recovery of the claim. Justice Ruffin thus states the law: "We do not understand counsel who argued the plaintiff's exceptions in this court to insist very earnestly upon them. Nor can we ourselves perceive any error in the ruling of the court below. The statute fixes the limitation to actions upon judgments rendered by justices of the peace at 7 years in language so plain and positive that it leaves nothing open for construction; and, notwithstanding the fact that the judgments declared on in this case had been docketed, they continued to be the judgments of the justice for every purpose and intent save those of lien and execution, and as much subject to the limitations prescribed for such judgments as though no transcript of them had ever been forwarded to the superior court." Counsel have asked us to reconsider that decision and reverse the principle, as therein declared, but we must decline to do so, as we think the case was correctly decided. An inspection of the pleadings in this case will reveal the fact that the action is brought directly upon the judgment. It is true the plaintiff seeks to enforce its payment out of the assets—personal as-

sets, we assume, as no other kind are mentioned—in the hands of the administrators, but the relief so sought by the plaintiff does not change the character of the action as being one upon the judgment. It may well be added that the judgment upon which this suit was brought was barred by the 7-year statute at the time of the intestate's death. Can it be that it has been revived by his death, so that the plaintiff now occupies a better position with respect to it than he did before. We think not. What Justice Ruffin says in *Daniel v. Laughlin*, 87 N. C., at page 436, with reference to *Battle's Revisal*, c. 45, § 40 (*Revisal* 1905, § 87), is a full answer to the question.

The decision of the court upon the case agreed was correct, and is sustained.

**Affirmed.**

**PATE v. TAR HEEL STEAMBOAT CO.**  
(Supreme Court of North Carolina. Oct. 28, 1908.)

**1. WITNESSES (§ 388\*)—IMPEACHMENT.**

Where, in an action for death of a steamboat passenger by drowning, defendant proved the condition of the bateau sent from the steamer to the rescue of deceased, plaintiff could, in order to lay the foundation for evidence to impeach the witness, ask him if, shortly after the drowning of deceased, witness had not stated that he could have saved deceased if he had had another man with him to bail the water out of the bateau.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233–1237; Dec. Dig. § 388.\*]

**2. SHIPPING (§ 166\*)—CARRIAGE OF PASSENGERS—ACTION FOR DEATH—SUBMISSION TO JURY—SUFFICIENCY OF EVIDENCE.**

In an action for death of a steamboat passenger through falling off a boat and being drowned, evidence held sufficient to warrant the submission to the jury of the question whether, notwithstanding deceased's negligence, defendant could, by the exercise of reasonable care, have prevented his death.

[Ed. Note.—For other cases, see *Shipping*, Dec. Dig. § 166.\*]

Appeal from Superior Court, Cumberland County; Long, Judge.

Action by James Pate, administrator, against the Tar Heel Steamboat Company. Judgment for plaintiff, and defendant appeals. No error.

Civil action to recover damages for the death of Hector Lloyd Pate, alleged to have been brought about by the negligence of the defendant. The following issues were submitted: "(1) Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged? Ans. Yes. (2) Did the plaintiff's intestate, by his own negligence, contribute to his death? Ans. Yes. (3) Notwithstanding such negligence on the part of said intestate, could the defendant, by the exercise of reasonable care and prudence, have prevented his death? Ans. Yes. (4) What damages, if any, is plaintiff entitled to

recover? Ans. \$1,000 (one thousand dollars)." From the judgment rendered the defendant appealed.

Rose & Rose and Robinson & Shaw, for appellant. Q. K. Nimocks, Sinclair & Dye, and Cook & Davis, for appellee.

**BROWN, J.** It is unnecessary to consider any exceptions arising upon the trial bearing exclusively upon the first and second issues. In consequence of the findings of the jury upon these issues, the plaintiff cannot recover, except upon the ground that, after discovering the peril of the plaintiff's intestate, the master and servants of defendant failed to make all reasonable efforts to rescue him. The intestate was a passenger on defendant's steamer *Tar Heel* from Wilmington to Fayetteville. When about eight miles up the river from Wilmington, at about 8 o'clock at night, when about to descend the stairway of said steamer, which was narrow and dark, with a sharp turn near the bottom, and with a loose step which landed at the edge of the boat, and within 18 or 20 inches of the water's edge, the intestate accidentally fell overboard and was drowned. That it was the duty of the master and crew to make every reasonable endeavor, consistent with the safety of ship and passengers, to rescue their passenger after discovering his situation is properly admitted. But it is contended upon the entire evidence that there is nothing to show any dereliction of duty in this respect, and the court was requested so to charge. His honor thought otherwise, and submitted the question for the determination of the jury under the third issue.

1. We think the exception to the question asked Andrew Jackson upon cross-examination cannot be sustained. The defendant had proven by Jackson the condition of the bateau sent from the steamer to the rescue of the intestate. Upon cross-examination the plaintiff was permitted to ask this question: "Q. Andrew Jackson, I want to ask you if, shortly after the drowning of Lloyd Pate down at the river wharf at Fayetteville, you did not state to Mr. Frank Glover that you could have saved Lloyd Pate's life the night he was drowned if you had had another man in the boat with you to bail the water out of the boat? (Objection by defendant overruled, and defendant excepts; the Court making its ruling understanding that it is offered for the purpose of contradicting the witness and impeaching him.) A. I do not remember whether I told him that way or not. I remember Mr. Glover asked me if the boat leaked any, and was there any water in it when I got back. I told him there was some water in it when I got back." Of course the declarations of the boat hand made after the occurrence are incompetent for the purpose of proving the dangerous condition of the bateau. *Southerland v. R. R.*, 106 N. C. 100, 11 S. E.

189. But having been examined by the defendant as its witness as to the condition of the bateau, it was competent to impeach or contradict his evidence upon that point, by his declarations on that subject to Glover. To lay the foundation for offering such impeaching evidence it was proper to ask the witness, in cross-examination, the question objected to. His honor properly confined the scope and effect of the question to "impeaching evidence."

2. The evidence upon the question of a dereliction of duty in attempting to rescue the intestate is not very satisfactory; but, upon a careful examination of the record, we think his honor properly submitted the matter to the jury under the third issue. There is some evidence tending to prove unnecessary delay and confusion in the efforts to save the passenger after his peril was known; that the bateau was very leaky and unfit; that it was not properly manned; that there were no lights; and that with reasonable alacrity the boatman with proper help might have reached the spot where the passenger sank in time to have saved him. The testimony offered for defendant tends to prove that every reasonable effort was made that could have been made, and that the bateau was well manned and in good condition. This question is one eminently proper to be decided by a jury under the circumstances of this case. His honor's charge properly placed the burden of proof upon this issue upon the plaintiff, and clearly and fully submitted the question for their decision.

Upon a review of the record we find no error.

### STATE v. DIXON.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### 1. CRIMINAL LAW (§ 804\*)—TRIAL—INSTRUCTIONS—READING OF NOTES OF EVIDENCE TO JURY.

Though a court is required, on request, to reduce to writing the charge as to the law of the case, it is permissible for the judge to read his notes of evidence to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1943, 1951; Dec. Dig. § 804.\*]

#### 2. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction that a reasonable doubt implies that the jury must be satisfied to a moral certainty, and that, "if the state so satisfies you, you should return a verdict of guilty," following a charge that if the jury, after having given all the evidence consideration, reach the conclusion that the guilt of accused is established, the jury would not, in contemplation of law, entertain a reasonable doubt, is not misleading as withdrawing from the jury consideration of the evidence offered by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1904-1922; Dec. Dig. § 789.\*]

#### 3. CRIMINAL LAW (§ 786\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction that, in passing on the evidence of the accused, the jury should take into consideration the interest he has in the indictment, and should scrutinize his evidence closely, but that the jury would not be warranted in refusing to believe what accused said, because of the fact that he was under indictment, etc., was not misleading as expressing an opinion of the court, or as casting any suspicion on the testimony of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901; Dec. Dig. § 786.\*]

#### 4. RECEIVING STOLEN GOODS (§ 8\*)—DEFENSES—VALUE OF PROPERTY.

On a trial in the superior court for receiving stolen property, consisting of 18 hams, 11 shoulders, and 8 sides of meat, the fact that the value thereof was under \$20 was a matter of defense, and it was incumbent on accused to prove the value, before he could rely thereon in diminution of sentence.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Dec. Dig. § 8.\*]

Appeal from Superior Court, Sampson County; Neal, Judge.

James Dixon was convicted of receiving stolen property, and he appeals. Affirmed.

The defendant, James Dixon was convicted under the second count in the bill for receiving, and sentenced to two years on the roads. From the judgment pronounced he appealed to the Supreme Court.

John D. Kerr, F. R. Cooper, and Stevens, Beasley & Weeks, for appellant. Assistant Attorney General Olement and Faison & Wright, for the State.

BROWN, J. The evidence sent up with the record tends strongly to prove that on Friday night, March 6, 1908, the smokehouse of one Bruner, in the county of Sampson, was broken into, and a large number of hams, shoulders, and sides of meat were stolen therefrom, and that on the next night this meat was found in the smokehouse of defendant. The meat was identified by the owner, by private marks or holes he had made at the bone. The evidence of guilt not only justified his honor in submitting the matter to the jury, but it is plenary and convincing. There are a number of exceptions to the testimony, all of them without merit, and we find nothing in them which requires discussion.

In respect to the charge of the court, there are several assignments of error, some of which we will notice.

There is nothing appearing in the record to sustain the exception "that his honor, after having been requested to put the charge in writing, stated orally, at great length and with vigor, the contentions of the state, after having read the written charge; and the oral statement of the contentions of the state was error." The written charge is a full instruction, generally, as to the law bearing



on the charge; and, although required, upon request, to be in writing as to the law of the case, it was entirely permissible for his honor to read his notes of evidence to the jury. There is nothing in the record indicating that the judge stated verbally "at great length and with vigor" the contentions of the state to the prejudice of the defendant.

The defendant excepts to that part of the charge relating to the oft-discussed subject of the reasonable doubt. Judge Pearson doubted if this common formula had ever been of any practical benefit in the administration of the criminal law. But we think whatever benefit a person charged with crime may get from it was more than given this defendant, when his honor stated substantially that a reasonable doubt implied that the jury must be satisfied to a moral certainty. His honor further told the jury in that connection: "If the state so satisfies you, you should return a verdict of guilty." It is earnestly contended that this last expression is prejudicial error, in that it withdraws from the jury any consideration of the evidence offered by the defendant. We think, with all respect to learned counsel, this exception has nothing to support it. The burden was upon the state, after all the evidence was heard, to satisfy the jury beyond a reasonable doubt of defendant's guilt. Nothing in the language complained of took from the jury the right to weigh and consider the evidence offered in behalf of the defendant. This is manifest from the language of the court immediately following the phrase excepted to, viz.: "If the jury, after having heard all the evidence, and having given to it all a fair and deliberate consideration in an effort to reach the truth, and having then gathered all the light they can from the argument of counsel, and further having applied the charge of the court, if the minds of the jury then reach the conclusion that the guilt of the defendant is established, then the jury would not, in contemplation of law, entertain a reasonable doubt." How could the jury entertain a reasonable doubt if, after considering all the evidence, they declared the guilt of the defendant to be established? When a fact is established, it is completely and fully proven. We think the precedents fully sustain this charge of his honor. *State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *State v. Gould*, 90 N. C. 662.

The defendant excepts to that portion of the charge bearing on defendant's credibility, viz.: "In passing upon the evidence of the defendant you should take into consideration the interest they have in the indictment. You should scrutinize their evidence closely. You would not be warranted in refusing to believe what they say because of the fact that they are under indictment, but you should consider their interest in the contest,

and give to what they say such weight as you think, under all the circumstances, it is entitled to." We think this exception is without merit, as the charge distinctly instructs the jury that they would not be warranted in disbelieving what defendant testifies to because he is under indictment. The instruction is in line with *State v. Byers*, 100 N. C. 517, 6 S. E. 420, citing *Flynt v. Bodenhamer*, 80 N. C. 205, and *State v. Hardee*, 83 N. C. 619. The essential question in every case where error is based upon such instruction must be, was the jury thereby misled to the prejudice of the defendant? There is nothing whatever in the language of his honor which can be said to express any opinion that he entertained, or that was calculated to cast, any suspicion upon the defendant's testimony. As long as the trial judge did not cast suspicion upon his evidence, we fail to see how the defendant was prejudiced by the instruction. We think the charge also sustained by the courts of other states. *Palmer v. State*, 70 Neb. 136, 97 N. W. 235; *McIntosh v. State*, 151 Ind. 251, 51 N. E. 354.

The only other exception we deem it necessary to notice relates to the punishment. It is contended that the court could sentence to no longer term than 12 months, as the value of the property was under \$20. We fail to discover any such finding in the record, or any evidence to sustain such contention. The property stolen consisted of 18 hams, 11 shoulders, and 8 sides of meat, and doubtless the quantity of it deterred the defendant from attempting to prove that the meat was worth no more than \$20. However that may be, it was matter of defense, and it was incumbent on defendant to prove its value in diminution of sentence. *State v. Harris*, 119 N. C. 812, 26 S. E. 148.

Upon an examination of the record we find no error that we think would require us to order another trial.

No error.

#### DORTCH v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### 1. TRIAL (§ 351\*)—ISSUES—SUBMISSION TO JURY—SUFFICIENCY.

Where the issues as framed were sufficient to present to the jury every defense that was made in the case, the refusal to submit issues in the form presented by the defendant was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. § 351.\*]

#### 2. TRIAL (§ 350\*)—ISSUES—SUBMISSION TO JURY.

Where issues are sufficiently definite to afford each party opportunity to introduce all pertinent evidence and apply it fairly, the issues are, as a rule, unobjectionable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 828; Dec. Dig. § 350.\*]

**3. MASTER AND SERVANT (§ 112\*) — SAFE PLACE TO WORK—DUTY OF RAILROADS.**

A railroad company owes it to its employees to provide reasonably safe tracks, and while it is not required to keep spur tracks up to the same standard as the main line, it must keep them reasonably safe for the traffic over them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 218, 221; Dec. Dig. § 112.\*]

**4. MASTER AND SERVANT (§ 112\*)—INJURY TO SERVANT—NEGLIGENCE.**

A conductor was killed by the derailment of a car on a spur. The rails in the track lacked four inches of meeting where the car ran off, and had been in that condition 8 or 10 months. The spur track generally was in very bad condition. *Held*, to establish negligence of the railroad company in failing to provide a reasonably safe track.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 112.\*]

**5. MASTER AND SERVANT (§ 247\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE.**

A conductor in charge of a train left a car on a spur without setting the brakes, and attempted to make a coupling without fastening the brakes. He failed, and the car began to move, and he and a brakeman jumped on it to apply the brakes, but the car could not be stopped, and, because of the defective condition of the track, it jumped, causing the death of the conductor. *Held*, that the negligence of the conductor, in failing to set the brakes before making the coupling, and in jumping on the moving car with a view to stop it, were not the proximate cause of the accident, but the negligence of the company in failing to provide a reasonably safe track was the proximate cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 797; Dec. Dig. § 247.\*]

**6. MASTER AND SERVANT (§ 240\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

Ordinarily jumping on or off a moving car is such contributory negligence as bars a recovery for the injuries received.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 753; Dec. Dig. § 240.\*]

**7. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

A conductor, in charge of a switching train, jumped on a moving car to set the brakes, to save it from destruction. When he felt that the car was leaving the track, he learned that he was in great danger, and jumped and was killed. There was nothing to show that he knew of the defect in the track which caused the derailment. Had he remained on the car, he would not have been injured. *Held* that an instruction that, if the conductor's death was caused by his act in attempting to get off the car, and his conduct in that respect was negligent, in that he did not exercise the care of a man of ordinary prudence under similar circumstances, his conduct was the proximate cause of his death, properly submitted the issue of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

Appeal from Superior Court, Wayne County; Biggs, Judge.

Action by J. T. Dortch, administrator of Gurnie L. Wiggins, deceased, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for the alleged negligent killing of plaintiff's intestate, Gurnie L. Wiggins, who was killed in defendant's service on March 7, 1907, tried at April term, 1908, of the superior court of Wayne county, his honor J. Crawford Biggs presiding. These issues were submitted: "(1) Was the plaintiff's intestate killed by the negligence of defendant as alleged in the complaint? Answer. Yes. (2) Did the plaintiff's intestate by his own negligence contribute to his death, as alleged in the answer? Answer. No. (3) What damages, if any, is the plaintiff entitled to recover? Answer. \$5,000." From the judgment rendered defendant appealed.

Aycock & Daniels, for appellant. W. T. Dortch, Shepherd & Shepherd, and J. D. Langston, for appellee.

BROWN, J. It is useless to comment on the exception to the refusal of the court to submit the issues in the form presented by defendant. The issues as framed are sufficient to present to the jury every defense that has been made in this case, or that is likely to be made in cases of this kind. If issues are sufficiently definite to afford each party to the action opportunity to introduce all pertinent evidence and apply it fairly, they are, as a rule, unobjectionable. *Black v. Black*, 110 N. C. 398, 14 S. E. 971; *Pretzfelder v. Insurance Company*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424. The evidence in this case was all offered by plaintiff, and tended to show that plaintiff's intestate was conductor in charge of the switching train of the defendant at Rocky Mount on the 7th day of March, 1907. He had a car of stone to be placed on the spur track for the use of the Rocky Mount Mills. There were two spur tracks there. The car of stone was to be placed on the spur track going down to the river. The stone car was shifted onto the spur track, and left there a short time while the other cars in the train were placed on the upper track. Then the engine came back to couple to the car of stone. When the conductor left the car of stone he failed to tie the brakes. His attention was called to this before he attempted to couple, and he was told, in the event he missed coupling the car, it would go into the river. Notwithstanding this, he attempted to make the coupling without fastening the brakes, saying that he could make the coupling. He scotched the car with wood, and signaled the engineer to move back cautiously. The engineer did move cautiously, but the car, being on a curve, failed to couple, and the car jumped the wood scotch and moved a few feet. The conductor was again told to apply the brakes. He got some wood and scotched the train, but did not apply the brakes, saying that he would make the coupling that time. The second attempt failed, and the car jumped all the scotches.

and by that time, to use the language of the witness, "had such momentum that no brake could have stopped it." The conductor and one of his brakemen jumped on the moving car to apply the brakes. Following the language of plaintiff's witness, "he did apply them, but the application did no good. I was watching him and the car at the time. Shortly after getting on the car, I saw a man, and he must have lost his head, and swung out on each side next to the mill. Instantly the car jumped the track, and I heard Mr. Wiggins groan. I ran to his assistance and found him dead. He was between the car and the mill wall." The evidence tends to prove that the car was derailed some four or five car lengths from where it started, because one of the rails had been moved out of alignment, and had been in that condition some 8 or 10 months. The rails lacked four inches of meeting at the point where the car jumped the track, and where the intestate was killed. The spur track generally was in very bad condition. There is also evidence tending to prove that, "if the car had not jumped the track, the plaintiff's intestate would have been safe on top the car." At the conclusion of the evidence the defendant moved to nonsuit. The court overruled the motion. Defendant excepted.

That the defendant is guilty of inexcusable negligence in allowing its track, although a spur track, to get into such dangerous condition is not a debatable question. If there is a duty which a railway company owes to its employes, as well as its passengers, it is to provide a reasonably safe track over which its engines and cars may be moved with comparative safety. Of course we do not mean to hold that spur tracks shall be kept up to the same standard of excellence as the main line, but it is the duty of the company to keep its sidings and spurs in a reasonably safe condition for the traffic done over them. All the evidence shows that this track was in a desperately bad condition, and that the derailment of the car, which was the occasion of the intestate's death, was due to its defective state. At the very point at which the rails were four inches out of alignment the car left the track, under such headway that brakes could not stop it. We are not confined here to a *prima facie* case of negligence, evidenced by the fact of a derailment, but we have complete proof of a condition of track amounting almost to gross negligence, which caused a derailment resulting in death. We have also evidence tending to prove that the intestate himself was guilty of negligence, first, in not fastening the brakes before undertaking to couple up the car; and, secondly, in jumping on the rapidly moving car with a view to stop its headway. The question is, what negligence was the proximate cause of his death? It is true that, had the intestate not jumped on the car he would not have been killed, and there is a probability that had he tied the brakes the car would not have

gotten from his control. The former, while reckless, was in the master's service and for its benefit, for he was endeavoring to save the car and its load from the river. The latter, while the part of wisdom, did not cause the derailment, no more than the other. The plaintiff's intestate may have committed both acts of negligence, and yet have lived uninjured, had the track been in reasonably good condition. There is no such intermingling and co-operation of these alleged negligent acts of the intestate with the negligence of the defendant as to indicate that the intestate's negligence concurred with that of the defendant and helped to produce the derailment. 7 Am. & Eng. Enc. 374. Of course, had the car not been derailed, and had it gone overboard, and had the intestate been drowned, the negligence of the defendant in maintaining so dangerous a track would not have been the cause of his death, but rather the intestate's own careless conduct. But it is incontestible that the defective track caused the derailment, and not the act of the intestate. We have no difficulty in concluding, therefore, that the negligence of the defendant was, in any view of the evidence, the proximate cause of the derailment.

The next mooted question is was the intestate, at the time of the derailment, guilty of contributory negligence in jumping from the car? Ordinarily, of course, jumping on or off a moving car is such contributory negligence as bars recovery, and it is so held generally in the courts of this country. *Hutchinson on Carriers*, § 1177, citing many cases. *Brown v. R. R.*, 108 N. C. 34, 12 S. E. 958; *Burgin v. R. R.*, 115 N. C. 673, 20 S. E. 473. But the principle does not apply here. Although the intestate risked life and limb in jumping aboard the car, he did it in the endeavor to save it from destruction. There is no evidence that he then knew of the gap in the track which caused the derailment. As to that, he had a right to believe that he was comparatively safe. When he felt the rapidly moving car was leaving the track, he suddenly learned that he was in a position of great danger. As the sequel proved, it would have been safer not to jump, but under such conditions the law does not exact infallible judgment, but only reasonable care and prudence. *Hinshaw v. R. R.*, 118 N. C. 1047, 24 S. E. 426. The able and careful judge who tried this case properly left that to the jury, when he instructed them: "If you find the derailment was caused by the bad condition of the track, but you also find that the plaintiff's death was caused by his act in attempting to get off the car while it was passing between the buildings, and that his conduct in this respect was negligent—that is, that he did not exercise the care that a man of ordinary prudence would have exercised under similar circumstances—then such conduct on his part would be the proximate cause of his death, and you should answer the second issue, 'Yes.'"

Upon a careful review of the entire record, we are unable to find any error of which the defendant has just cause to complain.

No error.

# SUMRELL & MCCOY v. INTERNATIONAL SALT CO. et al.

(Supreme Court of North Carolina. Oct. 28, 1908.)

## 1. CONTRACTS (§ 348\*)—ISSUES, PROOF AND VARIANCE—AMENDMENTS—NECESSITY.

A plaintiff may not declare on one contract and without amendment recover on another.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. 1720; Dec. Dig. § 348.\*]

## 2. SALES (§ 81\*)—CONSTRUCTION OF CONTRACT—TIME OF DELIVERY.

In reply to plaintiffs' letter asking quotations on salt, defendant replied, inclosing quotations, and saying that it could deliver some time in October or November, but could not guarantee an exact date, owing to the shipment moving by water. Plaintiffs then wrote defendant to enter their order for a cargo to arrive about November 1st to 10th, and defendant answered that the order had been entered. Thereafter plaintiffs wrote requesting an earlier shipment, to which defendant replied that it could not say definitely that a shipment would arrive on any particular date, but that the salt would be shipped as soon as a boat could be secured. *Held*, that no contract was shown fixing any definite day for delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 217; Dec. Dig. § 81.\*]

Hoke, J., dissenting.

Appeal from Superior Court, Lenoir County; Biggs, Judge.

Action by George W. Sumrell and H. H. McCoy, doing business as Sumrell & McCoy, against the International Salt Company of New York and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The plaintiff sues to recover damages for an alleged breach of contract, made by defendant, to sell and deliver a cargo of salt. The contract was made by correspondence, all of which is set out in the record. The plaintiffs are copartners, conducting a mercantile business in the town of Kinston. The defendant is a corporation, doing business in the state of New York, engaged in the manufacture and sale of salt, having a branch office in the city of Savannah, Ga. Plaintiffs allege that on June 11, 1906, the defendant contracted to sell to them 250 tons of salt, for the sum of \$1,817.80, and to deliver the same "at the city of Newbern, between the 1st day of October, 1906, and the 1st day of November, 1906." That defendant failed to deliver said salt "in accordance with its contract"; that plaintiffs were ready, able, and willing to receive and pay for said salt in accordance with the terms of the contract. That by reason of the failure of defendant to deliver the salt, plaintiffs sustained \$500 damages. Defendant denied that it contracted to sell and deliver to plain-

tiff, at Newbern, the salt at the time alleged. It also denied that plaintiff has sustained any damage by reason of its action in the premises. Two issues were submitted to the jury: (1) "Was the contract, as alleged in the complaint, made between the parties, and, if so, was there a wrongful breach of said contract by the defendant?" (2) What damages have the plaintiffs sustained thereby?" Upon the conclusion of the evidence his honor stated that he would instruct the jury to answer the first issue "No," and the second, "Nothing." Plaintiffs excepted, submitted to a judgment of nonsuit, and appealed.

Wooten & Clark, El. R. Wooten, and Shepherd & Shepherd, for appellants. Loftin, Varser & Dawson, for appellees.

CONNOR, J. The contract relied upon by plaintiffs is evidenced by the correspondence between the parties, and the answer to the first issue depends upon the construction of the letters. It appears that defendant's salt works were located at Scranton, from which place the salt was brought, through the canal, to New York, and shipped from there, by schooner, to Newbern. There is no suggestion that it was to be shipped by rail. H. H. McCoy, one of the plaintiffs, testifies: "Dealings are in writing by letter \* \* \* which was the contract." The first letter introduced from defendant, dated May 14, 1906, addressed to plaintiffs, acknowledges receipt of a letter asking for quotations, which are inclosed "f. o. b. Schooner New Bern. \* \* \* We could make the delivery of the salt to you some time in October or November, at your option, though you understand that by reason of shipment moving by water, an exact date could not be guaranteed on which it would arrive at destination." On June 1, 1906, plaintiffs wrote defendant: "Referring to your quotations, May 14th, \* \* \* you can enter our order for one cargo, 250 tons, to arrive at Newbern about November 1, to 10, 1906." June 11, 1906, defendant wrote plaintiffs: "Replying to your favor, June 1st, we have, as requested, entered your order for one canal boat load of salt, say approximately 240 to 250 net tons." It will be noted that plaintiffs allege that this letter closed the contract. There was a proposition to buy by plaintiffs, and acceptance to sell by defendant. If the case is to turn upon these two letters, plaintiffs have failed to make good their allegation that the contract was to deliver the salt "between the first day of October and the first day of November 1906." The proposition, made by plaintiffs June 1st, and accepted June 11, 1906, was that the salt should "arrive at Newbern about November 1 to 10, 1906." It is clear that this gave to the defendants until the last day named, November 10, 1906, to

deliver the salt. The breach alleged is that defendant "failed to deliver said salt as it had contracted to do." It is elementary that a plaintiff may not declare upon one contract and, without amendment, recover upon another. If the rules of pleading were otherwise, a defendant would never be able to prepare his defense. If, upon the introduction of the letter, the plaintiffs had asked permission to amend the complaint to correspond with the terms of the contract, his honor would, as a matter of course, have allowed them to do so.

As said by Pearson, C. J., in *Shelton v. Davis*, 69 N. C. 324: "Under the Code a plaintiff may sue for a horse and recover a cow; but, in order to do this, when the variance appears, the plaintiff must obtain leave to amend by striking out 'horse' and inserting 'cow.'" It is said in *Parsley v. Nicholson*, 65 N. C. 207: "Every material allegation in the complaint, which is denied by the answer, must be sustained in substance by proofs." This has been uniformly held by all courts in which any degree of certainty in pleading is required. It can hardly be contended that a contract to deliver salt on November 1, 1906, is shown by proving one to deliver on November 10, 1906, any more than a cause of action on a note, alleged to be payable on November 1st, would be sustained by showing a note due November 10th. In either case the variance must be cured by an amendment. Passing by this view of the case, we do not think that, in the light of all of the correspondence prior and subsequent to June 11th, a contract to deliver, either on November 1st, November 10th, or at any other definite time, is shown. The letter of May 14, 1906, calls attention to the fact that "an exact date could not be guaranteed on which it would arrive at Newbern." On September 1st the plaintiffs write defendant that they wish the order entered "to arrive at Newbern about October 15th." On September 3d defendant replies, from Savannah, Ga., that it had ordered shipment about October 15th, saying: "It may be necessary to ship this a little earlier, on account of conditions of freight on the canal, but the difference in time will not be enough to inconvenience you." On September 5th plaintiffs answer that they want the salt shipped, instead of October 15th, in time to arrive at Newbern October 15th, or as near that date as possible. On September 6th defendant writes that instructions had been sent to make shipment, "so that, if a vessel for Newbern could be readily obtained, the salt should reach there by about October 15th. You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day, but we will come as near to the date desired by you as we can." On October 5th plaintiffs write to inquire whether the salt had been shipped. "If not shipped, please do so at once." October 8th defendant answers that the salt has

not been shipped, "but we are keeping right after the works, and, as soon as a schooner is secured to go to Newbern, your salt will be shipped on her. You understand there are only a limited number of vessels sailing from New York to Newbern, and it is not always possible to secure one promptly, but our people are on the lookout, and will ship your salt at the earliest possible moment." On October 16th plaintiffs write defendant that they hope "you have been able before now to ship our salt, as our trade are already needing and wanting. Giving you an assortment as early as we did, we did not anticipate but that you would be able to get it to Newbern by November 1st, anyway, and we sold accordingly, hoping it would be there by October 15th, which was the time specified. Kindly do the very best for us, as we are needing it." On October 30th plaintiffs again write defendant, saying: "We thought that surely you would get it to Newbern by October 15th and allowing two weeks for slow time, it would have placed it there November 1st. We sold it to our trade for delivery between October 15th and November 1st, and they are all waiting for same, yet at this time we have no guaranty from you that it will be shipped before Christmas." Defendant wired November 7th to plaintiffs, "Have wired Scranton for definite information regarding your shipment. Will advise promptly as possible." On same day plaintiffs write defendant, complaining of the delay, and stating that they had sold to customers, etc. On November 13th defendant answers: "Our people have done everything they could to get your salt off, and, as previously advised, the reason for the delay is that they have been unable to get schooner in which to forward salt to Newbern." There was other correspondence of very much the same character, resulting in a cancellation of the order by plaintiffs, December 4, 1906.

Treating the contract as closed by the letter of June 11, 1906, and the other letters as evidence throwing light upon the language used in the letter of June 1st and June 11th, we concur with his honor that no contract is shown by which any definite day was fixed upon for the arrival of the salt in Newbern. Every letter by both parties recognized the fact that the salt was to be shipped by schooner from New York to Newbern, and that defendant was to ship on first schooner which could be secured for that purpose. The liability of defendant was to ship by first available vessel or schooner, and not an unconditional promise to deliver on any definite day. If plaintiffs had alleged and shown that a vessel or schooner did, in fact, sail or, by proper diligence on the part of defendant, could have been secured to carry the salt from New York to Newbern, they would have been entitled to recover such damages as they showed they sustained by such failure on the part of defendant. The

defendant in every letter, both prior and subsequent to June 11th, calls attention to the fact that the time of the shipment is dependent upon securing a vessel. On November 13th referring to the complaint of plaintiffs that the shipment has been delayed, it writes: "It is not within our power to make any definite promise as to the date." Plaintiffs write on the same day: "Since September 1st it seems to us that you could have secured tonnage for Newbern, as it seems you have done for other people." These letters are all introduced by plaintiffs. They clearly establish a contract to ship the salt by the first schooner, which could be secured, sailing from New York to Newbern. The plaintiffs prefer to allege and rely upon an unconditional promise "to deliver at Newbern between October 1st and November 1st, 1906," but they fail to show that any such contract was made, or that any contract was made binding defendant to deliver at Newbern on any definite day. There is no allegation that a schooner or vessel sailed from New York to Newbern between October 1st and November 1st, or that, by reasonable diligence, defendants could have secured one. The entire correspondence shows that, while plaintiffs "anticipated" that the salt would arrive, and acted upon such anticipation, they did not claim or suggest that there was an unconditional promise to deliver on any day. They complained of the delay, suggested negligence on the part of defendant in making the shipment, and urged that shipment be made, but defendant, in reply, repeatedly said: "You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day" etc. To this plaintiffs made no other reply than to urge shipment. Upon a careful examination of the entire correspondence we concur with his honor that no such contract as that alleged in the complaint has been shown. This renders it unnecessary to consider the exception to his honor's ruling upon the second issue.

The judgment must be affirmed.

HOKE, J. (dissenting). I differ from the court in the disposition made of this case, and am of opinion that, on a perusal of the entire correspondence and the parol evidence relevant to the inquiry, there has been a breach of contract established on the part of defendant company, and that the order dismissing the action as on judgment of nonsuit is erroneous. The first letter on part of plaintiff, of date June 1st, is in substance: "That you can enter our order for one cargo of 250 tons of salt, to arrive at Newbern about November 1, to 10, 1906. We, of course, will give you assortment later, as we wish as long a time as possible to sell our trade and make up quantity of each kind." On June 11th defendant answers: "Replying to your favor of June 1st, we have, as requested, entered your order for one canal

boat load of salt, say approximately 240 to 250 net pounds. You can give us assortment any time up to September 1st, but the earlier you can give it the better." On September 1st plaintiff writes to defendant, giving the assortment referred to, to "arrive at Newbern about October 15th; 100 lbs. table salt; 100 3 lb. bags table salt, etc., etc. Please have same shipped % A. & N. C. Co." Defendant, replying to this letter, wrote as follows: "We have your valued favor of the 1st, with assortment for your boat load of salt, which we are to-day forwarding to the works, with instruction to ship about October 15th. It may be necessary to forward this a little earlier on account of conditions of freight on the canal, but the difference in time will not be enough to inconvenience you," etc. On September 5th, plaintiff wrote: "We are in receipt of your favor of the 3d, in regard to shipping date of our cargo of salt, and you have it wrong. Instead of shipping October 15th, we want it shipped from salt works in time to arrive at Newbern about October 15th, or as near that date as possible." Defendant replied, on September 6th, as follows: "We have your favor of the 15th, with reference to your order. We sent this in with instructions to make shipment, so that if a vessel for Newbern could be readily obtained, the salt should reach there by October 15th. You understand that it is not possible to say definitely that a shipment by schooner will arrive on any particular day, but we will come as near to the date desired by you as we can."

There was quite an amount of correspondence after this date, the plaintiffs complaining of a failure on the part of defendant to deliver the salt, as per contract, and stating the disappointment and injury to plaintiff and his customers incident to such failure, and defendant explaining why this was not done. But the letters set out indicated the contract between the parties if there was one. The testimony further shows that defendant, writing at different times in explanation of delay, had failed to deliver to plaintiffs any salt till date December 4th; when the order was finally canceled. Here was an order for salt, for use in the approaching winter season, placed in ample time, and accepted for delivery on or about October 15th. If it be granted that some margin was contracted for, owing to the uncertainties attendant upon a shipment by water, the purpose and terms of the contract both gave clear indication that this margin was not to cover a period, at most, greater than two weeks, and that both parties so understood it. And by reason of this margin, too, the contract declared on is not required to be set out with the same exactness of statement as under other and different conditions. The uncertainty was rather in the delay usually incident to water shipment after it had commenced, and there was

no indication given that the uncertainty of procuring a vessel for the purpose would in any way affect the time of delivery when the contract was entered into, or until after a delay in breach of such contract agreement had become manifest; and, if it were otherwise, the margin allowed, as stated, was evidently not to extend to a period greater than two weeks.

The correspondence between the parties, after it became apparent that a delay would occur, will give some light on the matter, and tends to justify, I think, the position that there had been a wrongful delay on the part of defendant, and in breach of its agreement. On October 5th plaintiffs wrote as follows: "Kindly advise if our cargo of salt has been shipped, and if so, when it is due to arrive. If not shipped, please do so at once. Awaiting your reply," etc. On October 8th defendant replied: "We have your favor of the 5th inst. Your salt has not yet been shipped, but we are keeping right after the works, and as soon as a schooner is secured to go to Newbern, your salt will be shipped on her. You understand there are only a limited number of vessels sailing from New York to Newbern, and it is not always possible to secure one promptly, but our people are on the lookout, and will ship your salt at the earliest possible moment." On October 16th plaintiffs wrote: "We trust you before now have been able to ship our salt, as our trade is already needing and wanting same. Giving you the assortment as early as we did, we did not anticipate but that you would be able to get it to Newbern by November 1st anyway, and we sold accordingly, hoping it would be there by October 15th, which was time specified. Kindly do the very best for us, as we are needing it." On October 30th plaintiffs wrote as follows: "On September 1st, when we gave you assortment for our cargo of salt, we thought that surely you would have ample time to get to Newbern, N. C., by October 15th, and allowing two weeks for slow time, it would have placed it there on November 1st. We sold it to our trade for delivery between October 15th and November 1st, and they are all wanting same, yet at this time we have no guaranty from you that it will be shipped before Christmas, which you can readily see is placing us in an embarrassing position to our trade. Some of our competitors take pleasure in telling the trade that we would not be able to deliver the salt, and at the present time this is true, although it is no fault of ours. We will thank you to give us some definite information promptly, in order that we can tell our trade when they may expect the salt. We would also appreciate it if you would advise us if you have already shipped any cargoes to Newbern, because, should our trade supply themselves, we would then have no output for

the quantity bought from you. As this is very important to us, we trust you will give us full information promptly." On November 7th defendant wired plaintiffs: "Have wired Scranton for definite information regarding your shipment. Will advise as promptly as possible." On November 7th plaintiffs wrote defendant as follows: "We wrote you some days ago in regard to our cargo of salt, and as yet have no reply, and we wired you to-day as follows: 'Wire something definitely concerning arrival our cargo salt; important'—which we now confirm, and await your prompt reply. We are very much surprised at this late day not to have any notice of shipment, for if it now has to be shipped and take several weeks, it will arrive too late for our trade, as all are now wanting and needing salt, and you certainly have placed us in an embarrassing position. Other people have had salt to arrive at Newbern, and in fact we were notified to-day from Newbern that ours had arrived, and went around and told our customers would be here in few days, and later we were advised that it was for T. W. M. & Co. Certainly buying at the early date we did, and then giving specification on September 1st, it is strange that others should receive theirs before we do, and after our trade have bought elsewhere, we will then have no use for the salt. It cost us considerable time and money to sell this cargo, and after having done so, it is hard to have to disappoint our trade, besides losing the profit, and we must say that it does not seem to us as if we have been given a square deal. We trust you will favor us with a prompt reply, fully explaining."

As heretofore stated, I am of opinion that this correspondence, and the parol testimony relevant to the inquiry, clearly shows that there was a breach of contract on part of defendant company, calculated to work the plaintiffs substantial wrong, and that the matter should have been submitted to the jury for decision.

#### WILSON et al. v. FISHER et al.

(Supreme Court of North Carolina. Oct. 28, 1908.)

##### 1. MORTGAGES (§ 1\*)—DEFINED.

A "mortgage" is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4596-4606; vol. 8, p. 7725.]

##### 2. MORTGAGES (§ 33\*)—EQUITABLE MORTGAGE.

A deed conveying premises, in the usual form, for a recited consideration, and stipulating that if first parties paid the amount inserted in the deed, with interest, within a time

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fixed, the deed should be void, and cutting off the equity of redemption by the payment of a fixed amount by second party, was a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 63; Dec. Dig. § 33.\*]

**3. MORTGAGES (§ 38\*)—EVIDENCE AS TO CHARACTER OF TRANSACTION—SUFFICIENCY.**

Evidence held to show that the transaction was a loan, to be secured by mortgage, and not an absolute conveyance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 108; Dec. Dig. § 38.\*]

**4. MORTGAGES (§ 20\*)—EQUITY OF REDEMPTION—AGREEMENT TO SURRENDER—VALIDITY.**

An agreement, made at the execution of a mortgage, to surrender the equity of redemption for a fixed amount, is invalid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 21; Dec. Dig. § 20.\*]

**5. MORTGAGES (§ 203\*)—IMPROVEMENTS BY MORTGAGEE—ACCOUNTING.**

Though a mortgagee in possession is not entitled, as a general rule, to pay for improvements, yet, where equitable relief is sought after a long lapse of time, there should be an accounting as against rents for such enhancement in value as may be due to permanent improvements.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 542; Dec. Dig. § 203.\*]

Appeal from Superior Court, Pender County; Neal, Judge.

Action by G. W. Wilson and others against J. C. Fisher and another. Judgment for defendants, and plaintiffs appeal. Error.

On and prior to December 8, 1894, Callie F. Wilson, wife of plaintiff G. W. Wilson, and mother of the other plaintiffs, was the owner of the land in controversy. She had joined with her husband in the execution of a mortgage on said land to Gibson James, for the purpose of securing the payment of a debt of her said husband, amounting on said date (December 8, 1894) to the sum of \$100. The debt was overdue, and Mr. James was pressing Wilson for payment. In this condition of affairs defendant Fisher says: "Wilson had been to me to borrow money. I told Wilson that I would give him 12 months to redeem the land." Mr. J. R. Marshburn, a witness for defendant, thus describes the transaction, which Fisher says is correct: "Wilson was in destitute circumstances, and was around everywhere, trying to borrow the money to pay James' mortgage. He offered me the land for \$150; asked me to try to sell the land or borrow the money for him. I told Fisher about Wilson's land, and told him I thought it a pretty good chance. I told Wilson that I thought Fisher would buy. Then Fisher and Wilson traded. Fisher advanced \$100 to Wilson. I drew deed. Fisher was to pay \$100 down. If Wilson and wife should pay back \$100 and 8 per cent. interest, deed stood null and void; and, if not, then Fisher was to pay \$50 more, then deed was good. Wilson said he had received the \$50 and had rented the land from Fisher."

The portions of the deed pertinent to the

controversy are as follows: The land is conveyed in the usual form, for a recited consideration of \$100. Immediately following the habendum are these words: "The condition of this deed of conveyance is such that if the said parties of the first shall well and truly pay, or cause to be paid, the inserted amount in this deed, together with interest at 8 per cent. per annum, at the expiration of 12 months from date of deed, then this [deed] shall be null and void." On the margin of the deed, in the handwriting of the draftsman, written before the deed was signed, are these words: "Provided, further, that if the party of the second part fail to pay a certain bond or note bearing even date herewith, to the amount of \$50, then this deed to be null and void; otherwise, to be in full force and effect. And the said parties of the first part shall immediately render up possession of the said hereby granted property to the said party of the second part." The deed, with the "marginal" addition, was duly registered. Callie J. Wilson died May, 1902. Wilson never paid any part of the debt, but upon its maturity took the \$50 from Fisher and he took the land. Wilson rented two years and moved away. Wilson says: "If I paid him \$100, the land was to be mine. If I did not pay him the \$100, he was to pay me the \$50, and the land was to be his." There is no substantial controversy in regard to the terms of the contract and the conditions under which it was entered into. The opinion of the witnesses as to the real value of the land at the date of the deed varies from \$150 to \$400. Fisher says that he made some little improvement on the land; took in just a little land, and moved some old buildings; sold to defendant Bullock, for \$550, this and another piece of land. The rent was worth some \$20 or \$25.

Plaintiffs requested his honor to hold, as a matter of law, upon an inspection of the deed, that it was a mortgage. This was declined. Plaintiffs excepted. At the close of the evidence plaintiffs asked his honor to instruct the jury that, upon a consideration of all the evidence, they should find that the paper writing, executed by Wilson and wife to Fisher, was a mortgage, and that they should answer the issue accordingly. This was declined, and plaintiffs excepted, submitted to a judgment of nonsuit, and appealed.

R. G. Grady and Kenan & Herring, for appellants. Rountree & Carr and Stevens, Beasley & Weeks, for appellees.

CONNOR, J. We are of the opinion that, if there had been any controverted allegations of fact, the more orderly course of procedure would have dictated to plaintiffs to note their exception and await the verdict

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



under the instruction of the court, noting exceptions as they may have been advised. By declining the instruction asked, his honor did not intimate that they could not recover, thereby driving them to elect whether they would submit to a nonsuit or have a judgment against them. It may be that his honor was of the opinion that the legal character of the instruction was dependent upon the intention of the parties, which was a fact to be found by the jury. However, as we differ with his honor upon the construction of the deed, there was nothing to be submitted to the jury. In our opinion, the deed was upon its face a mortgage, with a provision cutting off the equity of redemption by the payment of \$50 by the mortgagee, if the debt of \$100 was not paid at maturity. There was an absolute conveyance, with a well-defined, unmistakable clause of defeasance, entitling the grantor to defeat the deed by paying the amount loaned. But for the marginal addition, no question could have arisen respecting the character of the deed or the rights of the parties to it. There being no power of sale, the only method by which the equity of redemption could have been foreclosed was by a civil action in the nature of a bill in equity, followed by a judgment giving the mortgagor a reasonable time within which to redeem, and, upon failure to do so, to direct a sale of the property in accordance with the course and practice of the court. The testimony of Fisher and Marshburn shows that the real transaction was a loan of money, secured by a conveyance of the land, with a right to redeem by paying the "amount inserted"—\$100. Hopkins on Real Property, p. 186; Wilson v. Weston, 57 N. C. 850. In Robinson v. Willoughby, 65 N. C. 520, Rodman, J., says: "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity, and the debtor has a right to redeem." The same learned judge says: "In the present case the express terms of the writing indicate a mortgage, and the circumstances do not contradict, but sustain, this view." This language is peculiarly applicable to this appeal. The plaintiff was in debt, he was trying to borrow money. Fisher says: "Wilson had been to me to borrow money. I told him that I would give him 12 months to redeem the land."

All of the testimony sustains the construction of the deed as a mortgage—so understood and intended by the parties. Bunn v. Braswell, 139 N. C. 135, 51 S. E. 927. The marginal addition, with equal clearness, shows the parties undertook to add to the relation of mortgagor and mortgagee an agreement on the part of Wilson to sell his equity of redemption, in the event he did not pay the debt, for \$50. This, for manifest reason, the courts have uniformly refused to enforce. "If the transaction be a mortgage in sub-

stance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being, on grounds of equity, an exception to the maxim, 'Modus et conventio vincunt legem.' Nor can a mortgagor, by any agreement, at the time of the execution of the mortgage, that the right to redeem shall be lost if the money be not paid by a certain day, debar himself of such right." Robinson v. Willoughby, supra. This court, following an unbroken line of decisions in England and this country, has uniformly held that an agreement, made at the time of the execution of the mortgage, to surrender the equity of redemption for a fixed amount, is invalid. The maxim, "Once a mortgage, always a mortgage," is too deeply rooted in our jurisdiction to be brought into controversy. Ruffin, J., in Poindexter v. Cannon, 16 N. C. 377, 18 Am. Dec. 591, says that when, upon the face of the instrument, it is doubtful whether a transaction is a conditional sale or a mortgage, the "court will lean to considering it a mortgage," and will look to the "acts of the parties and the circumstances attending the transaction." "When it is once determined to be a mortgage, all the consequences of account, redemption, and the like follow, notwithstanding any stipulation to the contrary; for the power of redemption is not lost by any hard conditions, nor shall it be fettered to any point of time not according to the course of the court. This is well expressed by the familiar maxim, 'Once a mortgage, always a mortgage.'" It is well settled, upon sound equitable principles, that contracts made at the time the mortgage is executed, restricting the right to redeem, are void. "When one borrows money upon the security of his property, he is not allowed, by any form of words, to preclude himself from redeeming." Jones on Mortgages, 251. It is said: "A man shall not have interest on his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." Comyns v. Comyns, 5 Irish Eq. 583. In Broad v. Self, 9 Jur. (N. S.) 885, it is held "that a mortgagee cannot, at the time he advances his money, stipulate for his advantage not strictly belonging to his contract of mortgage."

We are of the opinion: (1) That the deed is, upon its face, a mortgage; (2) that, taking the defendant's evidence to be true, the transaction was a loan of money to be secured by mortgage; (3) that the attempt to fix a price upon the equity of redemption, and retain to the mortgagee the power to deprive the mortgagor of the right to redeem by paying the amount stipulated, was void. His honor was therefore in error in refusing either of plaintiff's motions. There should be judgment directing a decree permitting plaintiff to redeem upon paying the amount due, including the \$50 with interest at 6 per cent. less reasonable rent. While it is the general rule that a mortgagee in possession is not entitled to pay for improvements, we

are of the opinion that, as the plaintiffs in this action are asking equitable relief, after so long a time they should account in diminution of rents for such enhancement in value of the property as may be found by reason of permanent improvements put thereon by defendants. There should be a reference to state an account between the parties, upon the principle indicated in this opinion. Let this be certified to the superior court of Pender.

Error.

# MASON et al. v. NELSON et al.

(Supreme Court of North Carolina. Oct. 21, 1908.)

## 1. CARRIERS (§ 58\*)—BILLS OF LADING—SECURITY FOR ATTACHED DRAFT—TITLE TO PROPERTY REPRESENTED.

The holder of a draft, who takes an attached bill of lading by assignment, as security for the amount advanced on the draft, becomes the owner of the goods, as against the acceptor, to an extent sufficient to secure and protect his claim.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-189; Dec. Dig. § 58.\*]

## 2. CARRIERS (§ 58\*)—BILL OF LADING.

Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-189; Dec. Dig. § 58.\*]

## 3. EVIDENCE (§ 20\*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

A court will take judicial notice of the general business methods of railways and quasi public corporations, when the methods are universally practiced and commonly known to exist; and the court will assume, in the absence of proof to the contrary, that a bank discounting a draft for the price of goods with a bill of lading attached does not thereby intend to take over the original contract of sale, or to come under its burdens.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

## 4. CARRIERS (§ 58\*)—BILLS OF LADING—PLEDGE—PURCHASER OF DRAFT—RIGHTS ACQUIRED.

A buyer of a draft for the price of goods with a bill of lading attached, may hold the goods as owner until the draft is paid; and the fact that the buyer of the goods under a contract of warranty is compelled to pay the draft before he can examine the goods does not render the buyer of the draft liable for breach of warranty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-189; Dec. Dig. § 58.\*]

## 5. COURTS (§ 89\*)—STARE DECISIS.

General laws of business, established to facilitate and promote commercial intercourse, are framed on the assumption that men will act honestly, and such laws should not be interfered with because, in exceptional instances, a wrong may be possible.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

## 6. COURTS (§ 89\*)—RULES OF DECISION—STARE DECISIS.

The rule of stare decisis is founded on public policy, and it does not require a court to adhere to a decision, clearly erroneous, which injuriously affects a general business law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

## 7. COURTS (§ 90\*)—STARE DECISIS.

A decision rendered 10 years ago, and cited only twice as direct authority, and disapproved in the state where the rule originated, and pronounced unsound by the great weight of authority, cannot be considered to have been acquiesced in, or to have become the accepted law, and the court may overrule it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 320; Dec. Dig. § 90.\*]

## 8. COURTS (§ 93\*)—STARE DECISIS.

The fact that a contract was made while a Supreme Court decision expressing the rule governing such contracts prevailed does not prevent the court, in a suit on the contract, from overruling such decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. § 93.\*]

## 9. COURTS (§ 100\*)—STARE DECISIS.

A decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 341; Dec. Dig. § 100.\*]

## 10. CONSTITUTIONAL LAW (§ 116\*)—OBLIGATION OF CONTRACTS—JUDICIAL DECISIONS.

Where a Constitution or statute has received a construction by the courts of last resort, and contracts have been made, and rights acquired, in accordance therewith, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision, notwithstanding the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 278; Dec. Dig. § 116.\*]

## 11. COURTS (§ 93\*)—STARE DECISIS.

An erroneous decision of the Supreme Court on general mercantile law, contrary to accepted doctrine and recognized business methods may be overruled, and when so done, the general rule that a decision of a court of supreme jurisdiction, overruling a former decision, is retrospective in its operation applies.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. § 93.\*]

## 12. CARRIERS (§ 58\*)—BILLS OF LADING—TRANSFER AS SECURITY—LIABILITY OF PLEDGEE.

A buyer of a draft for the price of goods sold under a warranty with bill of lading attached, who receives payment from the buyer of the goods, is not liable for a breach of warranty, where he bought the draft for full value, in the regular course of mercantile dealing, and had no interest in the goods, and took no part in the bargain, and had no notice of its terms.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-189; Dec. Dig. § 58.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; Ward, Judge.

Action by R. E. Mason and another, composing the firm of R. E. and C. E. Mason against A. E. Nelson and others. From a

judgment overruling a demurrer to the complaint, defendant W. A. Trice appeals. Reversed.

The facts stated in the complaint, considered material to a proper understanding of the cause, are: (1) That in August, 1906, defendant A. E. Nelson, doing a cotton business in Texas, contracted to sell and deliver to plaintiff, resident and doing business in Charlotte, N. C., 50 bales of cotton, at the price of 8¼ cents per pound, and guaranteed that said cotton, in grade, texture, and quality, was according to samples exhibited. (5) That on the 6th day of August, 1906, the said defendant A. E. Nelson, in pursuance of said contract, delivered at Houston, Tex., 50 bales of cotton, marked "L. O. N. G.," to the Texas & New Orleans Railroad Company, a common carrier, and took and received from said railroad company a bill of lading therefor in the usual form, stipulating that said cotton was deliverable to the order of the said A. E. Nelson at Charlotte, N. C., with instruction to notify plaintiffs R. E. & C. E. Mason, upon its arrival at said point, and thereafter upon the same day the said Nelson drew his draft for the said sum of \$2,176.14, the price agreed to be paid for the said cotton, upon the plaintiffs, payable to the order of one W. A. Trice, and attached to the said draft, as security for the payment of same, the aforesaid bill of lading, and thereupon indorsed the said bill of lading, and sold, assigned, and transferred the same to the defendant Trice for full value, and the said Trice thereby became the owner of the cotton described in and covered by said bill of lading. (6) That thereafter the said Trice indorsed the said draft and bill of lading to T. W. House, banker, of Houston, Tex., for collection, who forwarded the same to the First National Bank of Charlotte, N. C., for a like purpose. (7) That plaintiffs were unable to get said cotton from the railroad company when it arrived in Charlotte without presenting the bill of lading therefor, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain whether or not said cotton was of the same grade, texture, and type contracted for, and plaintiffs, relying on the representations and guaranty of said A. E. Nelson that said cotton was of the same grade and type as the E. V. A. samples, paid said draft to the First National Bank of Charlotte, to wit, \$2,176.14, and took up and surrendered the bill of lading to the Southern Railway Company, and took into their possession the said 50 bales of cotton. (8) That immediately, or as soon thereafter as practicable, plaintiffs examined said cotton, and found that said cotton was not of the same grade as the E. V. A. samples in type or texture. On the contrary, said cotton was much inferior to said samples in grade and texture and type, and was what is known as "threshed cotton," worth in the market a little more than one-half the value of cotton of the grade and texture of said E. V. A. samples, al-

though said defendant A. E. Nelson had represented and guaranteed to plaintiffs that said 50 bales should be the same grade, type, and texture of said E. V. A. samples. (9) That by reason of the low grade and texture and inferior quality of said cotton, plaintiffs were compelled to sell said cotton at a great loss, and were put to great expense in storing and reselling said cotton. (10) That by reason of the failure of said cotton to be of the same grade, texture, and type of the E. V. A. samples as defendant A. E. Nelson represented, warranted, and guaranteed it to be, and by reason of the breach of the warranty, and the expense incurred by reason of such breach and failure of said cotton to come up to the grade, texture, and type of the E. V. A. samples, plaintiffs have been damaged in the sum of \$1,795.62. (11) That plaintiffs are informed and believe, and are so advised, that by reason of the assignment of said bill of lading by the indorsement of said A. E. Nelson to W. A. Trice, and the indorsement of said draft by said W. A. Trice, and the assignment of said draft and bill of lading to House, and by the indorsement of said draft and bill of lading by said House, banker, unincorporated, and the payment of same by these plaintiffs, said W. A. Trice became liable to plaintiffs for all damages they have sustained by reason of the failure of said cotton to come up to the grade, texture, and type guaranteed to plaintiffs by said A. E. Nelson, as hereinbefore set out. (12) That plaintiffs have demanded payment from the defendants, and payment has been refused. Defendant W. A. Trice demurred to said complaint, for "that same does not set" forth any fact whereby this defendant became liable to the plaintiffs, and it appears in and by said complaint that said W. A. Trice is in no way liable to account for the alleged breach of contract set out against his said codefendants. There was judgment overruling the demurrer and allowing said defendant to answer over, whereupon he excepted and appealed.

Tillett & Guthrie and W. A. Trice, for appellant. Burnell & Cansler and W. F. Harding, for appellees.

HOKE, J. In the case of Finch v. Gregg, reported in 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, this court held, in effect, that when a purchaser and consignee of goods has accepted and paid a draft, drawn on himself by the consignor for the purchase price, to a holder of the draft "in due course," said holder, having taken an assignment of the bill of lading attached, or otherwise, as security for the amount paid in obtaining the draft, and this bill of lading is turned over to the consignee on the payment of the draft, who thereby obtains possession of the goods, the said consignee can recover of the holder receiving such payment damages for breach of warranty given by the consignor in the original contract of sale, and this, though the holder of the draft had no interest ultra in

the goods, and took no part in the bargain. The present writer, who presided at the trial of *Finch v. Gregg* in the superior court, first made this ruling in the court below, following with much hesitation a decision of the Texas Court of Civil Appeals, then recently made (*Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246), and the position was sustained on appeal. The purport of this Texas decision, cited with approval in the opinion of our Supreme Court, on the question chiefly considered here, is thus stated in 46 S. W. 48: "(1) A consignor of wheat delivered to a bank a bill of lading, with draft drawn upon his consignee attached. The bank cashed the draft, and paid the consignor. The consignor had contracted to furnish sound wheat, but the wheat furnished was of inferior quality. Held, that the bank purchasing the bill of lading became the owner of the wheat, and was responsible to the consignee for the failure to furnish sound wheat." "(3) A bank cashing a draft, attached to a bill of lading, drawn on the consignee of goods, becomes a purchaser of the goods, and must, at its peril, exercise care to see that the goods are of the quality that the consignor contracted to furnish." These cases, and the principle upon which they are made to rest, apply to the facts presented here, and, if they are to be regarded as the law governing the rights of these parties, the judgment of the court below overruling the demurrer must be affirmed. Trice, the appellant who demurred to the complaint, was the holder of the draft, in due course, with a bill of lading attached and assigned to him as security for the amount paid in discounting the draft. So far as appears, he had no interest in the goods, except what belonged to him by reason of these papers, took no part in the bargain and sale, and had no knowledge or notice of its terms, and he is sued by the consignee, who accepted and paid the draft, for breach of warranty given by the consignor to the consignee in the contract of sale. After giving the question our best consideration, with a due sense of the great importance of adhering to decisions when formally announced as law by the court, we feel constrained to overrule the case of *Finch v. Gregg*, being of opinion that the decision is based on an erroneous principle, or rather on the erroneous and unwarranted extension and application of an admitted principle, and is contrary to the great weight of well-considered authority. The case excited much comment at the time it was announced, was the subject of adverse criticism in a learned and intelligent note by the editor of *Lawyers' Reports Annotated*, in volume 49, at page 679, and the principle upon which it was made to rest was likewise condemned in a well-considered and instructive note to the case of *Hall v. Keller*, 91 Am. St. Rep. 209, the case being taken from 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758. Another comment of like purport will be found in a note to an Alabama case (*Haas v. Citizens' Bank of Dyersburg*,

144 Ala. 562, 39 South. 129, 1 L. R. A. [N. S.] 242, 113 Am. St. Rep. 61), citing additional authorities in support of the editor's position.

The opinion in *Finch v. Gregg*, delivered by our Supreme Court at February term, 1900, was referred to at the same term in *Sloan v. Railroad*, 126 N. C. 487, 36 S. E. 21, as announcing a correct principle of law, and again at fall term, 1902, in the case of *Perry v. Bank*, 131 N. C. 117, 42 S. E. 551—in this last case only to say that it had no application to the cause then being considered—and with these two exceptions, so far as the writer can discover, no other reference was made to the case until fall term, 1903, in *Mfg. Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026, when it was cited in the opinion in support of this principle: "It is well settled that when the vendor of goods ships them, taking from the carrier a bill of lading to deliver to his own order, and thereupon draws a draft payable to his own order upon the vendee, attaching the bill of lading, and indorses to a third party such draft for value, the title to the goods vests in the indorsee at least to the extent of the amount advanced. Daniel on Neg. Instruments, § 1734 (a). The law is thus stated and cited with approval by Mr. Daniel: 'When the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, and at the same time draws upon the purchaser for the price and delivers the bill of exchange, with the bill of lading attached, to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor.' *Emery v. Irving Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Dows v. Ex. Bank*, 91 U. S. 618, 23 L. Ed. 214. This court in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, recognized this almost elementary principle, carrying it to its fullest extent." To the extent indicated in this citation from *Mfg. Co. v. Tierney*, the principle contained in *Finch v. Gregg* is sound. The holder of a draft or bill of exchange, who takes an attached bill of lading by assignment, or otherwise, as security for the amount advanced on the draft, does become the owner of the goods, as against the acceptor, to an extent sufficient to secure and protect his claim. And it is in extending this wholesome and very generally accepted principle of mercantile law to an unwarranted length that the error in *Finch v. Gregg* consists. That decision not only makes the holder of a negotiable instrument, who has taken an assignment of the bill of lading only as security, the owner outright of the goods, but imposes on him the burden and obligation of a contract concerning the property, made between the consignor and consignee, in which the holder took no part, and of which he had

no notice. And in no aspect of the matter, as we view it, can such a position be sustained. Since the noted case of *Lickbarrow v. Mason*, *Smith's Leading Cases* (9th Am. Ed.) p. 1045, and before that time, it has been accepted doctrine that the holder of a bill of lading by assignment will, under certain conditions, be regarded as the absolute owner of the goods; but, as pointed out by the American annotator of this decision, in *Law Library Ed.*, vol. 43, p. 543, this is only true when, by the terms of the contract between the assignor and the assignee, the entire title was to pass to the assignee. That decision was made on a question not at all relevant to this inquiry, and is therefore not further pursued; but there is nothing in the case, or the principle therein announced, which prevents the assignee, when the contract so provides, from taking a restricted interest under such an assignment, and of having his rights protected and enforced according to the stipulations of his contract. And, so far as we can discover, until these decisions were made which we are now reviewing, it was a doctrine universally recognized that the holder of a negotiable instrument, with bill of lading attached, under the circumstances indicated, was in by right superior to that of a consignee, who had accepted and paid a draft drawn on him for the purchase price of the goods, and whether such consignee accepted and paid, as in this case, or paid the draft on presentation, as in *Finch's Case*, the result was the same. In either event the consignee thereby took a position in recognition of the holders' rights under his contract, whatever they were.

In accordance with this doctrine, the case of *Mfg. Co. v. Tierney*, *supra*, correctly holds: "(4) Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he cannot retain the price of the goods on account of a debt due him from the consignor." This principle is entirely inconsistent with the doctrine announced in *Finch v. Gregg*, and, as stated, is in accord with the general current of authority on the question in this country and in England. *Robinson & Cherry v. Reynolds*, 42 E. C. L. 634; *Hoffman & Co. v. Bank*, 79 U. S. 181, 20 L. Ed. 366; *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. 313, 30 L. Ed. 515; *Blaidsell v. Bank*, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 963, 97 Am. St. Rep. 944; *Arplin v. Owens*, 140 Mass. 144, 3 N. E. 25; *Tolerton & Stetson Co. v. Bank*, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; *Lewis v. Small Co. et al.*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887, 119 Am. St. Rep. 994; *Hall v. Keller*, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209, with a large number of additional authorities applying the same principle cited in the notes above referred to. *Finch v. Gregg*, 126 N. C. 176, 35

S. E. 251, 49 L. R. A. 679; *Tolerton's Case*, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; *Haas' Case*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61; *Hall's Case*, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209.

In *Robinson's Case*, *supra*, *Tindal, C. J.*, for the court, said: "The sole ground on which the defendant relies is that the acceptance was not binding on account of the total failure or insufficiency of the consideration for which it was given, the document, on the delivery of which the acceptance was given, having been forged, and there never having been any other consideration whatsoever for the acceptance of the defendants. And this would have been a good answer to the action if the bank had been the drawers of the bill. But the bank are indorsees and indorsees for value, and the failure or want of consideration between them and the acceptors constitutes no defense, nor would the want of consideration between the drawer and acceptors (which must be considered as included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea." The exact case is presented in *Tolerton's Case*, *supra*, where it is held: "(1) The purchaser of a draft with bill of lading attached is not liable on a warranty, made by his assignor, of the goods represented by the bill of lading. (2) Payment by the drawee to the payee of a negotiable draft, with bill of lading attached, cannot be recovered back by the drawee on the ground that the payee has received money which it cannot equitably retain because of a breach of warranty made by the drawer to the drawee on the sale of the goods for which the bill of lading was given, since any equities arising therefrom do not affect the payee when he has secured an acceptance or payment."

In *Hoffman's Case*, *supra*, it was held: "A consignor, who had been in the habit of drawing bills of exchange on his consignee, with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts, with the forged bills of lading so attached, discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. Held, that there was no recourse by the consignee against the bank." And the doctrine and the reason upon which it rests is well stated in the opinion as follows: "Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. Different rules ap-

ply between the immediate parties to a bill of exchange—as between the drawer and the acceptor or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of the fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

The opposing principle, that maintained in *Finch v. Gregg*, is not only contrary to this great array of well-considered authority, but is against the real facts of the transaction, bringing the holder of a negotiable instrument under the burdens of a contract which he never made, and in which, so far as appears, he had no interest. The allegations in the complaint, made by the plaintiff himself, and admitted by the demurrer, are to the effect that one Nelson, of the Nelson Cotton Company, sold the cotton to plaintiff. He, or one of them, owned the cotton, made the bargain, gave the warranty, and got all the profits, if there were any. Trice, the defendant and payee, took the draft for full value, in the regular course of mercantile dealing, and, as heretofore stated, so far as the facts show, he had no interest in the cotton, took no part whatever in the bargain, and had no knowledge or notice of its terms. He simply received what was due him under his contract; and, this being true, it would be a hard measure of justice to hold him responsible for the assurances and stipulations given by the vendor to the purchaser in the contract between them, from which he derived no benefit. This case of *Finch v. Gregg*, and the two or three others of like import, profess to find support in *Dows et al. v. Bank*, 91 U. S. 618, 23 L. Ed. 214, and *Bank v. White*, 65 Mo. App. 677, but neither of these decisions is authority for their position. In *Dows et al. v. Bank* the precise

question we are now discussing was not presented, but the case in its principal feature held that, where a bank had discounted a draft in due course for the purchase price of certain wheat, and had taken bills of lading as security for the amount, these bills making the wheat deliverable on account of the cashier of a correspondent bank, the bank discounting the draft, holder of the same in due course would be the owner of the wheat to the extent necessary to protect its claim, and could recover the same from one who had purchased the wheat from the drawee of the draft, to whom it had been delivered, but who had received it as warehouseman, subject to instructions not to deliver till the drafts were paid. The drawee of the draft had neither accepted the same, nor paid it on presentation, and the question was simply one of title between the bank, the holder of the draft with bill of lading attached, and the purchaser from the drawee, who had received the wheat as warehouseman, with instructions not to deliver; and the rights and obligations of the respective parties, after acceptance or payment of the draft by the drawee, were in no way considered. So far as this decision bears on the question, it favors defendant's position in holding, as it does, that a person discounting a draft in due course for the purchase price of goods, and taking a bill of lading attached as security, can enforce his claim according to the terms of his contract; the case on this point being properly digested as follows: "(2) A party discounting a draft and receiving therewith, deliverable to his order, a bill of lading of the goods, against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft."

In the *Missouri* case the bank, having discounted a draft of a lumber company for the price of certain shingles, with bill of lading attached and assigned to the bank as security for the amount, sued one White, a lumber dealer and drawee of the draft, to whom the shingles had been consigned for sale at a certain price. White, the consignee and defendant, had taken the shingles from the carrier, paying a freight bill thereon to the amount of \$134.61, and, finding the shingles were off grade, and not salable at the stipulated price, immediately notified the consignee requesting that they take the shingles and reimburse him for the amount of his costs and charges, or the shingles would be sold for that purpose. No attention being paid to this request, White sold the shingles, realizing the market value, reimbursed himself for the amount he was wrongfully out of pocket, and remitted the balance of \$40 to the consignee and original owner. The bank sued for the entire amount of the draft, and the Court of Appeals, in holding that the defense was available against plaintiff's demand, said: "From that time on plaintiff occupied the same relation towards the

shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolic delivery of the property covered by it. However, the rights of White, the consignee, were not impaired or disturbed by this change of ownership in the property. He was left with the same defense, as against the plaintiff bank, that he would have as against the lumber company," etc. It will be noticed here that White, the consignee, had not accepted or paid the draft drawn on him and discounted by the bank, and this distinction serves to indicate and emphasize the error in the cases we are reviewing. Until White, the drawee, had accepted the draft or acknowledged his obligation thereon by paying the same, he was only bound by the terms of the original contract, and that was the only consideration moving against him; and the discounting bank, having to assert its demand under and by virtue of the original contract of the consignor, must take his position in the transaction, and be subject to the defenses available against him. But on acceptance of the draft the owner comes under a different obligation, and the amount paid by the bank for the draft becomes a new and binding consideration, giving the bank, when a holder in due course, a position superior to the original contract between the consignor and consignee, and to any defenses existent as between them.

So far as we are now aware, the first case notably making erroneous application of these two authorities was that of *Landa v. Latin Bros. et al.*, decided by the Texas Court of Civil Appeals, in June, 1898, and reported in 19 Tex. Civ. App. 246, 46 S. W. 48. That decision held, as stated, that the purchaser of goods and drawee of draft for purchase price, who pays same on presentation, may recover for breach of contract stipulations made by the vendor, against one who has become the owner of the draft, in due course, with bill of lading attached and assigned as security for the amount paid in obtaining the draft—a conclusion drawn from the position maintained in this and other cases holding the same view that the holder, in taking the assignment of the bill of lading as security, becomes the owner outright of the goods, and responsible for the stipulations of the bargainor given in the original contract of sale, a position which we have endeavored to show cannot be sustained in reason or authority. The decision has since been disapproved by the Supreme Court of Texas, in an opinion delivered in June, 1903 (*Blaisdell Co. v. National Bank*, 96 Tex. 627, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944), and is no longer recognized as authority in that state. The Supreme Court of Mississippi has rendered a decision similar to that of *Landa v. Latin Bros.* in *Searles Bros. v. Smith Grain Co.*, 80 Miss. 688, 32 South. 287. The opinion in this case, however, simply adopts the reasoning of the court in *Landa v.*

*Latin Bros.*, embodying the opinion in that case as its own deliverance on the subject, and in itself adds nothing to the discussion, and affords the position maintained no additional weight, except that which arises from the sanction and approval of that learned and usually sane and safe court. Another case sustaining the position announced in *Landa v. Latin Bros.* is that of *Haas v. Bank*, 144 Ala. 562, 39 South. 129. The decision reported also in 1 L. R. A. (N. S.) 242, and 113 Am. St. Rep. 61, where it is subjected to adverse comment in a note by the editor, proceeds on the theory that the holder in taking over the draft with bill of lading attached, without proof ultra, thereby became the owner outright of the goods and of the contract of sale, and by delivering the bill of lading on payment of the draft, he came under all the obligations of the original parties to the contract of sale. The judge, delivering the opinion, states the position as follows: "And when, as here, the defendant became the owner of the debt and the goods, and assuming necessarily the responsibility and burden of delivering them to the plaintiffs, it became the seller in fact, and must bear the burden of the transaction. In short, the defendant took the contract of Klyce, the shipper, and stood in his shoes with the same rights, no greater no less."

There is doubt if the court intended, in strictness, to apply the principle stated to a case like that presented here, for in our case it is stated expressly that the appellant took the bill of "lading as security," but, on the facts suggested in the opinion, we do not think the decision of *Haas v. Bank* can be sustained, proceeding, as it does, on the assumption, without proof, that the bank, on discounting the draft with bill of lading attached, became the owner of the original contract of sale. As we have held in *Furniture Co. v. Express Co.*, 144 N. C. 642, 57 S. E. 458, "A court will take judicial notice of the general business methods of railways, and other well-known and quasi public corporations, when these methods are universally practiced and commonly known to exist, and to the extent that such methods are sufficiently notorious to make their assumption safe and proper." And we think it an erroneous position to hold or assume that a bank, in discounting a draft for purchase price of goods with bill of lading attached, took over, or intended to take over, the original contract of sale, or to come under its burdens. On the contrary, we may safely assume, when there is no proof to the contrary, that no such intent existed, and that the bank simply discounted a draft according to the ordinary methods of mercantile dealing. It held it, and had a right to hold it, by reason of the consideration moving from itself to the drawer and when the drawee accepted or paid the draft on presentation, he did so in recognition of the bank's position.

It is earnestly contended that the appellant in the present case comes under the obligation of the contract of sale, because the plaintiff was compelled to pay the draft before he could make examination of the cotton; that he was forced to take the cotton "unsight, unseen." There is doubt if any such allegation is made against the appellant. In this connection, the complaint states: "That plaintiffs were unable to get said cotton from the railroad company when it arrived at Charlotte, without presenting a bill of lading therefore, and plaintiffs were compelled to pay said draft before they could get said bill of lading and examine said cotton to ascertain," etc. The allegation here seems to be against the carrier, and we have held in *Sloan v. Railroad*, 128 N. C. 487, 36 S. E. 21, that a common carrier, under certain circumstances may permit a consignee to inspect goods without subjecting itself to liability; but, if it be conceded that no such right existed here, and that the refusal was imputable to Trice, the appellant, he had the right to stand on the integrity of his own contract, and hold the goods as owner till his draft was paid. As heretofore stated, by reason of the consideration moving from himself, as purchaser of the draft, his position was superior to that of the drawee, and he had the contract right to insist that the drawee should recognize this position before delivering to him the bill of lading. Even on grounds of expediency, if such considerations should have place in a discussion of this character, the weight of the argument is against the plaintiff. The utmost that can be urged by plaintiff against the doctrine we apply in denial of his claim is that, by negotiation of the draft, at times colorable, he may be forced to seek redress for his wrong in a distant forum, and that his recovery may on occasions be restricted to a vendor who is insolvent. But these general laws of business, established to facilitate and promote enlightened commercial intercourse, are framed, and properly framed, on the assumption that men will act honestly, and, as a rule, they do. The few cases that are brought before the courts for decision are exceedingly small in proportion to the immense volume of business that is carried on and satisfactorily adjusted between the parties. And one of these rules, universally recognized as well fitted for its purpose, should not be interfered with, nor have its usefulness seriously impaired, because in rare and exceptional instances a wrong may be possible. And it must be borne in mind that the plaintiff is left without interference to assert his demand against the original vendor, the man with whom he had elected to deal. Speaking to this question, in the case of *Hall v. Keller*, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209, Smith, J., delivering the opinion of the court, said: "To fix a liability upon the bank, or upon Keller & Dean, under the circumstances of the pres-

ent case, would not only violate well-settled rules of the law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain, and other commodities, by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damages on account of the defective quality of the property shipped and covered by the bill of lading, or for failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned. To hold with the plaintiff in error would, to use the language of the author of the note in *Finch v. Gregg*, 128 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, 'undoubtedly cause a revolution in commercial circles.'"

We are not insensible to the great importance of the doctrine of *stare decisis*, a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time so as to become accepted law constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them require or permit that a court should adhere to a decision found to be clearly erroneous, which affects injuriously a general business law; and under the circumstances indicated here. As it has been well said, "where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right, of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be a grievous mistake to allow more harm than good to come from it." 26 A. & E. (2d Ed.) p. 184. This decision, announced something like 10 years ago, cited not more than twice as direct authority for the position it contains, and disapproved in the state where it seems to have originated, commented on adversely by the intelligent annotators and reviewers of the country, and pronounced unsound by the great weight of authority bearing on the question, cannot be considered to have ever been acquiesced in or to have become the accepted law of the land. Nor are we inadvertent to the fact that this contract was made at a time when *Finch v. Gregg* expressed the rule which prevailed with us on the question presented, but we are of opinion that this should not be allowed to affect the result.



The general principle is that a decision of a court of supreme jurisdiction, overruling a former decision, is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. *Center School Township v. State ex rel.*, 150 Ind. 168, 49 N. E. 961; *Stockton, Trustee, v. Mfg. Co.*, 22 N. J. Eq. 56; *Storrie v. Cortes & Wife*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666. To this the courts have established the exception that where a Constitution or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; *Gelpcke v. City of Dubuque*, 68 U. S. 175, 17 L. Ed. 520; *City of Sedalia v. George A. Gold*, 91 Mo. App. 32. And there is high authority for the position that this is the only exception that should be allowed. *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193. And while this court in a case of unusual hardship has extended the principle of this exception to a criminal cause (*State v. Bell*, 136 N. C. 674, 49 S. E. 163), a cause, it will be noted, arising on the construction of a statute; and in another decision, to a case where a title to real estate had vested (*Hill v. Brown*, 144 N. C. 117, 58 S. E. 693), the principle should certainly not be further extended and applied to an erroneous decision on general mercantile law, which is contrary to accepted doctrine and recognized business methods. We are of opinion, therefore, that the case of *Finch v. Gregg* should be overruled, and the principle upon which it rests disapproved, first, as contrary to the general current of authority on a subject where uniformity of decision is so greatly to be desired; second, because it puts an undesirable and injurious clog upon commercial intercourse between different sections of the country; and third, because it may, and frequently does, work grievous wrong to parties litigant, in subjecting them to the burdens and obligations of contracts which they never made, and holding them responsible for fraud and wrongs which they did not commit, and of which they had no knowledge or notice.

And from this it follows that the judgment overruling the demurrer of the defendant Trice should be reversed, and on the facts stated in the complaint said demurrer should be sustained.

Reversed.

CLARK, C. J. (dissenting). The complaint alleges that the defendant Nelson in Texas contracted to sell the plaintiff 50 bales cotton of a certain grade and quality, at a certain price, and shipped said 50 bales to plaintiff, taking a bill of lading to deliver same to his own (Nelson's) order in Charlotte, N. C. He

drew a draft upon plaintiff for the purchase price payable to defendant Trice, attached the bill of lading thereto, and delivered them for value to said Trice; who indorsed the draft and forwarded it to his correspondent in Charlotte for collection, with instructions not to deliver bill of lading to plaintiff till the draft was paid. Upon arrival of the cotton the plaintiff was not allowed to examine or inspect the same till the draft was paid. When plaintiff did receive the cotton and examined it, he found that it was very inferior to the grade and quality of cotton he had contracted and paid for, so much so that he avers a loss of \$1,795.62, and he brings this action to recover back said sum from Nelson and Trice. The latter demurs to the complaint, on the ground that it states no cause of action against him, and appeals from the judgment overruling the demurrer.

If Nelson had given Trice a simple draft upon the plaintiff, and the latter had paid the same, he could not have recovered anything back. It would have been his own fault. But defendant Trice was not satisfied with a draft. He took an assignment of the bill of lading, taking thus to himself the title and the possession of the cotton. He did this to secure himself. He would not permit the plaintiff to receive or even examine the cotton till he had paid the draft. He thus, in effect, represented to the plaintiff that the cotton was as contracted for and worth, on the basis of the contract, the amount of the draft. It is a bad rule that will not work both ways. If the assignee of the bill of lading acquires the title and possession to protect himself against nonpayment of the draft, the drawee, who is not given the opportunity to examine and reject the cotton, is entitled to recover any sum he pays in excess of the contract price, if there is shortage either in the quantity or quality of the goods. This is fair and just to both sides. It gives the same protection to both. If Trice had permitted the plaintiff to examine the cotton before accepting it, there could have been no complaint. But having compelled the plaintiff to take the cotton "unsight, unseen" under risk of suit for damages if he refused, there was an implied representation, in all fairness, that the cotton was such as was contracted for, and for the price of which Trice was paid. There should be no unjust advantage given to the payee of a draft over the drawee because the payee has an assignment of the bill of lading. If the seller had brought the cotton into town on his wagon, to deliver in accordance with a previous contract, he could not require payment until the cotton had been examined and it was ascertained that it came up to the contract, and, had he so exacted, certainly the seller would be liable for the deficiency in quantity and in quality. When the cotton is sent by railroad instead of by wagon, and instead of the seller the holder of the bill of lading has the title and possession

and refuses to deliver, unless payment is made, without inspection, the relation and rights of the parties are the same. Consignees are entitled to a "fair deal," as well as the payees of draft secured by assignment of bills of lading. The latter has the security of title and possession of the goods. The consignees are entitled to inspection of goods before payment of draft; and if that is refused, and they are forced to pay under penalty of sale or reshipment of goods and protest of the draft, then the payee of the draft is bound to make good the quality and quantity as per the contract for which the draft is drawn. This same point was before this court, and after able and elaborate argument was decided as above by a unanimous court. *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679. Exactly the same ruling was made in *Grocery Co. v. Bank*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61, *Searles v. Grain Co.*, 80 Miss. 688, 32 South. 287, and *Landa v. Lattin*, 19 Tex. Civ. App. 248, 46 S. W. 48, though the last-named case has since been reversed in Texas.

In *Bank v. Bank*, 91 U. S. 98, 23 L. Ed. 208, Mr. Justice Strong says: "That the holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper is not to be doubted. He has the same right to demand acceptance of the accompanying bill and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holders. Bills of lading that are transferable by indorsement are only quasi negotiable. The indorsee does not acquire a right to change the agreement between the shipper and his sendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignee."

*Bank v. White*, 65 Mo. App. 679, was a case where a manufacturer of lumber and shingles sold and shipped to a dealer a car load of shingles, at the same time drew a draft on the purchaser with a bill of lading attached, and assigned the same to the plaintiff, the banking company. When the shingles arrived they were found to be of inferior quality, and the purchaser refused to pay the draft. Thereupon the bank sued the purchaser for the entire amount of the draft, and the purchaser interposed his defense. The court, in supporting the contention of the defendant, says: "We can discover no prejudicial error in the trial of this case, and since, too, substantial justice has been done, the judgment will not be disturbed. Plaintiff's counsel are right in the contention that when the bank took an assignment of the draft and bill of lading from the lumber company, whether as an absolute purchase or collateral security, it became vested with the

title to the property. From that time on plaintiff occupied the same relation towards the shingles then in transit that the lumber company did before the bill of lading was transferred. The assignment of the bill of lading operated as a symbolical delivery of the property covered by it. However, the rights of the consignee were not impaired or disturbed by the change of the ownership in the property. He was left with the same defense, as against the bank, that he would have had as against the lumber company."

In *Haas v. Bank*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61, a shipper consigned goods in his own name, having the bill of lading made out to himself, and assigned the bill, accompanied by draft on the buyer, to a bank to which the draft was made payable, and which paid the seller for the goods. In that case it was held that the bank became the absolute owner of the goods and of the debt due from the buyer, and, on constructively delivering the goods to the buyer by an assignment of a bill of lading and the acceptance and payment of the draft by the buyer, became liable to him to the same extent as the seller would have been, but for the assignment, for any shortage in the goods. On page 572 of 144 Ala., on page 131 of 39 South. (1 L. R. A. [N. S.] 242, 113 Am. St. Rep. 61), the court said: "In short, the defendant took the contract of the shipper and stood in his shoes, with the same rights, no greater, no less, and the payment of the draft by plaintiffs, which were consignees, which merely evidenced the price to be paid for the goods, could no more shield or protect the defendant bank from liability than its payment would have protected the shipper had he undertaken a delivery of the goods and received the purchase price for them. It would be an anomaly to hold that the defendant is protected, as purchaser of the account and bill of lading, because the plaintiffs paid the draft, which also belonged to it in right of its ownership of the goods, or that it held the bill of lading for security for a debt which belonged to it. 'Just how it could be the unqualified owner of the debt and only a qualified owner of the goods when it purchased both,' says the court, 'we confess our inability to see.'" In almost identical language is *Searles v. Grain Co.*, 80 Miss. 688, 32 South. 287, citing and approving *Lattin v. Landa*, supra, *Bank v. White*, supra, *Finch v. Gregg*, supra, and *Miller v. Bank*, 76 Miss. 84, 23 South. 439. In the *Searles* Case plaintiffs purchased a lot of corn from the *Smith Grain Company* at a fixed price. Only a part of the corn was shipped, and in order to supply their customers, they were compelled to go into the market and buy other corn at a higher price. The corn shipped them was defective in quality, whereby they suffered loss. The *Smith Grain Company* drew on the plaintiffs for the purchase price of the corn in favor of the *Exchange National Bank*, and said

bank paid said draft; and on other dates they brought other corn and suffered losses in the same way. All the drafts were drawn on the same bank, and paid through the same channels. The court, citing the cases above named and approving them, says, "This case falls within *Miller v. Bank*, which is in accord with and supported by *Landa v. Lattin*, supra, *Bank v. White*, and *Finch v. Gregg*," and further says, "We specially refer to the reasoning in *Landa v. Lattin* as thorough and sound." "There are cases to the contrary of our views," says the court, "but they clearly fail to apprehend the true nature of this sort of transaction. The bank buying the draft and bill of lading is bound to comply with all the terms of the contract between seller and buyer. This places it, as to the buyer, in the exact situation in which its assignor stood." On page 699 of 80 Miss., on page 290 of 32 South., the court says: "We think the courts which have taken the other view have dealt with half the transaction, not the whole of it. They have looked to the draft. Not to the bill of lading. They have failed to give every factor in the transaction its full significance and to look through form to substance."

Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of transferror to the goods described in them. *Williams v. R. R.*, 98 N. C. 42, 53 Am. Rep. 450; *Haas v. Bank*, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61; *Bank v. Hurt*, 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; *Trust Co. v. R. R.*, 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75; 4 Am. & Eng. Ency. (2d Ed.) 549. By the assignment of this bill of lading to Trice he became the owner of the property. *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214; *Daniel*, Neg. Instr. § 1734a. By the endorsement of the draft to him he became the owner of the right to receive the purchase money evidenced by the draft. On arrival of the cotton the plaintiff had the right, if it was short either in quality or quantity, either to refuse it or, if he received it and was sued for the price, to have set up the loss by reason of such defects. *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840. In common justice the consignee should be allowed to see the goods before paying or refusing to pay the draft. The rights of Trice, assignee of the bill of lading, are not greater than those of Nelson, assignor. If Trice had sued consignee and drawee for refusal to pay draft and accept goods, he could recover no more than their value on the contract basis. He cannot put himself on a higher plane by compelling the purchaser to take them without opportunity of inspection, and thus having collected more than their contract value, refuse to be liable in an action by the purchaser to recover back the excess sum thus extorted. *Finch v. Gregg* has been reaffirmed by *Sloan v. R. R.*, 126

N. C. 489, 36 S. E. 21; *Mfg. Co. v. Tierney* (Connor, J.) 133 N. C. 636, 45 S. E. 1026, and has been cited and followed in other states, ut supra.

The bill of lading is a security to the holder of the draft attached thereto that he shall receive the purchase price before he surrenders possession of the property, but it does not protect him from refunding, if by refusal of opportunity to inspect he collects the full purchase price when the goods upon delivery are found to be below the contract. Such cases as this could not possibly occur if the consignee was permitted to inspect the goods before paying the draft. The assignee takes the draft and bill of lading relying on drawer and the goods. He should have no more. If there is a defect in quality or quantity, the holder of the draft and bill of lading should look to the party from whom he bought them to make good, and not, having forced payment out of the consignee and drawee by refusing sight of the goods, refuse reimbursement. This is not fair. A bill of lading has not the characteristics of negotiable paper, and it should not have. A bill of lading is not good against the company that issues it, even in favor of a bona fide holder for value, unless goods of the quality and quantity described therein are actually delivered to it. *Williams v. R. R.*, 98 N. C. 42, 53 Am. Rep. 450. Certainly, therefore, it should not be conclusive against the consignee, unless he is afforded an opportunity to examine the shipment as to quantity and quality before accepting or paying a draft attached to the bill of lading. The rule should not be more rigid against the drawee than the holder can enforce it against the railroad or other common carrier.

The rule in this state, allowing the drawee to inspect goods before accepting the draft, thus making the drawee liable for no more than the carrier would be if there was no delivery—I. e., only for goods of the quantity and quality actually delivered—was held the law in this state nearly 10 years ago by one of the best and ablest judges on the superior court bench, and on appeal he was affirmed by a unanimous court. *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679. It has ever since been recognized as law here. Parties, including those to this action, are presumed to have dealt with each other, relying upon that ruling being the law. It has worked no hardship. Its revocation will unquestionably protect the vendor and shipper in this case in a fraud he has perpetrated, and will deprive consignees of the just protection they have had. Why then change it? For what purpose? *Finch v. Gregg* has not only been held law in this state for many years, and not denied till now, but our decision has been cited and followed in other states, as above quoted, as well as in our own court. *Finch v. Gregg* is a just decision protecting the consignee here against fraud by vendors in distant states. It has

"made for righteousness," and should stand. If courts in other states, where the interest of dealers in mercantile paper is the public policy, have specially favored them, by assimilating bills of lading to the rights of negotiable paper, that is no reason why we should abandon our own decisions to follow theirs. We did not abandon our doctrine of mental anguish because the courts in some other states, where the claim of telegraph companies to exemption from liability were more favored, held to the contrary.

It has been suggested that vendees of goods shipped here can by special contract, in each case, secure the right to examine the goods before accepting or paying the draft. But why change our decisions to require a special contract? Besides such contract, if conceded by the vendor, would not be put by railroads in the bills of lading, and it could not be put into the draft without affecting its negotiability, and hence the holder having no notice would be exempt, and the opportunity of vendors to commit the same fraud as the vendor in this case, both in the quality and quantity of shipments, will be unrestricted.

There are 380 cotton mills within 100 miles of Charlotte, N. C., and the number is increasing, and will largely increase. The adjacent territory is growing more and more incapable of furnishing a full supply of cotton, and it must be shipped in ever increasing quantities from distant points. Under the just and honest rule laid down in *Finch v. Gregg*, and followed for so many years in this and other states, above cited, the assignee of a draft looks to the drawer till acceptance, and until then the bill of lading is good against vendee only to the extent that the quality and quantity of the goods come up to the contract, with the necessary corollary that the consignee can always examine the goods before he assumes unqualified liability by accepting the draft. It is a serious matter to affect our great and growing manufacturing interest by changing the law as we have so held it to be, a law which has protected the consignee without any possibility of injury to any honest consignor. The holder of the draft usually receives it "for collection." But if he buys it, he should take it on faith of vendor's credit, supplemented only by value of goods. Indeed the holder will be benefited by a rule which forces the shipper to send goods of the quality and quantity contracted for. Failure to do so will be rare when he knows the consignee has the right to see them.

The change will have a wider application than affecting injuriously our great cotton milling industry. There are many dealers in North Carolina who buy meats, lard, corn, wheat, and flour in the northwest in large quantities to retail to their customers. These shipments are drawn for with bills of lading

to shipper's orders, attached to the draft, which is usually assigned, as in this case "for collection." Under the law as we have held it, without detriment, for nearly 10 years past, the vendee ran no risk, for he has till now had the right to examine the goods before accepting the draft. But if that is now changed, the vendee must assume the risk of such frauds, as the vendor has perpetrated in this case, for not only a special contract could not be put into bill of lading or draft, but the vendors of these articles, like Armour, Swift and others, will not make such special contracts, well knowing that the dealers here must buy of them or not at all.

Our rule has worked well. It has protected consignees here. It has not injured any honest consignor. The revocation of the rule will deliver purchasers here into the uncovenanted mercy of distant consignors, who cannot be reached by the process of our courts.

#### STATE v. DOBBINS.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### 1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for keeping intoxicating liquor for illegal sale, evidence held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 309; Dec. Dig. § 236.\*]

#### 2. CRIMINAL LAW (§ 753\*)—SUFFICIENCY OF EVIDENCE.

Whether evidence against accused be strong or weak, it should be submitted to the jury, if it be not merely conjectural, but reasonably tends to establish his guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1713, 1727–1730; Dec. Dig. § 753.\*]

#### 3. CRIMINAL LAW (§ 789\*)—TRIAL—FORM OF INSTRUCTIONS—REASONABLE DOUBT.

No particular formula is required in charging upon reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1904–1922; Dec. Dig. § 789.\*]

#### 4. CRIMINAL LAW (§ 834\*)—TRIAL—INSTRUCTIONS—REQUESTS—COMPLIANCE.

Where accused, on trial for keeping a barrel filled with bottles of whisky for illegal sale, requested a charge that if the evidence did not remove every reasonable view of the case except the guilt of accused, the jury should acquit, a charge that to convict the jury must find beyond a reasonable doubt that the barrel filled with bottles of whisky was in accused's possession, that he was keeping it for sale, and that there was more than one quart, and if not so satisfied, they should acquit, was sufficiently responsive to the request, and was proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.\*]

Appeal from Superior Court, Richmond County; B. B. Jones, Judge.

C. D. Dobbins was convicted of keeping intoxicating liquor for illegal sale, and he appeals. Affirmed.

The defendant was indicted for keeping liquor for sale in the county of Richmond, contrary to chapter 21 of the Laws of 1908. One of the questions in the case is whether there was any evidence against the defendant of a violation of the statute. George Smith, a witness for the state, testified: "I am a tinner by trade, and have a shop in the town of Hamlet, Richmond county. On February 17, 1908, I let C. D. Dobbins have the key to my tin shop, between 7 and 7:30 a. m. I returned to my shop about 10 a. m. on the same day, in company with one Charles Niven, and found C. D. Dobbins in my shop when we got there. There was no one else in the shop at that time. In a few minutes Dobbins went out, and a very short time thereafter, Mr. Hubbard, the policeman, came into my shop with papers to search it, and found a barrel full of pint and half-pint bottles filled with corn whisky. There was no whisky in my shop when I let C. D. Dobbins have the key at 7:30 that morning. The barrel of whisky was put in my shop between the hour that I let Dobbins have the key and 10 a. m., when I returned. The officer took possession of the whisky, and arrested Dobbins. I never put the whisky in there, and don't know who did. I don't recall by whom I sent the key of my shop to Dobbins. He came to me and said that Dobbins wanted my shop key, and I handed it to him. I don't know whether he gave the key to Dobbins or not, but do know that I found Dobbins in possession of my shop when I reached there at 10 o'clock, about three hours later. There was no one in the shop except Dobbins." J. A. Spencer, a witness for the state, testified: "At the request of Chief of Police R. L. Hubbard I watched the shop of George W. Smith, and saw the defendant, Dobbins, in the shop. No one else was in there except him. Soon after I was stationed to watch the shop, I saw Dobbins come out of the shop, lock the door, and go over to a negro pool room. In 5 or 10 minutes I saw the defendant come back to the shop, unlock the door, and go in. The defendant had been in the shop a very short time when I saw G. W. Smith, the owner of the shop, and one Charles Niven go in the shop. A few minutes after Smith and Niven went into the shop, I saw the defendant, Dobbins, leave the shop a second time, and go to the negro pool room. At this time, Chief of Police Hubbard came to me with papers to search the shop for liquor. We proceeded to the shop, and in the back end of the shop found a barrel full of pint and half-pint bottles of corn liquor. It had been opened, and appeared as if some of its contents had been taken out. Smith, the owner of the shop, told me that he had sent his key to C. D. Dobbins early that morning, and he had not returned to the shop, after sending his key to Dobbins, until a few minutes before I came in; that when he returned to the shop he found Dobbins in the shop, but knew

nothing of the liquor being in the shop until we found it. The general character of G. W. Smith is good." R. L. Hubbard, a witness for the state, testified: "I was chief of police in the town of Hamlet on the 17th day of February, 1908, and in consequence of information received by me, I got J. A. Spencer to watch the movements of the defendant, also the tin shop of G. W. Smith. I saw the defendant open the door and go into the shop, and later come out, lock the door, and go over towards a negro pool room; and saw him return, open the shop, go in and come out the second time, and go towards the pool room, at which time, in consequence of these movements and the further information I had received, I had a warrant issued, under the statute, to search the shop for liquor kept for sale contrary to law. I left Spencer to watch the shop while I went before the mayor and got the warrant to search the premises. When I returned I saw the defendant in the shop. No one else was in the shop except the defendant. I saw him go to the window and look out, apparently for the purpose of seeing whether any one was watching his movements. Then he came out and went towards the pool room. G. W. Smith, the owner of the shop, and Charles Niven came to the shop a few minutes before the defendant left the last time, and a few minutes after he had left, I and Spencer, under the warrant I had received for searching the shop, went to the shop, searched the same, and found a barrel of whisky containing pint and half-pint bottles. The defendant had only been gone a few minutes when this search was made, and the liquor was found. G. W. Smith told me that he knew nothing about the whisky being in the shop, and that he sent his key to the defendant that morning about 7 o'clock, and found the defendant in his shop when he got there, that the liquor did not belong to him, and that he knew nothing at all about it. The general character of the witness G. W. Smith is good." The defendant offered no testimony, but requested the court to instruct the jury: "(1) That there is not sufficient evidence to warrant the jury in convicting the defendant, and the jury will return a verdict of not guilty; (2) If the evidence does not remove every reasonable view of the case except the guilt of the defendant, the jury will return a verdict of not guilty." The court refused to give the instructions, and the defendant duly excepted. Judgment was entered upon the verdict of guilty, and the defendant appealed.

Morrison & Whitlock, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). If we treat the first prayer for instructions as a request to charge the jury that there was no evidence of the defendant's guilt, we think it was properly refused.

The evidence was circumstantial, it is true, but it strongly pointed to the guilt of the defendant. If the jury found the facts to be in accordance with the testimony, they could hardly escape the conclusion that the defendant had placed the liquor in the shop of the witness, George Smith. But whether the testimony against the defendant was strong or weak, it should have been submitted to the jury, if it was not merely conjectural, but reasonably tended to establish his guilt. *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851. Why it did not have this tendency, we are unable to see. The liquor was not in the shop when the key was given to the defendant, and shortly thereafter Smith returned to the shop and found the defendant there, and immediately afterwards the policeman came and found a barrel of pint and half-pint bottles filled with corn whisky. There were other circumstances which tended to show the defendant's guilt, as will appear from a perusal of the evidence. It was not necessary that the court should have given the second prayer for instructions in the very words in which it is expressed. The law does not require that any particular formula shall be used in charging upon the doctrine of reasonable doubt. *State v. Adams*, 138 N. C. 688, 50 S. E. 765. The court charged the jury that in order to convict the defendant they must find from the evidence beyond a reasonable doubt that the barrel filled with bottles of whisky was in the defendant's possession, that he was keeping it for sale, and that there was more than one quart, and that if they were not so satisfied, the defendant should be acquitted. There was no error in this instruction, and it was sufficiently responsive to the defendant's second prayer.

No error.

#### CLEVELAND-CANTON SPRINGS CO. v. GOLDSBORO BUGGY CO.

(Supreme Court of North Carolina. Oct. 28, 1908.)

##### 1. SALES (§ 384\*)—BREACH OF CONTRACT—DAMAGES.

Where defendant contracted to take certain springs to be manufactured by plaintiff at a stated price, an instruction that the measure of plaintiff's damages for breach of the contract was the difference between what it would have cost plaintiff to carry out its part of the contract and the contract price was correct; the evidence showing that the output of plaintiff's shops was reduced by the amount of defendant's order.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1106; Dec. Dig. § 384.\*]

##### 2. SALES (§ 378\*)—BREACH OF CONTRACT—PLEADING—MITIGATION OF DAMAGES.

In an action for breach by defendant of a contract to purchase at a given price springs to be made by plaintiff, defendant, to rely on the defenses that plaintiff could not have complied with its part of the contract, or that it

was otherwise profitably employed, or that it could have sold such of the articles as it manufactured for as high a price as defendant agreed to pay, must plead the same.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 378.\*]

Appeal from Superior Court, Wayne County; Gulon, Judge.

Action by the Cleveland-Canton Springs Company against the Goldsboro Buggy Company. Judgment for plaintiff, and defendant appeals. No error.

W. S. O'B. Robinson and Aycock & Daniels, for appellant. W. C. Munroe, for appellee.

CLARK, C. J. The defendant contracted with the plaintiff to take certain springs to be manufactured by the plaintiff at a given price, and, after taking a small portion of each order, refused to take the remainder. The springs were to be manufactured by the plaintiff in accordance with the order of the defendant. The only exception of the defendant is to the charge of the judge to the effect that the measure of plaintiff's damages was the difference between what it would have cost the plaintiff to carry out its part of the contract and the contract price. This is correct, nothing else appearing. *Williams v. Lumber Co.*, 118 N. C. 987, 24 S. E. 800; *Oldham v. Kerchner*, 81 N. C. 430; *Hinckley v. Steel Co.*, 121 U. S. 275, 7 Sup. Ct. 875, 30 L. Ed. 967.

If the defendant had intended to rely upon the fact that the plaintiff could not have complied with its part of the contract, or that it was otherwise profitably employed during the time it would have been engaged in filling the defendant's order, or that it could have sold such of the articles as it did manufacture for as high a price as the defendant agreed to pay, or any other matter in mitigation of damages, it should have set up the same in its answer; for such defenses must be pleaded. *Oldham v. Kerchner*, supra, where this point is fully discussed; *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797. In *Lumber Co. v. Iron Works*, 130 N. C. 590, 41 S. E. 799, the court says: "It may be that the plaintiffs were profitably employed all the while, and really performed other work which was more remunerative than would have been the profits on these crates, which they could not have done, had the rollers been duly repaired and delivered to them; or for the want of repaired rollers, they may have been unemployed wholly or in part, with their laborers on their hands at an expense, and with their machinery idle and deteriorating in value. But as to this the pleadings are silent, and we must rule upon the questions as presented to us by the record. In *Current Law*, 348, it is said: "What the servant earned or could have earned in the meantime is a matter of defense, and should be pleaded in mitigation of damages, and the employer has the burden of showing that other and

more profitable employment than that in which plaintiff in fact engaged, in order to reduce the damages, had been offered and declined, or might have been found." This authority cites *Latimer v. Cotton Mills*, 68 S. C. 135, 44 S. E. 559, which sustains the text.

Besides, the defendant introduced no evidence, and the testimony for the plaintiffs is uncontradicted that the output of their shops was reduced by the amount of defendant's order. If the plaintiff did or could have reduced its loss by selling the goods to others, it was its duty to do so; but the burden was upon the defendant to allege and prove this fact in mitigation of damages. *Oldham v. Kerchner*, supra. It was in default by its breach of contract and liable for the difference, under the rule laid down by the court, unless it alleged and proved facts in mitigation.

No error.

### STATE v. KHOURY.

(Supreme Court of North Carolina. Oct. 28, 1908.)

#### 1. CRIMINAL LAW (§ 301\*)—PLEAS—WITHDRAWAL—DISCRETION.

It was within the trial court's discretion to refuse to strike a plea of not guilty entered at a prior term.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 687; Dec. Dig. § 301.\*]

#### 2. CRIMINAL LAW (§ 625\*)—TRIAL OF SEPARATE ISSUES—INSANITY—INQUISITION—JUDICIAL DISCRETION.

Whether, when accused was put on trial, the court should suspend proceedings and impanel a jury to ascertain whether he was then insane was a matter resting within its sound discretion, and it was not error to proceed with the trial, allowing evidence on the issue of sanity at the time of the offense and at the time of the trial, where counsel's suggestion of insanity was not supported by affidavit or otherwise.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1391-1395; Dec. Dig. § 625.\*]

#### 3. CRIMINAL LAW (§ 456\*)—EVIDENCE—OPINIONS—ACCUSED'S SANITY.

Persons, who had had more or less opportunity to form an opinion as to accused's mental condition, were properly allowed to express an opinion on the subject.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1045; Dec. Dig. § 456.\*]

#### 4. CRIMINAL LAW (§ 804\*)—TRIAL—INSTRUCTIONS—FORM.

Though a trial judge must put his entire charge in writing when so requested, it is not reversible error to state the contentions of the parties orally, or to supplement slight omissions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1948-1951; Dec. Dig. § 804.\*]

Appeal from Superior Court, Cumberland County; Peebles, Judge.

Solomon K. Khoury was convicted of burglary, and he appeals. Affirmed.

At the March term, 1908, of the superior court of Cumberland county, a bill of indictment,

charging defendant with burglary in the second degree, was found by the grand jury. At said term defendant, through his counsel, came into court, and entered his plea of "not guilty." At the same term the brother of defendant filed an affidavit, upon which he based a motion for a continuation of the case on account of the absence of certain witnesses named, by whom he expected to show that defendant is of unsound mind, and has been so for one or two years. The motion was continued. At May term, 1908, Judge Long presiding, defendant, through his counsel, tendered a plea of insanity at that time, and at the time of the alleged commission of the offense. He also moved to strike out the plea of not guilty entered at the last term, stating that he did not intend to enter such plea, and did not recollect having done so. Motion was continued. At the August special term, 1908, the motions were renewed, and counsel also moved to amend the record by striking out the plea of "not guilty." Motions refused. The defendant excepted. Defendant was put upon his trial upon his plea of not guilty. Verdict of guilty. Defendant moved in arrest of judgment, upon the ground that he was then insane. Motion overruled. Defendant excepts. Judgment and appeal.

V. C. Bullard and Q. K. Nimocks, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

CONNOR, J. (after stating the facts as above). The first assignment of error is directed to his honor's refusal to permit defendant to withdraw his plea of "not guilty," or to amend the record by striking out said plea, and submitting an issue directed to the question of his insanity at the time of the trial. His honor refused this motion, and upon the trial heard evidence in regard to defendant's insanity, both at the time of the trial and the time the alleged crime was committed. No ground was laid, by way of affidavit or otherwise, at the time the case was heard by Judge Peebles, to show that defendant was insane at the time the plea was entered (March term, 1908) or at the time of the trial. It was in the sound discretion of the judge to refuse to strike out the plea of "not guilty," entered at March term. We see no ground upon which his honor's action, in that respect, can be disturbed. Whether, at the time defendant was put upon his trial, the court should have suspended proceedings and impaneled a jury to ascertain whether he was then insane, is a matter resting in the sound discretion of the court. In *Haywood's Case*, 94 N. C. 847, the court, upon suggestion of counsel, submitted an issue directed to the defendant's present insanity. This court ordered a new trial upon entirely different grounds. While, as suggested by Smith, O. J., it would have been

more fitting that the suggestion of present insanity be first tried, he said that to try the question together with the issue of traverse was not error in law which would vitiate the verdict. In *Vann's Case*, 84 N. C. 722, the question of insanity, supported by affidavits, was made after conviction and upon motion for judgment. The court directed a jury to be impaneled to try the question. This course was approved by the court. "Although, if there be a doubt as to the prisoner's insanity at the time of his arraignment, he is not to be put upon trial until the preliminary question is tried by a jury, the question of the existence of such a doubt seems to be exclusively for the determination of the court. And counsel for the defendant can neither waive an inquiry as to the question of defendant's sanity, nor compel the court to enter upon such an inquiry, when no ground for doubting it appears. \* \* \* And the question whether an inquiry is called for by the circumstances of the case is for the determination of the court, who may also direct the manner in which such inquiry shall be conducted. Error will not lie to review the proceedings upon such an inquiry, whether the allegation of insanity be made before or after the conviction of the prisoner." *Buswell on Insanity*, § 461. In many states statutes have been enacted providing procedure in such cases. In this case his honor stated that, if an affidavit was filed that defendant had become insane since the time the crime was alleged to have been committed, it would not allow the plea to be put in. Counsel said they could not file such affidavit. The court thereupon proceeded with the trial, stating that evidence on the question of insanity, either at the time of the alleged commission of the crime or at the time of the trial, could be introduced. We can see no error in this course. It cannot be permitted that, with a defendant at the bar of the court when his manner, appearance, etc., may be seen by the judge, the trial may, upon the mere suggestion of counsel, unsupported by affidavit or otherwise, be stopped until a jury be impaneled to try the "suggestion." The court permitted witnesses who had seen defendant, and had more or less opportunity to form an opinion as to his mental condition, to express such opinion. This is in accordance with repeated rulings of this court, and may now be regarded as settled law. The value of the opinion is dependent upon the opportunity of the witness to form it. *Clary v. Clary*, 24 N. C. 78; *State v. Bowman*, 78 N. C. 509. Defendant made a number of requests for special instructions upon the question of insanity, burden of proof, etc. We have examined his honor's charge, and find that, so far as defendant was entitled, they were given. We do not find any error in the instructions given. His honor was requested to put his charge in writing, which he did. The case on appeal states: "Aside from the written

charge he paused several times, and commented on or explained certain features of the written charge, to which defendant excepts. After he had read his charge, he stated orally the contention of the parties, and gave oral instructions as to the law bearing on certain features of the contentions of the parties, to which defendant excepts." It is not suggested that any instructions given orally were erroneous or prejudicial to defendant. We do not think defendant entitled to a new trial because of the action of the judge in this respect. While it is true, as held in *Jenkins v. R. R.*, 110 N. C. 438, 15 S. E. 193, the judge must put his entire charge in writing, when so requested, it is not reversible error to state the contentions of the parties orally, or to supplement, as did his honor in this case, slight omissions. At least, in the absence of any suggestion of error or prejudice, a new trial will not be ordered. We have examined the entire record and find no error.

For the reasons given in regard to the suggestion of insanity before the trial, his honor could not arrest the judgment upon a mere suggestion of insanity after trial. There is no error.

#### YOW et al. v. SULLIVAN et al.

(Supreme Court of Georgia. Oct. 14, 1908.)

#### APPEAL AND ERROR—DISMISSAL—BILL OF EXCEPTIONS—SIGNING.

On an application for an ad interim injunction a judgment adverse to the petitioners was rendered on January 31st. On February 19th a bill of exceptions was mailed to the presiding judge, under a special delivery stamp, addressed to him at a county other than that of his residence, but where he had been holding court. Having finished the business incident to the term of the court at that point, he left for his home on the morning of February 20th, without receiving the bill of exceptions. It was forwarded to him at the place of his residence, arriving there on February 20th at 10 o'clock p. m., but was not delivered by the postmaster to the judge until the following morning. He then certified the bill of exceptions, adding to his certificate a statement of these facts. *Held*, that the writ of error must be dismissed. *Griffith v. Mitchell*, 117 Ga. 476 (4), 43 S. E. 742; *Long v. Bank of Minden*, 126 Ga. 679 (3), 55 S. E. 915; *Porter v. State*, 127 Ga. 288, 56 S. E. 430.

(Syllabus by the Court.)

Error from Superior Court, Franklin County; Chas. H. Brand, Judge.

Action by T. R. Yow and others against R. F. Sullivan, tax collector, and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

See, also, 58 S. E. 662.

John J. Strickland, J. B. Jones, and Fermor Barrett, for plaintiffs in error. J. H. Skelton and W. R. Little, for defendants in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur.



**SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. JACOWAY.**

(Supreme Court of Georgia. Oct. 14, 1908.)  
TELEGRAPHS AND TELEPHONES—SERVICE CONTRACTS.

Under the allegations of the petition, it was error to refuse to sustain the general demurrer filed thereto.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by J. P. Jacoway against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

McDaniel, Alston & Black, and Hunt Chipley, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

HOLDEN, J. Jacoway brought suit against the East Tennessee Telephone Company (hereinafter called the "Tennessee Company") and the Southern Bell Telephone & Telegraph Company (hereinafter called the "Bell Company"), and alleged that the North Alabama & Georgia Telephone & Telegraph Company (hereinafter called the "Alabama Company") was organized with a capital stock of \$2,500, of which the plaintiff owned stock to the amount of \$250, which he sold to the Alabama Company in consideration of this company furnishing him the perpetual use of one of its telephones, and also the right to the use of a designated line, with the understanding that the company was to keep the telephone in good condition without expense to the plaintiff, and that it was to be used either in his law office or his residence; that the company placed in his law office one of its telephones and connected it with their main line of wire, according to the contract, and kept it in repair for two or three years; that the Alabama afterwards sold and conveyed all of its rights to the Tennessee Company, and soon thereafter the latter company took possession of all of the property which belonged to the Alabama Company, with full knowledge of and recognizing plaintiff's rights, and kept the telephone and its connections in good repair for some time after its purchase, but finally refused to repair the telephone when it got out of order; that afterwards the Bell Company bought from the Tennessee Company all of the rights which it had acquired from the Alabama Company, and, with full knowledge of all of the rights of plaintiff, tore down the poles and carried away the wire which connected plaintiff's telephone with the main line of the company, and removed the telephone from his house without his consent. The plaintiff brought suit for damages. To the petition a general demurrer was filed by the Bell Company, and to the judgment of the court overruling this demurrer this company filed exceptions.

Jacoway was no party to the contract of sale made by the Alabama Company to the Tennessee Company, nor was he any party to the contract of sale from the Tennessee Company to the Bell Company. There is no allegation in the petition that when these contracts were made the purchaser agreed with Jacoway to furnish him a telephone and permit him to use any of the property which was purchased. Whatever may be the rights of Jacoway against the company with which he contracted, he has no right of action against the Bell Company because that company refused to furnish him a telephone and to permit him to use the property which it purchased. There is no privity of contract between the Bell Company and Jacoway. It does not appear from the allegations of the petition that the Bell Company agreed with Jacoway, or with the company from which it purchased, that the contract made between Jacoway and the Alabama Company would be carried out. There is an allegation in the petition that the Tennessee Company, after it had purchased from the Alabama Company, took possession of the property "with full knowledge of and recognizing petitioner's rights"; but there is no allegation that the Tennessee Company had any notice of plaintiff's contract, or evidenced any recognition of it, at the time of its purchase. There is no allegation in the petition that the Bell Company had any notice of the plaintiff's contract with the Alabama Company at the time of its purchase from the Tennessee Company. The petition does allege that the Bell Company, at the time it tore down the poles and carried away the wire which connected the plaintiff's telephone with the main line of the company, had knowledge of this contract; but there is no allegation that it had such knowledge at the time of its purchase from the Tennessee Company. However this may be, there is no allegation that either of the purchasers ever made any contract with Jacoway by virtue of which he would have any right of action against them because of being prevented from using the telephone line. There was no merger of either of the companies into the other, nor was there any consolidation of one with the other; but it appears that there was simply a contract of absolute and unconditional bargain and sale, and the obligations resting on and the debts due by the seller were not imposed on the buyer. In this connection, see *Waycross Air Line R. Co. v. Southern Pine Co.*, 115 Ga. 7, 41 S. E. 271; *Guthrie v. Atlantic Coast Line R. Co.*, 119 Ga. 663, 46 S. E. 824; *Hawkins v. Central R. Co.*, 119 Ga. 159, 46 S. E. 82, and authorities there cited.

We think the court committed error in refusing to sustain the general demurrer, and the judgment is reversed. All the Justices concur.

**HAGOOD v. STATE (No. 1377.)**

(Court of Appeals of Georgia. Oct. 28, 1908.)

**1. EMBEZZLEMENT (§ 35\*)—EVIDENCE—SUFFICIENCY.**

Where the indictment charges the fraudulent conversion of several sums of money, proof of the fraudulent conversion of one or more is sufficient.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 58; Dec. Dig. § 35.\*]

**2. WITNESSES (§ 267\*)—CROSS-EXAMINATION—REFUSAL TO ALLOW ABSTRACT QUESTION.**

The court did not unduly restrict the right of cross-examination in refusing to allow a purely abstract question on a subject about which there was already concrete and positive evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.\*]

**3. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTED CHARGE COVERED BY GENERAL CHARGE.**

Where a request to charge is fully and accurately covered in the general charge, the refusal of the request is immaterial and without error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**4. CRIMINAL LAW (§ 809\*)—TRIAL—INSTRUCTIONS—ABSTRACT PRINCIPLES.**

A request to charge, although it contains a correct abstract principle of law, is properly refused, where it may be misleading or confusing in its application to the facts of the particular case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.\*]

**5. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—"FRAUDULENT CONVERSION"—"TAKING WITH INTENT TO STEAL."**

The words "fraudulent conversion," constituting an essential element of the crime of larceny after trust delegated, as defined by Pen. Code 1895, § 194, are synonymous with the words "taking with intent to steal," in cases of ordinary larceny. Proof of fraudulent conversion necessarily proves both act and intent, or "the union of act and intention," in the commission of the crime. Where the court repeatedly instructs the jury that the evidence must show beyond a reasonable doubt the fraudulent conversion of the money, or some part of it, which has been intrusted to the defendant, it is not necessary to go beyond the statutory definition of this crime and tell the jury that the appropriation or conversion must be made with intent to steal the money.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2958.]

**6. EMBEZZLEMENT (§ 14\*)—ELEMENTS OF OFFENSE—INTRUSTING AGENT—WHAT CONSTITUTES.**

Where a principal intrusts his agent with bills for collection, and the agent collects the bills, the agent is, in legal contemplation, intrusted by the principal with the money collected.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 13; Dec. Dig. § 14.\*]

**7. EMBEZZLEMENT (§ 11\*)—INDICTMENT—CONDITIONS PRECEDENT—DEMAND.**

An indictment under section 194 of the Penal Code of 1895 need not allege, and the proof need not show, that any demand was made upon the defendant for the money or

property alleged to have been fraudulently converted to his own use.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 9; Dec. Dig. § 11.\*]

**8. CRIMINAL LAW (§ 776\*)—WRIT OF ERROR—HARMLESS ERROR—OMISSION TO CHARGE.**

In the absence of a timely request, it was not reversible error, under the facts of this case, for the court to omit from the charge to the jury specific reference to the effect and weight of proof of good character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.\*]

Russell, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

George S. Hagood was convicted of a violation of Pen. Code 1895, § 194, providing that, if any person intrusted with any money shall fraudulently convert the same, he shall be punished as therein prescribed, and he brings error. Affirmed.

Garrard & Meldrim, for plaintiff in error. W. W. Osborne, Sol. Gen., and W. L. Clay, for the State.

HILL, C. J. George S. Hagood was indicted by the grand jury of Chatham county for a violation of section 194 of the Penal Code of 1895. This section reads as follows: "If any person who has been intrusted by another with any money, note, bill of exchange, bond, check, draft, order for the payment of money, cotton or other produce, or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished," etc. The indictment contained 21 counts, varying the charge only in the amount of money alleged to have been intrusted and fraudulently converted. On his trial the jury found him guilty, and he thereupon filed a motion for a new trial, based on the general grounds and 11 special grounds. To an intelligent consideration and determination of the questions made in the motion a general statement of the facts proved by the state is necessary:

Hagood was a collector for the Western Union Telegraph Company at Savannah, Ga., and the indictment charges that in this capacity he was intrusted by the company with \$365.27 in money, the property of the corporation, for the purpose of applying it to the use and benefit of the corporation by safely keeping the money and accounting for the same and paying it over promptly to the owner, and that, after having been so intrusted with the money for the purposes aforesaid, he did wrongfully and fraudulently convert said sum to his own use; the indictment, as before stated, charging in separate counts the fraudulent conversion of separate amounts, aggregating \$365.27. Ha-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

good's duty as collector for the company was to take the bill or statement of accounts against each customer of the company for telegraphic services and present the bill or account to the customer, and collect the amount due. Sometimes Hagood would copy in his own handwriting these bills or accounts in small pass books or account books like grocers' account books, belonging to a customer. He collected money on the bills or accounts, sometimes receipting on the original bill, and sometimes writing receipts in the customer's pass books, and still again in receipt books or forms disconnected with the bills or pass books. It was his duty, after having collected this money, to turn it in to one Galvin, who was the bookkeeper or cashier of the company. In turning in money so collected, Hagood made in his own handwriting memoranda purporting to show the amounts collected from the various customers who owed the bills given him for collection. The company kept in its Savannah office a record book of bills, with the name of each customer and the monthly bill against each customer. This book was kept by Hagood, who made the entries in it.

The evidence for the state showed the following method of procedure by Hagood: He would present to a customer the correct bill, collect the full amount thereon, and turn a less amount, which less amount would be stated in his memoranda or report of collections as the amount collected, and would be entered by him in the record book of bills as the amount of the bill given him for collection. Thus the money he turned in to Galvin, the cashier or bookkeeper, while less than the amount of the bill given to him for collection and less than the amount actually collected by him, would correspond with the memoranda or report of collections turned in by him to Galvin, the cashier, and would also correspond with the incorrect amount of the bill entered by Hagood in the record book of monthly bills. The amount claimed to have been embezzled by Hagood was in each instance the difference between the amount of the true bill and the amount of the alleged falsified bill entered by Hagood in the record book. To illustrate: Take the first item proved by the state, which is covered by the second count in the indictment; this item being the amount of the bill or account against Duckworth. A bill against Duckworth for the month of May for \$11.21 was given to Hagood for collection. He copied this bill in Duckworth's pass book, and in a separate receipt book belonging to Duckworth he receipted him for the amount of this bill, \$11.21. Hagood then made a memorandum report of his collections, showing a collection from Duckworth of \$4.21, and this \$4.21 he paid over to the cashier, Galvin. He entered up in the monthly record book of bills the amount of \$4.21 as Duckworth's bill for May. This shows that he collected \$7 more than

he reported, and more than, according to Galvin's testimony, was turned into the company by him. To cover up this shortage he made a false return of the money collected and made a false entry in the record book of bills.

It is unnecessary to set out each case of shortage alleged and proved by the state. The proof shows 20 instances in all of alleged shortages in collections from eight different customers, covering a period of time from September, 1906, to September, 1907; the method of procedure in these cases being similar substantially to that used by Hagood in the instance of the Duckworth collection. The aggregate amount of shortage did not equal the aggregate amount charged in the indictment; the amount proved by the state being less than \$100. When Hagood was charged with the shortage, he denied any shortage, claiming that he had paid every cent collected by him to the company. He had been in the employment of the telegraph company for 10 years, and the company's officers who were witnesses testified that during this time his reputation and conduct had been good.

The defendant introduced no evidence. He made a statement in which he denied his guilt, attempted to explain the apparent discrepancy between the amounts collected by him and the amounts paid over to the company, attributed the apparent shortages in the accounts to the loose and careless manner in which the books were kept by the company, and asserted that four of his friends had paid for him to the Western Union Telegraph Company, or to the National Surety Company for the Western Union Telegraph Company, \$200 in settlement of the claim of \$900 which the telegraph company made against him. He asserted that he paid this amount because of the threat made to have him arrested and prosecuted for this crime, of which he protested his innocence.

The prosecution, in rebuttal of the statement of the defendant, introduced evidence denying that any demand had been made on him for \$900, or that any threat had been made to prosecute him, and evidence that the shortage claimed by the company was \$231.27, and that the Western Union Telegraph Company had never received any money from the defendant, or from any one for him, in settlement of this shortage. The prosecution further proved a confession made by the defendant of his misappropriation of a portion of the money he had collected on one of the accounts turned over to him for collection. The books of the telegraph company, showing the accounts against its customers, which had been turned over to the defendant for collection, were all introduced in evidence as also receipts showing collections by Hagood from these customers, and his memorandum reports of collections.

This summary of the evidence is sufficient to show that the verdict is supported, and

that the general grounds of the motion for a new trial are without merit, and that this court ought not to grant a new trial, unless some material and prejudicial error of law was committed by the court in the course of the trial; and, for the purpose of determining this question, we will now take up and consider each one of the special assignments of error made in the motion for new trial.

1. To prove one of the allegations in the indictment—that the defendant had collected a bill of \$11.85 from the Herman Coal Company—a bill against M. S. Herman for that amount was tendered in evidence. The defendant objected to the introduction of this bill upon the ground that there was no apparent relation or connection between M. S. Herman and the Herman Coal Company. The objection was overruled, and this ruling is assigned as error. The ruling was right. It was a question for the jury whether the evidence offered related to the same bill alleged to have been collected and fraudulently converted by the defendant. The documentary evidence shows that the bill given to Hagood for collection was made out against M. S. Herman, and that Hagood reported a collection from Herman & Bros., and in his record book of bills made an entry that the bill was against the Herman Coal Company. It was for the jury to say whether all these entries related to the same bill. Moreover, the monthly record book of bills or accounts was in evidence, showing the names of all the customers, and the jury by inspection could see whether in fact the bill was due by M. S. Herman, or by the Herman Coal Company. But whether this evidence was admissible or not is wholly immaterial, for it is well settled that the state is not compelled to prove, where separate items of larceny are charged in the indictment, every one of such items, or to prove, where an aggregate amount is charged to have been fraudulently converted by the defendant, the whole amount so charged. And there was other evidence, introduced by the state and unobjected to by the defendant, which tended to prove that other items and sums of money collected by him were fraudulently converted. *Jackson v. State*, 76 Ga. 569 (10); *Green v. State*, 114 Ga. 918, 41 S. E. 55 (1); 25 Cyc. 102, par. 4, and many cases cited in the note.

Counsel for the defendant, on cross-examination of the cashier of the telegraph company, propounded to him this question: "You find by reference thereto [the indictment], in the first portion of it, it is alleged that the Western Union Telegraph Company intrusted this man with \$365.27 in money. You are the bookkeeper. Have you got any entry on any book that he was intrusted with \$365.27? If so, produce it." The state objected to this question on the ground of irrelevancy, and the court sustained the objection. We think the court did right. The books were all in evidence and spoke for themselves. Besides, it was not claimed that

the defendant was at any time intrusted with this sum, or that he had at any time converted this sum; but it was charged that he had been intrusted with various sums, which he had fraudulently converted, aggregating this sum. If the defendant had been intrusted with any of the amounts as alleged, and had fraudulently converted any one of them to his own use, how was it material or relevant that the books did not show any single entry that he was intrusted with \$365.27? We think it wholly immaterial whether the books showed an entry in one sum, or in separate sums, that the defendant had been intrusted with \$365.27. Even if the witness had not been able to show in reply to the question any entry on any book that the defendant was intrusted with \$365.27, his failure would not have been at all significant or illustrative of the defendant's guilt or innocence. 25 Cyc. 102.

2. The cashier of the company, while under cross-examination, was asked by the defendant's counsel, "Where a man does not attend to his business, is not fair and honest in the discharge of his work, he is not retained?" This question was objected to, because irrelevant, and the objection was sustained. It is insisted by defendant's counsel that the court, in refusing to allow him to ask this question, unduly restricted his right of cross-examination; that this witness was the principal witness against the defendant; that he had known the defendant in his official relations for 10 years, knew his character for honesty in such relations, and was therefore entitled to prove in this manner, if he could, that the defendant's character was good; and that the question excluded by the court was for the purpose of laying the foundation for proof by this witness that the defendant's character was in fact that of an honest, trustworthy employé, and that he had been retained so long a time for that reason. Now the evidence was undisputed that the defendant had been employed by the telegraph company for 10 years, and this very witness had testified that during this time he had had opportunity for knowing his general character, conduct, and reputation, and during that time it had been good. In view of this testimony, we think the question propounded was purely an abstract one, and that any argument that might have been drawn from an affirmative answer could have been more effectively drawn from the foregoing testimony of the witness. It is difficult to see how the opinion of the witness could add any force or effect to the self-evident conclusion that an employé who did not attend to his business, and was not fair and honest in the discharge of his work, would not be retained, or add additional weight to the argument to be drawn from the retention of an employé by an employer for a long time that such employé did attend to

his business and was fair and honest in the discharge of his work.

3. The fourth and fifth grounds in the motion for a new trial allege error in the refusal of the court to charge that, "in order to convict the accused, it is necessary to prove the creation of the trust described in the indictment," and "it is further necessary, in order to convict the accused, to prove the fraudulent breach of the trust described in the indictment." Unquestionably these requests embody correct principles of law pertinent to the issues involved; but both principles were explicitly, accurately, and fully given in the general charge to the jury.

4. Error is assigned on the refusal of a request to charge the jury as follows: "You may look and see if any payment of money was made by the accused to the Western Union Telegraph Company, with a view of determining whether the alleged breach was or was not fraudulent." The charge requested is somewhat confusing and calculated to mislead the jury. If it referred to the payment of the sums which had been collected by the defendant for the company, it was pertinent; but the principle of the request was fully covered by the general charge. Counsel for plaintiff in error, in his argument and in his brief, insists that this request was based upon the statement of the defendant that, when charged with his shortage, he had paid \$250 to the company, and that the payment of this sum was a circumstance from which the jury might determine the innocence or criminality of the act of taking. The company denied that the \$250 had been paid to it; but whether it had been paid or not was immaterial. The evidence is undisputed that, when it was claimed to have been paid by the defendant, not to the telegraph company, but to the National Surety Company, a conversion of the telegraph company's money had been consummated, and the conversion discovered. Even if the defendant had then made restitution in full or in part, his act of restitution would have in no wise illustrated his purpose in the previous conversion of the company's money. The offense was complete when the money was fraudulently converted, and no restitution by the defendant thereafter could have had any legal effect. *Blrt v. State*, 1 Ga. App. 150, 57 S. E. 905; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

5. The court was asked in writing to charge as follows: "Before you can find the accused guilty, you must find that there was a joint operation or union of act and intention, or criminal negligence"—and the refusal of this request is assigned as error. Of course the request embodied an elementary principle of law. Both the act and the intention must be shown, before any criminal charge is proved. We do not think, however, that it is necessary for the judge to state this principle in the language of the Code. If he charges in such language as to con-

vey to the jury this elementary principle of law, it will be sufficient. Even without being told so, it is probable that any jury of ordinary intelligence would know that intention is an essential element of crime. Larceny after trust is a statutory offense. If the indictment charges the offense in the language of the statute, and the evidence proves the charge as laid in the indictment, and the court instructs the jury as to the definition of the offense made by the statute, nothing else can be required. Now the court did fully instruct the jury in this case that they must believe beyond a reasonable doubt that the evidence established the fraudulent conversion of the money of the corporation, intrusted to him for its use and benefit. A fraudulent conversion, after a trust has been delegated, in the statutory definition of the offense of larceny after trust, is synonymous with the words "taking with intent to steal" in ordinary larceny. The court, in the charge to the jury, made frequent use of the following expressions as descriptive of the character of the act charged against the defendant: "Was fraudulently converted to his own use;" "did fraudulently convert the same or some part thereof to his own use;" "after being so intrusted, this defendant fraudulently converted such money or a part of it to his own use;" "fraudulently appropriating or converting such money or any part of it to his own use." It seems to us that this language could not have failed to convey to the minds of the jury a clear and perfect conviction that the defendant could not be guilty unless there was proof both of the act and the criminal intent. In our opinion, the definition of this crime by Pen. Code 1895, § 194, makes the act of fraudulent conversion after the delegation of the trust described the crime, and a criminal intent is necessarily proved from the act itself. In other words, where a fraudulent conversion after a trust delegated has been shown, the evil intention will be presumed, and in such case the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies. *Chelsey v. State*, 121 Ga. 343, 49 S. E. 258. As said by the Supreme Court in *Keys v. State*, supra, "the gravamen of the offense of larceny after trust is the fraudulent conversion of the property of another, and therein consists the crime of larceny."

We think, therefore, that when the judge, in charging the jury in this case, gave the definition of the statutory offense, and frequently emphasized the fact that the evidence must establish a fraudulent conversion of the money of the company, he fully covered the principle of the request, and left to the jury no room to doubt that the defendant could not be convicted unless he had converted the money of the company fraudulently and with intent to steal the same. If the correctness of the view here suggested needs any support, it is found in the interpretations

which the courts have placed upon statutory offenses similar to that of larceny after trust as defined by our Code. The Supreme Court of California, after quoting the language of a statute substantially similar to ours, says: "Embezzlement is a statutory offense, and it was not necessary for the court to go beyond the statute and tell the jury that the appropriation or conversion must be made with intent to steal the money." *People v. Cobler*, 108 Cal. 538, 41 Pac. 401. The Supreme Court of Missouri, in commenting upon a similar statute, said: "It is next objected that the indictment is insufficient for failure to aver the intent with which the defendant converted the money to his own use. Section 3555, Rev. St. 1889, does not in specific words make the criminal intent an element of the offense, further than is necessarily included in the words 'convert to his own use,' or 'shall make way with or secrete.' These words must be held to be tantamount to and synonymous with the words 'with intent to defraud,' and to meet every requirement of the allegation of criminal intent." *State v. Noland*, 111 Mo. 486, 19 S. W. 717. "An instruction that if the jury find from the evidence that the defendant unlawfully, fraudulently, and feloniously converted to his own use money he collected by virtue of his official position they should find him guilty, was not erroneous as ignoring the criminal intent." *State v. Manley*, 107 Mo. 364, 17 S. W. 800.

We conclude that the words "fraudulent conversion," in the statute, in and of themselves supply the idea of intentional and willful wrongdoing, and no additional words, not even the general and elementary principle requested, were necessary to impress the jury with the fact. *Crawford v. State*, 4 Ga. App. —, 61 S. E. 886.

6. The following extract from the charge of the court is the eighth error assigned: "If you find that the defendant was an employé of the Western Union Telegraph Company, a corporation created under the laws of the state of New York, and that in the course of his employment and the discharge of his duties he collected in the county of Chatham, state of Georgia, money, on the day charged in the indictment, or on any other date or dates within four years prior to the date of indictment, from persons indebted to the Western Union Telegraph Company, and that it became and was his duty to turn the money so collected over and deliver the same to said Western Union Telegraph Company, or to some officer or agent of said Western Union Telegraph Company, the said defendant in that event, became, and within the meaning of the law was, intrusted by the Western Union Telegraph Company with such sum or sums of money when the same were by him collected; and if you find that the defendant did fraudulently convert the same, or some part thereof, to his own use, you should find him guilty." Three objec-

tions are made to this charge: (1) "The statement by the court that the defendant 'was intrusted by the Western Union Telegraph Company,' etc., was the assertion of a fact which was in dispute, that formed one of the issues in the case, and was the expression and intimation of opinion by the court." (2) "The charge that if the defendant was given bills to collect, and did so collect them, that therefore he was intrusted with such money, lays down a false principle of law. To be given a bill to collect is one thing; to be intrusted with money is a different thing." (3) "The charge is error, in that the collection of money in Chatham county, Ga., is not sufficient to make the defendant guilty, for that it is not the collection, but the conversion, which determines the venue."

In the argument of counsel and in his brief before this court only the second of these objections was presented, and therefore we treat the other two as having been abandoned. There is no merit in this objection. Giving the bills or statement of accounts due by different persons to the Western Union Telegraph Company was merely an incident in the collection of the money. The bills or accounts themselves were of no value. These were simply delivered to the collector, in order that he might get possession of the money from the different debtors of the company, and the trust delegated to him by his employer was the duty of collecting the money, and when he collected it from the different debtors he was intrusted by his employer, who was the owner of this money, with the money for the purpose of turning it over to the company. He was not intrusted with the money by those who owed it to the company, for as to these his position was not one of trust. The payment to him of the money which the debtor owed to the telegraph company was the payment of a debt which they owed to the company; and the money, when it thus came into his hands, was the property of his principal, and then the trust was created. The fiduciary relation existed only and strictly between him and the telegraph company. He had no authority to make any collection of money, except as he was authorized to do so by his employer, and this charge of the court correctly and accurately stated to the jury the whole law applicable to the gist of this offense—the trust reposed or delegated and the fraudulent conversion of the money. Instructions similar to the one now under review were approved by the Supreme Court in the following analogous cases: *Haupt v. State*, 108 Ga. 66, 34 S. E. 831; *McNish v. State*, 88 Ga. 499, 14 S. E. 865; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

7. The ninth and tenth grounds of the motion for new trial are fully controlled by the first and fourth divisions of this opinion, except where in the ninth ground it is claimed that the court erred in telling the jury that it was not incumbent on the state to allege or prove that a demand was made on the de-

defendant for the payment of the money which the indictment charges him to have fraudulently converted. It is well settled in this class of cases that it is not necessary to allege or prove a demand. *Goodman v. State*, 2 Ga. App. 438, 58 S. E. 558; *Keys v. State*, 112 Ga. 392 (1), 37 S. E. 762, 81 Am. St. Rep. 63.

8. The court did not charge the jury the law on the subject of good character, and it is insisted that "this was error because the defendant's good character was one of the main issues in the case and a material defense, and there was evidence to sustain such defense." There was no request to charge as to the legal effect or weight of proof of good character, and the court gave no specific instructions on the subject; nor was the court's attention called to this omission. In support of the contention of the very able attorney for the plaintiff in error that the court should have charged as a part of the general instructions the law as to the effect of good character without any request to do so, the case of *Seymour v. State*, 102 Ga. 803, 30 S. E. 263, is relied upon. In that case the record discloses that an old man who had theretofore borne an unblemished character was indicted for rape upon a child of tender years, and was convicted of an assault, and in the language of the Supreme Court, a careful study of the evidence for the state leads to the conclusion that "at most a very weak and unsatisfactory case against the accused was made out." The only evidence in his behalf was proof of his good character during his entire life. The judge, in his charge to the jury completely ignored this defense, and made no reference whatever to the law relating to good character, till he was about to conclude his charge, when, upon having his attention called to the matter, he in general terms charged upon this subject. The court held that, while the omission to charge especially on this subject of good character was, strictly speaking, not erroneous, yet, because of the peculiar and exceptional facts of the case, such special charge should have been given. Mr. Chief Justice Simmons says in the opinion: "There are cases where, owing to the peculiar circumstances in which a man is placed, evidence of good character may be all he can offer in answer to a charge of crime. \* \* \* Such a case is now under consideration. The accused submitted evidence that he had borne a most excellent character from his boyhood up to the time of the alleged offense. This, under the circumstances, was the only way in which he could meet the charge made against him."

We are of the opinion that the court in this case should have charged specifically as to the weight which the jury might attach to evidence of good character; but, under the facts of the case, it was not reversi-

ble error for him to omit to do so, where his attention was not called to the omission, and no request was made to charge on the subject. The situation of the defendant in this case and his ability to meet the charge against him otherwise than by proof of good character is not at all analogous to the situation of the defendant in the *Seymour Case*, who was unable to make a defense except by his good character. We do not see why he could not easily have shown, if such had been the truth, that he had in fact paid over to the company every dollar which he had collected for it. Instead of this, his own reports made to the company of his collections show a series of peculations extending over a considerable period, which are covered up and concealed by false entries made in the books by himself. Good character, however strong as a substantive fact of defense, could hardly outweigh the incriminating evidence furnished by this conduct of the defendant. The judge, in his able charge to the jury, told them to "take this case, consider it in the light of all the facts and circumstances and the evidence, and determine the truth of it." And he fully charged, also, the law of reasonable doubt and the weight which they might give to the defendant's statement. This would seem to be broad enough to cover the defense of good character, in the absence of a request for a more specific charge. In *Franklin v. State*, 69 Ga. 41, 47 Am. Rep. 748, the Supreme Court, in a murder case, where the trial judge neglected to charge the jury in reference to the good character of the defendant, but did call attention generally to the testimony for the defense, said that this was in effect to call the attention of the jury to proof of good character, and that, if the defendant wanted a more explicit charge on the subject, it was the duty of his counsel to call the attention of the judge to the omission.

We are driven to the conclusion, from a careful study of all the evidence and the defendant's statement, that the jury in this case did in fact give him the full benefit of his previous good character. In the light of the inculpatory facts and circumstances which he by his own conduct had furnished, proof of his good character and his long and honest connection with the telegraph company could not be deemed sufficient to generate a reasonable doubt as to his guilt; but it was very properly regarded as sufficient to temper justice with mercy. So thought the jury, and they recommended a misdemeanor punishment. So thought the trial judge, and he respected the jury's recommendation; and so thinks this court.

Judgment affirmed.

RUSSELL, J., dissents.

## HOLCOMBE v. STATE. (No. 1,280.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

## 1. OBSCENITY (§ 13\*)—INDICTMENT—SUFFICIENCY.

In an indictment charging the defendant with having used "profane, obscene, and vulgar" language in the presence of females, the word "profane" will be regarded as surplusage, where the language set forth is as a matter of law not profane, but is obscene and vulgar.

[Ed. Note.—For other cases, see Obscenity, Dec. Dig. § 13.\*]

## 2. OBSCENITY (§ 4\*)—"OBSCENE AND VULGAR LANGUAGE"—WHAT CONSTITUTES.

The object of section 396 of the Penal Code of 1895, so far as it relates to obscene and vulgar language, is the protection of the modesty of women from unreasonable invasions.

(a) As used in this Code section, the phrase "obscene and vulgar language" includes any foul words which would reasonably offend the sense of modesty and decency of the woman, or women, or any of them, in whose presence the words were spoken, under all the circumstances of the case.

(b) Language may be obscene and vulgar, within the purview of this Code section, although it has no reference to sexual intercourse or the sexual organs.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 4; Dec. Dig. § 4.\*]

## 3. OBSCENITY (§§ 4, 19\*)—TRIAL—QUESTIONS FOR JURY—CRIMINAL LAW (§ 829\*)—INSTRUCTIONS ALREADY GIVEN.

"Words get their points and meaning almost entirely from the time, place, and circumstances and intent with which they are used." Consequently it is usually issuable and therefore a question for the jury, as to whether any particular language is actually obscene and vulgar. There are, however, certain words which, by common consent of mankind, are obscene and vulgar, when used in the presence of women, except under exceptional and necessary circumstances. Such words may be said to be prima facie obscene and vulgar.

(a) Any gross reference to a woman's private parts, or to the adjacent portions of her person, is in this sense prima facie obscene and vulgar.

(b) Where a minister of the gospel, from the pulpit, in the presence of a mixed audience, aims at a female member of the congregation an indecent jest as to her buttocks, and especially as to the size of them, the language is prima facie obscene and vulgar; and the time, place, and circumstances are such as to exaggerate the indecency, rather than to relieve the words of their ordinary objectionableness. Therefore in such a case, the surroundings being conceded by the defendant, the court may properly instruct the jury that the defendant would be guilty if, without sufficient provocation, he used the language in the hearing of females.

(c) A written request to charge may be refused, where the same subject is fully and fairly covered in the general charge.

[Ed. Note.—For other cases, see Obscenity, Cent. Dig. § 4; Dec. Dig. §§ 4, 19\*; Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

## 4. CRIMINAL LAW (§ 310\*)—PRESUMPTIONS—POSSESSION OF FACULTIES.

There is a general presumption that the ordinary human faculties are possessed by every individual.

(a) In the absence of proof to the contrary, the law presumes soundness both as to mental and bodily functions.

(b) A person is presumed to have an ordinary

capacity for hearing, in the absence of some reason shown to the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 740-744; Dec. Dig. § 310.\*]

## 5. CRIMINAL LAW (§ 1173\*)—HARMLESS ERROR—INSTRUCTIONS.

The court erred in refusing a written request to charge the jury that it was necessary for the state to show that the crime was committed in the county of the prosecution; but, under the particular circumstances, it was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

## 6. WITNESSES (§ 37\*)—COMPETENCY—TESTIFYING FROM BEST RECOLLECTION.

The testimony of a witness is not to be excluded merely because he prefaces his statement by an expression of unwillingness to commit himself absolutely and positively to the accuracy of what he says. The witness may give his best recollection; the weight of his testimony being left as a matter for the consideration of the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

## 7. CRIMINAL LAW (§ 338\*)—EVIDENCE—RELEVANCY.

Matters without prima facie relevancy may become relevant by being interwoven into a conversation which is relevant and admissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.\*]

## 8. CRIMINAL LAW (§ 451\*)—EVIDENCE—OPINION EVIDENCE—HEARING DISTANCE.

A witness, though not an expert, may testify as to his judgment whether a person was within hearing distance of a remark made by another.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 451.\*]

9. The defendant was clearly guilty, and the record presents no reversible error.

Russell, J., dissenting in part.

(Syllabus by the Court.)

## 10. OBSCENITY (§ 4\*)—"OBSCENE."

The word "obscene" means "offensive to the senses; repulsive; disgusting; foul; filthy; offensive to modesty or decency; impure; unchaste; indecent; lewd."

[Ed. Note.—For other cases, see Obscenity, Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4887-4889; vol. 8, p. 7735.]

Error from City Court of Cartersville; A. M. Foute, Judge.

Walter Holcombe was convicted of a violation of Pen. Code 1895, § 396, making a person who shall use obscene and vulgar language in the presence of a female guilty of a misdemeanor, and he brings error. Affirmed.

The defendant and other ministers had been carrying on a series of revival services in what is known as "the Tabernacle" in Cartersville. On the concluding day, which was Sunday, a large number of people were in attendance. Services were held at 11 o'clock in the morning, and it was announced that early in the afternoon (either at 2:30 o'clock) a preacher named Oliver would de-



liver a lecture "to men only." The day was rainy. Many of the people had come from the country, and even from surrounding counties, and a large number of women either remained in the building or sought shelter there from the rain, so that when the time arrived for the lecture "to men only" the audience was mixed. It is conceded that more than 2,500 persons were present. The defendant himself estimated the audience as between 2,500 and 3,000 in number. The defendant, when the time arrived for the lecture to begin, asked the ladies to retire. On account of the rain they were slow in leaving, and a considerable number, variously estimated, remained. It seems that in the audience there was a large woman with her back to the rostrum. The defendant, upon being requested by the other preacher to get the ladies out, advanced to the front of the platform, and in the presence of the congregation said, as the state charged and the witnesses for the prosecution testified, "You woman with the big fat rump pointed towards me, get out of the way." The language, according to the defendant's statement, was: "Gentlemen, there is a big old woman, weighing about 400 pounds, with her rump turned this way. If she would turn around and let me speak to her head, I might explain to her the object of this meeting, and we might go on." He was indicted and convicted for violating section 396 of the Penal Code of 1895, which provides that "any person who shall without provocation . . . use obscene and vulgar or profane language in the presence of a female . . . shall be guilty of a misdemeanor." Exceptions are taken to the overruling of a demurrer to the indictment, and also the overruling of a motion for a new trial. Further facts necessary to the understanding of the points presented and decided will be stated in the course of the opinion.

Jno. T. Norris, for plaintiff in error. Thos. C. Milner, Sol., for the State.

POWELL, J. (after stating the facts as above). The indictment charged that the defendant did without provocation use in the presence of females, whose names are to the grand jurors unknown, the following profane, vulgar, and obscene language: "You woman with the big fat rump pointed towards us, get out of the way." The defendant demurred because the language was not profane; also because it was not obscene and vulgar. The language was not profane, and therefore the use of that word in the indictment was pure surplusage. "Defective allegations do not impair an indictment, if, on their being rejected, what remains fully covers the law." Bishop, New. Crim. Proc. § 480. The word "profane," as used, is merely epithetic of the general nature of the offense, and does not fall within the rule that, where the facts of the transaction are alleged with needless particularity, the un-

necessary allegations cannot be rejected as surplusage. *Disharoon v. State*, 95 Ga. 356, 22 S. E. 698.

2. The language charged was in our judgment clearly obscene and vulgar, within the purview of section 396 of the Penal Code of 1895. As was said in *Dillard v. State*, 41 Ga. 280: "This statute does not stand upon the footing of statutes against public indecency. Its object is not to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another. It is intended to protect females from insult; to furnish to the friends of a female whose modesty has been unlawfully shocked, or whose feelings have been wounded, by the use in her presence of obscene and vulgar language, some other remedy than that which nature dictates, to wit, club law. And the statute is to be construed and understood in the light of its object." We cannot adopt the suggestion of counsel that it is aimed alone at language suggestive of sexual intercourse, or tending to excite lewdness or to debauch the public morals. The word "obscene" means "offensive to the senses; repulsive; disgusting; foul; filthy; offensive to modesty or decency; impure; unchaste; indecent; lewd." *Century Dictionary*. We think that the phrase "obscene and vulgar language," as used in the statute, includes any foul words which would reasonably offend the sense of modesty and decency of the woman or women, or any of them, in whose presence the words were spoken, under all the circumstances of the case. It would be absurd to tolerate the suggestion that to speak of a woman's rump in a loose or jocular connection would not be offensive to the modesty and decency of the ordinary woman. As a matter of common knowledge, we know that such language would shock any decent and modest woman.

In other statutes having different objects from the one before us the word "obscene" may not be entitled to so broad a signification. In the federal statute (Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658]), by reason of its association in immediate context with the words "lewd or lascivious," it partakes of their meaning, and is therefore itself limited to less than its ordinary significance. Hence the many decisions of the federal courts on this statute, which counsel for the plaintiff in error cites, give us no light on the question at bar. Ours is a statute adapted to the temperament of the people of this state. It is to be understood in the light of our well-known sensibilities on certain subjects. Modesty, that "kind of quick and delicate feeling in the soul, the exquisite sensibility that warns a woman to shun the first appearance of everything hurtful," is, according to the mind of the average citizen of Georgia, as needful and legitimate a sub-

ject-matter of protection from invasions as those more familiar subjects of protection through the criminal statutes—life, liberty, and property.

Of course, language tending to incite illicit sexual intercourse is obscene and vulgar; and in most of the reported cases in this state (where the words were not profane, so as to fall within the other portion of the statute) the prosecutions were for using words suggestive of sexual intercourse; but it does not follow that no other language is obscene and vulgar. Indeed, in *Brady's Case*, 48 Ga. 811, the language is characterized as being "quite obscene and vulgar enough to shock the moral sensibilities of all sensible people." The language in that case was not reported, but an inspection of the copy of the original indictment contained in the record in the Supreme Court discloses that it was in no wise suggestive of lewdness or sexual intercourse. The objectionable language there was a threat to kick the same portion of a woman's anatomy as that which is the subject-matter of the present inquiry. Any one doubting that the language of the present indictment is within the meaning of the words "obscene and vulgar" as commonly and ordinarily understood may easily solve that doubt by quoting the language to his different male acquaintances as he meets them in the varying stations of life, and asking them if they would consider it obscene and vulgar to use that language in the presence of ladies.

3. In his charge to the jury the court did not submit the question as to whether the language was obscene and vulgar, but in effect instructed that if the language, substantially as alleged, was used by the defendant in the presence of the females, without provocation, the defendant would be guilty. Under the circumstances this was not error. "Words get their point and meaning almost entirely from the time, place, circumstances, and intent with which they are used" (*Dillard's Case*, supra); and therefore usually it is issuable, and consequently a question of fact for the jury, as to whether the particular language is actually obscene and vulgar. Certain suggestions are commonly known to be indecent. Certain words are per se obscene and vulgar, if used under any but peculiar and exceptional circumstances. *Dillard's Case*, supra; *Pierce v. State*, 53 Ga. 369; *Kelly v. State*, 126 Ga. 548, 55 S. E. 482. Any gross reference to the private parts of a woman, or to any of the surrounding portions of her person, is by common consent of mankind indecent and shocking to feminine modesty. Such a reference might, however, be made in the presence of a female, and not be per se criminal—for instance, in a brothel. But where the language is gross and prima facie indecent, and such that common consent condemns it as unfit by reason of its obscenity to be used in the presence of women—that is, if it is so universally recognized to be obscene and

vulgar that the court can assume its prima facie obscenity and vulgarity through judicial cognizance as a matter of common knowledge—and the conceded time, place, circumstances, and intent are such as to show no reason making or tending to make its use on the particular occasion less obscene and vulgar than it normally would be, there is no issue as to the obscene and vulgar quality to be submitted to the jury.

There is no conflict between this principle and those cases holding that whether particular language is opprobrious and likely to cause a breach of the peace is for the jury, because what effect particular language will have upon a person under particular or even ordinary circumstances is almost always, if not always, an issuable question, and in the nature of things cannot well become a matter of common knowledge, so as to be judicially assumed. In the present case, the reference, whether we take the state's version or the statement of the defendant himself, was gross. The language was prima facie obscene and vulgar. In form and in substance the allusion was indecent. The time, the place, and the circumstances, instead of making or tending to make its use on the particular occasion less likely to offend the modesty of any woman who might hear it than normally it would be, tended distinctly to the contrary. It was not the ribaldry of some low-grade comedian in some second-class theater. It was the indecent jest of a minister of the gospel, made in a house devoted to the service of God, in the presence of some 3,000 worshippers, aimed at a female member of the congregation whose excess of adipose upon an unmentionable part of her person happened to excite his attention. His own statement concedes every element of this characterization, except that the words of his jest were indecent, and as to that we have decided against him. We do not say that even a minister in the pulpit is precluded at all times and under all circumstances from making reference to things which are not usual subjects of conversation in polite society, if he couches his language in an inoffensive context (though even as to these things decency commands that he should be extremely cautious in the choice of his language), and we recognize that real modesty, and not prudery, and not pruriency, is the object of the law's protection; but we do say unequivocally that an indecent jest, couched in language ordinarily considered obscene and vulgar, is never permissible from the sacred desk, and that if it be made in the presence of females it is a criminal act. Our women certainly have a right to come to our places of religious worship without fear of shock or insult by reason of indecent language used by the minister in charge.

The exception to the court's refusal of a written request to charge the jury that it was incumbent on the state to show that the language was used without provocation is not

well founded. We find that the judge clearly covered this in his general charge in several places. He did not elaborate the question of provocation. It was not necessary that he should do so. Both sides had been fully heard as to all the circumstances, and no semblance of provocation appeared. Provocation, as used in this statute, means sufficient provocation. *Ray v. State*, 113 Ga. 1066, 39 S. E. 408; *Ratteree v. State*, 78 Ga. 385; *Dyer v. State*, 99 Ga. 22, 25 S. E. 609, 59 Am. St. Rep. 228; *Brady v. State*, 48 Ga. 311. It seems that, when the state makes a prima facie case, the burden shifts to the defendant to show provocation. *Pierce v. State*, 53 Ga. 365.

4. When the evidence on both sides of the case had been fully heard, about the only question as to which there was any material issue under the proof was whether the language was used in the presence of females. It was not denied that women were present in the building, but the defendant insisted that they were not within the hearing distance of his remark. The phrase "in the presence of a female," as used in this statute, means "within range of the female's hearing." *Brady v. State*, supra; *Sailors v. State*, 108 Ga. 35, 33 S. E. 813, 75 Am. St. Rep. 17; *Henderson v. State*, 63 Ala. 193; *Laney v. State*, 105 Ala. 105, 17 South. 107. On this question the court charged that, if any females were present on the occasion in question, the presumption would be that their hearing was ordinarily good, and that they could have heard and did hear any language spoken loud enough to have been heard by any person of ordinary hearing capacity. The plaintiff in error excepts to this instruction on the ground that there is no such presumption. We find no error in this charge. There is a general presumption that the ordinary human faculties are possessed by every individual. *Davis v. R. Co.*, 60 Ga. 333. In *Gardner v. State*, 81 Ga. 144, 7 S. E. 144, the following charge was approved: "The law presumes sanity, both as to mental and bodily functions."

5. The court was duly requested to charge the jury that the burden was upon the state to show that the crime was committed in Bartow county. He neglected to give this instruction. This was error, of course. However, we deem it too harmless and immaterial in the present instance to work a reversal. There was clear, direct proof that the crime was committed in Bartow county. There was not the slightest suggestion to the contrary. The place of the commission was no wise doubtful or uncertain, and only in a very limited sense can be said to have been issuable. In the light of the nature of the proof the requested charge, if given, could not, would not, and should not have benefited him at all.

6. Exception is taken to the fact that the court erred in receiving the testimony of Judge Fite, who was sworn as a witness for the prosecution, because he prefaced his ac-

count of the transaction with the following language: "If I have any best recollection, about it, the substance of it was about this; but I am not sure I recollect it. It may be that I talked with others about it—did talk in the committee room, a meeting of the trustees—and I might have gathered some from that." The trial judge instructed the witness merely to give his best recollection. It appeared that the witness was present at the services when the obscene and vulgar language was used. His hesitancy went only to the giving of exact words. His unwillingness to swear absolutely and unequivocally did not render his testimony inadmissible and was merely a part of the witness' "manner of testifying," which, under Civ. Code 1895, § 5146, was to be considered by the jury along with all the facts and circumstances of the case. *Mims v. State*, 2 Ga. App. 387, 58 S. E. 499 (2); *Dublin Ry. Co. v. Akerman*, 2 Ga. App. 749, 59 S. E. 10. See, also, 5 Enc. of Ev. 666.

7. Another ground of error is that while Judge Fite was testifying the court permitted him to state that he and others told the defendant that his language was obscene and vulgar. When we examine the whole context, we find nothing erroneous in this ruling. The defendant had stated on the trial that his remark was not addressed to the woman in question; that he had used the language innocently and as a mere side remark for the hearing only of the men near him; that he used the word "rump" because he was thinking of the word "hump" and the word "rump" rhymed with it. To rebut this explanation Judge Fite was called as a witness. He testified that on the next day after the language was used the defendant was called before a committee of the trustees of the tabernacle and told that offense had been taken on account of his statement and that he ought to make an apology, to which the defendant stated that he declined to apologize, as he thought that he had a right to say what he did. Judge Fite then said to him that the language as he considered it was vulgar and obscene. The defendant replied that he did not think so, and said in this connection: "That's the way I have got of moving them, and I move them." By this, and the further details of the conversation as narrated in this testimony, it was made to appear that the defendant did not deny that he used the language or that he intended for the woman to hear it, but sought to justify his conduct on the ground that it was his usual way of moving recalcitrant female members of his congregation. It will be seen, therefore, that as a part of the *res gestæ* of the conversation the statement objected to was admissible.

8. There is another exception to a ruling in the admission of testimony. The solicitor general asked a witness: "In what tone was that said, loud enough to have been heard by these women?" The witness answered: "I think he said it for them to hear it." If

this were construed as an opinion of the witness as to what the defendant's intention was, the answer would probably be subject to objection. It seems, however, that it was construed by court and counsel, not as an opinion as to the defendant's intention, but as to whether the words were spoken loud enough to be heard by the women; for the exception states that there was error because the court allowed this and other witnesses "to testify as to whether or not, in their opinion, the alleged remark was or could have been heard by women alleged to have been present." The answer, though apparently opinionative in form, was competent. "A fact of observation, depending on minutiae such as cannot be described to the jury with the same effect as they justly produce in the mind of an intelligent observer, may be proved by the testimony of the witness directly to the conclusion formed from such minutiae, provided that conclusion is not mere matter of opinion deduced from facts observed, but is itself a fact discerned by the witness in the act of observation, though it may be in part by the exercise of judgment. This rule allows a witness to state the result of a comparison without being confined to describing his observation of each thing compared." *Abbott's Trial Briefs, Mode of Proving Facts* (2d Ed.) p. 508. "A witness may testify as to whether or not a person was within hearing distance of another." *Enc. of Evidence*, vol. 5, p. 694; *Atlanta Ry. Co. v. Beauchamp*, 93 Ga. 6, 19 S. E. 24. "On a trial under an indictment charging the defendant with using abusive, insulting, or obscene language in the presence of a woman, it is competent for the witness, who was present and heard the language, to testify that in his judgment the woman was near enough to hear the language, or in his judgment the language used by the defendant could have been heard by the woman in question." Such statements of "collective facts" are not conclusions merely, and are admissible in evidence. *Rollings v. State*, 136 Ala. 126, 34 South. 339; *McVay v. State*, 100 Ala. 110, 14 South. 862.

9. The foregoing rulings will cover other points presented in the record and not expressly decided. The evidence fully supported the verdict, the defendant was clearly guilty, and the trial was free from material error.

Judgment affirmed.

RUSSELL, J., dissents from the ruling made in the third division of the opinion.

#### TILTON v. STATE. (No. 1,326.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

CRIMINAL LAW (§ 635\*)—TRIAL—EXCLUSION OF PUBLIC.

Every person accused of crime is entitled to a public trial. The presiding judge, in the ex-

ercise of a sound discretion, may, without violating this right, exclude from the courtroom during the trial, for any sufficient special reason, such portion of the spectators as fall within the class to which the reason applies. However, where the judge, without further reason than that the testimony will relate to matters ordinarily too indecent to be mentioned, orders, over the objection of the defendant, that "the courtroom be cleared of every one not connected with the case," he abuses his discretion and violates the defendant's right to a public trial. Prejudice to the defendant is conclusively to be presumed from such an order, and a new trial necessarily results.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1452; Dec. Dig. § 635.\*]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eye, Judge.

John Tilton was convicted of crime, and he brings error. Reversed.

Pierce Bros., for plaintiff in error. J. C. C. Black, Jr., Sol., for the State.

POWELL, J. The only exception insisted upon is that as soon as the jury was impaneled the court, over the express objection of the defendant, "ordered the courtroom cleared of every one not connected with the case." The objection of the defendant was that the action of the court violated his constitutional right to have a public trial. Our Constitution (article 1, § 1, par. 5 [Civ. Code 1895, § 5702]) provides, among other things, that "every person charged with an offense against the laws of this state \* \* \* shall have a public trial." Civ. Code 1895, § 5296, provides: "During the trials in the superior courts, and all other courts and trials occurring in this state, of any cause of seduction or divorce, or other case where the evidence is vulgar or obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants, or their attorneys, to hear and try the said case after clearing the courtroom of all or any portion of the audience." The state's counsel does not insist that the statute gives the presiding judge such a breadth of discretion that he may destroy or diminish the defendant's constitutional right of a public trial. Counsel for the accused does not contend that the statute is unconstitutional, because repugnant to the foregoing clause of the Bill of Rights, but recognizes that a trial may be public, though certain persons are, in the discretion of the judge, for special reasons excluded from the courtroom pending the hearing. The whole question presented, therefore, is: "Did the judge abuse his discretion in the present case?" Under the decision in the *Fews Case*, 1 Ga. App. 122, 58 S. E. 64, this is a question within the final jurisdiction of this court.

The text-writers and the annotators of the standard collections of cases, such as the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lawyers' Reports Annotated, the American State Reports, and the American & English Annotated Cases, all unite in stating that the reported cases on this question are comparatively few in number. Most of the courts, especially in the more recent cases, cite or quote as a reasonably accurate statement the following extract from Cooley's Constitutional Limitations (6th Ed.) p. 379: "It is also requisite that the trial be public. By this is not meant that every person shall in all cases be permitted to attend criminal trials, because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of a portion of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidence of human depravity which the trial must necessarily bring to light. The requirement of a public trial is necessarily for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is permitted to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." See, also, Bishop, New Crim. Proc. §§ 957-959. All the courts in those states whose Constitutions provide for public trials agree upon the proposition that the defendant may insist upon the trial being absolutely open and public, except in so far as there is some good reason for excluding certain persons or certain classes, in which event these and these only may be excluded. It is generally recognized that a person may be excluded for either of the following reasons: When there is no room for him in the courthouse; when he is a witness; when he is disorderly; when, because of age or sex, decency or morality demands it. Other special instances appear in the reported cases.

In *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630, the spectators in a case in which a female witness was testifying became so bolsterous with laughter as to interfere with the court and to confuse the witness, and the action of the judge in ordering them removed from the courtroom was upheld by the appellate court. In that case, however, attorneys disconnected with the case and jurors not in the box, etc., were not included in the judge's order, as in the present case, but only the general spectators. In *State v. Callahan*, 100 Minn. 63, 110 N. W. 342, the prosecutrix in a rape case, after a long public examination as to the details

of the crime, became so embarrassed by the presence of the crowd that the judge ordered the spectators to leave the room temporarily, and by a divided Supreme Court this was held to be no abuse of discretion. In *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849, the defendant became unmanageable and began to use profane and abusive language to the judge and officers of court. Her conduct created such commotion among the spectators that the trial could not proceed until they were sent from the room. It was held that, as it did not appear that the judge had gone any further than was necessary to preserve decorum, in the absence of any showing of injury to the defendant, his action would not be held to be illegal. In *Stone v. People*, 3 Ill. 326, there was considerable noise and confusion on the outside of the courtroom. The judge ordered the doors temporarily locked; but an officer was stationed at the door with a key to let any who wished to do so pass and repass. The trial was held to be public. In *Lide v. State*, 133 Ala. 63, 31 South. 963, it was held that where the spectators began to applaud the argument of the state's counsel, and the court ordered the offending persons removed, the court's action was for the benefit of the defendant, and he could not successfully complain. In *State v. McCool*, 34 Kan. 617, 9 Pac. 745, it was held proper for the judge to exclude all women from the courtroom where one of the attorneys in the case informed the court that he was about to refer to certain evidence which he could not decently discuss in their presence. In *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330, and in *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336, it was held that, if no undue impartiality was shown in the admission of persons, the judge might limit the size of the crowd to the seating capacity of the courtroom and that others seeking admission might be excluded. It is stated in *United States v. Buck*, 4 Phila. 169, Fed. Cas. No. 14,680, that dangerous persons who would be likely to interfere with the due administration of justice might be kept from the courtroom. In the Georgia case of *Myers v. State*, 97 Ga. 77 (5), 25 S. E. 252, it was held that, "while every person accused of crime is entitled to a public trial, it is not necessary to its legality that a great multitude should be in attendance, and the presiding judge should not permit the bar or courtroom to become so crowded as to impede the progress of the trial by rendering it difficult for the jurors to enter or leave the box, or by preventing the free movement of counsel and witnesses; moreover, the jury should not be in such close and constant contact with the audience as that remarks of bystanders as to the guilt or innocence of the accused, or other indications of public feeling for or against him, may reach their ears or come under their observation. The

bar, at least, should at all times be kept sufficiently open and clear for the prompt and orderly dispatch of the business of the court." However, an examination of the facts in that case will show that the exception was not to the action of the court in excluding the spectators, who overcrowded the room, but to his refusal to exclude them.

On the other side of the question no other court has gone quite so far as the Supreme Court of Michigan. In the case of *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294, it was held that "the constitutional right to a 'public trial' in a criminal case is violated by an order of the court to a police officer stationed at the door of the courtroom to 'see that the room is not overcrowded, but that all respectable citizens be admitted and have an opportunity to get in whenever they shall apply,' where it is shown that citizens and taxpayers were excluded by such officers while the seats provided for spectators were not all occupied." Subsequently to the rendition of this decision a statute was passed allowing the judge in certain cases to exclude "every person except those necessarily in attendance" upon the trial. In *People v. Yeager*, 113 Mich. 228, 71 N. W. 491, this act was held to be unconstitutional as applied to a criminal trial. In *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, it was held that an order, made in a rape case against the objection of the defendant, excluding from the courtroom during the trial of the case "all persons except the officers of the court and the defendant," is prejudicial error, being violative of the defendant's constitutional guaranty of a public trial. This case is not only comparatively recent, but the opinion in it is fair and able. The authorities on the question are carefully reviewed. Among other things, the court makes the following statement, which is peculiarly applicable to the case now before us: "Against the objection of the defendant, the court made an order excluding from the courtroom, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is in direct violation of that provision of the Constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of court were allowed to be present in no way made the trial public. For the purposes contemplated by the provisions of the Constitution, the presence of the officers of court, men who, it is safe to say, were under the influence of the court, made the trial no more public than if they, too, had been excluded." In the recent case of *State v. Hensley*, 75 Ohio St. 253, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Am. & Eng. Ann. Cas. 111, is also a

very able discussion of the whole question. The court recognizes that in many instances certain persons or classes of persons might be excluded from the courtroom without constitutional prejudice to the defendant on trial, but held in the case before it that "an order made by the court of common pleas during the trial of an indictment for a felony, to the effect that, in view of the testimony expected to be given by witnesses next to be called, the court would continue the trial during the taking of the testimony of witnesses likely to give immoral or obscene testimony in the small courtroom, that the sheriff should admit no one to said room except the jury, defendant's counsel, and members of the bar and newspaper men, and one other person, a witness for defendant, exceeds the power of the court in the premises, and its enforcement is a denial to defendant of his constitutional right to a public trial."

The cases of *Benedict v. People*, 23 Colo. 126, 46 Pac. 637, and *People v. Swafford*, 65 Cal. 223, 3 Pac. 809, cited by counsel for the state, are not in point. These cases merely hold that a new trial should not be granted because the trial court excluded persons from the courtroom where the defendant made no objection or where he consented to the order. Nor are the New York cases in point. The only provision in that state as to the publicity of trials is statutory, and contains express exceptions allowing the exclusion of the public in certain cases. Unquestionably the whole trend of American authority is to the effect that while the trial judge may for special causes exclude any or even all of the spectators from the courtroom, yet that he cannot make the order of exclusion extend further than the special causes warrant in the particular instance. A sweeping order, such as the one sub judice, has never been sustained, so far as we can find. To say that the judge may lawfully exclude from the trial all persons except those connected with the case, the defendant, his attorney, the witnesses, and the officers of court—to say the accused can be forced to trial thus without the presence of friend or family—is to say that the constitutional guaranty of a public trial is an empty promise—is to say that the guaranty adds nothing at all to what had already been guaranteed him by other provisions of the Bill of Rights. The right of counsel would give him the presence of his attorney, the right to be confronted by the witnesses would give him the benefit of their presence, the right of trial by jury would give him the benefit of the presence of the 12 men in the box, and besides these who else would be left to witness the trial save the prosecutor, the state's counsel, the judge, and the officers of court, persons absolutely necessary to the carrying on of any trial at all? How differs this from the secrecy of the Star Chamber?

An unreasonable exclusion of the public

over the objection of the accused is conclusively presumed to be hurtful to him. *People v. Hartman*, 108 Cal. 242, 37 Pac. 153; *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294; *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734. In the present case there is a strong probability that the accused suffered actual prejudice. He stood charged with fornication and adultery committed with his wife's 14 year old sister; and the girl herself was the only witness against him as to the principal fact. It seems, from the testimony, that he had previously been accused by her of rape. The jury doubtless knew of this, and knew of the public indignation such cases arouse—knew, in other words, what the general public expected of them. Certain physical facts, appearing on the trial, corroborated the defendant's strong denial that he had ever had sexual intercourse with the girl. These physical facts had never doubtless been given the same public notoriety as had been given to the fact that the accused had been held by the committing court for the perpetration of a most heinous crime on his wife's young sister. The jury evidently had doubts, for they added to their verdict a recommendation of mercy; and if the defendant was guilty it was not a case for mercy. There is much room for the suspicion that the jury was influenced not to give the defendant the benefit of the doubt they felt because they feared criticism from the public, who had heard the charge against the defendant, but had not heard the testimony in his favor. I have known of just such cases. The defendant, having been publicly charged, was entitled to have the public know just how weak the evidence against him really was—how strong were the circumstances in his favor. In any event he was entitled to a public trial and did not get it. The court, under the circumstances of the case and the nature of the testimony, might with greatest propriety and perfect legality have excluded from the courtroom during the trial all minors, all women, and all others who failed to behave decorously or who interfered in any manner with the decent conduct of the case; but his order was too sweeping.

Judgment reversed.

**CALLAWAY v. MIMS.** (Nos. 1,335, 1,358, 1,362, 1,376, 1,404, 1,405.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—NATURE AND SCOPE—ORDINANCES—CONFLICT WITH STATUTES—INTOXICATING LIQUORS.

Whenever the General Assembly has, by direct enactment or by its settled public policy, derivable from the various statutes passed from time to time, brought within the police power of the state any particular subject, thereupon the municipal authorities of the cities and towns

have the power, under the usual general welfare clause found in municipal charters, to deal with the subject, limited by the established rule that they cannot deal with an act which is purely a violation of a state criminal statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1311-1314.]

(a) In deciding whether a municipal ordinance is invalid by reason of the existence of a state criminal statute on the same general subject, the courts look not merely to the concrete acts which may in actual cases furnish the basis for convictions, but they examine both the statute and the ordinance, with the view of ascertaining the theoretical evils to be remedied by each, and thus determine whether the gist of the offense in each is the same. If so, the ordinance, unless it has been enacted in pursuance to direct express authorization by the General Assembly is void; otherwise, it is valid, provided, of course, the subject-matter of the ordinance is legitimately within the purview of the express or implicit police power with which the municipality has been clothed.

(b) There is a substantial distinction between the maintenance of a "blind tiger," or place where liquors are illegally sold on the sly, and the crime either of selling liquors illegally or of keeping them on hand in public places of business. Municipal authorities, therefore, have the power, under the usual general welfare clause, to pass ordinances penalizing the maintenance of "blind tigers," notwithstanding the provisions of the state prohibition act of 1907 (Acts 1907, p. 81), on the same general subject.

(c) Municipal authorities have the power under the usual general welfare clause to prohibit the keeping on hand of intoxicating liquors for the purpose of illegal sale, notwithstanding the provisions of the state prohibition act of 1907. The gist of the offense under such ordinances is materially different from the gist of any of the crimes created by the state statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1312.]

## 2. INTOXICATING LIQUORS — KEEPING FOR SALE.

A municipal ordinance which prohibits the keeping on hand of intoxicating liquors will not be declared void on the ground that it punishes mere intention, disconnected from any overt act.

## 3. MUNICIPAL CORPORATIONS — OFFENSES AGAINST ORDINANCES — CUMULATIVE SENTENCES.

Under the amendment to the charter of the city of Macon, approved August 17, 1907 (Acts 1907, p. 786), the recorder has the power to sentence a person convicted of a violation of any of the ordinances of the city to pay a fine not exceeding \$500, or to confinement in the city barracks for not more than 60 days, or to labor on the public works and streets of the city for not more than 3 months, and he may impose an alternative sentence, of labor on the public works and streets, for default in the payment of any fine imposed; but he cannot impose the punishments cumulatively.

(Syllabus by the Court.)

## 4. WORDS AND PHRASES—"BLIND TIGER."

A "blind tiger" is a place where liquors are sold on the sly, in violation of law, and is a common nuisance (citing Words and Phrases, vol. 1, p. 808).

## 5. PROSTITUTION — NATURE OF OFFENSE — "STREET-WALKING."

"Street-walking" is the parading in the streets by lewd women, to the encouragement or advertisement of their means of livelihood.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6896.]

Error from City Court of Macon; Robt. Hodges, Judge.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Hattie Mims, W. E. Lester, Mary Scarborough, and another, were convicted for violation of an ordinance of the city of Macon making it unlawful to keep a "blind tiger," or to keep for sale intoxicating liquors within the city of Macon. Each sued out a writ of habeas corpus against J. W. Callaway, superintendent of the city chain-gang at Macon; and from judgments sustaining the writs, Callaway brings error. Ike Bashinski was convicted in the recorder's court of Macon for a violation of the same ordinance; and, the judge of the superior court having refused to sanction a writ of certiorari, he brings error. C. H. Schroeder was convicted in the recorder's court of Savannah for violating an ordinance making it unlawful to keep within the corporate limits, for illegal sale, intoxicating liquors; and, the superior court having refused to sanction a writ of certiorari, he brings error. Judgment in the habeas corpus cases reversed, and in the Bashinski Case and in the Schroeder Case affirmed.

These six cases all present substantially the same points. The Mims, Lester, and Scarborough Cases each arose by a habeas corpus proceeding instituted against Callaway, superintendent of the city chain-gang at Macon. The prisoners had been convicted in the recorder's court of that city for a violation of what is known as the "blind tiger ordinance," which is in the following language (omitting formal parts): "It shall be unlawful for any person to keep a blind tiger, or keep for sale, barter, or exchange any vinous, spirituous or intoxicating liquors within the corporate limits of the city of Macon." In each case the illegality of the imprisonment was asserted on the grounds that the sentence was imposed for a violation of a state law, that the mayor and council had no charter authority to pass the ordinance, that the municipal court was without jurisdiction to try the case, that the offense charged was a misdemeanor under the state law, and therefore cognizable only in one of the state criminal courts. Of course, in these cases, none of the evidence on which the convictions were based was material. The attack on the ordinance was direct. The trial judge held the ordinance invalid and sustained the habeas corpus. Callaway excepted.

Bashinski was convicted in the recorder's court of Macon for a violation of the same ordinance. He presented to the judge of the superior court a petition for certiorari, and he also attacks the ordinance for the same reasons as were asserted in the habeas corpus case. He makes the point, also, that to allow the conviction to stand would subject him to double punishment for the same offense; the specific contention being that

the same transaction constituted a violation of the state prohibition law. In the case of *Bashinski v. State* (this day decided) 62 S. E. 577, there is a description of Bashinski's place of business and rooms. In the present case the testimony went to show that, subsequently to the raid and removal of the liquors referred to in that case, the police made another raid, and in what is called in that case the "downstairs storage room" they found one whole cask and part of another cask of whisky in pint bottles. Proof was also made that he had gone to this room and sold a bottle of whisky taken from it. Bashinski denied this sale, and insisted that, while he had the liquor in the storage room, it was in no wise connected with his place of business. The judge of the superior court refused to sanction the certiorari, and he excepts.

Schroeder and 23 others were convicted in the recorder's court of Savannah for violating the ordinance of that city which provides (omitting immaterial parts): "It shall be unlawful for any person, firm or corporation to keep within the corporate limits of the city of Savannah \* \* \* for the purpose of illegal sale any alcoholic, spirituous, malt, or intoxicating liquors or intoxicating bitters or other drinks which, if drunk to excess, will produce intoxication." They brought the cases to the superior court by certiorari. A stipulation was entered into that the other cases should abide the final result in Schroeder's Case. Upon the hearing of the certiorari, only two points were insisted upon: (1) That the ordinance is void because it in effect punishes an attempt alone; (2) that it is void because it undertakes to punish an act already covered by state legislation. The court overruled the certiorari, and Schroeder brings error.

In No. 1,335:

C. H. Hall, Jr., for plaintiff in error. Nottingham & McClellan, for defendant in error. In No. 1,358:

Minter Wimberly, Jesse Harris, and John R. Cooper, for plaintiff in error. C. H. Hall, Jr., for defendant in error.

In No. 1,362:

C. H. Hall, Jr., for plaintiff in error. W. D. McNeil, for defendant in error.

In No. 1,376:

O'Connor, O'Byrne & Hartridge, E. H. Abrahams, and Cann, Barrow & McIntire, for plaintiff in error. Samuel B. Adams, for defendant in error.

In Nos. 1,404, 1,405:

C. H. Hall, Jr., for plaintiff in error. Jesse Harris, for defendant in error.

POWELL, J. (after stating the facts as above). 1. Prior to January 1, 1908, there were in effect in this state several statutes directed against the sale of intoxicating liquors, but none against keeping them on hand. The general prohibition act of 1907 (Acts 1907, p. 81), in addition to forbidding the



manufacture and sale, also makes it unlawful for any and all persons "to keep \* \* \* at any \* \* \* public places, \* \* \* or keep on hand at their place of business any intoxicating liquors." It is settled, beyond all possibility of dispute, that a municipal corporation, in the absence of express legislative authority, cannot punish for an offense against the criminal laws of this state. *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329; *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298; *Hood v. Von Glahn*, 88 Ga. 413, 14 S. E. 564; *Braddy v. Milledgeville*, 74 Ga. 516, 58 Am. Rep. 443; *Mayor of Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *Jenkins v. Thomasville*, 35 Ga. 145; *Adams v. Albany*, 29 Ga. 56; *Collins v. Hall*, 92 Ga. 411, 17 S. E. 622; *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390; *Penniston v. Newman*, 117 Ga. 700, 45 S. E. 65; *Thrower v. Atlanta*, 124 Ga. 1, 52 S. E. 76, 1 L. R. A. (N. S.) 382, 110 Am. St. Rep. 147. It is equally well settled that prior to the enactment of the prohibition law of 1907 (Acts 1907, p. 81) those cities, the charters of which contained the usual general welfare clause, might pass ordinances prohibiting the keeping on hand of intoxicating liquors for the purpose of illegal sale. *Sawyer v. Blakely*, 2 Ga. App. 161, 58 S. E. 399; *Sutton v. Washington*, 4 Ga. App. 30, 60 S. E. 811; *Mayson v. Atlanta*, 77 Ga. 663; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559; *Mabra v. Atlanta*, 78 Ga. 679, 4 S. E. 154; *Hood v. Griffin*, 113 Ga. 190, 38 S. E. 409; *Osburn v. Marietta*, 118 Ga. 53, 44 S. E. 807; *Reese v. Newnan*, 120 Ga. 198, 47 S. E. 560; *Paulk v. Sycamore*, 104 Ga. 728, 31 S. E. 200; *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Brown v. Social Circle*, 105 Ga. 834, 32 S. E. 141; *Papworth v. Fitzgerald*, 106 Ga. 378, 32 S. E. 363; *Cunningham v. Griffin*, 107 Ga. 690, 33 S. E. 664; *Robinson v. Americus*, 121 Ga. 180, 48 S. E. 924; *Duren v. Stephens*, 126 Ga. 496, 54 S. E. 1045; *Rooney v. Augusta*, 117 Ga. 709, 45 S. E. 72; *Little v. Fort Valley*, 123 Ga. 503, 51 S. E. 501. So, also, ordinances forbidding the maintenance of "blind tigers," or places where liquors were kept or stored for illegal sale, were legitimate municipal enactments. *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; *Cunningham v. Griffin*, 107 Ga. 690, 33 S. E. 664; *Osburn v. Marietta*, 118 Ga. 53, 44 S. E. 807. Under these ordinances testimony as to the keeping of liquor and of one or more illegal sales thereof was deemed sufficient to authorize a conviction. *Sawyer v. Blakely*, 2 Ga. App. 161, 58 S. E. 399; *Mabra v. Atlanta*, 78 Ga. 679, 4 S. E. 154; *Rooney v. Augusta*, 117 Ga. 709, 45 S. E. 72; *Reese v. Newnan*, 120 Ga. 198, 47 S. E. 560; *Robinson v. Americus*, 121 Ga. 180, 48 S. E. 924.

The foundation of these decisions has been declared to rest upon the proposition that "whenever the General Assembly has by direct enactment, or by its settled public policy derivable from the various statutes passed from time to time, brought within the police

power of the state any particular subject, then the municipal authorities of a town or city would seem to have the power, under the usual general welfare clause in municipal charters, to deal with such subject by proper ordinance, limited only by the established rule that they cannot deal with an act which is declared to be a violation of the criminal laws of the state." *Henderson v. Heyward*, 109 Ga. 379, 34 S. E. 592, 47 L. R. A. 366, 77 Am. St. Rep. 384. It may be noted, too, that although the ordinance be valid at the time of its adoption, if the General Assembly subsequently makes the identical offense which is punishable under the ordinance a crime against the state, the ordinance thereupon ipso facto loses its validity as to future transactions. *Jenkins v. Thomasville*, 35 Ga. 147; *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329. In cases where there has been an attempt to set aside ordinances because of the existence of state statutes on the same subject, various tests have been proposed for the determination of whether there is such an identity between the crimes created by the state laws and the offenses created by the ordinances as to make the latter invalid. That the offender will be liable to prosecution under the state statute for something done in connection with the act by which the ordinance is violated, or for an act which merely tends to make proof of some element of the municipal offense creates no such identity; for example, that the offender under an ordinance forbidding the keeping for the purpose of unlawful sale will be subject to criminal prosecution for making the sale does not rob the municipality of authority to punish under the ordinance, although the purpose of the keeping be shown only by the fact that the illegal sale did take place. *Menken's Case*, 78 Ga. 668, 2 S. E. 559. To quote the terse statement of Chief Justice Bleckley in the case just cited, "An offense committed against one jurisdiction cannot be wiped out by committing another against another jurisdiction."

If the offense recognized by the ordinance contains an "ingredient or concomitant" which is essential to the city's peace, health, or good order, and which is not covered by the state law, the ordinance is valid. *Mayor of Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *Hood v. Von Glahn*, 88 Ga. 413, 14 S. E. 564; *Strauss v. Waycross*, 97 Ga. 476, 25 S. E. 329. It is recognized in *Hussey's Case* that there are some kinds of conduct which, though criminal, are not very pernicious in tendency when committed in thinly populated communities, but which, when committed in populous communities, such as cities and towns, take on an aggravation, and that this special mischief itself may furnish a legitimate basis for discriminating between the offense under the city ordinance and the crime under the statute, though both cover transactions nominally of the same nature. This principle has been recognized in several

subsequent cases, was elaborated in *Hood v. Von Glahn*, and was adverted to by Judge Russell in the case of *Sutton v. Washington*, 4 Ga. App. 30, 60 S. E. 811. "The act is single, its effect double; and for each effect there may properly and without working injustice to the rights of the offender be a separate remedy or penalty." *Horr & Bemis on Munic. Police Ord.* § 89. "If the breach of the municipal by-law is not an offense against the criminal laws of the state, and neither includes nor is included in the latter," it is not invalid by reason of that law.

From a study of the cases we deduce the proposition that, in deciding whether a municipal ordinance is invalidated by the existence of a state criminal statute on the same general subject, we look not merely to the concrete acts which may in actual cases furnish the basis for convictions; but we examine both the statute and the ordinance, with the view of ascertaining the theoretical evils to be remedied by each, and thus determine whether the gist of the offense in each is the same. If so, the ordinance, unless it has been enacted in pursuance to direct express authorization by the General Assembly, is void; otherwise, it is valid, provided, of course, the subject-matter of the ordinance is legitimately within the purview of the implicit police power with which the municipal government has been clothed.

Preparation to commit an act differs in gist from the consummation. Thus the carrying of deadly weapons differs from shooting at another, and even from murder itself; and by the same difference ordinances forbidding the keeping of liquors for the purpose of unlawful sale have been distinguished from the sale itself in the large number of cases cited above. Likewise, in *Karwisch v. Atlanta*, 44 Ga. 204, and in *Rothschild v. Darien*, 69 Ga. 503 (2), the action of the municipality in penalizing the preparative act of keeping open any store for the sale of merchandise on Sunday is differentiated from the state's action in punishing the consummation, the carrying on, of an ordinary calling on the Sabbath Day. Closely cognate to this is the proposition that where some harm to the public peace, health, security, or comfort may result from the doing of certain acts or the maintenance of certain things, but the conduct does not come up to the test of criminality under the state law because of the lack of some ingredient prescribed by that law, the city by ordinance may legislate upon the situation; for example, in *Vason v. Augusta*, 38 Ga. 542, and in *Healey v. Atlanta*, 125 Ga. 736, 54 S. E. 749, it was held that the city might legally enact an ordinance against the maintenance of nuisances except in those cases where notice to abate had been served in accordance with the state law, for the reason that the state statute made it criminal to maintain a nuisance only after notice to abate. Similarly it was held in *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845,

that the state vagrancy law did not prevent the enactment of a city ordinance against loitering in the streets. There is also a difference in gist between the doing of acts by which the commission of crime is encouraged or facilitated and the committing of the very crime itself; for example, the keeping of a gaming table or of a gaming house is not the same in substance as gaming, and the renting or maintaining of a lewd house is not the same crime as fornication. So by this distinction, in the case of *Braddy v. Milledgeville*, 74 Ga. 516, 58 Am. Rep. 443, an ordinance against "street-walking"—that is the parading in the streets by lewd women, to the encouragement or advertisement of their means of livelihood—was upheld, although, of course, we have state statutes against the several forms of fornication, open lewdness, and of renting, keeping, or doing anything toward the maintenance of a lewd house.

Akin to this is the principle, recognized in *Purdy's Case*, 68 Ga. 295, that there is a substantive difference between the opening of a tippling house on the Sabbath in violation of the statute and the permitting of persons to assemble at an opened tippling house on the same day. Much nicety of distinction is found among the cases of *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 285, *Karwisch v. Atlanta*, 44 Ga. 204, *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147, and *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 561. In the *Reich Case* a city ordinance of Columbus, which in direct terms penalized the opening of a tippling house on Sunday, was held to be the same in language, object, and substance with the state statute, and therefore void. In the *Karwisch Case* it was held that, notwithstanding the state forbade the opening on the Sabbath of tippling houses—that is, places where liquors were drunk—the city might by ordinance prohibit the keeping open on that day of places where commodities were sold, and that the ordinance was enforceable against the defendant, who opened his building where he sold liquors, as well as other goods, notwithstanding the place was also a tippling house by reason of the fact that liquors were drunk there, as well as sold. In the *Kassell Case* it was recognized that there was no state law directly prohibiting the selling of liquor by a licensed dealer on Sunday, that this result was reached only indirectly by the statute against the keeping open of barrooms and other tippling houses on Sunday, and that therefore a municipal ordinance which forbade the sale of liquor on Sunday was valid, but that it was in the particular case unenforceable against the defendant, because the selling of liquors was her regular vocation and there is a penal statute inhibiting all persons from pursuing their ordinary calling on the Lord's day. In all these cases the city derived authority to pass the ordinances only through general welfare clauses in the respective city char-

ters; but in *Von Glahn's Case* direct, express authority had been granted to the city "to pass all ordinances in relation to keeping open tippling houses on the Sabbath day," and such an ordinance was upheld. See, in the same connection, *Fitchtnberg v. Atlanta*, 126 Ga. 62, 54 S. E. 933. As showing that an act may at one and the same time violate the dignity of the state and the peace of the municipality, so as to subject the offender to punishment in both jurisdictions, it is necessary to refer only to the recent case of *Fountain v. Fitzgerald*, 2 Ga. App. 713, 58 S. E. 1129, where the defendant pointed a gun at another in the public streets of the city, and the older cases of *McRae v. Americus*, 59 Ga. 163, 27 Am. Rep. 390, where the defendant fought in a public street, and *De Graffenreid v. State*, 72 Ga. 212, where the defendant committed an assault and battery under similar circumstances.

Comparing, now, the ordinances sub *judice* with the state prohibition act of 1907 (Acts 1907, p. 81), and applying the criteria deduced above, we have no hesitancy in saying that the state law does not cover the maintenance of blind tigers, and that it was and still is competent for the city of Macon under the general welfare clause of the charter to penalize the keeping of a blind tiger. A "blind tiger" is a place where liquors are sold on the sly in violation of law, and is a common nuisance. *Legg v. Anderson*, 116 Ga. 404, 42 S. E. 720; *Cannon v. Merry*, 116 Ga. 294, 42 S. E. 274. For a collection of similar judicial definitions of what a "blind tiger" is, see *Words and Phrases*, vol. 1, p. 808. The keeping of a "blind tiger" differs from the ordinary illegal keeping or sale of liquor in the same respect that the maintenance of a gaming house or table differs from plain gambling, or the keeping of a lewd house differs from simple fornication or the parading of street-walkers. The gist of the offense of keeping a "blind tiger" consists neither in the keeping of the liquors nor in the sale of the liquors, though both of these may be essential evidentiary ingredients in the proof of the offense, but in the maintaining of a place where the state law as to liquors may be violated. The very keeping of such places is a severable menace to the peace and security of the inhabitants of the city, distinct from the violations which, through the acts committed therein, may ensue "to the laws of the state, the peace, dignity, and good order thereof."

We have but little or no less hesitancy in holding that the provisions of the state prohibition act against keeping liquors in public places and in places of business do not cover the same ground as the city ordinances against the having or keeping of liquors on hand for the purpose of illegal sale. We may say for the purpose of sale, for all sales are illegal. Overt preparation to violate the state law is the gist of this municipal offense. It may be complete, though no illegal sale ever takes place. It is not even necessary to show a con-

summation of the purpose by a sale to convict under it. For instance, if it could be shown that the defendant collected the liquors, had marked prices on the packages, had taken out a United States license as a retail liquor dealer, and had authorized his clerk to sell, who will say that the proof would not be sufficient to show the keeping and the purpose? This is in line with a suggestion of Justice Cobb in *Paulk v. Sycamore*, 104 Ga. 733, 31 S. E. 200. Note, also, the proof in the case of *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814. Under the state statute, so far as keeping is concerned, the nature of the place, that it shall be public as contradistinguished from private, or shall be a place of business or trade as contradistinguished from a mere workshop or manufacturing plant, is all-important. Under the ordinance the nature of the place is wholly immaterial and does not enter at all into the gist of transaction. The distinction here is very close to that given recognition in the *Karwisch Case*, *supra*. Proof of the facts necessary to convict under the city ordinance—namely, that the liquor was kept and that the purpose of the keeping was unlawful sale—would not be sufficient to convict under the state statute. Proof of the facts necessary to convict under the state statute—namely, that the liquor was kept and that the keeping was in a public place or place of business—would not be sufficient to convict under the ordinance. In each case there is an essential element of the other offense lacking. This makes the offenses legally distinct. *Blair v. State*, 81 Ga. 629, 7 S. E. 855. In line with the reasoning of Judge Bleckley in *Menken's Case*, *supra*, it may be said that the violator of the ordinance, who has procured and is keeping the liquor for the purpose of illegal sale, cannot wipe out his transgression against the city's jurisdiction by carrying it into a place of business or a public place, and thereby "committing another offense against another jurisdiction." Such ordinances do not cover any part of the ground covered by the state law, and the case of *Vason v. Augusta* and similar cases are wholly inapplicable.

We therefore hold that, notwithstanding the general prohibition law of 1907 (Acts 1907, p. 81), any town or city, in the charter of which is included an ordinary general welfare clause, may lawfully enact and enforce an ordinance prohibiting the maintaining of a "blind tiger" or the keeping of intoxicating liquors on hand for the purpose of sale, and that the ordinances sub *judice* are valid.

2. The contention that the ordinance is void because it punishes a mere intent without any overt act is untenable. The act of keeping is an overt act; and, where it is coupled with an intent to keep, that "union or joint operation of act and intention" which the very definition of a crime or a misdemeanor includes (Penal Code 1895, § 81) is present. The further ingredient that the purpose of

the keeping shall be an unlawful sale is merely an added characteristic, whereby the lawful and theoretically harmless keeping is distinguished from the unlawful and noxious keeping. As Judge Charlton says in the able opinion which he filed in connection with his order overruling the certiorari in the Schroeder Case: "It does not punish the intent. It punishes the act as informed by the intent. A man turns a door knob and enters a dwelling. His act may be entirely innocent. He may do it through mistake, through implied acquiescence, from a dozen plausible motives. But, if he turns the knob and enters the house with intent to steal, he commits burglary. An individual may keep all the liquor he desires in a place other than that wherein he transacts business or which is public, and, no matter what his intent, he breaks no law of Georgia. He may keep it in his dwelling for his own consumption, and break neither state law nor municipal ordinance. If he keeps it in his dwelling with the intent to sell it, he violates the ordinance. Manifestly all the ingredients of crime are here present."

3. In Bashinski's Case another point needs to be noticed. Upon his conviction in the recorder's court he was sentenced to pay a fine of \$500, and in addition thereto to be confined at labor on the streets of Macon for 90 days and in the city barracks of Macon for 60 days. The city attorney relies upon section 7 of the act of 1907 (page 788), amending the charter of Macon, as authority for this sentence (Acts 1907, p. 788, § 7). The authority there given is "that the recorder of said city shall have power to impose fines for the violation of any law or ordinance of the city of Macon passed in accordance with its charter to an amount not to exceed five hundred dollars, to imprison the offenders in the city barracks for the space of not more than sixty days, or at labor on the public works and streets of the city of Macon for not more than three months, and the said recorder shall have the power and authority to impose an alternative sentence at labor as herein prescribed in default of the payment of any fine imposed." We do not construe this as authorizing cumulative sentences. Any one of the three punishments may be imposed, but not all of them. If a fine is imposed, the sentence may include as an alternative a term at labor on the streets and public works of the city. While the judgment will be affirmed, direction will be given as to the correction of the sentence. *Pearson v. Wimlish*, 124 Ga. 713, 52 S. E. 751; *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390 (4).

Upon a full consideration of all the points raised in all of the cases it is our opinion that the judgments in the cases of *Callaway v. Mims* (No. 1,335), of *Callaway v. Lester* (No. 1,362), of *Callaway v. Scarborough* (No. 1,404), and of *Callaway v. Scarborough*, a friend (No. 1,405)—the habeas corpus cases—be reversed; that the judgment in the case

of *Schroeder v. Mayor, etc.*, of Savannah (No. 1,362) be affirmed; and that the judgment in the case of *Bashinski v. Mayor, etc.*, of Macon (No. 1,358) be affirmed, with direction that the judge of the superior court, in taking action upon the remittitur from this court and in making the judgment of this court the judgment of that court, shall order and direct that the recorder of the city of Macon shall resentence the defendant in accordance with the views expressed in this opinion.

#### COGGINS v. CITY OF GRIFFIN. (No. 1,291.)

(Court of Appeals of Georgia. Oct. 21, 1908.)

##### 1. INTOXICATING LIQUORS—MUNICIPAL ORDINANCE—VALIDITY.

The ordinance of the city of Griffin, which provides that "it shall be unlawful for any person to keep a blind tiger, or keep for illegal sale, barter, or exchange any vinous, spirituous, or malt liquors within the corporate limits of the city," is a valid exercise of authority, under the general welfare clause of the municipal charter, and is enforceable, notwithstanding any of the provisions of the general prohibition act of 1907 (Acts 1907, p. 81).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 122.]

##### 2. SAME—KEEPING LIQUOR.

The keeping of the liquor and the purpose of the keeping may be inferred from a single sale of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300-322.]

##### 3. SAME—EVIDENCE.

It is not necessary to show continuous keeping or frequent sales in order to authorize a conviction under the above-quoted ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 309.]

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Bud Coggins was convicted of selling intoxicating liquor, and brings error. Affirmed.

This case comes here upon exceptions to the refusal of the judge of the superior court to sanction a certiorari brought to review the conviction of the petitioner in the police court of Griffin. The accusation is not in the record; but it is recited that he stood "charged with the offense of keeping for sale a certain quantity of spirituous and intoxicating liquor in the city of Griffin on the 2d day of May, 1908, in violation of the city ordinance." A copy of the ordinance appears in the record, and is as follows: "It shall be unlawful for any person to keep a blind tiger, or keep for illegal sale, barter, or exchange any vinous, spirituous or malt liquors within the corporate limits of the city of Griffin." The accused demurred to the accusation on the following grounds: "That the offense charged in said accusation is an offense against a penal statute of this state, to wit: Acts Ga. 1907 (the state prohibition act) p. 81, and the city of Griffin

has no power or authority to try this defendant for said offense. The enactment by the General Assembly of the said statute, making it a state offense to keep liquor for sale, deprived the municipal authorities of the city of Griffin (they having no jurisdiction over state offenses) of the power to try and punish this defendant for committing the act alleged in the accusation." The proof was that the defendant in a certain railroad cut in Griffin made two separate sales of whisky to the witness for the prosecution.

Cleveland & Goodrich, for plaintiff in error. Wm. E. H. Searcy, Jr., for defendant in error.

POWELL, J. (after stating the facts as above). 1. That the very ordinance in question was valid prior to the passage of the general prohibition act was settled by the Supreme Court in the case of *Cunningham v. City of Griffin*, 107 Ga. 690, 33 S. E. 664. We have decided that it is still enforceable. Since we are, at this same sitting of the court, discussing at length in the case of *Callaway v. Mims*, 62 S. E. 654, the effect of the prohibition act of 1907 (Acts 1907, p. 81) upon the authority of municipal corporations to pass ordinances of the character of the present one, we will not go into elaboration here.

2. It is too well established by judicial precedent to be considered an open question that proof of a single illegal sale is sufficient to authorize the finding that the liquor was kept for the purpose of illegal sale. *Sawyer v. Blakely*, 2 Ga. App. 161, 58 S. E. 399, and citations.

3. The contention that the words of the ordinance, "or keep for illegal sale," etc., are restricted in their meaning by their association in the context with the word "blind tiger," is disposed of adversely to the plaintiff in error by reference to the decision in the case of *Cunningham v. City of Griffin*, supra, for the report of the testimony in that case does not disclose that the defendant made more than a single sale. We do not think that the keeping need be continuous, or the sales frequent, to constitute a violation of the ordinance.

Judgment affirmed.

**FOWLER v. ROME DISPENSARY et al.**  
(No. 1,130.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

**1. INTOXICATING LIQUORS (§ 306\*)—CIVIL DAMAGE LAWS—SALE TO MINOR—PETITION—SUFFICIENCY.**

An action for damages, brought against the Rome Dispensary, jointly with the dispensary commissioners and manager, based upon the illegal sale of whisky to a minor son of the plaintiff, cannot be maintained, and it was properly dismissed upon demurrer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 306.\*]

**2. INTOXICATING LIQUORS (§ 282\*)—CIVIL DAMAGE LAWS—SALE TO MINOR.**

Section 3871 of the Civil Code of 1895, which declares that "a father, or if the father be dead, a mother, shall have a right of action against any person who sells or furnishes spirituous liquors to his or her son under age for his own use and without his or her permission," confers a civil right, entirely distinct from the penalty imposed by section 444 of the Penal Code of 1895.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 282.\*]

**3. INTOXICATING LIQUORS (§ 299\*)—CIVIL DAMAGE LAWS—SALE TO MINOR—"PERSONS" LIABLE.**

The right of action conferred by the terms of section 3871 of the Civil Code of 1895 does not extend to government officers acting officially. To charge one with civil liability for damages due to the sale of intoxicating liquor to a minor, it must appear that the sale was made by the defendant in person, or in his presence and with his consent, either expressed or implied.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 435; Dec. Dig. § 299.\*]

**4. STATES (§ 193\*)—OFFICERS—ACTIONS.**

The officers of a dispensary created by law are officers of the government, and are not suable as such, except by express provision of law.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 193.\*]

**5. PLEADING (§ 34\*)—CONSTRUCTION AGAINST PLEADER—AMBIGUOUS PLEADINGS.**

Where pleadings are ambiguous, they will be most strongly construed against the pleader, especially where the ambiguity is pointed out by special demurrer, and no effort is made to amend.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.\*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by M. H. Fowler against the Rome Dispensary and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. B. Eubanks, W. B. Mebane, and W. M. Henry, for plaintiff in error. John W. & G. E. Maddox, for defendants in error.

RUSSELL, J. Fowler brought suit for \$5,000 damages against the Rome Dispensary, J. G. Polluck, D. E. Lowry, Frank Freeman, and Chas. Shiffett, for selling a pint of whisky, without his permission, to his son, who is a minor. Polluck, Lowry, and Freeman were alleged to be the dispensary commissioners, and Shiffett the manager of the dispensary. The sixth paragraph of the petition alleges that the Rome Dispensary, by its commissioners and manager and their servants and agents, whose names are unknown, acting under the charge of said commissioners and manager, and for them and for said Rome Dispensary, and acting within the scope of their employment, did sell and furnish petitioner's minor son, for his own use and without the permission of petitioner, one pint of corn whisky. The petition then proceeds to allege that the son

drank part of the liquor, and thereafter boarded a railroad train and became beastly drunk, and ran every person out of the coach, including the conductor and the flagman, and used loud and profane and violent oaths in the presence of ladies; that he was arrested and carried in a drunken condition to the calaboose and locked up, and later fined in the recorder's court for disorderly conduct, which fine was paid by the petitioner; that in addition to fining him for disorderly conduct the recorder bound him over to the superior court for using obscene, profane, and vulgar language in the presence of females and for the offense of being drunk on the public highway, and in accordance with the recorder's decision he was confined in a cell in Floyd county jail, whence he was later released on bond, after great trouble and expense on the part of petitioner, and taken before the city court of Floyd county and fined \$25, or in default thereof to serve six months in the chain-gang. The petitioner asked for special damages for the fines paid by him, for attorney's fees necessarily incidental to the defense of his son, for his expenses in making trips from his home in Forsyth county to Rome, and loss of time, for railroad fare, and for \$50 for the services of his son while confined in jail. The acts of the dispensary commissioners, the manager, and the agents and employes of the dispensary in furnishing the petitioner's son the said liquor are alleged to have been careless, reckless, and intentional, and punitive damages are also prayed.

To this petition the defendants demurred generally, and also specially demurred to the sixth paragraph, upon the ground that the name of the person who actually made the sale is not set out, and that the connection that any of the defendants named had with the sale is not stated. They also demurred specially upon the ground that the sale of the liquor to the petitioner's son was not the proximate cause of his conduct and the results thereof. The court sustained the demurrer. So far as the record discloses, no amendment was offered by the plaintiff setting forth the name of the person who actually made the sale to his son. We think the court properly sustained the demurrer and dismissed the petition. Without determining whether, under the terms of the act creating the Rome dispensary (Acts 1901, p. 620), it was the intention of the Legislature to create such a corporation as could sue and be sued, and therefore whether the demurrer was properly sustainable as to it, under the rulings in *Town of East Rome v. City of Rome*, 129 Ga. 290, 58 S. E. 854, *Augusta Southern Ry. Co. v. Tennille*, 119 Ga. 804, 47 S. E. 179, and *Town of Dexter v. Gay*, 115 Ga. 765, 42 S. E. 94, it is sufficient to say that, under prior adjudications of the Supreme Court, we are constrained to hold that the dispensary is a state agency and not subject to suit.

Our holding in the case of *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67, that corporations are subject to the penalties of the criminal law, which is cited by counsel for plaintiff in error, has no application to civil suits or to public corporations. Section 3871 of the Civil Code of 1895, under which this suit is brought, provides that "a father, or if the father be dead, a mother, shall have a right of action against any person who sells or furnishes spirituous liquors to his or her son under age for his own use, and without his or her permission." Section 444 of the Penal Code of 1895 deals with the sale of liquors to minors, both sons and daughters, and declares that "if any person, by himself or another, shall sell or cause to be sold, or furnished, or permit any other person, in his employ, to sell or furnish any minor spirituous or intoxicating or malt liquors, without first obtaining written authority from the parent or guardian of such minor, he shall be guilty of a misdemeanor." Even the ordinary liquor dealer might be liable criminally for a sale by his agent or his employé to a minor when he would not be civilly liable for damages. For this reason the special demurrer of the defendant was timely and appropriate, and properly required the plaintiff to amend his petition and state what individual actually sold the whisky to his minor son. And, as no such amendment was offered, the court was fully authorized to construe the petition most strongly against the pleader and to dismiss it. Upon this subject of construction, see *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885; *Evans v. Collier*, 79 Ga. 315, 4 S. E. 264; *Charleston R. Co. v. Stockyard Co.*, 115 Ga. 70, 41 S. E. 598; *A. & W. P. R. R. Co. v. Georgia Ry. & E. Co.*, 125 Ga. 798, 54 S. E. 753. In the case at bar attention was distinctly called by special demurrer to the fact that the petition did not charge specifically who made the sale, or what was the position in the dispensary of the person making the sale. The plaintiff could very easily have cleared this point if he had desired to do so, and the court was authorized to construe his failure to do so as an admission that the sale was not made either by the commissioners or by the manager.

In no event was the Rome Dispensary suable. The Supreme Court held, in construing the particular act which created this dispensary (*Barker v. State*, 118 Ga. 39, 44 S. E. 876) that: "The dispensary is a state institution. No private individual has any direct interest in its operation. The dispensary was established in furtherance of temperance, and in certain localities it has been thought better to sell intoxicating liquors under direct governmental supervision than to undertake to prevent the sale altogether or to allow it by private individuals. \* \* \* Dispensaries are governmental agencies designed to curtail the consumption of intoxicating liquors. This was the nature and pur-

pose of the local act for Floyd county." It had previously decided the same thing in *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181, *Dispensary Commissioners v. Thornton*, 106 Ga. 106, 31 S. E. 733, and *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751. In *Plumb v. Christie*, 103 Ga. 695, 30 S. E. 763, 42 L. R. A. 181, Judge Lewis delivering the opinion of the court, says: "There is no private corporation created by the act, and no irrevocable grant of a privilege to any one. On the contrary, the act prohibits any one from engaging on their individual account in this business. The government itself takes charge of it, and undertakes to control the traffic through the instrumentality of its public officials." In the *Thornton Case*, supra, the same judge, in a headnote, declared it to be the opinion of the court that "the dispensary commissioners \* \* \* are governmental officials." In the body of the opinion the court says: "It follows from the decision in the case of *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181, that the dispensary commissioners of Terrell county, under the dispensary act for that county, approved December 10, 1897, \* \* \* are mere governmental agents or officials, not only empowered, but required by the Legislature of the state, to establish, under certain rules and conditions, dispensaries for the sale of liquors in that county; that this body is not a private corporation, and that these dispensaries are in no sense private institutions, but they are public institutions of the government."

In *Butler v. Merritt*, supra, the qualified voters of Mitchell county had adopted the local option act, which provided that it should not be legal for "any person" within the limits of the county to sell intoxicating liquors; but, notwithstanding this, a local dispensary act was about to be put in force in the town of Camilla, in that county. The judge of the superior court granted a temporary restraining order at the instance of Merritt, but the Supreme Court reversed that decision, and held that the dispensary was not included in the words "any person" in the local option act. In delivering the opinion in that case, Chief Justice Simmons said: "The main and controlling question to be decided is whether the adoption by the people of the county of the provisions of the general local option act repealed or modified the dispensary act, so as to make the sales of liquors under that act illegal. It was contended by the plaintiff in the court below that the general local option law forbade any and all sales of intoxicating liquors in any county which properly adopted it, and that the terms of the act apply as well to the state and its agents as to private persons. The supervisors contended, on the other hand, that the state was not bound by the general local option law, as the state was not named therein and the terms of the act did not indicate any intention to bind the state. The

rule that the king or state is not bound by an act of Parliament or of the Legislature, unless named therein, has come down to us from the earliest times. It has been universally recognized, so far as we know, by all of the courts of England and of this country, and was recognized early in the history of this court in the case of *Doe v. Deavors*, 11 Ga. 79. See, also, *Brooks v. State*, 54 Ga. 36; *Lingo v. Harris*, 73 Ga. 28; *Mayor, etc., of Brunswick v. King*, 91 Ga. 522, 17 S. E. 940. It is true that the first decision just cited contained a statement that there were three exceptions to the rule, namely, statutes for the maintenance of religion, the advancement of learning, and the support of the poor. According to that case, a statute for one of these objects bound the sovereign or state, although the act did not expressly so provide. The general rule was so well established that it was placed in the last codification of the laws of this state and adopted by the Legislature in 1895. See *Pol. Code 1895*, § 3, which is as follows: "The state is not bound by the passage of a law, unless named therein, or unless the words of the act should be so plain, clear, and unmistakable as to leave no doubt as to the intention of the Legislature." It seems that the codifiers and the Legislature, in adopting this rule, omitted the exceptions above mentioned, and qualified the general rule so as to except cases where there was a manifest intent to include the state. Whether or not the exceptions are still of force in this state, the later decisions of this court and the Code section cited at least indicate a disposition not to broaden or increase the exceptions. We are clear that none of these exceptions, or any others laid down by text-writers, are applicable to the present case. We have carefully examined the general local option law and the amendments thereto, and find nothing therein which would indicate or suggest that the Legislature intended by this enactment to bind the state. Construing the act by the well-recognized rule that it is to be presumed, primarily, that the General Assembly intended to legislate with reference to individuals only, there is nothing in this act to raise a suspicion that the Legislature intended to bind the state. Its provisions seem to be directed entirely and solely to the acts of individuals. After prescribing the mode and manner of holding the election in each county of the state which complies with the rules laid down, it provides that, 'if a majority of the votes \* \* \* shall be against the sale, it shall not be lawful for any person within the limits of such county to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, any alcoholic, spirituous, malt, or intoxicating liquors,' etc. *Pol. Code 1895*, § 1548. At the time that this law was enacted (in the year 1885) there were no dispensaries in this state. The only per-

sons who were allowed to sell, or who did sell, intoxicating liquors, were natural persons or private corporations, and the law required that they should take out a license. A sale by the state or by a municipality was not at that time known in this state. Therefore the word 'persons' could not have been used in the act to mean or include the state or its agents or officers. Officers or agents of the state or of the law are not included in the word 'persons,' as used in the act. Upon this subject, see *Mayor, etc., of Brunswick v. King*, 91 Ga. 522, 17 S. E. 940; *Fears v. State*, 102 Ga. 274, 29 S. E. 463. As to the rights of the state, generally, to establish public dispensaries and appoint officers to manage them, and as to whether such a dispensary is a private enterprise, see the opinions of Mr. Justice Lewis in *Plumb v. Christie*, 103 Ga. 695, 30 S. E. 759, 42 L. R. A. 181, and *Dispensary Com'rs v. Thornton*, 106 Ga. 107, 31 S. E. 733. These points are so well and so lucidly discussed in these opinions that I feel it unnecessary to do more than refer to them. Having shown that the general local option law did not name the state, or by implication include it, and having shown, by reference to the opinions of Mr. Justice Lewis, that the dispensary is a state institution and managed by an officer of the government, we are forced to the conclusion that the judge erred in granting the injunction."

The words "any person" in the local option act are the same words as employed in section 3871 of the Civil Code of 1895, and seem to us to be used in the same sense. We conclude, therefore, that there is no civil liability upon the part of the Rome Dispensary, or upon the officers designated by the act creating it, in their official capacity, nor any liability upon these officials for the illegal acts of their subordinates, unless done with their knowledge, permission, and consent. Neither the state nor any of its subordinates or agencies are bound by the passage of a law, unless named therein, or the words of the act are so plain and unmistakable as to remove any doubt as to the intention of the Legislature. *Russell v. Men of Devon*, 2 Term R. 666; *Scales v. Ordinary*, 41 Ga. 225. Where there is doubt it will be resolved in favor of the public. *Lingo, Marshal, v. Harris*, 73 Ga. 30; *U. S. v. Herron*, 20 Wall. (87 U. S.) 251, 22 L. Ed. 275; *Lewis, Trustee, v. U. S.*, 92 U. S. 618, 23 L. Ed. 513. Furthermore, the act now in question, in its sixth section, specifically prohibits the sale of liquor to minors by its manager or any one else, and such a sale for that reason would be an act ultra vires, for which the dispensary could not be held liable, even if it could be sued. The commissioners and the manager, of course, would each be liable for any sale made by himself to a minor; but as commissioners or as manager none of them would be liable un-

der the rulings in *Plumb v. Christie* and *Thornton v. Dispensary*, for a sale made by an employé. Any commissioner or the manager might be criminally liable for any sale to a minor, of which he had knowledge and which he permitted; but under the terms of the act creating the officers of the Rome Dispensary the subordinate officers or employés are the employés of the dispensary as an institution, and not of the commissioners or of the manager.

For these reasons we are clear that the court properly sustained the demurrer and dismissed the petition.

Judgment affirmed.

#### TURNER v. STATE. (No. 1,367.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### 1. CRIMINAL LAW (§ 603\*)—CONTINUANCE.

The showing for a continuance based on the absence of a witness did not measure up to the requirements of Pen. Code 1895, § 962, and was properly overruled.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1349; Dec. Dig. § 603.\*]

2. No other error of law is assigned, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Dawson; M. C. Edwards, Judge.

Jim Turner was convicted of crime, and brings error. Affirmed.

Marlin & Hoyl, for plaintiff in error. M. J. Yeomans, Sol., for the State.

HILL, C. J. Judgment affirmed.

#### OLARKE v. STATE. (No. 1,382.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### 1. CRIMINAL LAW (§ 1037\*)—TRIAL—REMARKS OF SOLICITOR—REVIEW—OBJECTIONS.

An assignment of error, objecting to certain remarks made by the solicitor in his argument in a criminal case, without showing that some objection was made to the remarks at the time they were uttered, or some action was invoked of the court, which was refused, will not be considered by this court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2645; Dec. Dig. § 1037.\*]

##### 2. CRIMINAL LAW (§ 371\*)—EVIDENCE—OTHER CRIMES.

On the trial of one charged with a violation of the act of 1903 (Acts 1903, p. 90) in obtaining money on a fraudulent promise to perform a contract of service, evidence that three years previously the defendant had filed a plea of guilty to an accusation charging him with a violation of the same act, the transactions being in no way related one to the other, but entirely separate and distinct, was irrelevant and inadmissible, as it did not tend in any way to illustrate the intent of the accused in the transaction for which he was then being tried.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 830; Dec. Dig. § 371.\*]

(Syllabus by the Court.)



Error from City Court of Leesburg; H. L. Long, Judge.

Charlie Clarke was convicted of obtaining money on a fraudulent promise to perform contract of labor, and brings error. Reversed.

Howell B. Simmons, for plaintiff in error. W. G. Martin, Sol., for the State.

HILL, C. J. Charlie Clarke was convicted in the city court of Leesburg for a violation of the act of 1903 (Acts 1903, p. 90) in obtaining money on a fraudulent promise to perform his contract of labor. His motion for a new trial was overruled.

The testimony against him was that of the prosecutor, who stated that the defendant had worked for him under contract from January until the 6th day of July, 1907; that on the latter day his contract was up, and he wanted some money, and, having three weeks' more work on the farm which he wanted him to do, he advanced him \$4 on his promise that he would work for him for three weeks at the rate of \$13.50 per month, and 3½ pounds of meat, etc.; and that on the day he agreed to begin work he moved off the prosecutor's farm and did not do the work or return the money. The prosecutor further testified that he gave him no cause to leave. This testimony, under the terms of the act, was sufficient to raise a presumption of guilt, and the defendant made no statement and offered no evidence in rebuttal. The solicitor seemed not satisfied with the presumption of guilt, and offered in evidence the docket of the county court containing an entry showing that the defendant then on trial had three years previously filed a plea of guilty on an accusation charging him with a violation of the same statute. This evidence was admitted over the objection of the defendant, who insisted that the offenses were entirely distinct, and not in any manner related to each other, and did not illustrate any issue in the case. The admission of this evidence is made one of the grounds in the motion for new trial. Another ground in the motion for new trial contends that it was error for the solicitor, in opening the case to the jury, to state that "he expected to show that the defendant was an old offender." This assigns error in the remark of the solicitor, but does not assign error in any judgment of the court in reference to the remark. No allegation is made that the remark was objected to at the time, or that any ruling of the court was invoked or was made on the same. We decide the points in the case in the inverse order in which we have stated them.

1. The remark of the solicitor, in opening the case to the jury, that "he expected to show that the defendant was an old offender," was of course objectionable; but it does not appear that any objection was made to the remark at the time, or that any ruling of the court was invoked or made thereon. Having

permitted the remark to be made without objection, and not asking the court either to declare a mistrial or to instruct the jury that they could not consider such remark, the defendant cannot thereafter make it a ground for new trial.

2. The court erred in admitting in evidence the docket showing that three years previously the defendant had filed a plea of guilty on an accusation charging an offense of a similar character to the one for which he was then on trial. It is a general rule that upon the trial of a person for a criminal offense other and distinct transactions cannot be given in evidence against him, and this rule is only relaxed or modified when the transactions are so connected in time or so similar in their other relations that the same motive may be reasonably imputed to both. *Farmer v. State*, 100 Ga. 41, 28 S. E. 26, and cases cited. But we cannot think that evidence that, three years before the commission of the offense for which the defendant was then on trial, he pleaded guilty to fraudulently obtaining from another person money on another contract the two offenses being in no way connected or related, is within the reason of the exception to the general rule above stated, or tends in any way to illustrate the intent of the accused in the transaction for which he was then being tried. We think the admission of this evidence was prejudicial error, and for that reason a new trial should have been granted.

There is no merit in the motion to dismiss the writ of error.

Judgment reversed.

#### COWART v. POWELL. (No. 1,203.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### 1. PLEADING (§ 417\*)—WAIVER OF OBJECTIONS—FILING AMENDMENT.

A party who submits to a ruling of the court as to the sufficiency of the pleadings for any purpose, by voluntarily filing an amendment to meet the views of the court, waives his right to make exceptions on the ground that the amendment was unnecessary. *Atlantic Coast Line R. Co. v. Hart Lumber Co.*, 2 Ga. App. 88, 58 S. E. 316, (2), and citations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. § 417.\*]

##### 2. APPEAL AND ERROR (§ 1005\*)—REVIEW—FINDING.

The case, as finally narrowed by the pleadings and the evidence, involved only one question: "Did the defendant contract to rent the land from the plaintiff?" The trial judge fairly submitted this question to the jury and has approved their finding. This court is therefore without jurisdiction to interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3950; Dec. Dig. § 1005.\*]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action between Albert Cowart and H. C.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Powell. From the judgment, Cowart brings error. Affirmed.

Bush & Stapleton and P. D. Rich, for plaintiff in error. W. I. Geer, for defendant in error.

POWELL, J. Judgment affirmed.

#### LAND v. STATE. (No. 1,393.)

(Court of Appeals of Georgia. Oct. 26, 1908.)  
INTOXICATING LIQUORS (§ 132\*)—KEEPING IN PLACE OF BUSINESS.

Where the same room or premises is occupied both as a place of business and for residential or other private use, the proprietor cannot lawfully keep intoxicating liquors there during any of the hours when the place is open for business or when members of the public are admitted therein. During those hours in which the place is closed to public access and all business has ceased, and the room or premises is devoted to no other than private use, intoxicating liquors may be kept there, provided they are not allowed to remain there upon the reopening of the place for business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 132.\*]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Sam L. Land was convicted of keeping intoxicating liquors at his place of business, and brings error. Affirmed.

The defendant conducted a shoeshop in which he mended shoes for the public. He carried on the business transactions connected with his employment there, making it a place of business within the purview of the Roberts Case, 4 Ga. App. 207, 60 S. E. 1082. There was but one room, and as he slept there at night this also constituted his residence. According to the proof, he kept a little whisky there and occasionally sold some of it. He was convicted of keeping intoxicating liquors at his place of business.

E. A. Jones and Isaac Jackson, for plaintiff in error. Henry Reeves, Sol., for the State.

POWELL, J. (after stating the facts as above). The real contention of the plaintiff in error is succinctly stated in the following sentence culled from the motion for a new trial: "The keeping of liquor in a place which constitutes both the residence or home and the place of business of a person does not constitute the offense as contemplated by the statute." We rule this: Where the same room or premises is occupied both as a place of business and for residential or other private use, the proprietor cannot lawfully keep intoxicating liquors there during any of the hours when the place is open for business, or when members of the public are admitted therein. During those hours in which the

place is closed to public access, and all business has closed, and the room or premises is devoted to no other than private use, intoxicating liquors may be kept there, provided they are not allowed to remain there upon the reopening for business. See *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917. The mere circumstance that the doors were closed would not be conclusive of privacy; nor that they were open, of publicity. The doors might be closed merely to cloak or facilitate a keeping that would violate the spirit and the purpose of the law. On the other hand, the circumstances might be such that, despite the fact that the house was open, no criminality would follow. For example: If the place had a sole occupant, as in the present case, and he became sick in bed, so that his business necessarily ceased and the doctor prescribed both fresh air and whisky, we think he might keep the door open and also keep on hand the whisky; but these are rare cases. If the defendant's statement that he was an old Confederate soldier, that he suffered from old wounds received at Gettysburg, and under a physician's advice merely kept on hand at night a little whisky to alleviate his sufferings, and that he sold none of it, were the truth of the case, he would not have been convicted. If the jury had convicted him, Judge Harwell would have made the fine so light as to make it equivalent to an acquittal; and if Judge Harwell had not done so—well, judges should not admit that they could be sufficiently tempted to rape the law, so we will not say what we would have done. But the record does not bear him out. Even an old soldier should not run a "blind tiger."

Judgment affirmed.

#### PEAK v. STATE. (No. 1,298.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

CRIMINAL LAW (§§ 763, 782\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a case in which all of the testimony is positive it is erroneous to instruct the jury upon the comparative weight of positive and negative testimony. In any case it is reversible error to charge the jury, without qualification, that they are to believe positive testimony in preference to negative. It is for the jury to determine for themselves the comparative weight of positive and negative testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1744, 1878; Dec. Dig. §§ 763, 782.\*]

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

John Peak was convicted of crime, and brings error. Reversed.

R. H. Lewis, for plaintiff in error. R. W. Moore, Sol., for the State.

RUSSELL, J. On the trial the judge charged the jury as follows: "I charge you, if you find there are two classes of witnesses, one class swearing that the fact existed, that they saw it, and another class swearing that they were present, but did not see it, that you are to believe the former testimony in preference to the latter; the positive testimony instead of the negative." In the motion for a new trial error is assigned upon this instruction; and this is the only assignment of error insisted upon before this court.

We think the instruction above quoted was such an error as demanded a new trial. It is not only true, as insisted, that there was no evidence upon which to predicate this instruction, and that it tended to the prejudice of the defendant in calling the attention of the jury to the fact that he had introduced no testimony, but the language used was not a correct statement of the rule under which a jury is to consider the comparative weight of positive and negative testimony. It is in any case error to instruct the jury upon principles of law which are inapplicable to the evidence in the particular case on trial. Whether such error is ground for new trial may depend upon whether the error was harmful. In the present case the defendant must have been prejudiced by the unwarranted direction of the court that "you are to believe the former testimony" (that is, the positive testimony) "in preference to the latter" (that is, the negative testimony).

In the first place, this is not the correct rule of law upon this subject, even if the record disclosed that both positive and negative testimony was before the court. "In any case it is error to give in charge to the jury the rule in regard to positive and negative testimony embodied in Pen. Code 1895, § 985, without stating the qualification that other things must be equal and the witnesses of equal credibility." *Wood v. State*, 1 Ga. App. 685, 58 S. E. 271 (4). And that, in a case where both positive and negative testimony had been introduced, it is reversible error not to so instruct the jury, has been held not only in the *Wood Case*, supra, but also, among others which could be cited, in *Phillips v. State*, 1 Ga. App. 687, 57 S. E. 1079; *Kimbrough v. State*, 101 Ga. 585, 29 S. E. 39; *Atlanta Ry. Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934; *Skinner v. State*, 108 Ga. 747, 32 S. E. 844; *Grant v. State*, 122 Ga. 744, 50 S. E. 946. In the *Kimbrough Case*, supra, Justice Cobb uses the following strong language: "It would not do to lay down the broad rule that, as between witnesses, those who testify positively to a fact are rather to be believed than those whose testimony is negative. The negative testimony of a witness of good character will always outweigh the positive testimony of a witness shown to be unworthy of belief."

The judge did not have the right to tell

the jury that they must prefer witnesses who testified positively to those whose testimony was only negative. It was the right of the jury to determine the comparative weight of the positive and negative testimony upon a consideration of the comparative credibility of the witnesses giving the testimony, if other things were equal. But in the present case there was no necessity for the charge upon the subject of positive and negative testimony at all, because all of the testimony was positive, and any charge whatever upon the subject was error. We think this error was prejudicial to the defendant, because it stressed before the jury the fact that there was no denial of the positive testimony of the state's witnesses, except by the defendant's statement, which is not technically evidence, and the judge's injunction that they must prefer this positive testimony (the only positive testimony in the case) was virtually a charge to the jury to disregard the defendant's statement entirely. As we have already remarked, in *Wood v. State*, supra, the rule of evidence contained in section 985 of the Penal Code of 1895 should not be given in charge except in a clear case. Where it is improperly and erroneously given, with probable injurious consequences to the defendant on trial, a new trial should be granted.

It is insisted by counsel for the state that a new trial should not have been granted because, regardless of the error in the charge of the court, the verdict of guilty was demanded by the evidence. A sufficient answer to this argument is that the jury may believe the defendant's statement in preference to the testimony, and if, in the present case, they had believed it, an acquittal must have resulted. The charge of the court, if it did not wholly eliminate the defendant's statement from the case, at least so depreciated it that the jury was precluded from giving that preference to the statement which it was their right to accord it, if they saw fit.

Judgment reversed.

BURCH v. CITY OF OCILLA. (No. 1,334.)  
(Court of Appeals of Georgia. Oct. 28, 1908.)

1. LICENSES (§ 37\*)—ASSIGNMENT—CONSENT OF MUNICIPALITY.

A license granted by a municipal corporation cannot be transferred by the licensee without the consent of the licensing municipality.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 73; Dec. Dig. § 37.\*]

2. LICENSES (§ 19\*)—INTOXICATING LIQUORS (§ 11\*)—EXEMPTIONS—POWER TO CONTROL—CONFLICTING REGULATIONS.

A Confederate veteran, having a certificate authorizing him to peddle and conduct business in any county or municipality in this state without procuring a license, which certificate has been regularly granted to him under the provisions of Pol. Code 1895, § 1642 et seq., as amended (Acts 1897, p. 24; Van Epps' Code

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Supp. § 6146a), is not subject to a license tax imposed upon the sale of "near beer."

(a) Where the proof shows that the "near beer" or other liquid sold by such Confederate veteran is not intoxicating, a municipality is expressly forbidden to charge him a license tax.

(b) If the liquid sold is intoxicating, while the veteran's license would not protect him from the penalties affixed to the violation of the prohibition law, the municipality would have no authority to license its sale.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 73; Dec. Dig. § 19.\* Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.\*]

(Syllabus by the Court.)

### 3. WORDS AND PHRASES—"ARDENT SPIRITS."

"Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whiskey, brandy, and gin.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 491.]

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

J. M. Burch was convicted in the recorder's court for violation of the ordinance of the city of Ocilla imposing a license on the sale of near beer. The case was taken by certiorari to the superior court, where the certiorari was overruled, and Burch brings error. Reversed.

T. L. Griner and Hines & Jordan, for plaintiff in error. J. J. Walker and Mayson & Hill, for defendant in error.

RUSSELL, J. J. M. Burch was convicted in the recorder's court of the violation of an ordinance of the city of Ocilla, which prescribed a license of \$3,000 for any one engaged in selling near beer in that city, and provided penalties for the violation of the ordinance. The case was carried by certiorari to the superior court, where the certiorari was overruled, and exception is taken to that judgment.

The ordinance under which the defendant was found guilty, declares that from and after June 20, 1908, all persons, firms, or corporations who sell or offer for sale near beer within the city limits of Ocilla, Ga., shall first pay into the city treasury the sum of \$3,000 annually in advance, and receive therefore a license to carry on said business. The second section of the ordinance prescribes a penalty for any one who may conduct a business in violation of such ordinance. Upon the trial in the recorder's court it was shown by testimony, as well as by the admission of the defendant himself, that he had sold "near beer" in the city of Ocilla after the passage of the ordinance in question; but the testimony was uncontradicted that the "near beer" sold by the defendant was not intoxicating. One witness testified that he had frequently seen men drink as many as 11 glasses without showing any effect from it, and that the witness himself had drunk a keg or two in all, drinking at times as much as he could hold, and that it did

not intoxicate him a particle. It was further shown in the testimony, without contradiction, that the "near beer" in question had no more alcohol in it than lemon extract and other drinks sold at soda fountains.

The defendant introduced in his defense a license issued to Taylor & Warren, which had been transferred to him by the former licensees. The receipt or license was as follows: "\$1.50. City of Ocilla. No. 16. Received of Taylor & Warren one & no/100 dollars, entitling the holder to carry on the business of soda water and cold drinks in the city of Ocilla, Ga., until December 1, 1908. [Signed] D. W. Paulk, Clerk and Treasurer." Upon the back was the following transfer: "For value received we hereby transfer the within license to J. M. Burch. Ocilla, Georgia, June 20, 1908. [Signed] J. M. Warren. T. R. Taylor."

The defendant further introduced the following certificate from the ordinary of Pulaski county: "Georgia, Pulaski County. Ordinary's Office. August 13, 1901. I, P. T. McGriff, ordinary of said county, certify that John M. Burch, a disabled Confederate soldier of said county, has come before me and taken the oath prescribed by law, required of disabled Confederate soldiers, to authorize them to peddle or conduct business in any town, city, county, or counties in this state, and is therefore authorized to peddle or conduct business in any county or municipality in this state without procuring a license or being subject to tax therefor, provided he shall not peddle or deal in ardent and intoxicating drinks. Given under my official signature and seal of office the day and year above written. P. T. McGriff, Ordinary."

The license which was issued to Taylor & Warren by the city of Ocilla was, upon motion, excluded from the evidence by the recorder.

1. We think that the license issued to Taylor & Warren was properly excluded from the evidence. Waiving consideration of the other objections, it had not been properly transferred to the defendant, because the consent of the municipal corporation had not been obtained to the transfer. But, even had this license been properly transferred, it can hardly be questioned, we think, that the city of Ocilla could subsequently have passed the ordinance regulating the sale of "near beer," for the reason that soda water and cold drinks would not necessarily include "near beer."

We think, however, that the certificate issued by the ordinary of Pulaski county absolutely exempted the defendant from the operation of the near beer ordinance, and that for that reason the recorder erred in adjudging him guilty of violation of the ordinance, and the judge of the superior court erred in overruling his petition for certiorari. Under Pol. Code 1895, § 1642 et seq., as amended by the

act of 1897 (Acts 1897, p. 24), and Van Epps' Code Supp., § 6146a, indigent and disabled Confederate soldiers, upon compliance with the requirements of law, are licensed to conduct any business in any municipality of this state without procuring a license or being subject to any license tax, provided that the business conducted by them is not that of dealing in ardent and intoxicating drinks. The evidence in this case shows that the drinks sold by the defendant were not intoxicating, and, therefore, clearly the defendant was within the terms of the license. Indeed, the city of Ocilla was compelled to prove that the liquors sold were not intoxicating, or else the city's case was wrecked, because the recorder would have no jurisdiction to try for the sale of intoxicating liquors; the jurisdiction as to this matter being exclusively in the state. Upon the proof that the defendant was a Confederate veteran the case stood thus: If the evidence disclosed that the liquors sold were intoxicating, he was amenable to the state authorities. If the testimony showed that the liquors sold by him were nonintoxicating, as it did, he could not be convicted, because he had been properly authorized by law to conduct the business of selling such nonintoxicating drinks, and every municipal corporation in the state had been forbidden to exact from him any license tax therefor.

It is unnecessary for us now to determine whether the ordinance in question is unconstitutional or not. We do not think it is unconstitutional, but certainly it cannot operate to repeal a general law of the state, which exempts disabled and indigent Confederate soldiers from the operation of all such ordinances. Under the law any disabled or indigent Confederate soldier may peddle or conduct business in any town, city, or county without paying license for the privilege, provided this license does not authorize him to deal in ardent or intoxicating beverages. Burch's certificate from the ordinary was prima facie evidence of his being a disabled soldier. There was no evidence to rebut it. Under the decision in *Hartfield v. Columbus*, 109 Ga. 113, 34 S. E. 288, Burch has the right to carry on as many lines of business as he is able to conduct, with the exception of those prohibited. The mere fact that one of the witnesses testified that the "near beer" sold contained enough alcohol to preserve it would not afford evidence that it was an ardent drink, any more than an intoxicating drink. "Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whisky, brandy, and gin." *Sarils v. U. S.*, 152 U. S. 572, 14 Sup. Ct. 721, 38 L. Ed. 556. According to the proof the drinks sold by the defendant were neither ardent nor intoxicating.

The learned judge of the superior court, in the opinion filed in connection with his judgment dismissing the certiorari, says: "In my opinion, the sale of 'near beer' is in a class distinct and to itself with reference

to the classification of different businesses. It has come into existence as an outgrowth of the new prohibition law of the state, and it is not to be classed in the same class with 'soft drinks' usually sold at soda fountains, according to my judgment. Its very name of 'near beer' implies that it is a beverage, and that it approaches beer, with reference to its alcoholic qualities, as nearly as it is safe to do so under the state prohibition law. The evidence of the city of Ocilla showed that in this case it was sold as a beverage, and that it was alcoholic to some extent, and that the party from whom the plaintiff in certiorari purchased the business had obtained a federal revenue license. The policy of the state, as evidenced by the last prohibition act, is against the sale of alcoholic beverages, at least those which intoxicate if drunk to excess. The policy of the city of Ocilla, as evidenced by its ordinance fixing a tax of \$3,000, is against the sale of such beverages as 'near beer.' The policy of the state with reference to exempting old soldiers from paying a tax to do business, as is evidenced by Acts 1897, p. 24, and Acts 1898, p. 46, is that they shall not carry on such business as is obnoxious to the general trend of state legislation, and by inference to the municipality involved."

The view of the judge of the lower court seems to have been that, the "near beer" sold being alcoholic to some extent, either thereby the defendant was conducting a business of selling ardent and intoxicating drinks, or, if the drinks being sold by him were not ardent and intoxicating, then the city of Ocilla had the right to require the license fee of \$3,000, regardless of the state exemption, because of the policy adopted by the municipality. We cannot concur in either of these views. As we have already stated, Burch was not violating the terms of his state license, because the "near beer" he sold was, according to the evidence, neither ardent nor intoxicating. If he was selling either ardent or intoxicating drinks, the municipality could neither license him nor punish him for selling without a license; the power to license the sale of such drinks being forbidden by the state under the terms of the prohibition bill, and the right to punish being also reserved by the state.

Upon the proposition that it is the policy of the state to assist in the regulation by municipalities in the imposition of license taxes, this policy must yield to one much more to be respected—that of forbidding the imposition of license taxes upon disabled Confederate soldiers. No policy has been more tenaciously or more properly adhered to in this state than that of extending to Confederate soldiers, with proper qualifications, every possible exemption not forbidden by the Constitution. It is beyond the power of the Legislature to pass an exemption in their favor as to their property tax; but it is within the power of the Legislature,

and the policy of the state, to exempt certain classes of Confederate veterans from all special license taxes. When this general law of the state, the creator, is brought in conflict with the ordinances of a municipality, the creature of the state, the creature must yield and do obedience to the creator.

Judgment reversed.

#### GROW v. STATE. (No. 1,341.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

CRIMINAL LAW (§§ 941, 945\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

"Although newly discovered evidence may tend to establish the truth of a material contention in direct support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witnesses had already testified" (Fellows v. State, 114 Ga. 233, 39 S. E. 885); and when such evidence is adduced from witnesses properly vouched for, and it appears that there was no want of diligence in discovering the new evidence, which may probably cause a different result upon another hearing, to refuse a new trial is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324, 2329; Dec. Dig. §§ 941, 945.\*]

(Syllabus by the Court.)

Error from City Court of Miller County; H. M. Calhoun, Judge.

R. W. Grow was convicted of larceny, and brings error. Reversed.

B. B. Bush and Pottle & Glessner, for plaintiff in error. N. L. Stapleton, Sol., for the State.

RUSSELL, J. R. W. Grow, the plaintiff in error, was convicted in the city court of Miller county of the offense of simple larceny; it being alleged that he stole three rolls of wire fencing of Lyons' make from one L. Cowart, the prosecutor. Upon the trial the prosecutor testified that he lost three rolls of wire fencing, Lyons' make, from a car load of wire which he received during the summer of 1907; that he had hauled a portion of the car load to his father's (A. J. Cowart's) place, and a portion of it to J. G. Powell's store, and left three rolls of it on the railroad right of way near the depot and near J. S. Bush's warehouse; and that he found the three rolls of fencing on the defendant's place on the creek one day while he was hunting for convicts. He knew that J. G. Powell had let the defendant have four rolls of wire from the wire left at Powell's store, and that those four rolls had been paid for. Witness found the four rolls around the defendant's field along the road, and found the other three rolls on the back side of the defendant's place next to the creek. He spoke to the defendant about the matter one day between Fudge's store and the courthouse, and the defendant denied having more than

four rolls. Witness offered to take him out in a buggy and show him that he had seven rolls, instead of four; but he refused to pay for more than four rolls. Witness had been hunting for the wire four or five months before he found it. A. J. Cowart testified for the state that he had not sold the defendant any wire fencing at all, and that he had not authorized him to get the three rolls in question at the depot, as he did not even know that they were at the depot. J. G. Powell testified that he sold the defendant four rolls of fencing and that the defendant paid for it, but he did not sell him the wire fencing at the depot.

In behalf of the defendant his driver testified that he hauled three rolls of wire fencing from the depot for Mr. Grow (the defendant); that Mr. Grow gave him an order, which he carried to Mr. Cowart's store, and Mr. Cowart told him that he had sold all the fencing that he had at the store, but that he had three rolls at the depot, and asked the witness to go by the depot and get it; and that he (the witness) gave the order to Mr. Cowart and got the three rolls of wire from the depot. Another witness testified that Mr. Cowart and Mr. Grow had some words in Mr. Grow's law office about an account for lumber and wire; that Cowart told Grow that he had an order for everything on the account, and Grow claimed to have had a settlement with Cowart last year, and said he thought that he had paid for the wire, but if Cowart would prove that he had not paid for it he would do so. Another witness testified to a similar conversation between Grow and Cowart, in which Grow told Cowart that he did not owe that much for the lumber and thought that he had paid for the fencing; that Grow did not deny having the wire, and said that he would pay for it if Cowart would show that he had not done so. The defendant in his statement to the jury, said that he gave an order to Walter Williams, his driver, for the wire, after having just been to the store of A. J. Cowart, the prosecutor's father and seen some wire there, and after A. J. Cowart had "told me that he would sell it to me \* \* \* and I could send and get it at any time." Defendant further stated that he knew nothing about the wire having been hauled from the depot until the warrant was sworn out, and that when the prosecutor first came to him and asked about the wire he did not remember it, and told him if he got it it had been settled for. Defendant denied ever having said that he did not have seven rolls of wire. He stated that he had bought four rolls of Jesse Powell and paid for it, and after that time sent an order to Cowart's store for three rolls, but he had never heard that the wire came from the depot until the day the warrant was sworn out. He said that he

had never denied having possession of the wire, but he did deny having it hauled from the depot; and he stated, further, that the wire lay for three months or more on his place within a few feet of the public road, and was put up along the public road.

In the first ground of the amended motion for new trial complaint is made that the court erred in refusing to allow the witness Walter Williams to testify that he carried to A. J. Cowart a written order, signed by R. W. Grow, on A. J. Cowart, for three rolls of wire fencing at the depot in Colquitt, Ga., and refused to allow the witness to state the contents of said writing. The court refused to permit this testimony upon the ground that the original writing had not been accounted for. It appears from the record that prior to this ruling Walter Williams had testified that he delivered the order in question to A. J. Cowart, and that A. J. Cowart had instructed him to go to the depot and get the wire fencing there and deliver it to Mr. Grow, and that the witness had gone to the depot and gotten the three rolls of wire and had delivered it on Grow's plantation; that A. J. Cowart testified that he had received no such order from the witness Williams, and that Williams had not delivered him any such order from Grow for wire fencing. It further appeared from the evidence that A. J. Cowart had authority to deliver wire for his son, L. Cowart. We do not know that the refusal of the court to permit the questions to be answered was materially prejudicial to the defendant, for the reason that the witness was permitted to testify to enough to lead the jury to infer that the order was from Grow and related to the three rolls of wire fencing in question, for he testified that he got the order from Grow and delivered it to A. J. Cowart, and that when he did this Cowart told him to go to the depot and get the three rolls of wire fencing. But we think the defendant had sufficiently accounted for the loss of the original to entitle him to prove its contents by secondary evidence. It is true he had not served a subpoena duces tecum upon A. J. Cowart; but, as Cowart had denied ever having received such an order, he had proved that a subpoena duces tecum would have been unavailing, and that he would not have secured the original order by serving such a subpoena upon A. J. Cowart or upon L. Cowart, and it appeared from the testimony of Walter Williams that the order was no longer in his possession.

Upon the motion for new trial the defendant introduced the affidavits of H. S. Sutton and T. W. De Bary, and asked another hearing upon the ground of newly discovered evidence as set forth in said affidavits; and we think a new trial should have been granted upon this ground. The whole issue in the case turned upon the question of intent. That the three rolls of wire fencing described in the accusation and which belonged to

the prosecutor had been taken by the defendant and were in his possession was not denied. The only question was whether he had bought them or had stolen them. The evidence tending to show the defendant's guilt was wholly circumstantial, and necessarily must be sufficient to exclude every other reasonable hypothesis than that the intent of the defendant was to steal. If the defendant sent the order for the wire fencing, and upon that order it was furnished him, he is clearly innocent. If he sent no order, and obtained the wire fencing without the knowledge or consent of the prosecutor, or of either of his agents for the sale of wire fencing, the verdict rendered by the jury might be authorized. Sutton testified, by affidavit, that he saw the order given by the defendant to Walter Williams on A. J. Cowart for the three rolls of wire fencing in dispute, and that he saw the defendant and A. J. Cowart in conversation, and knew it was in reference to said wire fencing. De Bary testified that during the fall of 1907 he had a conversation with Cowart, the prosecutor, in which he tried to purchase the wire fencing from Cowart, and in which conversation Cowart told the affiant that he had three rolls of wire fencing at the depot in Colquitt, but that the same had been sold to Mr. R. W. Grow on the Saturday previously. Sutton further swore that the order which he saw was handed to him by Walter Williams, who came to his place of business inquiring for some screen doors and windows which were being made for said Grow, and that the order was as follows: "Mr. A. J. Cowart: Please send by wagon the three rolls of wire fencing"—that deponent read the order and gave it back to Williams, and told him it was not for the screen doors and windows, but was for wire fencing, and was intended for Mr. Cowart, and that Williams drove off towards the store of Cowart. Sutton also testified that about the 6th of July 1907, he was present at a settlement between Jeff Cowart and Grow, and that they walked out to where some wire fencing was lying, and he could see from the movements of both parties that they were talking about the wire, and that, as deponent and Grow started to get into their buggy to go home, Jeff Cowart told Grow to send for the wire fencing when he got ready for it, as he had it there for sale. We place our judgment on Sutton's affidavit, for De Bary's affidavit was contradicted by an affidavit of L. Cowart, not only denying the conversation to which De Bary testified, but stating that De Bary had taken an active interest in behalf of the defendant and was in conversation with him at the courthouse upon the day of the trial; and the trial judge had the right to use his own preference in determining this conflict. There is however, no contradiction of Sutton's two affidavits. If Sutton had been introduced as a witness, and had testified that he saw the order that Grow sent, in which

"the three rolls of wire fencing" were specifically referred to, and the jury believed the testimony, it would be impossible to convict the defendant, because there would not only be an absolute failure to prove the animus furandi, but, on the contrary, the honesty of purpose in a legitimate transaction of a purchase and sale would be demonstrated beyond question.

Though this evidence may be in some sense impeaching, as related to the testimony of A. J. Cowart, who says he received no such order from Grow, it is not necessarily wholly impeaching. It is a circumstance newly discovered which throws light upon the intent of the accused, regardless of whether the testimony of Mr. Cowart should be impeached or not; for even if Mr. Cowart's testimony be true that Williams never delivered him any such order, still, if Grow gave this order to his agent and directed him to deliver it to Cowart, and obtained the wire fencing upon the order in ignorance of the fact that his driver had not delivered the order, he could not have had any intent to steal. He would have presumed that the order was delivered and that he had purchased the wire fencing in question, and the newly discovered evidence of Sutton is more than cumulative, because the language employed, "the three rolls of wire fencing," indicates a previous bargain in which the three rolls of wire fencing had been separated and identified. As well said by Judge Lewis, in *Fellows v. State*, 114 Ga. 233, 39 S. E. 885: "Although newly discovered evidence may tend to establish the truth of a material contention, in direct support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witness had already testified. Thus, where in a criminal trial the defense was alibi, and the accused introduced witnesses who testified that on the day of the commission of the crime they saw the accused in a county other than that in which it was perpetrated, he being on that day according to the testimony of some of them at one place in the county to which their testimony related, and according to the testimony of others of them at other places therein, and according to the testimony of all too far from the scene of the offense to have been possibly present at the time of its perpetration, newly discovered testimony of still another witness, which placed the accused, in the county where the other witnesses located him on the day in question at a different hour and place from any testified to by them, is not merely cumulative, though it of course tended, like the other testimony, to establish the truth of the defense of alibi."

In the present case testimony was introduced tending to show an intent to buy, and not an intent to steal. But the witness Sutton testifies to two distinct circumstances,

tending like those introduced to establish an innocent intent, but not previously testified to by any witness. It appears that Sutton moved to Albany a short time after the transaction involved in this case, and that ordinary diligence would not have ascertained the facts related by him, and his character for truthfulness and veracity is properly vouched for. The case, upon the point of intent, depends entirely upon circumstantial evidence, from which the guilt of the defendant may gravely be doubted. We therefore think that the court erred in not granting a new trial.

Judgment reversed.

#### WILLIAMS v. STATE. (No. 1,892.)

(Court of Appeals of Georgia. Oct. 28, 1908.)

CRIMINAL LAW (§ 788\*)—TRIAL—INSTRUCTIONS.

Where, in a prosecution for the unlawful sale of whisky, a defendant states that he, as agent for the buyer, procured the whisky in question from a named illegal vendor of liquors, or blind tiger, and the alleged seller is not produced as a witness, the jury should be instructed, upon proper written request therefor, that no witness is required to incriminate himself. The fact that a witness is not compellable to testify against himself may or may not be a sufficient explanation of the absence of such witness in a case in which one who is accused of selling intoxicating liquors relies upon his statement that the intoxicating liquor delivered by him to a purchaser was not in fact sold by him, but was procured by him from another individual, identified and designated by name, and whose existence and present residence are unquestioned.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 788.\*]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

John Williams was convicted of an unlawful sale of intoxicating liquor, and he brings error. Reversed.

This case presents but a single point. The defendant was indicted for the illegal sale of alcoholic, spirituous, malt, and intoxicating liquors. The evidence in behalf of the state conduced to show that he "waited on the boys around town," and two witnesses testified that they had gotten him to get whisky for them; that they would give him the money, and he would go off, and be gone about 20 minutes to a half hour, and maybe longer, and come back with the whisky; that "there are blind tigers around Mountville, and the way the boys usually get whisky is to have some negro like him, who they send for it." Another witness testified that he had known the defendant for a long time and had frequently made him get whisky for him; that the defendant waited on "all the boys around Mountville," carried notes, ran errands, and did anything they wanted him to do, and that when they wanted whis-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



ky they would send him for it; that he had acted "as a sort of flunkiey for all of the white boys around Mountville for long time." The defendant, in his statement to the jury, said that he got the whisky for the witnesses at the time that they had testified to; that he knew where the blind tigers were, and they would send him for it, but that he had never sold any whisky; that he got the whisky from Tom Boddy and Richard Boddy, and that they were in the chain-gang for selling whisky. One of the witnesses for the state testified that Tom and Richard Boddy had been sent to the chain-gang for selling liquor.

It appears from the record that the solicitor, in his argument, insisted that the defendant should have had the two men brought from the chain-gang and made them corroborate his statement to the effect that he purchased liquor from them and that he was not the seller; the argument of the solicitor, as quoted, being: "Why had not the defendant got those two men here? He could have done so, because they are in the power of the state and under its control, and he could have had them here if he had wanted them, to corroborate his statement." In reply to this argument, counsel for defendant requested in writing the following charge: "I charge you, gentlemen, that if the defendant, as he claimed, was only acting as agent for some one else, he could not, by subpoena, force or require the principal to disclose under oath the fact that he sold it to the defendant, for the reason that no man can be required to give evidence against himself."

E. A. Jones, for plaintiff in error. Henry Reeves, Sol., for the State.

RUSSELL, J. (after stating the facts as above). We think the court erred in refusing to deliver the written request of counsel for the plaintiff in error. When the state proved that the defendant took the money and shortly thereafter returned with whisky and delivered it to the purchaser, the presumption arose that the defendant himself was the seller, and a prima facie case of guilt was established. It then devolved upon the defendant to disclose, if he himself was not the seller, who was. He could rebut the presumption raised against him, either by sworn testimony or by his statement alone, if the jury was prepared to believe it. Having stated that he purchased the whisky as agent for the buyers, and that he was not an agent of the sellers, he could corroborate his statement, if he wished, and if it were in his power to so corroborate it, by sworn testimony. When, however, the defendant disclosed the parties from whom he claimed to have bought the whisky, if it was proper for the solicitor to comment on their absence, it was likewise necessary for

the court to instruct the jury the principle which was requested, namely, that no witness is compellable to criminate himself. When an argument is being made which a party or his counsel thinks is improper, he can either object to the argument or by an appropriate request invoke the ruling of the court upon its propriety.

We do not know whether objection was made to the argument, or not, in this case, nor is it material. We think the solicitor had the right to use the language he employed in his argument. But, when the sole issue before the jury was whether they would accept the explanation offered by the defendant in his statement as sufficient to rebut the prima facie case in behalf of the state, and when the argument was being made that the statement of the defendant was probably untrue, because the sellers were not called as witnesses, it was most material to the defendant's rights that the jury should be told that, even if the defendant had procured the presence of the witnesses, they could not be compelled to testify. The request was appropriate and timely. It embodied a principle of law which the jury could and should have considered in connection with the argument that the witnesses were absent. We cannot know what effect the suggestion of the solicitor had upon the minds of the jury; but if, indeed, the absence of the parties that the defendant claimed to be the sellers caused the jury to disbelieve the defendant's statement, it is probable that if the jury had been informed that, even if the witnesses were present, they could not be made to testify, this consideration would have detracted greatly from the weight attached to the circumstance of their absence.

Judgment reversed.

#### HERCULES MFG. CO. v. ROBINSON. (No. 1,242.)

(Court of Appeals of Georgia. Oct. 26, 1908.)  
APPEAL AND ERROR (§ 1005\*)—REVIEW—VERDICT.

This case involves solely a question of fact. The finding of the jury, with the approval of the trial judge, has conclusively settled that, and this court has no jurisdiction to interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3950; Dec. Dig. § 1005.\*]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action between the Hercules Manufacturing Company and J. B. Robinson. From the judgment, the company brings error. Affirmed.

W. G. Harrison, for plaintiff in error. J. W. & Watts Powell, for defendant in error.

POWELL, J. Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

JORDAN, Tax Collector, v. FRANKLIN et al.

(Supreme Court of Georgia. Oct. 14, 1908.)

STATUTES (§ 63\*)—EFFECT OF TOTAL INVALIDITY.

Where, after the passage of the act of 1905 (Acts 1905, p. 425), but before the amending act of 1906 (Acts 1906, p. 61), which made provision to cure the unconstitutional feature of the former act, as ruled in *Brown v. Southern Railway Company*, 125 Ga. 772, 54 S. E. 729, a local election to authorize the levy and collection of an educational tax in a school district was held, being then without constitutional authority, it did not warrant the assessment and collection of such a tax.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 63\*; Constitutional Law, Cent. Dig. § 47.]

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by J. O. Franklin and others against M. K. Jordan, tax collector. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. C. Armistead, for plaintiff in error. O. J. Lester and O. T. Lester, for defendants in error.

LUMPKIN, J. Franklin and others, suing in their own right and in behalf of any other citizens and taxpayers who might come in and be made parties, brought their equitable petition against Jordan, as tax collector of Pike county, to enjoin the collection of certain taxes sought to be levied and collected in the Meansville district for school purposes, under the act of the Legislature approved December 23, 1905. The presiding judge granted an interlocutory injunction, and the defendant excepted.

The election in regard to imposing a local tax in the school district was held after the passage of the act of August 23, 1905 (Acts 1905, p. 425), but before the passage of the act of August 21, 1906 (Acts 1906, p. 61). In *Brown v. Southern Ry. Co.*, 125 Ga. 772, 54 S. E. 729, it was held that the act of 1905 (Acts 1905, p. 425), in so far as it provided for the levying and collection of a local tax by school districts, was unconstitutional. In *Griffin v. Brooks*, 129 Ga. 698, 700, 59 S. E. 902, it was said that an election for local taxation in a school district, held under the act of 1905, became of no avail when that portion of the act was declared unconstitutional, and that, in order to have local district taxation, an election for that purpose would be necessary in accordance with the curative act of 1906. While this may not have been essential to the decision of the case then under consideration, it was followed and directly ruled in the case of *Dolvin v. Lewis*, 131 Ga. 29, 61 S. E. 913. In *Sellers v. Cox*, 127 Ga. 246, 56 S. E. 284, it was suggested that there might be a case of estoppel from contesting the levy and collec-

tion of a tax under a law subsequently found to be unconstitutional; but the actual ruling was that the act then under consideration was unconstitutional, and that the plaintiffs were not estopped. The difference between irregularities in an election under a valid legislative enactment and a case where the provision of the act on which the election was based was unconstitutional and conferred no authority to hold an election, was clearly pointed out. It is unnecessary to discuss whether a case might arise in which parties would be estopped from urging the unconstitutionality of an act of the Legislature. In the case at bar, certainly, no estoppel is shown as against some of the plaintiffs.

The proceeding was on behalf of the plaintiffs and other taxpayers who might join with them. The presiding judge granted the interlocutory injunction, instead of refusing it, as in *Irvin v. Gregory*, 86 Ga. 606, 13 S. E. 120. In the opinion in that case it was also stated that the suit was not brought on behalf of the citizens generally, but for the separate benefit and protection of the plaintiffs, and the failure to advertise was there treated as an irregularity. None of the other grounds urged against the grant of the interlocutory injunction are such as to show it to be erroneous and require a reversal. The views above expressed being controlling in their character, the exceptions taken to rulings in regard to the admission of certain evidence will not be discussed in detail.

Judgment affirmed. All the Justices concur.

SMITH v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia. Oct. 14, 1908.)

1. EVIDENCE (§ 442\*)—PAROL EVIDENCE AFFECTING WRITINGS—RELEASES.

Where one who has suffered a personal injury on a railroad received from the agent of the companies operating such road \$1,750 in settlement, and gave to him a receipt and contract discharging and relinquishing the original company and its lessees from all claims for damages, of every kind, nature, and character, growing out of or incident to such injury, such person could not afterwards repudiate or rescind the contract by alleging that, when the agent obtained it, he agreed that at the time of delivering it to the lessee companies he would obtain from them a writing stating that, if the injuries to the plaintiff proved more than of a merely trivial character, an additional amount in accordance with said injuries would be paid, and that the agent transmitted the receipt and acquittance, but did not obtain the additional paper, as he had promised to do.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 442.\*]

2. EVIDENCE (§ 442\*)—PAROL EVIDENCE AFFECTING WRITINGS—RELEASES.

A parol promise to add terms to a complete written contract is different from an agreement not to deliver a paper except upon the happening of some event; and this case differs from those of *Hansford v. Freeman*, 99 Ga. 376,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

27 S. E. 706, and *Moore v. Farmers' Mutual Ins. Ass'n*, 107 Ga. 199, 33 S. E. 65.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 442.\*]

**3. RELEASE (§ 15\*)—PERSONAL INJURIES—SETTING ASIDE—INCAPACITY TO CONTRACT.**

While the petition contains certain allegations touching the unfitness of the plaintiff to transact business when she made a contract of settlement, on account of personal injuries which she had received, yet, taken as a whole, the allegations show that she understood the situation and the instrument which she was signing, and that she negotiated in parol for an additional stipulation to be afterwards made.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 30; Dec. Dig. § 15.\*]

**4. RELEASE (§ 43\*)—PLEADING—DEMURRER.**

Where the petition discloses that the real cause of complaint was because of an alleged parol promise to supplement a complete written contract, it will not be saved from a demurrer by reason of the allegations in regard to the plaintiff's condition arising from the injury and the medicines administered to alleviate pain, or the insistence of the agent of the railroad company in effecting a settlement.

[Ed. Note.—For other cases, see *Release*, Dec. Dig. § 43.\*]

(Syllabus by the Court.)

Error from Superior Court, Tallahassee County; H. G. Lewis, Judge.

Action by Lola Lou Smith against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Lola Lou Smith brought suit against the Georgia Railroad & Banking Company, alleging in brief as follows: On June 10, 1905, she was a passenger on the railroad of the defendant. The train was composed partly of passenger cars and partly of freight cars. A car in front of the one occupied by her and other passengers was loaded with flour beyond its capacity and safety. It was also old and of defective and worn material. A part of this car broke, obstructing the track, and violently stopping the cars following it. The passengers were thrown from their seats, and the plaintiff was severely injured causing pain and suffering, and also pecuniary loss, which was set out. The effect of the injury was such as to prostrate her for weeks after the accident. It was necessary to administer opiates and anodynes to her to alleviate the pain. The effect of all this was to totally unfit her for the transaction of any business. While she was thus situated, she was approached by the agent of the Louisville & Nashville Railway Company and the Atlantic Coast Line Railway Company, lessees of the defendant company, to settle and arrange her claim for damages. She suggested delay, but he continued to visit her and to insist on a settlement, stating that it was merely temporary, and to pay her for a temporary injury, and if her injury proved permanent, or of a severer nature than was known to her, the payment would be supple-

mented by the company, and this settlement would not prevent such a course or demand, and that he would at once go to Augusta and get the authorities of the lessees to make such an agreement when he delivered her receipt. He did not go to Augusta, but delivered her receipt without obtaining such agreement. She received \$1,750, and gave the lessees a receipt for her claim. "She claims that this was a fraud upon her, and should not prevent her making a freer and reasonable recovery in this suit, and shows that her gross damages by the negligence of said company are \$10,000, and she prays a judgment for said sum, less the \$1,750." Before filing suit she tendered to the lessees the \$1,750 which she had received, with interest, but it was refused. The agent of the company who approached her for a settlement was notified by her nurses and attendants that she was not in a mental and physical condition to attend to any business, but he insisted on an interview or settlement. He stated to her that when he delivered this receipt to the authorities of the lessee companies he would at the same time obtain from them a writing in which it would be stated by them that, if the injuries of the plaintiff proved more than of a merely trivial character, an additional amount in accordance with said injuries would be paid to her. He said that he would not send the agreement by mail, but that he would carry it in person to the authorities, and have them, when he delivered the receipt, give in return a writing to the effect of his agreement. She was induced by said agreement upon the part of the agent "to give him said receipt to transmit to the said lessee companies, to rely upon his return to her of the agreement in writing he was to get from said companies. Plaintiff claims and avers that when said agent undertook, as herein set forth, that the said receipt by its terms and the terms of the agreement was not to be delivered without first obtaining the written agreement from said companies, which he undertook to obtain for her, and hence the delivery of the same was not proper or efficacious. \* \* \* She claims and avers that under said circumstances, and also the promise of said agent, who told her that he came to her not only as the agent of said company but as her friend, it would be unjust and unfair to hold her to said receipt."

The release signed by the plaintiff was as follows: "\$1,750. Atlanta, Ga., July 18, 1905. Received of the Georgia Railroad (under which style the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, as lessees, operate the Georgia Railroad & Banking Company), through W. L. Kendrick, its agent, the sum of seventeen hundred and fifty dollars (\$1,750); and in consideration of said sum I

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hereby acquit, discharge, and release the said Georgia Railroad & Banking Company, the Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company for all claims for damages of every kind, nature, and character, growing out of or incident to personal injuries sustained by me while a passenger of said Georgia Railroad on its Washington Branch, between the stations of Barnett and Sharon, in the derailment of the train known as No. 43, June 10, 1905."

The defendant demurred generally to the petition. The demurrer was sustained, and the plaintiff excepted.

F. H. Colley and Jno. A. Beezley, for plaintiff in error. Jos. B. & Bryan Cumming, Park & Park, and Hawes Cloud, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1, 2. It is a familiar rule that pleadings are to be construed most strongly against the pleader. In one portion of the petition there is a somewhat vague reference in regard to "when said agent undertook, as herein set forth, that the said receipt by its terms and the terms of the agreement was not to be delivered without first obtaining the written agreement from said companies, which he undertook to obtain for her, and hence the delivery of same was not proper or efficacious." But this is not a direct allegation that the relinquishment was not to be delivered except upon a condition. The expression, "when said agent undertook, as herein set forth," etc., makes this entire statement depend on what had been set forth "herein"; and nowhere in the petition was it alleged distinctly that the delivery of the release, or its taking effect, was made conditional upon the obtaining of the counter agreement. There is a clear distinction between giving to a person a paper to be delivered to another upon the fulfillment of some condition, and not otherwise, and the making of a written agreement, with a parol promise to give a counter agreement, changing or modifying its plain terms. In the one case, the theory is that the agreement has never been delivered in the legal sense. In the other, it has been (consummated), but with a parol agreement for the adding of other terms to the contract. An agreement of the latter character violates the rule against changing or supplementing a written agreement, which is complete on its face, by parol evidence. The plaintiff did not allege that the relinquishment was intrusted to the agent to be delivered only in the event of the making and returning to her of an additional written agreement from the other parties, or that if they declined to make such an agreement the relinquishment was not to be delivered at all, or was to be returned to her. The contract was complete on its face, and was a relinquishment on account of all damages sustained by her. She

received a consideration and delivered the paper. She did not allege that she received \$1,750 upon condition that it should be returned if the other parties did not give her a counter agreement. Apparently she received that sum of money absolutely, and gave to the agent the contract of release. The money was hers, and the relinquishment was to be "transmitted" to the other parties, and was delivered to their agent. Construing the petition under the rule to which reference has been made above, there was a complete payment and relinquishment, but the agent of the other parties agreed to get them, when he delivered the release to them, to give her another writing, the effect of which would be to practically annul the relinquishment contained in the instrument signed by her. A petition setting forth such facts was demurrable. Moreover, there was no direct statement that the agent was acting for both parties in regard to the delivery of the receipt or release. He approached her as the agent of the adverse party, for the purpose of making a settlement with her; and, while he said he was her "friend," he was the agent of the other parties, and evidently dealt with her as such. What has been said readily distinguishes this case from *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706, and *Moore v. Farmers' Mutual Ins. Ass'n*, 107 Ga. 190, 33 S. E. 65, and similar cases.

3, 4. The allegations of the petition are insufficient to show a case of fraud or incapacity to contract, which would authorize the setting aside of the written agreement. It is alleged that the plaintiff was prostrated by the injury, that it was necessary to administer opiates and anodynes to her to alleviate the pain, that "the effect of all this was to totally unfit her for the transaction of any business," and that she proposed to delay the settlement, but the agent of the lessees of the defendant urged it. Had the petition stopped with reliance upon a fraudulent taking advantage of her condition, with sufficient allegations of fact as to the fraud or incapacity to contract, there would have been more merit in the effort to set aside the contract; but, when taken as a whole, it is evident that the real trouble is not on account of incapacity on the part of the plaintiff to contract, but because she contends that the agent of the other parties did not comply with a verbal promise made by him in connection with the contract. So far from showing a mental and physical inability to make a trade, if she could enforce the parol promise alleged to have been made to her by the agent, she would have received \$1,750 and have given a receipt and relinquishment specifying that "I hereby acquit, discharge, and release the said Georgia Railroad & Banking Company, the Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company for all claim for damages of every kind, nature, and character growing out of or incident to personal injuries sustain-

ed by me," and yet she would have an agreement in return which would practically nullify the relinquishment of "all claims for damages," and make the payment of \$1,750 only for "trivial" damages, leaving her to get as much more as she could if her injuries proved more than trivial or temporary. Such a trade would certainly indicate no mental incapacity. There is no denial that she knew the contents of the paper signed by her, and understood that on its face it was a complete relinquishment of her claims, or that she was receiving \$1,750 when she signed it. According to her petition, the real trouble was that she made a complete written contract, and now claims to supplement it with a parol promise on the part of the agent of the other parties. Taken as a whole, the petition sets out no such case of incapacity to contract or fraud as would authorize the setting aside of the agreement.

Judgment affirmed. All the Justices concur, except HOLDEN, J., disqualified.

#### BAILEY v. STATE. (No. 1,351.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### CRIMINAL LAW—APPEAL—REVIEW.

No error of law is complained of, and the verdict is supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

Solomon Bailey was convicted of crime, and he brings error. Affirmed.

Kenan & Crawford, for plaintiff in error. N. J. Norman, Sol. Gen., and Edwin A. Cohen, for the State.

HILL, C. J. Judgment affirmed.

#### ORR v. STATE. (No. 1,350.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### 1. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE OR IMPEACHING.

Evidence of one alleged to have been shot, and for the shooting of whom a defendant has been convicted, that he was neither shot nor shot at by the accused at the time and place alleged in the indictment, and in fact that he never had been shot at by any person in his life, is not merely cumulative and impeaching, but goes to the substantial justice of the case; and, where the affiant's character is properly vouched for, such testimony tends to show that the verdict reached was the result of grave mistake or willful perjury, and leads to the conclusion that a different result may be reached on another trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

##### 2. CRIMINAL LAW (§ 939\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

While motions for new trial upon the ground of newly discovered evidence are not to

be favored, and new trials should not be granted because, subsequently to the trial, facts have been ascertained which, in the exercise of ordinary diligence, could have been discovered before the trial, still whether diligence used was ordinary or less than ordinary must be determined in each case by comparing the conduct under consideration with that of the ordinary man under similar circumstances. Ordinary diligence is affected by one's surroundings and attendant circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2318; Dec. Dig. § 939.\*]

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Henry Orr was convicted of shooting another, and he brings error. Reversed.

W. L. Stallings and J. O. Newman, for plaintiff in error. J. R. Terrell, Sol. Gen., for the State.

RUSSELL, J. The defendant in the court below was convicted of shooting at another. He filed a motion for new trial upon general grounds, which was thereafter amended by the addition of a ground insisting upon newly discovered evidence. The motion for new trial was overruled, and he excepted. In the indictment, which was for assault with intent to murder, it was alleged that the defendant shot one Albert Ball with a pistol. Upon the trial witnesses swore that the defendant, Orr, not only shot at Albert Ball three times, and hit him in the leg, but that Ball was shot to the ground. The evidence also showed that Orr and Albert Ball had a personal encounter prior to the shooting, and that Orr also had a difficulty with Robert Ball, a brother of Albert Ball. This was the case on the part of the state. The defendant made a statement to the jury, in which he averred that he never shot at Albert Ball, though he admitted having a difficulty with Robert Ball, and stated that he shot at Robert Ball after Robert shot at him.

If the case rested upon the general grounds alone, the decision of the judge of the superior court in refusing a new trial would have been right. We think, however, that the court erred in not granting a new trial upon the ground of newly discovered evidence. In support of this ground of the motion the movant produced the affidavit of Albert Ball, the person alleged to have been shot, in which he swore that not only had the defendant never shot at him or shot him, but that as a matter of fact he had never been shot at in his life by any one. Two questions are to be considered in the determination of the sufficiency of the newly discovered evidence as presented by the record. In the first place, should the motion have been refused because the newly discovered evidence was merely cumulative and impeaching? Nothing is better settled, of

course, than that in such a case a new trial will not be granted. In the case at bar, however, while the evidence was impeaching, so far as it related to the testimony in behalf of the state delivered upon the trial, it was more than cumulative. If the witnesses had merely sworn that Henry Orr shot at Albert Ball, we might feel considerable reluctance in granting a new trial, because it would be possible for Albert Ball to have been shot at, if he was not hit, without being conscious of the fact; but the testimony in behalf of the state went further, and the witnesses not only swore that Albert Ball was shot at, but they proceeded to particularize by saying he was hit in the leg. When, therefore, the party alleged to have been shot and hit in the leg comes forward and swears he never was hit at all, and that the occurrence of which the state's witnesses testified never transpired, the newly discovered evidence does not come within the class of evidence merely cumulative and impeaching, but goes to the substantial justice of the case. If this testimony is true, the verdict of the jury finding the defendant guilty was either due to a gross mistake or to willful perjury. While courts are always reluctant to grant new trials upon the ground of newly discovered evidence, this ground not being a favorite of the law, still one of the tests to be applied to such evidence (no less than the determination of the question as to whether it is cumulative and impeaching) is whether the newly discovered evidence would likely produce a different result upon another trial. In other words, with evidence before another jury from the person alleged to have been shot that he never had been shot, is it likely that this defendant would be convicted?

It was insisted, however, that the newly discovered evidence did not authorize the grant of a new trial, because it could have been obtained upon the trial by the exercise of ordinary diligence. We concur in the proposition that a motion for new trial based upon the ground of newly discovered evidence should be refused when it appears that by ordinary diligence before the trial the true facts could have been ascertained, and we have had occasion several times to advert to the fact that it is frequently remarkable how much of what could sooner have been ascertained can be discovered by the losing party after a verdict has been rendered against him; but whether ordinary diligence was exercised in a special case is to be determined by the peculiar facts and circumstances of each particular case for itself. What might be ordinary diligence under a certain state of facts might fall far short of it under different circumstances. In every case, the exercise of ordinary diligence or its absence is to be determined by comparing the conduct under consideration with that of an ordinary man under similar

circumstances, and, indeed, in some contingencies, inaction may be the result of circumstances such as would cause every other ordinary man likewise to be inactive. In the present case, no matter how diligent the defendant or his counsel, they could hardly have anticipated that the witness Albert Ball would testify as he has sworn since the trial. Even if the defendant knew, as a matter of fact, that he had never shot at Albert Ball, he would naturally have presumed from the circumstances that Albert Ball was prepared to testify that he had. The indictment alleged that he shot Albert Ball, and one ordinarily would have supposed that Albert Ball would testify to this fact. In reply to the argument that he could have seen Albert Ball in advance of the trial, and have ascertained that Albert would swear to the contrary, we will only say that, while it is proper to ascertain in advance of the trial what each witness intends to testify, still neither law nor the purest ethics encourage too great an intimacy or too frequent private conferences with witnesses subpoenaed by one's antagonist. Measuring the conduct of the defendant and his counsel by what we apprehend would be the conduct of an ordinarily diligent man, we do not doubt that the defendant expected Albert Ball to be present at court, and presumed that he would testify adversely to his interest, instead of in his favor. For this reason we think that the plaintiff in error and his counsel were not precluded by lack of ordinary diligence from having the newly discovered evidence of the person alleged to have been shot considered by another jury.

Judgment reversed.

CONDON v. TOWN OF JESUP. (No. 1,894.)  
(Court of Appeals of Georgia. Oct. 28, 1908.)  
COURTS (§ 190\*)—BOND—VALIDITY.

The act of 1902 (Acts 1902, p. 105) requires in explicit and express terms that one who seeks a writ of certiorari to review and correct the judgment of a municipal court, in the absence of an affidavit in forma pauperis, shall, as a condition precedent to an issuance of the writ, first file with the clerk, or, if no clerk, with the judge of the municipal court, a bond payable to the municipal corporation under which such court exists, approved by said clerk or judge, as the case may be, conditioned for the personal appearance of the plaintiff in certiorari to abide the final judgment of said court or of the superior court in such case. The execution, filing, and approval of such bond must affirmatively appear in the application for the writ before the clerk of the superior court is authorized to issue the same. A bond approved by the judge of a municipal court, although in other respects valid, is not a sufficient compliance with the statutory requirement, where it appears from the record that there was a clerk of the municipal court when the bond was approved by the judge.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.\*]

(Syllabus by the Court.)

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Error from Superior Court, Wayne County; T. A. Parker, Judge.

J. F. Condon was convicted in the mayor's court of the town of Jesup of a violation of an ordinance of that town, and sued out a writ of certiorari. From a judgment dismissing the certiorari, Condon brings error. Affirmed.

Bennet & Conyers and Jas. W. Poppell, for plaintiff in error. Willson, Bennett & Lambdin and D. M. Clark, for defendant in error.

HILL, C. J. Condon was adjudged guilty of violating a municipal ordinance by the mayor's court of the town of Jesup, and he sued out a writ of certiorari to correct error in the judgment. On the hearing of the certiorari the defendant therein moved to dismiss the proceeding because the petitioner had not given bond as required by the act of 1902 (Acts 1902, p. 105). The act provides that "any person who seeks a writ of certiorari to review and correct the judgment of any recorder's court, or of other police court, of any town or city by whatever name known, shall first file with the clerk of said court, or, if no clerk, with the judge of said court, except when the pauper affidavit hereinafter provided for is furnished, a bond payable to the municipal corporation under which such court exists, in amount and security acceptable to and approved by the said clerk or judge, as the case may be, conditioned for the personal appearance of the defendant to abide the final order, judgment, or sentence of said court, or of the superior court, in said case." There was no affidavit in forma pauperis. There was a bond signed by the plaintiff in certiorari and a surety, which appeared to be in all respects in conformity to the statute, supra, except that the bond does not appear to have been filed with or approved by the clerk of the court before the writ of certiorari issued. The record shows that when the judgment was rendered which the certiorari seeks to review, and when the certiorari bond was made, and the writ was issued, the municipal court had a clerk. The certiorari bond was approved by the judge of the court, and not by the clerk.

The terms of the statute are explicit and mandatory, and there is no room for judicial construction. The condition precedent to the issuance of the writ of certiorari, where there is a clerk, is that the party seeking the writ "shall first file with the clerk of said court" an appearance or certiorari bond, in amount and with security acceptable to and approved by the said clerk, etc. Neither the bill of exceptions nor the record shows that this was done before the writ was issued, and it affirmatively appears that the bond was only approved by the judge whose decision was to be reviewed. The judge is

authorized to approve the bond only in the event there is no clerk of the court to do so, and when there is a clerk the approval of the bond by the judge amounts to no approval in law. The reasons for this statutory requirement might be easily suggested, but "ita lex scripta est," and beyond this the court has no concern.

The Supreme Court has frequently decided that a writ of certiorari in a civil case, unless sued out in forma pauperis, is void if the same be issued before the applicant has given the bond required by Civ. Code 1895, § 4639, and that the bond, to render it effectual, must be approved by the judge of the court in which the case was originally tried. *Dykes v. Twiggs County*, 115 Ga. 699, 42 S. E. 36, and cases cited. And that court and this court have held, where the writ was sought in order to correct a judgment of a municipal court, that the requirements of the act of 1902, supra (where there was no pauper affidavit), as to the execution, approval, and filing of the bond, was necessary to give validity to the certiorari proceeding. *McDonald v. Town of Ludowici*, 3 Ga. App. 654, 60 S. E. 337; *Poulos v. City of Atlanta*, 4 Ga. App. 567, 61 S. E. 1128; *Stallworth v. Mayor and Council of Macon*, 125 Ga. 250, 54 S. E. 142; *Johns v. City of Tifton*, 122 Ga. 734, 50 S. E. 941. The statute in this case not having been complied with in the essential indicated, the superior court had no jurisdiction of the certiorari proceeding, except for the purpose of dismissing it, and the judgment is therefore affirmed.

Judgment affirmed.

#### SOUTHERN RY. CO. v. DECKER. (No. 1,098.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

1. TORTS (§ 2\*)—COURTS (§§ 8, 95\*)—DEATH (§ 35\*)—WHAT LAW GOVERNS—COURTS OF DIFFERENT STATES—COMITY—PENAL STATUTES.

The laws in force at the situs of a tort usually determine the civil results of its commission. In suits based on torts committed in other states, the courts of this state will enforce and will be governed by the *lex loci delicti*, subject to the usual exceptions recognized as being applicable in cases involving private international law.

(a) The courts of this state will not enforce a foreign law which is solely penal, or which contravenes the public policy of this state.

(b) The courts of this state, while yielding in the construction of the statutes of another state to the interpretation and effect given by the decisions of the highest courts of that state, will nevertheless determine for themselves whether the statute as construed and applied is penal or violative of the public policy of this state.

(c) The statute of the state of Alabama authorizing a civil action for unlawful homicides, as construed and applied by the Supreme Court of that state, is not penal in the international sense.

(d) A statute is not penal in the international sense merely because it awards only punitive

damages, measuring the amount by the culpability of the wrongdoer.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 2; Dec. Dig. 2\*; Courts, Cent. Dig. §§ 18, 19, 323; Dec. Dig. §§ 8, 95\*; Statutes, Cent. Dig. § 256; Death, Cent. Dig. § 50; Dec. Dig. § 35.\*]

**2. DEATH (§ 35\*)—COURTS (§ 511\*)—STATUTES—COURTS OF DIFFERENT STATES—COMITY—PUBLIC POLICY.**

The statute of the state of Alabama authorizing a civil action for negligent homicides is not violative of the public policy of this state because the measure of damages to be awarded under it is dissimilar to the measure prescribed in like cases by the statutes of this state.

(a) The policy of this state tends toward the preservation of actions beyond the death of the parties; and the courts, therefore, do not hesitate to enforce the statutes of other states and foreign countries substantially similar to the English statute known as "Lord Campbell's Act," though the elements of damage sought to be compensated may be variant from what is deemed adequate or just in this state.

(b) The courts of this state will not exclude Alabama suitors, so long as the courts of that state do not exclude Georgia suitors. Only in this sense is the expression "reciprocity is comity" applicable to causes of action springing from wrongful deaths occurring in Alabama.

(c) It is not competent for any foreign Legislature to prescribe what laws shall be recognized and enforced in the courts of this state, even though the law as to which cognizance is sought to be excluded is a statute of the state whose Legislature seeks to create the exclusion.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35\*; Courts, Cent. Dig. § 1432; Dec. Dig. § 511.\*]

**3. CARRIERS (§ 280\*)—CASE DUE PERSON RIDING ON CONDUCTOR'S INVITATION.**

A railway company owes the duty of exercising ordinary care and diligence to a person gratuitously riding upon a train by consent of the conductor, in the absence of collusion between him and the conductor to defraud the company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1103; Dec. Dig. § 280.\*]

**4. CARRIERS (§ 307\*)—PERMIT TO RIDE ON ENGINE—RELEASE OF LIABILITY—CONSTRUCTION.**

A writing prepared by a person and containing special provisions for his benefit will be most strongly construed against him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1258; Dec. Dig. § 307.\*]

**5. The record is free from error.**

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

Action by M. E. Decker, administratrix of the estate of Nathan E. Decker, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, as the administratrix of her husband, Nathan E. Decker, filed her suit for the homicide of her husband, which occurred in the state of Alabama on April 16, 1907. She recovered a verdict, and the case comes here on exception to the overruling of a motion for new trial filed by the railway company. Upon the trial it appeared that on April 15, 1907,

Decker made application to the Southern Railway Company for employment as a locomotive engineer. He was not employed; but a permit was granted him in the following language: "Birmingham, Ala., April 15, 1907. All Freight Engineers: The bearer, N. E. Decker, desires to enter the service of the Southern Railway Company as engineer on the Atlanta Division, and is hereby authorized to ride on freight engines for the purpose of learning the road and also the duties of an engineer, at his own risk and without expense to the company. Engineers with whom this man rides will see that he is given all opportunity to learn the business, and if they can recommend him as a proper man for employment in this capacity they will sign their names, and from and to what point they ride with him. This order is good for 30 days from date. If this permit is presented after the expiration of same, take it up and return same to my office, with full explanation. Yours truly, N. N. Boyden, Master Mechanic. N. E. Decker, Signature. W. R. Tomlinson, Witness." Under this permit he went upon the engine of a freight train leaving Birmingham for Atlanta, and rode on the engine until Anniston, Ala., was reached. At that point, it having become dark and the night being rainy, the deceased left the engine, and, seeing the conductor in charge of the train, said to him, "I believe I will go back to the cab." The conductor replied, "Very good;" and under this consent the deceased went back and lay down in the cab. Just before the train reached Choccolocco, Ala., it broke in two without attracting the notice of the persons in charge of it. The engineer stopped the front portion of the train at the station, and a few moments later the rear cars and the cab crashed into it, and in the collision Decker's neck was broken. It is not necessary or important to recount the acts of negligence charged, or the evidence offered in proof or in disproof of them. It will be sufficient to say that the jury was authorized to find that there had been a failure in ordinary care and diligence on the part of the defendant, but not that there was any wantonness or gross negligence. Further facts essential to an understanding of the points decided will be stated in the course of the opinion.

McDaniel, Alston & Black, C. E. Battle, Howell Hollis, and Blalock & Culpepper, for plaintiff in error. Reuben R. Arnold, for defendant in error.

POWELL, J. (after stating the facts as above). 1. Initially in the case arises a question of private international law, raised by the contention of the plaintiff in error that the courts of this state will not give juridic recognition and enforcement to the Alabama statute on which this suit is based—section 27 of the Code of Alabama of 1896—which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



is a mere codification of the substantial provisions of a statute enacted by the General Assembly of that state and approved February 5, 1872. As to the identity of this statute and the Code section, see *R. & D. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 802. This statute, as codified above, provides: "A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act or omission or negligence; and the damages recovered are not subject to the payment of debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." The contention is that the courts of this state should not enforce this statute, as construed by the Alabama courts, because it is penal in its nature; is dissimilar in character, principle, and design from any and all the laws of this state, especially in that it authorizes the assessment of punitive damages for mere negligence, without the proof of any actual damages; also because foreign statutes are enforced only through comity, and the laws of Alabama will not permit a nonresident corporation to be sued in its courts for a tort committed in another state; that "reciprocity is comity."

The courts of this state will give to a statute of a sister state the same meaning as is given it by the courts of that state. *Georgia, Fla. & Ala. Ry. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 506 (7b). Nevertheless the courts of this state will decide for themselves whether the statute as construed by the courts of the state of its enactment is in fact penal, in the sense that this term is used as to questions of private international law and the comities arising thereunder, or is contrary to our public policy, and to this end may disregard language employed by the local tribunals in describing the statute, or in designating the nature of the damages that are awarded thereunder. *Huntington v. Attrill*, 146 U. S. 657, 683, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Evey v. Mexican Central R. Co.*, 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387, 393; *Whitlow v. N., C. & St. L. R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 506. The courts of nearly every civilized state or country give force and effect to foreign laws and administer rights arising under them,

not because they are compelled or bound to do so by any superior authority or by any agreement among states or nations, nor yet so much because of comity, as that word is generally used, but because justice and enlightened policy demand that they should do so. *Warrender v. Warrender*, 2 Cl. & Fin. 530; *Minor on Conflict of Laws*, § 4; *Wharton on Conflict of Laws* (2d Ed.) §§ 1a, 2, 3. The same primary principles which demand as the general rule the enforcement of foreign laws, where applicable, also raise certain exceptions. The rules and the exceptions come to the courts of this state as an inheritance from the common law, and we enforce them as such. See *Wharton on Conflict of Laws*, § 1a. See, also, *Civ. Code* 1895, § 9. As exceptions to the general rule, a foreign law will not be enforced if it is penal only, and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries, or if it contravenes our established public policy or the recognized standards of civilization and good morals; and this exception on account of the contravention of public policy of the state is sometimes invoked where the foreign statute is designed to redress an injury, but prescribes a form of redress which is radically dissimilar to anything existing in our own system of jurisprudence. *Wharton*, § 4; *Minor*, §§ 5, 200; *Higgins v. Central Railroad*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

We shall therefore first inquire: Is the statute penal? On its face it is not so. It purports to award damages, and not a penalty. It is hardly supposable that a civilized state would, for the violation of one of its penal statutes, pursue vindication even beyond the death of the lawbreaker and entail punishment upon the innocent distributees of his estate; and yet such would be the case if this statute were held to be penal, for by its terms "such action shall not abate by the death of the defendant, but may be revived against his personal representative." The suggestion that it is penal is prompted mainly by certain expressions that are to be found in the decisions of the Supreme Court of Alabama construing it. For example, in the case of *Savannah R. Co. v. Shearer*, 58 Ala. 672, which arose soon after the passage of the act in question, the court said: "Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury may deem just. The damages are punitive, and they are none the less so, in consequence of the direction the statute gives to the damages when recovered. They are assessed against the railroads to 'prevent homicide.'" This language is repeated and amplified in the case of *S. & N. R. Co. v. Sullivan* (decided at the same term of the same court) 59 Ala. 278; and in substance the same statement has been made in a number of subsequent decisions. However, we find it unnecessary to make a review of these

decisions, or to multiply words in attempting to display their true meaning; for the Supreme Court of Tennessee has handled this very problem with so masterful a touch that we cannot do better than to quote the very language of that court at length.

In the case of *Whitlow v. N. C. & St. L. R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503, it was asserted by the original defendant that the courts of Tennessee should not enforce this Alabama statute for substantially the same reasons here asserted; and Judge Neil, in behalf of the court answers the contention that the statute is penal thus: "It is true that in construing this statute, or a prior one of similar import, the Supreme Court of Alabama has held that it is not necessary to aver that the intestate left a widow, children, or next of kin (*Alabama & F. R. Co. v. Waller*, 48 Ala. 459), and that evidence of loss of services or mere pecuniary loss is immaterial and irrelevant (*Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 800; *Savannah M. & R. Co. v. Shearer*, 58 Ala. 672; *Buckalew v. Tenn. Coal & Iron Co.*, 112 Ala. 146, 20 South. 606; *Ala. G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 South. 913); and that evidence as to age, physical and mental condition, and earning capacity, and occupation of plaintiff's testator or intestate, and that the amount of money contributed by him from his earnings to the support and maintenance of those dependent upon him is immaterial and incompetent (*Louisville & N. R. Co. v. Tegner*, 125 Ala. 593, 28 South. 510). It is also true that the court in several opinions (*Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *South & North Ala. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 800) has referred to the damages to be assessed under the statute as a 'pecuniary mulct'—a 'punishment or fine'—against the wrongdoer, to be distributed by the administrator as personal property. Yet no one can read the foregoing authorities and other decisions of the Supreme Court of Alabama on cases arising under this statute (*Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Memphis & C. R. v. Copeland*, 61 Ala. 376; *Cook v. Central R. & Bkg. Co.*, 67 Ala. 533; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Bentley v. Georgia P. R. Co.*, 86 Ala. 484, 6 South. 37; *Louisville & N. R. Co. v. Black*, 89 Ala. 313, 4 South. 246; *Leak v. Railroad Co.*, 90 Ala. 161, 8 South. 245; *Railroad Co. v. Vaughn*, 93 Ala. 209, 9 South. 468, 30 Am. St. Rep. 50; *Railroad Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Railroad Co. v. Dobbs*, 101 Ala. 219, 12 South. 770; *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Railroad Co. v. Bush*, 122 Ala. 470, 26 South. 168; *Armstrong v. Street Railway Co.*, 123 Ala. 233, 26 South. 349; *Shannon v. Jefferson County*, 125 Ala. 384, 27 South. 977; *Railroad Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Railroad Co. v. Bryan*, 125 Ala. 297, 28 South. 445; *Railroad Co. v. Mitchell*, 134 Ala. 261, 32 South. 735; *Railroad Co. v. Hamilton*, 135 Ala. 343, 33

*South. 157; Railroad Co. v. Shelton*, 136 Ala. 191, 34 South. 194; *Railroad Co. v. Guest*, 136 Ala. 348, 34 South. 968; *Railroad Co. v. Crenshaw*, 136 Ala. 573, 34 South. 913; *Bryant v. Railroad Co.*, 137 Ala. 488, 34 South. 562) as a series, and note the questions that were stated and discussed in them, without being convinced that these cases were ordinary damage suits, brought to recover for a wrongful death inflicted by the defendant upon the intestate or testator of the plaintiff, and for the benefit of the estate of the person so killed; that the only difference, in respect of damages between these suits and others brought to recover for a wrongful death inflicted, as, for example, for the death of an employé (for cases of this character, see *Railroad Co. v. Bridges*, 86 Ala. 449, 5 South. 864, 11 Am. St. Rep. 58; *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77; *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Railroad Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *James v. Railroad Co.*, 92 Ala. 231, 9 South. 335), resides in the fact that, while in the class of cases last referred to the jury are furnished by the court with rules of approximate certainty for measuring the damages, in cases arising under the statute sued on in the present case they are left somewhat at large, with no more certain guide than that they must consider all of the circumstances of the occurrence eventuating in the death complained of, for the purpose of ascertaining and determining the degree or extent of the negligence, if any, of the defendant, and upon such consideration they must assess damages to such amount or in such sum as to them may seem a just retribution for the injury in such manner inflicted, ranging from nominal damages upwards according to or proportioned to the degree of culpability, and, further, that the terms 'mulct' and 'punishment' and 'fine,' used in some of the decisions referred to, do not in these decisions, bear the meaning attached to them in the domain of criminal law, and were not intended to be so understood by the Supreme Court of Alabama."

In the case of *Southern Ry. Co. v. Bush*, 122 Ala. 470, 26 South. 168, the Supreme Court of Alabama had the question before it as to whether the defendant in an action under this statute is exempt from discovery by reason of the constitutional guaranty against compulsory process to compel any one to answer any question the answer to which would tend to incriminate him or expose him to a penalty or forfeiture, and that court decided that the defendant was not exempt from discovery, saying, among other things: "While the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not in a strict sense a penalty; nor is the action penal or quasi criminal, within the meaning of the constitutional provisions as above construed. The statute is remedial, and not penal, and was designed as well to give a

right of action where none existed before as to prevent 'homicide,' and the action given is purely civil in its nature, for the redress of private, and not public, wrongs." In the *Freeman Case*, 97 Ala. 289, 11 South. 800, the statute is held to award punitive damages to the plaintiff, but not to be penal in the sense of vindicating the public justice of the state. In the case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, the Supreme Court of the United States went at length into the discussion of what were penal laws in the private international sense, and by none of the tests there enunciated is the statute before us a penal law. That the damages are punitive does not render the statute which prescribes them penal. As is said in *Minor's Conflict of Laws*, § 198: "With respect to punitive damages, also, if the case is one for which such damages may be given in the discretion of the jury under the *lex delicti*, that law will govern the legal right to demand such damages in another state, unless the *lex fori* should expressly prohibit punitive damages, or the enforcement of the *lex delicti* in this respect would contravene an established policy of the forum. This is a substantive right, not a mere matter of remedy."

2. Is the statute in question repugnant to the public policy of this state; and is the nature of the redress thereby proposed so dissimilar to our own method of remedying like wrongs that we should refuse to enforce it? Just here we find it expedient to quote a few general observations from *Minor's Conflict of Laws*, § 200, as to causes of action arising under enactments similar to the English statute, known as "Lord Campbell's Act," whereby wrongful injuries resulting in death are made actionable. "The view first advanced was that, although the *lex delicti* made the tortious death actionable, it would be of no avail upon an action brought in another state, even though the death was made actionable by the *lex fori* also, because such statutes were to be regarded as penal, or at least as having no extraterritorial force. As more liberal ideas advanced, the next step taken by the courts was to recognize these statutes as remedial, not penal, and to permit actions to be brought in one state for a tortious death resulting in another state and actionable there, provided there was a statute substantially similar in the state of the forum. But, if there were any very marked dissimilarities between the statutes of the two states, this was still taken to indicate that the enforcement of the *lex delicti* was contrary to the policy of the forum, and the right to sue there would be denied. The present tendency of the more recent decisions is to advance still further towards liberality, and to throw open the courts to litigants whose cause of action has arisen in other states and under the laws thereof, even though not actionable at common law, or not actionable if it had arisen in the forum, pro-

vided the enforcement of the *lex delicti* would not seriously contravene the established policy of the forum. The presumption is in favor of the right to sue, and the burden rests upon the party objecting to show that the enforcement of the 'proper law' would be inconsistent with the domestic policy."

Of course, the bringing of an action to recover for negligent homicide is not repugnant to our public policy. We have a statute authorizing it, and our courts daily award damages for that character of wrong. *Civ. Code* 1895, § 3828. Indeed, the case of *Central R. Co. v. Swint*, 73 Ga. 651, was sustained by our Supreme Court under this same Alabama statute, and the case of *Selma, Rome & Dalton R. Co. v. Lacy*, 43 Ga. 461, *Id.*, 49 Ga. 106, was based upon a prior similar enactment of that state. The *O'Shields Case*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152, and the *Chaffin Case*, 84 Ga. 519, 11 S. E. 891, related to Alabama homicides, but were controlled by another statute. Such causes of action were not maintainable at common law, not because the wrong was wholly unrecognized, but because of the maxim that "personal actions die with the person." The present declared policy of this state is to the contrary, and favors the survival of actions beyond the death of parties. *Civ. Code* 1895, §§ 3825, 5035. It is difficult to persuade mankind that to kill a person wrongfully does not damage him. It is a superlative damage. Even the sanctity of a common-law maxim was not sufficient to answer the demand for some redressing of such wrongs; and England and most of the American states have passed statutes recognizing the civil quality of the injury, creating a survivorship, and prescribing remedies for the assessment of damages against the wrongdoer. These enactments vary greatly in detail—naturally so; for how shall that priceless possession, a man's life, which "consisteth not in the abundance of the things which he possesses," be valued in terms of dollars and cents? For an unlawful homicide there can be no conceivable measure of damage which is more than a speculation. Not even an approximation is possible. In the broadest sense the expression "the value of a man's life" is but a figure of speech.

As the will of the lawmaking power in the respective states became fixed upon the proposition that civil damages ensue to persons wrongfully killed, and that a right of action to recover such damages should survive, it became necessary, in order to make this will effective, that legislative ingenuity should find some way of converting the quantum of the injury into denominations of dollars and cents. Adequate redress being beyond human power to give, it is not unnatural that the different intellects who come to deal with the varying phases of those subordinate injuries, of which as the aggregate, the summum delictum of wrongful death consists, one aspect should appeal most strongly to one, and an-

other to another. In some states the Legislatures specified concretely the elements of damage which appealed strongest to them; in others they made provision in general terms for the allowance of damages, and left it to the courts to work out what elements should be considered; and in this event the problem was transferred from the lawmaking power to the judicial. Some saw in the homicide the cutting off of earning capacity, and by taking the expectancy of an average man's life and the developed earning capacity of the particular person, together with such probabilities of increase or diminution therein as they thought reasonable to consider, formulated a rule of damage fairly apt for mathematical calculation, but withal very speculative in essence; for what is more uncertain than the duration of any man's life, or what his earning capacity will be from time to time in the future? If the dead man's estate is to be recompensed only for the net cash loss arising through the taking away of his earning capacity, there should be made in the calculation just referred to a deduction of necessary living expenses, and in some states this is done. It may be seen, however, that such a deduction is not at all necessary from any consideration of justice or accuracy of calculation; for the wrongdoer deprives the victim, not only of the cash increment to his estate through net earnings, but also of that very life which the living expenses would have supported; and the enjoyment of this life itself (apart from affording the necessary condition for the acquiring of net earnings) is, as ordinary humanity values such things, fully worth all its cost in necessary living expenses. Taking this view, the Georgia courts—following the explicit direction of the statute, however—make no deduction on account of the necessary living expenses of the deceased.

In some states (for example, Florida, though the courts there do not reach the result on the theory now about to be expressed) the jury, in assessing damages for the homicide, may take into consideration the loss of the comfort, protection, companionship, and society which the deceased would have afforded his immediate family if he had lived. Though we view the action allowed by the statute purely as a survival of the action which the victim could have instituted if he were not dead, the admission of this element into the measure of damages is nevertheless logically permissible. The deceased may be considered as possessing in his state of being alive the potentialities, not only of acquiring money and property through net earnings and of enjoying a valuable thing in the mere condition of life itself, but also of giving forth something additional—companionship, comfort, and protection. The potentiality for these things is his own, though others may be the necessary beneficiaries of them. The unlawful death

stroke is an invasion of his possession of these valuable potentialities.

As to each and all these elements we have just been discussing it is to be noted that the theory is that, if the wrongdoer had not killed the deceased, the latter would have continued to live, to labor, and to love—throughout some further period of time definite enough of estimate to furnish a legitimate basis for calculation. But why may not the Legislature, or the courts, if they deem best, accept the Calvinistic view that when a man's time has come he dies, and not otherwise, and thus say of an unlawful homicide that the victim had lived out his predestined days and in God's own foreordained will had no further time allotted to him in which to live, to labor, or to love—that the time of his death was the foredoom of God, although the death stroke was the act of the wrongdoer? It boots not that by this doctrine neither wrongdoer nor victim could have done otherwise than they did—the one kill and the other die; for the law may nevertheless adjudge the civil rights and say to the former, "You did a civil wrong to the deceased in killing him under the circumstances," and yet say to the latter "Though you have suffered a civil wrong from the man who killed you, he cut off none of your actual potentialities"—that the whole civil wrong consists in the manner of the homicide and in the spirit in which it was committed. In other words, "it is impossible but that offenses will come, but woe unto him through whom they come."

This brings us to the Alabama rule: The plaintiff cannot prove any so-called expectancy of the deceased as to years of life or earning capacity, nor recover for lost potentialities of companionship or comfort, etc., but may recover a sum, to be assessed by the jury, based solely upon the quality of wrongfulness in the act of the defendant which was the immediate cause of the death. The damages thus assessed are therefore compensatory to the deceased, not for earnings, joys, and comforts which, but for the killing, he might have enjoyed, but for the wrong of being killed in the manner and in the spirit in which his slayer acted. This is not a new view. My neighbor slaps me in the face. He really does not hurt me enough to make that a matter for consideration. I suffer absolutely no financial loss; but I recover heavy punitive damages, based on the spirit in which the assailant acted. As the Alabama Supreme Court said as to this same statute in the case of *Railroad v. Freeman*, 97 Ala. 289, 11 South. 802: "It is clearly within the legislative competency, of course, to punish negligence as it is to punish wantonness, willfulness, or intentional wrongdoing. It is not controverted at all that the common-law doctrine by which the imposition of punishment through a recovery at the suit of an individual of exemplary damages for

wanton, willful, or intentional misconduct is allowed, is well within organic limitations; and we conceive no basis for the distinction between the power to punish in this way for negligence and such power in respect to wantonness and the like."

The courts of this state, especially in the enforcement of private international law, will display no partiality between rival theological bases for legislative or judicial action. As Justice Lumpkin sentimentiously said in the case of *L. & N. R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, "death is unique," and we shall feel it our duty to enforce, where applicable, the varying homicide statutes of our sister states, irrespective of whether the measure of damages recognized by the *lex loci delicti* is superinduced by Arminian or by Calvinistic tendencies.

As to the point that the courts of this state should refuse to enforce the Alabama statute in the present case, because the courts of that state will not enforce our homicide statute under similar circumstances, we may say that we recognize no such limitation on the general rule. The saying, "reciprocity is comity," quoted by counsel from the opinion in *Kyle v. Montgomery*, 73 Ga. 345, is of limited application, as appears from the context in which it appears. While Civ. Code 1895, § 1817, opens the doors of the courts of this state to suitors domiciled in other states so long as the courts of those states accord our citizens the same privilege, this does not require that the courts of the sister states shall afford citizens of this state any remedy additional to what they do their own. In Alabama there is no provision for suing a nonresident corporation upon any foreign cause of action; and this applies as well to citizens of that state as to nonresidents. *Pullman Co. v. Harrison*, 122 Ala. 149, 25 South. 697, 82 Am. St. Rep. 68. It may be true that the courts of Alabama do not enforce the laws of other states as broadly as we do. We have no concern with her policy in this respect, for it can neither broaden nor limit the power of the courts of this state to give effect to what Judge Harris in *Jackson v. Johnson*, 34 Ga. 520, 89 Am. Dec. 263, calls the cardinal rule—"that the laws of every state in force within its own limits ought to have the same force everywhere, so far as they do not prejudice the rights of other states or of their citizens."

By a recent statute, adopted since the present suit was instituted, the Legislature of Alabama has provided that suits under its homicide statutes shall be brought only within the courts of that state. See Code Ala. 1907, § 6115. Even if this statute had been in force at the time the suit was instituted, it would have been the duty of the courts of this state to disregard it. Our own sense of justice, subject to the guidance of the law-making power of this state, determines sole-

ly and alone what laws, domestic or foreign, we will enforce, and this discretion is subject to neither limitation nor extension by the Legislature of any other state.

3. Exception is taken to an instruction to the jury substantially that, if the deceased was riding in the cab by the consent of the conductor, the company owed him the duty of exercising ordinary care and diligence. The insistence of counsel is that the permit quoted in the preceding statement of facts was the deceased's sole authority for being upon the train, and that it allowed him to ride only upon the engine; that when he entered the cab he was a trespasser, and not entitled to demand ordinary care and diligence from the company; that the conductor had no authority to bind the company or to create any higher duty by allowing him to ride in the train. Another exception complains of an instruction that, if the deceased was riding in the cab by the consent of the conductor, the company owed him the duty of ordinary care, "without reference to the mere theoretical question as to whether he was a passenger, an employé, or a mere third person." We will discuss these two exceptions together.

The permit gave the deceased no authority to ride elsewhere than upon the freight engines. This seems plain. His riding upon the cab, therefore, was either upon other authority or without authority. If it was without authority, he was a trespasser; if with authority, he was not a trespasser; and, as the court said, irrespective of what relation he bore, he was entitled to ordinary care and diligence at the hands of the company and its servants. He had the express permission of the conductor to ride in the cab. As to who shall ride upon railroad trains, and upon what terms, the conductor, in the absence of proof to the contrary, has the authority to decide. If he allows persons to ride upon the train, even though gratuitously, the company and its servants must use ordinary care to protect them. The following cases are more or less similar to the one at bar, and from them it is easily deducible that the deceased was not a trespasser: *Higgins v. Cherokee R. Co.*, 73 Ga. 149; *Steamboat Co. v. King*, 18 How. 469, 14 L. Ed. 1019; *Phila. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Washburn v. Nashville R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *Chicago R. Co. v. Michie*, 83 Ill. 427; *Sherman v. Railroad Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Whitehead v. Railroad Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

4. It is contended that the deceased contracted, in accepting the permit, that he would ride at his own risk. The permit in terms relates only to the risk of riding on freight engines. It does not purport to cover any other risk. He was not injured through any risk of riding on the engine. Such writings will not be extended by impli-

cation in favor of the person who issues them. As the Supreme Court said in *Georgia Railroad Co. v. Clarke*, 97 Ga. 707, 25 S. E. 368: "It may be fairly presumed that one who himself writes or prepares a written contract in which he is interested will be sure to use language which he conceives is best adapted to secure to himself the full benefit of everything he could claim under the agreement the writing is intended to evidence. It is therefore allowable and just, at the instance of the opposite party, to scan critically the phraseology employed." See, also, *R. & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *W. & A. R. Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207.

5. After a painstaking review of the whole record, and of the exceptions preserved, we find no reversible error. The verdict is large; indeed, so large in comparison with the apparent culpability of the defendant's agents that we have scanned the record very carefully to see if there was any error of the court superinducing it. But in a juridic sense we are unwilling to say that it is excessive.

Judgment affirmed.

#### GRIFFIN v. STATE. (No. 1,279.)

(Court of Appeals of Georgia. Oct. 26, 1908.)

##### 1. GAMING (§ 98\*)—CRIMINAL PROSECUTIONS—EVIDENCE—SUFFICIENCY.

The possession of either cards or money may authorize the inference that a defendant who was present at an unlawful game of cards was engaged therein; and, upon proof of an unlawful game, he may legally be convicted of participating therein.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 292; Dec. Dig. § 98.\*]

##### 2. CRIMINAL LAW (§ 929\*)—NEW TRIAL—GROUNDS—MISCONDUCT OF WITNESS.

That the prosecutor in a criminal case, without the knowledge of the defendant or his counsel, entered the jury room where the jury were considering the case, and delivered to the jury a pack of cards which had been identified during the trial as having been used by the defendant in the unlawful game in question, but which had not been admitted in evidence by the court, is good ground for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2276; Dec. Dig. § 929.\*]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Tom Griffin was convicted of gaming, and he brings error. Reversed.

Haygood & Cutts, for plaintiff in error. O. H. Elkins, Sol., for the State.

RUSSELL, J. In the court below the defendant was convicted upon an accusation of the offense of gaming. He moved for a new trial upon the general grounds, and also upon the special ground that the prosecutor in the case entered the jury room while they were

considering their verdict, and delivered to the jury a pack of playing cards. While all of the evidence of the defendant's guilt is circumstantial, and the case against him weak, still, under our ruling in the case of *Griffin v. State*, 2 Ga. App. 534, 58 S. E. 781, we cannot say a verdict of guilty was unauthorized by the evidence.

The more serious question in the case is the special ground, from which it appears that the prosecutor went into the jury room and gave them, for use during their deliberations, a pack of playing cards which some of the witnesses had testified was the same pack used by the players in the game in which it was alleged the defendant participated; some of these cards being the cards which witnesses testified they saw the defendant handling and shuffling. According to the record, a pack of cards was identified during the introduction of the testimony; but they were not tendered in evidence or admitted by the court. It is not a case, therefore, where a part of the evidence, which had been properly tendered and admitted, but inadvertently had been left in the courtroom, was thereafter delivered to the jury. But even if the pack of cards had been properly in evidence, and the court had desired them delivered to the jury, the sheriff in the present instance, being the prosecutor, could not act as the officer of the court for this purpose. He was disqualified to act as sheriff during the trial of this case. The jury cannot properly be put in the charge of the sheriff while trying a case in which he is prosecutor.

The testimony in behalf of the movant in support of this ground was that after the jury had been out for some time he saw the prosecutor go into the jury room, where the jury were with the case under consideration, and close the door behind him and remain in the room about 10 minutes. For the state the prosecutor testified: "I opened the jury room door, and walked in and laid the pack of cards on the table in the room, and spoke no words to any one; nor did I make any sign of any kind whatsoever. The table was three or four feet from the door, and I was in the room only so long as it took me to walk to the table, lay the cards down, and walk out." Three of the jurors testified that the sheriff only walked to the table, and laid the cards down, and walked out, and was in there no longer than was necessary for that purpose, and that his presence in the room did not influence their decision. Just as the verdict was about to be published, a bystander informed the defendant's counsel that the prosecutor had been in the jury room.

We think this unauthorized introduction of foreign matter before the jury, and unwarranted interference with their deliberations, on the part of the prosecutor, requires the grant of a new trial. The highest public policy and the maintenance of the purity of

our jury system demand that the verdict of the jury shall not only be untainted by illegal, improper, and prejudicial influences, but even that it shall be above suspicion. Where gross irregularities are shown, the presumption arises that the injured party has been prejudiced thereby, and it devolves upon the party gaining the verdict, at least, to demonstrate unequivocally that it was not in the slightest degree affected by the incident which marred the legal harmony of an orderly trial. We apprehend this to be the rule in civil and criminal cases alike; but certainly, if the rule is to be relaxed in its observance, it is less important where only property rights are concerned than where the liberty of the citizen is involved. As held in *Killen v. Sistrunk*, 7 Ga. 283 (2): "If a paper not in evidence be delivered to the jury by design, by the party in whose favor the verdict is returned, the verdict will be set aside, even if the paper is immaterial." Judge Lumpkin, delivering the opinion in that case, cites the case of *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, and says: "The case of *Sargent v. Roberts* is a strong illustration of the solicitude with which every statement or communication in the jury, not made in open court and in the presence or with the knowledge of the parties or their counsel, is excluded. A new trial was granted because the judge, after the court was adjourned, wrote a letter to the jury, respecting the cause which had been committed to them, which he directed them to bring into court with them, to be filed with the papers, and the substance of which it was admitted, was wholly unexceptionable. The court acted upon the opinion that any communication at all was improper, and that for that reason the party against whom the verdict was, was entitled to a new trial."

In *Walker v. Hunter*, 17 Ga. 364 (4), in which Judge Benning rendered the opinion in behalf of the court, the rule is even more stringently stated, and it is held that "if a paper, calculated to influence the jury in favor of one of the parties, gets before them while considering of their verdict, and they find for that party it is a ground for a new trial." It will be observed that this holding goes to the extent that if a paper gets before the jury, though not even by means of one of the parties, and it is calculated to influence them, a new trial should be granted. The *Walker Case*, like the *Sistrunk Case*, was a civil case. In the *Walker Case*, one Solomon, who was the ordinary, seems to have wished to be sustained in his ruling in setting up the will then in question. In the present case, the prosecutor, who was the sheriff, might have desired, and naturally would have desired, to sustain his testimony.

So far as the regularity of the trial is concerned, to use the words of Judge Benning, "the affair has an ugly look." The crucial

point in the present case was whether the defendant, whom no testimony showed to have had money during the game, had any cards in his hands. The testimony of the prosecutor was that he did have them. Several witnesses testified, in behalf of the defendant, that he had no cards, and did not, at the time in question, participate in any game. What could better impress upon the jury the testimony of the sheriff and prosecutor, contradictory of the evidence in behalf of the defendant, that he had seen the defendant with cards, and that these were the cards; and if, as is usual, the sheriff was reasonably popular with the jurors, what could be more prejudicial to the defendant than this silent recall and emphasis of the sheriff's testimony, by the presentation and deposit of the cards upon the table? Three jurors say that it did not influence their decision. It is significant that no evidence was secured from the remaining jurors who tried the case, and they are not shown to have been inaccessible. The presumption remains that the other nine jurors were affected to the prejudice of the defendant.

Judgment reversed.

#### FROIDEVAUX v. JORDAN et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 6, 1908.)

##### 1. MORTGAGES (§ 33\*) — ABSOLUTE DEED AS MORTGAGE.

A deed absolute on its face will, in equity, be declared to be a mortgage, if a separate sealed and recorded contract between the parties clearly evidences that the deed was, at the inception of the transaction, executed for the forbearance of a loan.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 68-69; Dec. Dig. § 33.\*]

##### 2. MORTGAGES (§ 97\*)—ONCE A MORTGAGE ALWAYS A MORTGAGE.

That which is a mortgage in its inception remains a mortgage, unless changed by a new contract, plainly fair and reasonable, and upon adequate consideration, or unless it is conclusively shown that mortgagor's equity has been waived, rescinded, or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted upon or fully performed by them.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 97.\*]

##### 3. MORTGAGES (§ 384\*)—STRICT FORECLOSURE.

Strict foreclosure of mortgages in rare instances, if at all, prevails in this jurisdiction. The practice is to appoint a day within which the mortgagor may redeem, and to decree a sale of the property for payment of the debt secured in case of default in redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1149; Dec. Dig. § 384.\*]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by T. D. Froidevaux against H. L. Jordan and others. Decree for defendants, and complainant appeals. Reversed and remanded, with directions.

R. L. Blackwood, R. L. Sanders, and Simms, Enslow, Fitzpatrick & Baker, for appellant. McComas & Northcott, for appellee.

ROBINSON, J. A small tract of land belonging to plaintiff, by sale in judicial proceedings, passed to the ownership of one Simpson. Plaintiff arranged to redeem the property. The defendants furnished the money, and Simpson, at plaintiff's direction, conveyed the land to them. A separate written contract between plaintiff and defendants, duly executed under seal, acknowledged, and recorded, expressly states that \$275 of the money so furnished is a loan by defendants to plaintiff, and that the residue of the money furnished is satisfied by the sale of the timber on the land to defendants by plaintiff. The contract shows, also, that plaintiff is to retain possession of the land and pay the taxes thereon. It is specific in limiting defendants to certain rights on the land for cutting and removing said timber. It provides that, if the aforesaid loan and its interest are paid within three years, then the defendants shall execute and deliver to plaintiff a general warranty deed for the land, but if, at the end of the three years, the sum and its interest are not paid, the plaintiff shall vacate the premises. The money not having been paid within the stipulated time, defendants entered into possession of the land. Plaintiff soon thereafter filed his bill against defendants. Its general purposes are to have the deed declared to be only a mortgage for the security of money and to have an accounting for the crops carried away and the rents collected by defendants. It asserts that, notwithstanding that the deed was merely a security for the loan of money, defendants have taken possession of the land and appropriated the issues and profits thereof. The answer completely controverts the case, denying that the deed was to operate only as a mortgage, and alleging that plaintiff voluntarily surrendered possession of the property to defendants and thereby relinquished his rights therein. Depositions were taken and read. Upon the hearing there was dismissal of the bill, and plaintiff has appealed.

Clearly the money involved in the transaction was a loan. The parties, in the inception of the matter, so deemed it and gave it that name. The intention of the parties is plain, and that intention must control in the construction of their dealings. Since the money involved was a loan, we must say that the deed covering it operated only as security therefor. There can be no question that the transaction originally had for its object security for the payment of the money. The context of the writing drawn up between the parties cannot be construed otherwise. That writing states that the money was to be a loan for three years; and for that time, it cannot be gainsaid, the deed operated solely as se-

curity. If it was for that time a mortgage, it must continue to be a mortgage. The forbearance of a debt is expressed in the writing, not the purchase of the property. The principle enunciated in *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583, most fittingly applies in this case: "If, by the intention of the parties, the transaction was originally a security for the payment of money, it will be held in equity to be a mortgage, and the maxim, 'Once a mortgage, always a mortgage,' applies, and it will remain such, unless changed by a new contract upon an adequate consideration, and so reasonable and fair as to relieve it of any suspicion of unconscionable advantage; but if, originally, the transaction was a sale of property with a right of repurchase at the option of the grantor, it is a conditional sale, and no subsequent event short of a new agreement between the parties can convert it into a mortgage." Nowhere in the written papers between the parties, nor in the record of this case, can we find that which even tends to show that originally the transaction consummated a sale of the land with a right of repurchase at the option of grantor. The parties have not denominated it a sale of the property, but call the transaction a loan of money. The grantor remained in possession. Besides, defendants, at one time after the debt was due, admitted that a loan existed, by executing a deed for the property to plaintiff and being willing to receive the money and deliver the deed. The defendants thus recognized an interest on the part of plaintiff in the land. *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367. We think the evidence is clearly, specifically, and decisively to the effect that the deed operated only as a mortgage.

Plaintiff, under the allegations of his bill, had a right in a court of equity to ask that the deed be declared a mortgage and to call for an accounting. Equity, having assumed jurisdiction for these purposes, will go through and enforce all the equities involved. This is the universal rule. *Hogg's Eq. Prin.* § 319. But what are the other equities involved? They pertain, certainly, to both the mortgagor and mortgagee. The former has the right of redemption; the latter, the right of foreclosure upon default of redemption. Long ago, in the Virginias, did we depart from the strict technical import of mortgages, tending more and more to view them in the light of what they really are—mere liens for the security of debts. Only in rare instances and under peculiar circumstances will strict foreclosure be had. In this case it appears that the land is of far greater value than the amount of the debt. "The practice is to decree a sale, and a day of redemption is given; but, if the mortgagor does not avail himself of this privilege, then the land is sold, and the proceeds, after paying the costs of suit and sale, are applied to the payment of the debt and interest, and, if there be any residue, it is paid to the mortgagor."



2 Barton's Ch. Pr. 949; Hogg's Eq. Prin. § 550; 2 Minor's Inst. (2d Ed.) 319.

But it is alleged and maintained on behalf of defendants that plaintiff abandoned his rights, and by parol waived his equity in the property. On this point, however, the evidence is not sufficiently positive to enable us to sanction that position. The case does not come within the rule that "a written contract creating an equitable interest in land may be rescinded, waived, or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted on or fully performed by them." *Jordon v. Katz*, 89 Va. 628, 16 S. E. 866; *Phelps v. Seely*, 22 Grat. (Va.) 573. This rule cannot be applied in the absence of clear and conclusive proof. *Ballard v. Ballard*, 25 W. Va. 470; *Jones on Mortgages*, § 338. It is not conclusively shown that plaintiff's rights were relinquished by him.

The circuit court should have held the deed to be a mortgage, and directed an account to be taken between the parties. Having jurisdiction in these particulars, the court should have gone through and enforced the remaining equities involved. In other words, it should have appointed a day within which to redeem and directed a sale of the property in default of redemption. The decree dismissing the bill is therefore reversed, and the cause remanded, with directions for procedure therein according to the principles herein pronounced, and further according to equity.

#### STATE v. STEVENSON.

(Supreme Court of Appeals of West Virginia.  
Oct. 6, 1908.)

##### 1. JUDGES (§ 24\*)—SPECIAL JUDGE—EFFECT OF APPEARANCE OF REGULAR JUDGE.

It is reversible error for a regular judge, pending the trial of a cause begun and continued before a special judge duly elected to preside in the absence of such regular judge, on making his appearance at the same term, to assume jurisdiction thereof, proceed with the trial, and pronounce judgment therein.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. § 98; Dec. Dig. § 24.\*]

##### 2. CRIMINAL LAW (§ 636\*)—PRESENCE OF DEFENDANT—RECEPTION OF EVIDENCE—CIRCUMSTANCES OF OFFENSE.

It is error, to the prejudice of the prisoner's legal rights, for the court, after receiving a prisoner's plea of guilty of murder in the first degree, and before pronouncing judgment thereon, to proceed in the absence of the prisoner to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court, or to advise him as to the character of judgment that should be pronounced on said plea.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1465-1482; Dec. Dig. § 636.\*]

##### 3. CRIMINAL LAW (§ 274\*)—PLEA OF GUILTY—WITHDRAWAL—DISCRETION OF COURT.

It is a matter addressed to the sound discretion of the trial court, reviewable here for any abuse thereof, whether it will permit a defendant to withdraw his plea of "guilty of murder in the first degree" entered after having withdrawn his former plea of "not guilty," and to plead anew his plea of "not guilty," and have a trial thereon before a jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 633; Dec. Dig. § 274.\*]

(Syllabus by the Court.)

Error to Circuit Court, Mercer County.

Fank Stevenson was indicted for murder in the first degree. He entered a plea of not guilty, which was thereafter withdrawn on his motion and a plea of guilty entered. Subsequently, and before any judgment was pronounced by the special judge who had received the plea, the regular judge appeared and assumed the bench, and proceeded in defendant's absence to hear statements of the special judge as to what the witnesses had testified at the time of entering the plea of guilty, and also to hear the sworn statements of a part of the witnesses summoned. Following this, the court, the regular judge presiding, adjudged defendant guilty of murder in the first degree and sentenced him to be hung, and defendant brings error. Reversed and remanded.

Hugh G. Woods, for plaintiff in error. A. M. Sutton, Atty. Gen., for the State.

MILLER, J. The indictment in the criminal court, returned January 8, 1907, for murder and manslaughter, was in the form prescribed by section 4200, Code 1906, and charged that the defendant on September 21, 1906, "in the said county of Mercer, feloniously, willfully, maliciously, deliberately, and unlawfully did slay, kill, and murder one Mose Blagman, against the peace and dignity of the state." January 12, 1907, the prisoner demurred to the indictment, which being overruled, in his own proper person he entered his plea of not guilty, and issue was joined thereon. January 26, 1907, the case was continued generally to April 8, 1907. The record does not show that anything further was done in the case until July 9, 1907, when, the regular judge having failed to attend, the attorneys present and practicing in said court by ballot elected John M. McGrath judge to preside in the absence of the regular judge, who, after taking the oath prescribed by law to perform faithfully and impartially the duties of said judge of said court so long as he shall continue to act as such, assumed the bench, and proceeded with the business. Whereupon the defendant moved the court to permit him to withdraw his plea of not guilty, which was granted; and, the plea being withdrawn, in his own proper person the defendant entered a plea of "guilty of murder in the first degree in manner and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

form as the state in her said indictment against him hath alleged," and the court took time to consider of its judgment thereon. Subsequently, July 18, 1907, and before any judgment on the defendant's plea of guilty was pronounced by the special judge who had received the plea and taken time to consider of his judgment, Judge Maynard, the regular judge, appeared and assumed the bench, and, as he recites in a bill of exceptions, proceeded in the absence of the prisoner and his counsel, and not in open court, to hear statements of Special Judge McGrath as to what the witnesses had testified at the time of entering the plea of guilty, and also to hear the sworn statements of a part of the witnesses summoned in the case, stating at the same time, however, as further certified in said bill of exceptions, that he had heard the statement of the special judge and of the witnesses examined solely for his personal satisfaction; the judgment pronounced being based solely on the prisoner's plea of guilty, uninfluenced by any statements of the special judge or witnesses examined. Following this proceeding the court August 1, 1907, the regular judge presiding, the prisoner having nothing to say in opposition thereto, adjudged him guilty of murder in the first degree, and that he be taken from the jail of the county to the penitentiary of the state, and there confined until October 25, 1907, when he should be hanged by the neck until he be dead. Immediately after judgment was thus pronounced against him, as shown in said bill of exceptions, the prisoner moved the court to set aside "its sentence and judgment, and to permit him to withdraw his plea of guilty and enter a plea of not guilty, and have his case tried by a jury," which motions, being resisted by the attorney of the state, were overruled, and the action of the court thereon was excepted to by the prisoner. On September 7, 1907, the prisoner presented his petition to the circuit court for a writ of error, but, that court being of the opinion that there was no error, the writ was refused. Whereupon, on presentation of his petition to this court, October 17, 1907, the writ was allowed.

Three questions are here presented for our consideration: First. Was it competent for Judge Maynard, the regular judge, to assume the bench and displace Special Judge McGrath while considering of his judgment on the prisoner's plea of guilty, and proceed to pronounce judgment of conviction and sentence? Second. If competent and having jurisdiction to pronounce judgment, was it error to the prejudice of the prisoner's legal rights for Judge Maynard, in the absence of the prisoner and his counsel, to hear the statement of the special judge, and examine witnesses for his personal satisfaction preliminary to pronouncing judgment of conviction and sentence? Third. Did the court err in overruling the prisoner's motion for leave

to withdraw his plea of guilty, and plead anew his plea of not guilty, and have his case tried by a jury?

With respect to the first question, the record shows that Special Judge McGrath, in the absence of the regular judge, and pursuant to section 3631, Code 1906, was elected to hold the court generally in the absence of the regular judge, and not specially to preside in this particular case. Undoubtedly, therefore, the appearance of Judge Maynard, the regular judge, operated to vacate the office of the special judge, without any order to that effect, as to all business except as to those cases the trial of which was already begun and continued before him. *State v. Carter*, 49 W. Va. 709, 39 S. E. 611; 23 Cyc. 611, 612, 613, and cases cited in notes. How is it as to unfinished business in the hands of such special judge? Does the appearance of the regular judge or the adjournment of the term at which the special judge is elected to preside vacate the office of the special judge entirely? In *State v. Carter*, supra, it is said: "The appearance of the regular judge would vacate the office of the special without an order to that effect, and, if he was again absent on another day, a new election for a special judge would be necessary. \* \* \* When a special judge fails to attend, or, being present, declines to hold court when he should do so, he thereby vacates his office except possibly as to any unfinished business in his hands, and another person may be selected to hold court in lieu of the regular judge then absent. The election of a special judge is merely for the time being, or for the disposition of a particular case or cases." There is in this case the suggestion that the appearance of the regular judge, or the absence of or declination to act of the special judge, would not vacate his office as to such unfinished business. In 23 Cyc. 612, 613, on the authority of the several cases cited in note 58, it is said: "A special judge does not lose jurisdiction to complete the trial of a case because the regular judge returns during the trial and resumes his duties." In *Bohannon v. Tabbin* (Ky.) 76 S. W. 46, 49, one of the cases cited in said note, a special judge was elected to preside, as in this case, in the absence of the regular judge. The court there says: "The fact that the regular judge returned before the case was finally disposed of by the special judge in no wise nullified the jurisdiction of the latter. It would create inextricable confusion if, after a special judge, elected because of the absence of the regular judge, had commenced the trial of a case, his jurisdiction to further try it should be ousted by the return of the regular judge. It needs no argument to demonstrate the hardship and expense to litigants which would arise upon the adoption of such a principle." *State v. Moberly*, 121 Mo. 604, 26 S. W. 364, decided that: "Where a special judge was called in at the request

of the regular judge, and for a time presided in a case, he acquired jurisdiction to try the case, which could not be divested by the regular judge; and the fact that the latter completed the trial is ground for reversal." But on the authority of *Hyllis v. State*, 45 Ark. 478, and our own case of *State v. Carter*, supra, the rule of the cases just quoted is modified by the condition: "Unless the special judge was selected to preside only during the regular judge's absence." Our case, however, will not support such an exception to the general rule, when applied to the trial of a case already begun by a special judge; for, as already stated, it is there indicated that the return of the regular judge would not oust the special judge of jurisdiction to try and finally dispose of any case begun before him. Whether such jurisdiction would end with the term at which such special judge was elected we need not decide, for the question does not arise; all the proceedings here involved having occurred at the same term of the court. We have decided in *Carper v. Cook*, 39 W. Va. 346, 19 S. E. 379, that a special judge so elected retains jurisdiction to sign bills of exceptions in a case tried before him within 30 days after the adjournment of the term. But seeing there must be a reversal of the judgment on other grounds, and as the question will arise in the further proceedings in the case, it is proper, we think, that we should intimate the opinion that the jurisdiction of a special judge elected, not to try any particular case, but to preside only in the absence of the regular judge, does end for all purposes with the adjournment of the term at which he was elected, except as to the matter of signing bills of exceptions in cases tried and finally determined by him. Authorities do hold, however, that such special judge may adjourn the hearing of a case beyond the regular term without losing jurisdiction thereof. 23 Cyc. 612, and cases cited in note 54. The fact that the term of a regular or special judge has ended or expired before a trial begun is completed will not preclude his successor, the regular or a newly elected judge, from trying the case, but he would have to try it *de novo*. 23 Cyc. 565. It is said at the page just cited, on the authority of *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258, and *In re Sullivan*, 143 Cal. 462, 77 Pac. 153, that "a judge who did not hear the evidence cannot render a judgment in a cause notwithstanding the testimony may have been written down and preserved."

In answer to the second inquiry, it is argued that as the prisoner had withdrawn his plea of not guilty after being warned by court and counsel of the effect thereof, and voluntarily entered his plea of guilty of murder in the first degree as charged in the indictment, without offering anything in mitigation of his crime, and as this plea was tendered to the court and not personally to

the special judge presiding at the time, it was perfectly competent for the regular judge on appearing to pronounce the judgment of conviction and sentence complained of without further inquiry as to the facts; the effect of a confession being to supply the want of evidence. In the able and well-considered case of *Green v. Commonwealth*, 12 Allen (Mass.) 155, it was ruled that the plea of guilty of murder in the first degree did have that effect, and, when tendered to single justice, judgment of conviction and sentence, without the intervention of a jury to try the degree of the crime, might be pronounced against him, although without such plea, and, upon a plea of not guilty in a capital crime, the trial could only be had, as provided by statute, before a full court composed of all the judges. The statute of Massachusetts, as does our statute, requires the jury to find the degree of the crime, and it was argued in that case, and decided adversely to the proposition, that as all murder was presumed to be murder in the first degree, the court could not accept the plea of guilty in the first degree; and, as the jury in a trial of the issue on a plea of not guilty were required on the evidence to find the degree of murder, all the court could do was to accept the plea of confession, and impanel a jury to try the degree of the crime. Our statute (section 4584, Code 1906) provides that: "If the accused pleads guilty of murder in the first degree, sentence of death or confinement in the penitentiary for life shall be pronounced upon him by the court, as may seem right, in the same manner and with like effect as if he had been found guilty by the verdict of a jury." There is here given to the court a discretion either to pronounce judgment of death or imprisonment for life, certainly not an arbitrary discretion, but a reasonable discretion, and as may seem right. How is the court to be informed as to the right of the matter? The court's decision of this question is of the most vital importance to the prisoner. With him it is veritably a question of life and death. In this case the court presided over by the special judge had pursued the only practical method known to the law to inform itself as to what judgment should be rendered. It had in the presence of the prisoner examined the witnesses in open court, and the judge had taken further time to consider of the judgment to be pronounced. If such proceeding is necessary to advise the court, it is a part of the trial, and it follows as a necessary corollary that it must take place in the presence of the prisoner; for we have held that the prisoner must be present during the whole of his trial, a constitutional right which cannot be waived or taken away from him by the court. *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791; *State v. Conkle*, 16 W. Va. 736; *State v. Sutfin*, 22 W. Va. 771; *State v. Greer*, Id. 800;

State v. Parsons, 39 W. Va. 464, 19 S. E. 876; State v. Sheppard, 49 W. Va. 582-611, 39 S. E. 676. The statute (section 4567, Code 1906) provides that: "A person indicted for felony shall be personally present during the trial therefor. \* \* \*" And as Judge Brannon says in State v. Parsons, supra: "The great weight of authority is that he must be present when any step affecting him is taken from arraignment to judgment inclusive." If, therefore, as already stated, a judge who did not hear the evidence cannot render a valid judgment in a cause notwithstanding the testimony may have been written down and preserved, or make any findings of fact in a cause tried by his predecessor, upon what principle can we sustain the judgment of conviction and sentence in this case? It is practically conceded by the Attorney General on the authorities cited that the judgment must be reversed on this ground.

As to the third question, the motion of the prisoner to withdraw his plea of guilty, and plead anew his plea of not guilty and have a trial before a jury, no grounds for the motion were assigned. The motion was not made until the prisoner had been advised of the judgment against him upon his plea of guilty. Under such circumstances, he would be quite willing to try his chances again before a jury. But this motion would, at least at that term, have been properly addressed to the special judge engaged in the trial of the case. It is quite likely that the real ground of the prisoner's motion was his surprise at the severity of punishment, or that the special and regular judge should have made some investigation of the aggravating circumstances of his crime. It is no abuse of the discretion of the court, however, to refuse the withdrawal of a plea under such circumstances. 12 Cyc. 350, 351, 352, and cases cited. It is, generally speaking, a matter addressed to the sound discretion of the court, subject to review on writ of error, whether it will allow such a plea to be withdrawn. But in capital cases it is said, in 4 Bl. Comm. 329, "the court is usually very backward in receiving and recording such confessions out of tenderness to the life of the subject, and will generally advise the prisoner to retract it and plead to the indictment." If, therefore, the motion had been properly addressed to the proper trial judge, and overruled, no good ground for the motion appearing, the judgment could not be reversed on that account.

For the reasons assigned, we reverse the judgment of the criminal court, and, entering such judgment as the circuit court should have entered, the case will be remanded to the said criminal court to be therein further proceeded with according to the principles announced and directions given herein.

KAHLE v. PETERS, Mayor, et al.

SCHOEW v. SAME.

(Supreme Court of Appeals of West Virginia. Oct. 6, 1908.)

MUNICIPAL CORPORATIONS (§ 124\*)—COUNCILMEN—QUALIFICATIONS—VALIDITY.

The provisions of section 10 of the charter of the city of Bluefield, requiring, among other things, as a qualification of membership in the council, that "they shall each respectively be the owner of a freehold in said city for at least one year prior to their said election, such ownership to be evidenced by proper deeds of record in the county court clerk's office of Mercer county, West Virginia," and that "before entering upon the duties of their respective offices they shall severally take and subscribe an oath that they possess the above qualifications and are not subject to any of the disqualifications prescribed by this act," do not contravene any of the provisions of sections 1, 4, 5, and 8, art. 4, of the Constitution of this State. (Code 1906, pp. lii-liv), and are therefore constitutional and valid. [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 292; Dec. Dig. § 124.\*]

McWhorter, J., dissenting.

(Syllabus by the Court.)

Separate original applications by James S. Kahle and Karl F. Schoew to compel the mayor and others to restore petitioners to their rights as members-elect of the common council of Bluefield. Petitions denied.

For dissenting opinion, see 62 S. E. 1119.

Jas. H. Gollehon, Wm. E. Ross, and York Coleman, for petitioner. D. E. French, for respondent.

MILLER, J. Section 10 of the charter of the city of Bluefield, among other things, provides: "The mayor, each member of the board of supervisors and each member of the council shall be qualified voters of the city, and each member of the council shall be a qualified voter of the ward from which he is elected. They shall each respectively be inhabitants of said city for at least one year prior to their election, and they shall each respectively be the owner of a freehold in said city for at least one year prior to their said election; such ownership to be evidenced by proper deeds of record in the county court clerk's office of Mercer county, West Virginia. Before entering upon the duties of their respective offices they shall severally take and subscribe an oath that they possess the above qualifications and are not subject to any of the disqualifications prescribed in this act. \* \* \*" The petitioners, Kahle and Schoew, it is conceded were at an election held May 5, 1908, duly elected members of the common council of said city, Kahle from the Fifth Ward and Schoew from the Fourth, each to serve for the term of one year from the 1st day of June following, and were duly declared elected by the common council sitting as a board of canvassers, received from said council certificates of election, took an oath of of-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lice, and assumed their seats as members. Subsequently, upon investigation, it was discovered that the petitioners had not been the owners "of a freehold in said city for at least one year prior to their said election \* \* \* evidenced by proper deeds of record" in Mercer county, as required by said section, and also that the oaths of office taken and subscribed by them, respectively, were not in accordance with the requirements thereof. Accordingly, on June 18, 1907, the petitioners having failed and refused to take and subscribe such oath, it was ordered by resolution of the council that their names "be stricken from the council roll, and that the auditor refrain from calling or recording their votes upon any questions or propositions relative to any business of the council until they had taken the oath of qualification as prescribed by the charter." The petitioners, by their respective petitions, seek by original process of mandamus from this court to be restored to their alleged rights as members-elect of said common council. The return of the defendants to the mandamus nisi admitting the facts is demurred to by petitioners, and the sole question presented is as to the constitutionality of that provision of said section of the municipal charter requiring such freehold qualification.

It is claimed by petitioners that this charter provision contravenes the following provisions of article 4 of the Constitution of this state (Code 1906, p. 111): "(1) The male citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside," etc. "(4) No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office," etc. "(5) Every person elected or appointed to any office, shall, before proceeding to exercise the authority or discharge the duties thereof, make oath or affirmation that he will support the Constitution of the United States and the Constitution of this state, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration or test shall be required as a qualification unless herein otherwise provided." "(8) The Legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the term of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." The proposition which petitioners deduce from these provisions of the Constitution is that section 4 by negation excludes from the privilege of holding office, state, county, or municipal all persons except those made electors by section 1; and, as there is nothing in the form of oath prescribed by section 5 or in the provisions of section 8 authorizing, in terms or by implication, the imposition of any other or additional qualification, the plainly de-

clared intention of the Constitution is that all qualified electors shall be eligible to hold office, and that, therefore, the Legislature was without authority to impose the freehold qualification prescribed by said charter. Said provision is substantially the same as that of section 1853, Code 1906 (section 13, c. 47, Code 1899), relating generally to the incorporation of cities, towns, and villages of less than 2,000 inhabitants, except that no particular time of such holding is prescribed. It is conceded that this court in *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343, decided that the freehold provision of said section 1853 is valid, and unless we overrule it, as we are asked to do, it must control our decision in this case, so far at least as the right of the Legislature to prescribe a freehold qualification is challenged. We have re-examined the opinion in that case. Counsel admit that they have practically nothing new to offer in support of their proposition not already covered by the very able and exhaustive dissenting opinion of Judge Brannon in that case. The whole subject pro and con seems to have been thoroughly considered in that case in the concurring opinions of Judges Dent and Holt and the dissenting opinion of Judge Brannon, and we do not see that we can add to what has been there already said on the subject covered. We are not called upon to say what the court as presently constituted might have decided if the question had been presented to us in the first instance, but, as the provision in question has long been contained in the general law of said section 1853, and similar provisions have been carried into the special charters of many other municipalities before, and since the Constitution was so interpreted as not inhibiting it, and have been acted on as valid and binding provisions, well-recognized rules of practice preclude us from disturbing that decision except for very cogent reasons, and unless satisfied that it was clearly and palpably wrong. Very respectable authority. It is true, has held that the rule of stare decisis has no application to questions of construction of organic laws or the constitutionality of statutes (*Burks v. Hinton*, 77 Va. 1); but certainly such a doctrine, if sound, should not detract from a proper adherence to the rule of practice just alluded to. After a question has been as thoroughly considered and decided as the one disposed of in *State v. McAllister*, supra, some stability should be attached to it, and it should not be overthrown for slight reasons.

But it is said that the petitioners were freeholders at the time of their election, as is admitted, and qualified to fill the office of councilman under said section 1853 of the general law, and, conceding the validity of the provision requiring the property qualification, that the time limit of one year pre-

scribed by said charter, a question not involved or decided in *State v. McAllister*, is unreasonable, unconstitutional, and void. We cannot accede to this proposition. The only proper justification for such property qualification is that it will secure better and more competent public officers, and in whose hands the people may more securely intrust the public business. Being themselves freeholders, possessed of a portion of the very land on which a city is built, and thereby directly interested in and subjected to a share of all the burdens of taxation, it is but reasonable to suppose that better and safer municipal officers will be found among that class of electors than among those not so qualified; and, if such a requirement is justified in the interest of the public good, and freed from constitutional objection, then it follows that any reasonable concomitant requirement as to the time of such holding that will better accomplish the object ought to have equal justification. Such a requirement tends to prevent all temporary shifts of property and doubtful expedients that might be resorted to by persons otherwise disqualified to hold office. We think this additional qualification within the reason of the law of *State v. McAllister*, and controlled by the same principles.

We are therefore of the opinion to deny to the petitioners the aid of the peremptory writ.

McWHORTER, J., dissents. See 62 S. E. 1119.

BRANNON, J. I wish to say that I still hold the opinion expressed in my dissent in *State v. McAllister*; but I do not dissent in this case, but concur, in deference to that case. I have no desire to reopen the question.

#### STATE v. ABBOTT.

(Supreme Court of Appeals of West Virginia.  
Oct. 6, 1908.)

**HOMICIDE (§§ 7, 11, 22, 146, 152\*)—CRIMINAL LAW (§§ 24, 561\*)—MALICE—DEGREE OF MURDER—BURDEN OF PROOF—PRESUMPTION FROM UNLAWFUL ACT—REASONABLE DOUBT.**

A case in which no new principle is involved to be passed upon by this court.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 12, 15, 35-38, 265-271, 283; Dec. Dig. §§ 7, 11, 22, 146, 152\*; *Criminal Law*, Cent. Dig. §§ 26-28; Dec. Dig. §§ 24, 561.\*]

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

John Abbott was convicted of murder in the first degree, and he brings error. Affirmed.

Anderson, Strother & Hughes, for plaintiff in error. R. R. Smith, Atty. Gen., and G. L. Counts, for the State.

McWHORTER, J. This was a prosecution in the criminal court of McDowell county against John Abbott for the murder of Henry Pegram. Upon the trial the jury found him guilty of murder in the first degree, and that he be punished by confinement in the penitentiary. Defendant applied to the circuit court of McDowell county for a writ of error, which was refused, and the defendant then procured a writ of error from this court, making several assignments of error: In overruling the demurrer to the indictment; in admitting improper evidence to go to the jury over the objections of the defendant; in refusing to admit proper evidence on behalf of the defendant; in giving improper instructions to the jury at the request of the state; in refusing to set aside the verdict of the jury and award the defendant a new trial; and in refusing to arrest judgment on said verdict.

As to the demurrer to the indictment the counsel for plaintiff in error make no point in their brief, and the indictment seems to be entirely sufficient under the statute. The demurrer was properly overruled.

There is but one bill of exceptions saved to the defendant in the record which covers all the evidence and the exceptions to the instructions given for the state. While objections to certain parts of the evidence were made by the defendant, many of such objections were sustained, and in a few instances overruled, but no exceptions taken as to the overruling, and no reference made in the brief for defendant complaining of the rulings of the court touching such evidence.

Counsel for defendant seem to rely wholly upon their assignment of error in giving the instructions on behalf of the state, and the fact that the finding of the jury was contrary to the instructions given by the court on behalf of the defendant. The instructions given for the state are as follows:

"No. 1. The court instructs the jury that whoever kills a human being with malice aforethought is guilty of murder. That a murder which is perpetrated by poison, lying in wait, or any other kind of willful, deliberate, and premeditated killing is murder in the first degree.

"No. 2. The court instructs the jury that, where a homicide is proved, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime, and, if the prisoner would reduce it to manslaughter, the burden is on him.

"No. 3. The court instructs the jury that on a charge of murder malice is presumed from the fact of killing. When the killing is proved, and is unaccompanied with circumstances of palliation, the burden of disproving malice is thrown upon the accused.

"No. 4. The court further instructs the jury that, whenever the killing is willful, deliberated, and premeditated, the law infers malice from this fact.

"No. 5. The court instructs the jury that, to convict one of murder, it is not necessary that the malice should exist in the heart of the accused against the deceased. If the accused was guilty of shooting Henry Pegram with a pistol, and of killing him, the intent, malice, and willfulness, deliberation, and premeditation may be inferred from the act, and such malice may not be directed against any particular person, but such as shows a heart regardless of social duty and fatally bent on mischief.

"No. 6. The court instructs the jury that there is no particular period during which it is necessary that malice should have existed, or the prisoner should have contemplated the homicide. If the intent to kill is executed the instant it springs into the mind, the offense is as truly murder as if it had dwelt there for a long period.

"No. 7. The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act.

"No. 8. The court instructs the jury that proof beyond a reasonable doubt is not beyond all possible or imaginary doubt, but a proof to a moral certainty, rather than to an absolute certainty.

"No. 9. The court instructs the jury that a reasonable doubt is not a vague or uncertain doubt, and what the jury believe from the evidence as men they should believe as jurors."

It is contended on behalf of the defendant that, while the state's instruction No. 1 might state a correct rule of law in the abstract, it was not supported by the evidence in the case; that the evidence did not show, nor tend to show, that Abbott killed Pegram with malice aforethought, but, on the contrary, that it showed that the killing was not done willfully, deliberately, and premeditatedly, hence the instruction could not apply to the case. The circumstances of the shooting as related by witness James Boyd, the only person immediately present at the killing, when asked to tell the jury just what he saw, were as follows: "Well, I went out on the back porch where the urinating bowl was on the porch. I was out there making water, and John Abbott came out. He says: 'Stand around a little bit, Jim, please, and let me get there to the bowl. I am about to urinate in my britches.' I gets back out of the way for John to get in. Then the other fellow walks up on this side of him. Q. What other fellow? A. Henry Pegram. He walks up on the right of him, and then I went on back from him and was fixing up my clothes, and I heard John say, 'Don't you piss on that floor,' talking to Pegram: and Pegram he says, 'It is none of your business,'

and John says, 'You will have to pay for it.' And so then I heard John say, 'What are you doing with that pistol?' and, before I could look around, a shot was fired, and, when I looked around, Pegram was falling, and John he passed right on out by me, and went on in the saloon, and the fellow was lying down there, and I went on in the saloon right behind John. John went on in and pulled off his apron, and put on his coat and hat, and I went on in, and he called me in the office, and he said, 'Jim, is that fellow dead?' and I said, 'Yes; he is dead.' And he commenced crying like, and I believe he had a handkerchief in his hand, and he said to me: 'I didn't aim to kill him. I just aimed to hit him.' And he said, 'I wish I had gone away when I intended to,' and got to talking about his wife and child." The defendant himself testified that he went out to the back porch, and, when he first got out there, he saw Pegram, who was not doing anything at the time, but afterwards commenced to urinate on the floor, which witness told him not to do; that Pegram replied that he would urinate where he pleased, and asked what Abbott had to do with it, and then he told Pegram that, if he continued to do so, he would make him pay for it, and when he told him that Pegram run his hand down in his pocket and said: "I will stop you from making me or anybody else pay for it," and he started to run his hand down in his pocket." And witness said: "I had a little pistol in my pocket, and I hit him aside the head with it, and the pistol fired when I struck him." He said he did not cock the pistol. "I did not hit him just with my hand. I hit him with the gun, hand, and all." And on cross-examination: "Q. Did you just thump him with the gun this way? A. No, sir; I just came with the whole side of it in my hand. Q. If you hit him sideways with that gun as you say you did, explain to the jury, then, how the bullet went into his head and went through to the opposite side. A. Well, I don't know. I only know how I hit him." The ball went straight into the head and to the skull on the other side. The jury seems to have been unable to see the reasonableness of defendant's theory that, in striking the deceased with the hand and the pistol on the side of the head, the pistol should fire accidentally, and discharge the ball directly into his head. Counsel for defendant contend that as the defendant testified that the pistol fired without his cocking it, or pulling the trigger, it was the duty of the jury to believe his testimony that it was an accident because it was not directly contradicted by other witnesses. That the pistol was fired from his hand there is no dispute, and his explanation is based upon a very improbable theory, and it was wholly within the province of the jury to believe it or not. The witnesses were before them, and they were to take into consideration as well

the manner and demeanor of the witnesses as the words they uttered. The circumstances connected with the shooting were as much in evidence to be considered by the jury as the verbal testimony of the witnesses. It is said defendant was corroborated by the testimony of witness Boyd. This witness at the time of the shooting had his back to the parties, and did not see it at all; says he heard Abbott say, "What are you doing with that pistol?" and, before I could look around, a shot was fired, and, when I looked around, Pegram was falling, and John passed right on out by me and went on in the saloon, and the fellow was lying down there, and I went on in the saloon right behind John." It would seem that if it had been an accident, as was claimed on the trial, the perpetrator of the act would not have deliberately walked away from the scene, but would have at once tendered his kind offices to render the victim of the accident all aid possible. When one man intends to shoot another, his first thought seems to be to find a plausible pretext to excuse himself. He can construe the slightest motion of his intended victim into an effort to draw a weapon for the purpose of assaulting him, and he may cry out, charging his intended victim with attempting to draw a weapon, that the bystanders may take the impression that his act is done in self-defense, and thus lay a foundation for his defense when brought to answer for his crime. The first instruction for the state is substantially the language of the statute in defining murder in the first degree, and was given in McCue's Case, 103 Va. 870, 49 S. E. 623, and approved by the Court of Appeals of that state.

Instruction No. 2 was given in Cain's Case, 20 W. Va. 679, and approved in Douglass' Case, 28 W. Va. 297, and also in McCue's Case, supra.

Instruction No. 3 was given in the language here used in Hall's Case, 89 Va. 178, 15 S. E. 519, where it is said in the opinion speaking of several instructions, including this one: "These instructions are so obviously correct and in literal conformity with the numerous decisions of the old general court and of this court that no other comment upon the prisoner's exception to the action of the trial court in giving them is necessary"—citing Hill's Case, 2 Grat. (Va.) 594, and Honesty's Case, 81 Va. 283.

The fourth instruction was also given in the McCue Case, above cited, and approved by the Court of Appeals of Virginia.

Instruction No. 5 is the same as one given in the case of State v. Welch, 36 W. Va. 600, 15 S. E. 419, and which is there approved by this court on pages 697 and 698. Also State v. Tucker, 52 W. Va. 420, 44 S. E. 427.

Instruction No. 6 was given in the Welch Case, before cited, and was there held to be

good. See, also, Hall's Case and Douglass' Case, supra.

Instructions Nos. 7 and 9 were both held good in State v. Dickey, 48 W. Va. 325, 37 S. E. 695; and No. 9 was also approved in Bickle's Case, 53 W. Va. 597, 45 S. E. 917. Instruction No. 8 was approved in Ice's Case, 34 W. Va. 244-251, 12 S. E. 695.

So that it appears that all the instructions given at the instance of the state have been approved by the Supreme Court of Virginia or West Virginia, and quite all by the latter. They all propound the law correctly and were properly given.

The defendant asked for and the court gave six several instructions touching all the defenses set up by him, and giving his theory of the case in every phase thereof including accidental shooting, self-defense, the matter of reasonable doubt, etc. It is clear that from the evidence in the case the jury were fully warranted in the verdict they rendered; and, not finding any error in the judgment, the same is affirmed.

STATE ex rel. MAULDIN v. MATTHEWS  
et al.

(Supreme Court of South Carolina. Oct 30, 1908.)

# 1. MANDAMUS (§ 72\*)—WHEN PROPER.

Generally mandamus does not lie to control the judgment or discretion of a public officer, lying only to require performance of a plain ministerial duty; but courts can control officers or official boards vested with discretionary power, when they refuse to perform official duty or so misconceive official power or duty that the purpose of the law will be defeated.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.\*]

# 2. DRUGGISTS (§ 3\*)—LICENSES—STATE BOARD—AUTHORITY.

Under the statute entitling a regular graduate in pharmacy from any reputable college to a license upon payment of a fee, etc., the state board of pharmaceutical examiners has no discretion to refuse a license to such a graduate because in the board's opinion his college does not impose sufficient requirements upon graduates.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 3.\*]

# 3. DRUGGISTS (§ 3\*)—LICENSES—"REPUTABLE COLLEGE."

A "reputable college," within the statute entitling graduates in pharmacy from any "reputable college" to a license, is one of whose character the public, having general acquaintance with the subject, entertain a good opinion.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 3.\*]

Mandamus by the state, on the relation of John M. Mauldin, against O. A. Matthews and others. Writ issued.

W. C. Benet and O. K. Mauldin, for petitioner. Spenscers & Dunlap, for respondents.

WOODS, J. The statute law of the state provides that the board of pharmaceutical



examiners, consisting of six pharmacists elected by the Pharmaceutical Association of the State of South Carolina, "shall alone possess and exercise the powers of granting, withholding or vacating the license of pharmacists, apothecaries and druggists." The statute requires the board to subject every applicant to examination before issuing a license, making, however, an exception in these words: "No examination shall be required in case the applicant is a regular graduate in pharmacy from any reputable college; but such applicant shall be entitled to a license upon furnishing evidence of his graduation satisfactory to the said board and upon payment of the fee of five dollars." At a regular examination appointed by the board, the petitioner, John M. Mauldin, appeared, presented a diploma showing his graduation from the University of Maryland, Department of Pharmacy, otherwise called Maryland College of Pharmacy, and, without claiming the benefit of the exception as to college graduates, offered to take the examination. The board excluded him from the examination on the ground that he had not complied with the board's requirements as to conditions of granting a license that the applicant "had served not less than four years with a druggist or apothecary." Thereafter the petitioner presented his diploma, tendered the fee of \$5, and demanded a license without examination as a regular graduate in pharmacy from a reputable college. His demand having been refused, the petitioner now applies to this court for a writ of mandamus requiring the board to issue to him a license.

The board by its return alleges that it cannot be compelled by mandamus to issue the license because it acted in a judicial capacity in refusing it, on the grounds that the applicant is without sufficient experience and that he does not hold a diploma from a reputable college. The board further alleges that it does not wish to reflect upon the University of Maryland, but it holds it not to be a reputable college, because: "(1) That it does not require, as a prerequisite to receiving its diploma, that the candidate shall have had such practice and experience in drugs, etc., as to make it safe to the public for him to practice pharmacy in the state of South Carolina; and (2) that said college only requires two terms, of six months each, for said candidate to study and receive his diploma, which period and course of study are too short and inadequate to properly fit any person to practice pharmacy."

In *State ex rel. Smith v. Matthews*, 77 S. C. 357, 57 S. E. 1099, it was held the statute confers on the board of examiners the power to determine whether the college from which the applicant graduated is reputable, and that the power involves the exercise of discretion not subject to control or review by mandamus, excepting where it clearly appears the board has failed to exercise reason-

able discretion and has arbitrarily refused a license. The general rule is everywhere recognized that the writ of mandamus will not issue to control the judgment or discretion of a public officer, but only to require the performance of a plain, ministerial duty. *State ex rel. Fouché v. Verner*, 30 S. C. 277, 9 S. E. 113; *State v. Whiteside*, 30 S. C. 579, 9 S. E. 661, 8 L. R. A. 777; *State ex rel. Burnett v. Burnside*, 33 S. C. 276, 11 S. E. 787; *State ex rel. Abbeville County v. McMillan*, 52 S. C. 60, 29 S. E. 540. Whether the courts can control the action of officers or official boards vested with discretionary power when they refuse to act in consequence of a conclusion they have reached which is without any foundation in the facts before them, and therefore, in the view of the court, capricious or arbitrary, is a question of some difficulty. But it must be answered in the affirmative, on principle as well as authority. This was the view indicated, not only in *Smith v. Matthews*, supra, and *Lynah v. Commissioners*, 2 McCord, 170, but by Lord Mansfield in *Rex v. Askew*, 4 Burr. 2186, 16 Eng. R. Cases, 760, where the application was to couple the admission of a physician to practice; and it is in accord with the weight of authority. *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Bradley*, 74 U. S. 364, 19 L. Ed. 214; *Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994; *St. Louis v. Manufacturing Co.*, 139 Mo. 560, 41 S. W. 244, 61 Am. St. 474; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. 249; *Ill. State Board Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201. The courts should exercise, however, the utmost circumspection not to substitute their own discretion for that of the officers or board whose refusal to act is under consideration, and to interfere by mandamus only when the facts so clearly show the duty of the officer or board to act that there is really no room for the exercise of reasonable discretion against the doing of the act which the court is asked to require performed. In other words, the courts should interpose only where it clearly appears that the officer or board refuses to perform official duty or so misconceives official power or duty that the purpose of the law will be defeated.

The practice of pharmacy being a legitimate and useful business, it was clearly not within the legislative intent that any citizen should be excluded from it by the arbitrary will of the board of examiners. The board subjects itself to being held within its duties by mandamus when it so misconceives its duties and power that its exactions amount to imposition on the applicant of terms and conditions not contemplated by the statute. The statute provides that a regular graduate in pharmacy from any reputable college shall be entitled to a license. The evidence is full and conclusive that the Maryland College of Pharmacy is held in high esteem by phy-

sicians and pharmacists. Indeed, we do not understand the respondents seriously to question that this is a fact. But their position is that they believe it unsafe for the public for one to compound drugs who has not had at least four years of such practical experience as service for that period under a druggist or pharmacist would give; that they should not recognize as reputable a college which does not require practical experience in its laboratories or under a pharmacist, either or both together, for a period of four years; that the Maryland College of Pharmacy does not require that period of service under a druggist or in their laboratory, but only two terms of study and laboratory work of eight months each; and, therefore, they cannot recognize that college as reputable. Clearly the respondents, in taking this position, have misconceived their duty and power. It was shown at the hearing that there is ground for difference in opinion among pharmacists and colleges of pharmacy as to the value of four years' service in a drugstore before graduating in pharmacy. The undisputed evidence was that the University of Michigan, Vanderbilt University, Northwestern of Chicago, Cleveland School of Pharmacy, Albany College of Pharmacy, New York College of Pharmacy (Department of Columbia University), and National College of Pharmacy, at Washington, D. C., do not require the four years' service, insisted on by the respondents; their reasons being that the time is better spent in acquiring general knowledge in school or college. Some other colleges of high reputation, like the University of Virginia, still require the four years' practical work.

The question is not whether Maryland College of Pharmacy ought to have all the requirements that the respondents think essential to make a capable pharmacist. The statute does not confer on the board of pharmaceutical examiners the power to exact a college compliance with its own standards. On that point the General Assembly has assumed the responsibility of danger to the public, and has directed that licenses be issued to graduates of reputable colleges—that is, colleges of whose character the public, having general acquaintance with the subject, entertain a good opinion. Maryland College of Pharmacy, being a college of which such good opinion is entertained, is a reputable college. The board of examiners had, therefore, no discretion to refuse to issue the license to the petitioner, who is one of its graduates.

It is therefore ordered that the writ of mandamus do issue requiring the respondents, constituting the board of pharmaceutical examiners, to issue to the petitioner a license as a pharmacist, upon payment by him of a fee of \$5.

## WARREN v. WILLIFORD.

(Supreme Court of North Carolina. Oct. 21, 1908.)

## 1. EJECTMENT (§ 15\*)—PROOF OF TITLE.

Where plaintiff and defendant in ejectment claim title through the same person, defendant claiming by purchase at tax sale, plaintiff need not show title out of the state, but only from such person.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.\*]

## 2. EJECTMENT (§ 12\*)—TITLE TO SUPPORT—MORTGAGE.

As a mortgage puts the legal title in the mortgagee, it is enough to entitle the grantee of the mortgage to recover in ejectment of the mortgagor, or one claiming under him; foreclosure being essential only to cut off the equity of redemption.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 12.\*]

## 3. TAXATION (§ 750\*)—TAX TITLE.

Failure to comply with Laws 1899, p. 88, c. 15, §§ 63, 64, providing that no purchaser at tax sale shall be entitled to a deed unless he shall serve on the person in actual possession, and the person in whose name the land is listed for taxation, three months before expiration of time to redeem, a notice, and shall make affidavit that he has complied with the provisions as to notice, makes such deed void and unavailing against an action of ejectment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.\*]

## 4. DEEDS (§ 82\*)—NECESSITY OF RECORDING TO VEST TITLE.

A deed, though not recorded, vests title from its delivery, as against the grantor and all but his creditors and purchasers from him for value.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 217; Dec. Dig. § 82.\*]

## 5. TAXATION (§ 800\*)—ATTACKING TAX DEED—PAYING TAXES.

One whose tax deed is void because of his noncompliance with the statute as to notice before expiration of time to redeem cannot avail himself, in defense of an action for the land, of Laws 1901, p. 791, c. 553, § 20, intended to protect purchasers at tax sales, and providing that, where a tax deed has been made substantially as required by the statute, no one may question the title acquired thereby without showing that the taxes have been paid by him or the person under whom he claims.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.\*]

Appeal from Superior Court, Sampson County; W. R. Allen, Judge.

Action by G. R. Warren against J. S. Williford. Judgment for plaintiff. Defendant appeals. Affirmed.

This action is prosecuted by plaintiff to recover possession of the land described in the complaint, and to have a tax deed, held by defendant, declared invalid. The plaintiff, by deeds duly recorded, showed title in R. G. Williford. He then showed a mortgage from R. G. Williford and wife to L. J. Best to secure the payment of an indebtedness of \$220; a deed from Best to Tew reciting a consideration of \$250; deed from Tew to plaintiff, dated January 2, 1905. It was

admitted that on February 25, 1905, Best transferred and assigned to plaintiff the mortgage from Williford. Plaintiff instituted an action April 25, 1906, in the superior court of Sampson county against R. G. Williford and wife and J. S. Williford, the present defendant. The purpose of said action was the foreclosure of the mortgage from R. G. Williford to Best, and to cancel a tax deed which the sheriff had executed to defendant, J. S. Williford. At the April term, 1906, defendants, R. G. Williford and wife, having failed to file an answer, plaintiff took judgment by default against them, adjudging a sale of the land, for the purpose of foreclosing the mortgage. F. R. Cooper was appointed commissioner to make sale. Plaintiff introduced a deed from Cooper, commissioner, to him, dated September 31, 1906, duly registered. Plaintiff, for the purpose of attacking and impeaching it, and as estoppel, introduced a tax deed made by J. M. Marshburn to J. S. Williford. This deed was delivered January 19, 1903. Defendant purchased the land at a sale made for the collection of taxes due by R. G. Williford—sale made December 31, 1901. Plaintiff then read in evidence, over defendant's exception and objection, the evidence of defendant taken before the clerk January 14, 1907, upon notice, etc. The material parts of this testimony show that defendant is the brother of R. G. Williford, who left the state during the month of November, 1901. He says: "I wrote my brother R. G. Williford, in Virginia, the latter part of 1902 or the first of 1903, that I had bought the land at the tax sale. I never wrote to any one else about it. \* \* \* L. J. Best tendered me the money that I paid out for the land, about the 1st of April, 1902. He said he would pay the taxes on it if I would tell him how much it was. I told him I did not remember how much it was then. I told him to send the money to the clerk's office, and I would send down the certificate. He never sent the money that I know of. I never published any notice in any newspaper regarding or concerning the purchase of this land at the tax sale. It was generally reported that R. G. Williford left the state about the 1st of November 1901, but I do not know this of my own knowledge." A newspaper was published at Clinton in Sampson county. Defendant says that he never published any notice in that or any other paper, nor posted any notice at the courthouse door, concerning the tax sale or his purchase. He never made any affidavit relating to the sale or the purchase. It appears that at the time of the trial no answer had been filed. It was agreed that the allegations in the complaint should be treated as denied, and that defendant could file his answer thereafter. "It was understood that the title to the land depended upon the validity of the tax deed, but no restriction was placed upon the right of the defendant to set up any defense in

his answer, when filed. The usual issues were submitted without objection regarding the title to the land and amount of taxes paid by defendant. After the trial defendant, among other defenses, set up in his answer the statute of limitations. No issue was tendered or submitted upon that defense." The court explained to the jury that the ownership of the land depended upon the validity of the tax deed, and among other things charged the jury that, if they found from the evidence that the defendant did not file the affidavit (explaining its requirements), provided by sections 63, 64, c. 15, p. 88, Laws 1890, said tax deed was not valid. Defendant excepted. Verdict for plaintiff. Defendant moved for new trial, assigning errors. Motion denied. Defendant appealed.

Geo. E. Butler, for appellant. F. R. Cooper and Faison & Wright, for appellee.

CONNOR, J. The defendant abandons, in his brief, the exception to the introduction of his deposition or examination taken before the clerk. The first exception, therefore, is to his honor's charge that the plaintiff's right to recover depended upon the validity of the tax deed under which defendant claimed title. He says that plaintiff has not shown title out of the state. In view of the pleadings and the chain of title introduced it appears that both plaintiff and defendant claim under R. G. Williford. This, under the well-settled rule of practice, sometimes called an estoppel on the defendant to deny the title of the common source, relieves the plaintiff of showing title out of the state. This rule of practice has been recognized and followed in this state too long to require discussion. In *Love v. Gates*, 20 N. C. 490, Daniel, J., says: "It has been decided in this state that when both parties claim title under the same person, it is not competent to either, as such claimants, to deny that such person had title." In this case defendant claimed under a tax deed. *Whissenhunt v. Jones*, 78 N. C. 361; *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142. The plaintiff, therefore, having shown a chain of title from R. G. Williford, for the purpose of relieving himself of the necessity of showing title out of the state, introduced the deed from the sheriff to defendant, showing that he also claimed under Williford. This is a common and well-settled practice in the trial of actions of ejectment in this state. The defendant is not estopped to show that he has the better title, notwithstanding the deed from the common source. The only effect of the rule is to dispense with the necessity, on the part of plaintiff, of showing a grant, or 30 years' possession, to take title out of the state. The parties are thus brought to issue as to which has the superior title. Plaintiff showed a mortgage from R. G. Williford to Best, thus putting the legal title in him, a deed from Best to Tew, and from Tew to

himself. This would have entitled plaintiff to recover against the mortgagor, or any person claiming under him. The proceeding to foreclose, followed by the sale and deed from Cooper, commissioner, was not essential to plaintiff's legal title. Its only effect was to cut off R. G. Williford's equity of redemption. It is too well settled in this state to require discussion that the mortgagee is the owner of the legal title, and may maintain an action to recover the possession of the land. The plaintiff, having shown the tax deed, unless invalidated by extraneous evidence, put the title in defendant, and he could not recover unless he showed that it was invalid. His honor, therefore, correctly told the jury that plaintiff's right to recover depended upon the validity of the tax deed. This, again, depended upon the effect of defendant's failure, as admitted by himself, to comply with the provisions of sections 63, 64, c. 15, p. 88, Acts 1899, that statute being in force when the sale was made. It is true, as contended by defendant, that the lien for taxes was superior to the mortgage, and if the land was advertised and sold, purchased by defendant, and he complied with the provisions of the statute and took a deed, his title, thus acquired, would be superior to plaintiff's. The only respect in which the deed is attacked is his failure to comply with sections 63, 64, c. 15, p. 88, Laws 1899. These sections provide that "no purchaser of land sold for taxes shall be entitled to a deed for the land" so purchased "until the following conditions shall be complied with." The conditions, upon the performance of which such purchaser shall be entitled to a deed, are that he shall serve upon the person in the actual possession, and also the person in whose name the land is listed for taxation, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption on such sale, a notice containing the information prescribed by the statute. If no one be in possession, and the person in whose name the land was listed for taxation cannot be found, the purchaser is required to publish the notice in some newspaper, etc. Section 64 provides that before he shall be entitled to a deed, such purchaser shall make an affidavit that he has complied with the provisions of section 63. Said affidavit shall be delivered to the sheriff, and by him delivered to the register of deeds, who shall register the same and file it with the records of his office. This court, in *King v. Cooper*, 128 N. C. 350, 38 S. E. 921, held that these "conditions precedent" must be proven outside of the deed, and in the absence of such proof the purchaser acquired no title. There is no presumption that he has done so. *Matthews v. Fry*, 141 N. C. 582, 54 S. E. 379. His honor was manifestly correct in his instruction to the jury. The

defendant not only failed to show that he had complied with the condition precedent, entitling him to a deed, but expressly admitted that he had not done so.

The defendant makes further exception to his honor's charge for that it does not appear that he, or the one under whom he claimed, had title to the property at the time of the sale. Several answers may be made to this. Plaintiff showed a deed from S. W. Williford to R. G. Williford, dated July 16, 1895, and registered December 31, 1904. The land was sold for taxes December 31, 1901. Defendant says that, until the registration of the deed, R. G. Williford had no title. This is a misconception of the registration act. The title vests, as against the grantor and all others, except "creditors and purchasers for value," from the delivery of the deed. We do not think that this case comes within the language of section 20, c. 558, p. 791, Laws 1901. It is true that, construing this section, this court said, in *McMillan v. Hogan*, 129 N. C. 314, 40 S. E. 63: "The taxes due must be paid, which the law requires as a condition precedent to contesting the title carried by the deed by authority of the statute." The defendant, having obtained his deed in violation of the express terms of the statute, acquired no title. As was said by Walker, J., in *Matthews v. Fry*, supra, "as the making of a proper affidavit was a condition precedent to the defendant's right to call for a deed, with which he has not complied, he has not acquired title to the land." The deed was simply void, and defendant was not entitled to avail himself of the provisions of the statute intended to protect purchasers at tax sales. This disposes of the exception in regard to the statute of limitations. The plaintiff, having shown that he held the title of R. G. Williford, was entitled to recover.

The judgment must be affirmed.

MCKOY v. CAPE FEAR LUMBER CO. et al.  
(Supreme Court of North Carolina. Oct. 28, 1908.)

#### TRESPASS (§ 44\*)—PROVING TITLE—COMMON SOURCE.

Where F., the grantor of plaintiff, and plaintiff, claiming land as absolute owners, F. as life tenant, and plaintiff as reversioner and in possession of the premises, conveyed to C., with right to carry away, all the timber trees of certain dimensions on the land, speaking of it as "our" land, and, after F.'s death, C. conveyed its timber rights to defendants, defendants are in under F. and plaintiff, in recognition of their title, unless and until they show a better outstanding title, and connect themselves with it; so that plaintiff, in an action for cutting timber other than conveyed, but on the same land, need not prove title.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 44.\*]

Appeal from Superior Court, Pender County; Neal, Judge.

Action by L. W. McKoy against the Cape Fear Lumber Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

There was evidence tending to show that, under certain deeds from plaintiff, and those under whom he claimed, conveying to defendants the standing timber of certain dimensions, within a given boundary of land, with the right to enter, cut, and remove same, said defendants, or their grantees, had entered and cut the timber on said land not included in their deed or contract, and had wrongfully committed other spoil and injury to said land not contemplated or authorized by said deed. Under the charge of the court the jury rendered the following verdict: "(1) Is the plaintiff the owner of the lands and premises described in the complaint? Ans. Yes. (2) Did the defendant C. W. Mitchell and W. P. Taylor, trading as Mitchell & Taylor, unlawfully and wrongfully cut and remove timber, cross-ties, and wood, and otherwise injure the plaintiff as alleged in the complaint? Ans. Yes. (3) Did the defendant New Hanover Shingle Company unlawfully and wrongfully cut and remove timber, cross-ties, and wood, and otherwise injure the plaintiff as alleged in the complaint? Ans. Yes. (4) What damage is the plaintiff entitled to recover? Ans. \$1,000.00." There was judgment on the verdict for plaintiff, and defendants excepted and appealed.

Meares & Ruark, for appellants. R. G. Grady, E. K. Bryan, and C. E. McCullen, for appellee.

HOKE, J. (after stating the case as above). The objections chiefly urged to the validity of the trial below are for alleged errors in the determination of the first issue—that addressed to the plaintiff's ownership of the land on which the timber was situated. In *Whitaker v. Cawthorne*, 14 N. C. 390, Daniel, J., delivering the opinion, quotes with approval the statement of Blackstone in reference to the term "land": "If a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows." And in determining the ownership of this important species of property it is a rule well recognized with us that, when both parties claim title under the same person, it is not competent for either, as such claimant, to deny that such person had the title. *Fisher v. Mining Co.*, 94 N. C. 397; *Christenburg v. King*, 85 N. C. 230; *Worsley v. Johnson*, 50 N. C. 72; *Register v. Rowell*, 48 N. C. 312; *Johnston v. Watts*, 46 N. C. 228; *Ives v. Sawyer*, 20 N. C. 179. This is not in strictness an application of the doctrine of estoppel, but is a rule established for the convenience of parties in actions of this character, relieving them of the necessity of going back further than the common source, when it is apparent that both parties are acting in recognition of this common source as the true title. Warren

v. Williford (at present term) 62 S. E. 697. In *Christenburg v. King*, supra, Ashe, J., for the court, in speaking of this rule, said: "It is well settled as an inflexible rule that, where both parties claim under the same person, neither of them can deny his right, and then as between them, the elder is the better title, and must prevail. \* \* \* To this rule there is an exception when the defendant can show a better title outstanding, and has acquired it." And, further on in the same opinion: "It must be borne in mind that the general rule applicable to cases like this is not strictly an estoppel, but a rule of justice and convenience, adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back behind the common source, from which he and the defendant derive title, and deducing his title by a chain of mesnes conveyances from the state"—citing *Frey v. Ramsour*, 66 N. C. 466.

There is a class of cases which hold that, when a party having the weaker claim is holding under a grant or deed from the common source, which creates a special interest in the property, or conveys a restricted estate therein, and nothing else appears but the production of such a grant or deed, the rule only applies to the extent of the interest created, or to the amount of the estate conveyed. But this apparent limitation of the rule does not obtain when it is made to appear further that the owner of the common source of title, at the time he created the special interest in the property, or conveyed the particular estate, had a deed for the land which purported to convey to him the fee, or was in the actual possession of the property, claiming to own it. And especially is this true when the common grantor professes in his deed to be the true owner. An instance and illustration of this position will be found in *Worsley v. Johnson*, supra, where it was held: "Where a person made a deed to another, conveying a life estate in an unoccupied lot of land, and such life tenant conveyed the premises in fee simple, it was held that such purchaser is not precluded, by the rule of practice in ejectment, from denying the title of the vendor beyond the life estate conveyed, and the heirs of such vendor can only recover by showing, either that their ancestor had a deed for the land purporting to convey a fee, or that he was in possession of the premises claiming a fee." And this decision is recognized and approved in *Fisher v. Mining Co.*, supra. In such case the question is, did the common grantor profess to be the real owner, and the grantee of a limited estate take in recognition of that claim? Applying this principle to the facts presented, there is no error in the record which gives the defendant any just ground for complaint. It appears that in 1893 one Fred McKoy, the grantor of plaintiff, and plaintiff himself, claiming the property as absolute owners, one as life tenant and the other as reversioner and in possession of same, conveyed to the Cape Fear Lumber

Company the standing timber on the land in question that would measure 10 inches and upwards, with the privilege to enter said land and cut and carry away the timber within 20 years from date, etc. "All the timber trees on our tract of land of the following dimensions" are the words of the instrument describing the interest conveyed. After the execution of this conveyance, to wit, in 1903 and six or seven years after the death of Fred McKoy, the life tenant, and leaving the plaintiff, according to the terms of his own deed, the sole owner of the land, the Cape Fear Company conveyed the property to the other defendants, stipulating that these grantees should cut and sell to said company all the merchantable timber on the land which said grantees did not use, at a certain price per thousand, etc.; that these grantees entered, under this deed of the Cape Fear Lumber Company, and committed the spoil and wrong, and to the amount established against them by the verdict. It will be thus seen that the Cape Fear Lumber Company bought the timber on the land in recognition of Fred McKoy, plaintiff's grantor, and plaintiff himself, as the true owners of the property, and the defendants, having entered under and by virtue of these deeds from the Cape Fear Lumber Company, are also in under Fred McKoy and plaintiff himself, and in recognition of their title, unless and until they can show a better title outstanding, and connect themselves with it.

There is no reversible error in the record, and the judgment below will be affirmed.

Affirmed.

## JONES-LANE CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 28, 1908.)

### 1. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—ACTIONS FOR LOSS—EVIDENCE.

In an action against a carrier for loss of live stock delivered to it for transportation, evidence held sufficient to sustain a finding that an animal was injured while in the possession of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.\*]

### 2. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—ACTIONS FOR INJURIES—EVIDENCE.

Proof that live stock was injured while in the possession and under the care of a carrier for transportation is sufficient to take the case to the jury, and throws on the carrier the burden of showing that it discharged its duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 957; Dec. Dig. § 228.\*]

### 3. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—CONTRACTS—LIMITING LIABILITY—VALIDITY.

A stipulation in a shipping contract that in case of loss or damage the carrier shall not be liable beyond a fixed value agreed on is valid, when fairly entered into, and when the circumstances indicate that the stipulation as to value is reasonable or is based on a valuable

consideration, and is not an evasion of the carrier to escape liability for its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 936; Dec. Dig. § 218.\*]

### 4. CARRIERS (§ 218\*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—VALIDITY.

A shipping contract, which gives to the owner a reduced rate in consideration of his agreeing to a reduced value of the property, which is reasonable and is not entered into on the part of the carrier to evade its liability for its negligence, is valid, where the shipper had the option of paying the full charges fixed by law, without limit as to value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 936; Dec. Dig. § 218.\*]

### 5. CARRIERS (§ 218\*)—CONTRACT OF CARRIAGE—LIMITATION OF LIABILITY—VALIDITY.

A stipulation in a shipping contract that in consideration of a lower rate granted him the shipper will give notice in writing of his claim before the property is removed from the place of destination is reasonable and will be enforced.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 936; Dec. Dig. § 218.\*]

### 6. CARRIERS (§ 218\*)—CONTRACT OF CARRIAGE—STIPULATIONS—APPLICABILITY.

A stipulation in a contract of carriage that in case of loss the shipper will give notice in writing of his claim before the property has been removed from the place of destination will not avail the carrier, where the property was injured while in its custody and before delivery to the shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 218.\*]

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by the Jones-Lane Company against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Civil action for the recovery of the value of one horse and one mule. These issues were submitted to the jury: "(1) Was the horse in controversy delivered to the defendant? A. No. (2) Was the mule in controversy injured while in possession of defendant? A. Yes. (3) If so, was such injury caused by the negligence of the defendant? A. Yes. (4) What damage, if any, is plaintiff entitled to recover? A. \$200." From the judgment rendered the defendant appealed.

Moore & Dunn, for appellant. W. D. McIver and R. A. Nunn, for appellee.

BROWN, J. Plaintiff shipped a car load of horses and mules by defendant's railway to Washington, N. C. The jury have found that one of the mules was injured while in the defendant's possession by its negligence. We deem it necessary to notice only a few of the assignments of error.

1. The court charged the jury, if they believed the evidence, to answer the second issue "Yes." The testimony of defendant's agent at Washington establishes the fact that the car load of stock arrived about noon on January 11th; that the agent "could not find plaintiffs, and procured Winfield (a sta-

ble keeper) to take care of the stock until they came in the next day or two." It appears that the stables of plaintiff are at Bath, a town some miles below Washington. The agent further testifies that, when unloaded from the car, the stock was apparently in good condition. Lane testifies that he reached Washington next morning, and then saw the stock at Winfield's stables. "One mule was dead; looked like he had been trampled and bruised." There is no evidence to the contrary. We have recently held, in *Poythress v. Railroad* (at this term) 62 S. E. 515, that the liability of the carrier (as distinguished from that of a warehouseman) is continued after actual transportation ceases for a reasonable time, during which it remains liable as a carrier for the safety of the property intrusted to it. Upon the principles laid down in the opinion in that case, and under the facts proven by defendant's agent, as well as Lane, the court did not err in the instruction given; for the mule was injured, if injured at all, while in the possession of the defendant. There is no evidence in the record, that we can find, supporting defendant's contention in the brief that the stock was delivered to Winfield at plaintiff's request. It was stabled there on account of the defendant, to give plaintiff an opportunity to come in and receive it and pay the freight charges on it.

2. We find no error in his honor's charge on the third issue. We have held, in the case of *Jones v. A. C. L. Railroad* (at this term) 62 S. E. 521, that where there is proof that the animal was injured while in possession of the carrier a prima facie case of negligence is made out, so as to require the submission of the matter to the jury upon all the facts and circumstances in evidence. The jury are not obliged to find that the carrier is guilty of negligence because the animal is injured while in its possession. The facts and circumstances in evidence may show that the animal was probably injured from other causes than the carrier's neglect of duty, and may cause the jury to exculpate the carrier. But proof of injury received while in the carrier's possession and under its care is sufficient to take the case to the jury, and throws upon the carrier the burden "at least of introducing evidence tending to show that it has discharged its duty." *Meredith v. Railroad*, 137 N. C. 487, 50 S. E. 4.

3. The defendant requested the court to charge the jury "that plaintiff's recovery in this action is limited to the value fixed upon the stock at the time it was offered and delivered for shipment, and if you believe the evidence in this case this valuation was fixed at \$100 per head, and any recovery would be limited to \$100 for each animal which may have been lost or damaged in transit." The court declined to give this instruction, and defendant excepted. The consignor of the stock, acting for the plaintiff,

elected to ship the stock under a bill of lading or shipping contract containing the following clauses:

"St. Louis & San Francisco Railroad Company. Read this contract carefully. Notice. This company has two rates on live stock. Shippers of live stock will take notice that rates of freight and the extent of liability of the company are governed by the valuation which they place thereon. Rates of freight are on file, and will be shown by agent on application.

"To the St. Louis & San Francisco Railroad Co.: The undersigned offers for shipment over your road 25 head of horses and mules from Ft. Scott, Kan., to Washington, N. C., each head of the estimated weight of \_\_\_\_\_ pounds, and valued at \$100 per head, which valuation is named by me for the purpose of securing a reduced rate of freight on this shipment; and I agree that, in case of loss or damage to same, said valuation so named shall be conclusive, should I make any claim for such loss or damage against any carrier over whose line the same may pass. This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations.

"Erwin Piper Horse & Mule Company.

"Witness: E. E. Walker.

"The St. Louis & San Francisco Railroad Co. accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon.

"St. Louis & San Francisco Railroad Co.,

"By E. E. Sx. W. Agent.

"Note.—The rates of freight on live stock are fixed in view of the nature and extent of liability assumed by the carrier, and all kinds of live stock shipped in car lots under a contract similar to the following, limiting the liability of the carrier, are taken at reduced rates. All kinds of live stock will be taken at carrier's risk, if the shipper so elects, at rates provided by the existing tariffs, classifications, and under the provisions and conditions relating thereto; and in either event no agent of this company has any power to bind it in any way, in regard to the shipment of live stock, except by written contract."

We have recognized the doctrine, held by nearly all the courts of this country, that a stipulation in a shipping contract that in case of loss or damage the carrier shall not be liable beyond a fixed value, agreed upon, is valid, when freely and fairly entered upon, and when the circumstances indicate that the stipulation as to value is reasonable, or based upon a valuable consideration, and is not an obvious evasion of the law upon the part of the carrier, for the purpose of escaping in large measure liability for the consequences of its negligence. This doctrine is clearly recognized by this court in *Mitchell*

v. Railroad, 124 N. C. 236, 32 S. E. 871, 44 L. R. A. 515, in *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 328, in *Selby v. Railroad*, 118 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635, and in *Everett v. Railroad*, 138 N. C. 74, 50 S. E. 557, 1 L. R. A. (N. S.) 985. In the *Gardner Case* the law is summarized as follows: "A common carrier can make a valid agreement, fixing the value of shipments in case of loss by its negligence, if such agreement be reasonable, or based upon a valuable consideration, and it must clearly appear that such was the intention of the parties." In the *Everett Case* the contract was not upheld, as it was unreasonable, and was a plain attempt to escape practically all liability, as the property lost through the carrier's negligence was worth \$250, and the valuation fixed upon in the bill of lading was only \$30. Nevertheless the opinion of the court refers to contracts of the character of the one now under consideration and recognizes their validity. Page 74 of 138 N. C., page 557 of 50 S. E. (1 L. R. A. [N. S.] 985). The same observation can be made as to the *Minnesota case*, frequently cited upon the question of the limited liability of carriers upon special contract. In that case it is said: "Yet there is no reason why the contracting parties may not in good faith agree upon the value of property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized." *Moulton v. Railroad*, 31 Minn. 89, 16 N. W. 498, 47 Am. Rep. 781. This statement of the law is sustained by text-writers, as well as by innumerable adjudications in the federal and state courts. *Moore on Carriers*, p. 349, § 31; *Hutchison on Carriers*, § 426, and note 42, where the cases from the federal courts and 21 state courts are collected.

In this case there is no evidence whatever of a purpose upon the part of the carrier to evade liability for its own negligence. On the contrary, the manifest purpose is to agree upon, in good faith, a stipulated value for a species of property of very uncertain value, and concerning which, in case of loss, the carrier would be without evidence, and consequently entirely at the mercy of the shipper. The contract of shipment gave the owner reduced rates, which is a valuable consideration, and at the same time gave him the option to pay the full charges fixed by law without limit as to value. The shipper voluntarily chose the former, and he cannot now be allowed to repudiate his contract. That the agreed valuation per capita is reasonable, and is not an evasion, is manifest. In fact, it appears from the bill of sale of

the stock that some animals are valued lower than the stipulated sum; one horse being valued as low as \$80. We are of opinion that his honor erred in refusing the prayer for instruction.

4. It was agreed in this contract of shipment, in addition to the limited value clause, that in consideration of the rate granted him, as a condition precedent to his right to recover, the consignee would give notice in writing of his claim to some officer of said company or its nearest station agent before the said stock was removed from the place of destination or mingled with other stock. This provision of the contract is inserted for the protection of the carrier, to the end that when the stock has been delivered to the consignee at the place of destination, if there is any injury or damage, the carrier may have an opportunity for examination before the stock is removed or mingled with other stock. It is a reasonable and just provision, intended to prevent fraud and imposition, and which has been distinctly upheld and enforced by this court in *Selby v. Railroad*, 118 N. C. 594, 18 S. E. 88, 37 Am. St. Rep. 635. We do not think, however, that it will avail the defendant under the facts of this case; for the animal, if injured at all, was injured while in the custody of the defendant and before delivery to the plaintiff.

Let the judgment of the superior court upon the fourth issue be set aside, and the cause remanded to that court, with direction to enter judgment upon the other findings for the stipulated value of \$100.

Error.

HOKE, J. (concurring). It is the settled law of this state that, in the absence of legislative sanction, a common carrier, in its contract of shipment, cannot stipulate against recovery for a loss or damage occasioned by its own negligence; and it can make no such stipulation as to either a total or partial loss. Speaking to this question, in *Everett v. Railroad*, 138 N. C. 71, 50 S. E. 558, 1 L. R. A. (N. S.) 985, the court said: "It is the law of this state, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. *Capehart v. Railroad*, 81 N. C. 438, 31 Am. Rep. 505; *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 328. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation, which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden." In the



rare and exceptional cases when a carrier is allowed, on recovery had for breach of contract of carriage of certain classes of goods, to limit the amount of such recovery to a value fixed and predetermined by the contract of shipment, the rule is, I think, correctly stated in *Everett's Case*, as follows: "Such agreements are upheld where, the carrier being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate." This rule is particularly applicable to shipments of stock in quantities, and eminently just to both parties to such contracts, affording to the shipper a fair and reasonable shipping rate, and protecting the carrier from exorbitant and unconscionable recoveries by reason of excessive valuations, which it had no opportunity to ascertain or to resist successfully, and for which it has received no adequate compensation. But to permit or uphold such a contract, when the loss arises from negligence, all the conditions suggested must exist. The carrier must be without knowledge or notice of the true value, the valuation must be the fair average valuation of property of like kind, and it must have been made the basis of a fair and reasonable shipping rate.

The rule, as stated, is given only by way of suggestion in *Everett's Case*, *supra*, but is, I think, the principle to be deduced from many well-considered authorities on the subject, both decisions and approved text-writers, some of them referred to in the opinion delivered in that case—among others, *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 323. In my judgment the second headnote of *Gardner's Case*, cited with approval in the principal opinion, as follows: "(2) A common carrier can make a valid agreement, fixing the value of shipments, in case of loss by its negligence, if such agreement be reasonable, or based on a valuable consideration, and it must clearly appear that such was the intention of the parties"—is not a correct digest of the decision rendered by the court, nor does it correctly express the rule applicable to the case now considered. In the opinion the court thus refers to the question immediately under discussion: "It is a well-settled rule of law, practically of universal acceptance that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. Mit-

chell v. Railroad Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 322, 6 Sup. Ct. 750, 29 L. Ed. 873; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 415, 10 Sup. Ct. 365, 33 L. Ed. 730; *Constable v. Steamship Co.*, 154 U. S. 51, 62, 14 Sup. Ct. 1062, 38 L. Ed. 903. The measure of such liability is necessarily the amount of the loss; and if a common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for only a small part of the loss—it is thereby exempted pro tanto from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts and nullify the settled policy of the law. We do not mean to say that there are no cases where a common carrier can make a valid agreement as to the value of the article shipped, but all such agreements must be reasonable, and based upon a valuable consideration. Moreover, it must clearly appear that such was the intention of the parties"—citing case of *Hinkle v. Railroad*, 126 N. C. 932, 938, 36 S. E. 348, 78 Am. St. Rep. 685.

It will thus be seen that the decision in *Gardner's Case* was against the claim of exemption from liability for loss occasioned by the carrier's negligence, and that this second headnote, stated by the reporter as one of the points decided in that case, was only made by way of suggestion, and should not be considered as authority for the position stated. On the contrary, it will appear, by careful examination of the authorities referred to and others relevant to the subject, that the learned justice had in mind contracts made by carriers against their common-law liability as insurers, an entirely different proposition, and his statement of such a proposition, in reference to stipulations against negligence, is inaccurate and to some extent misleading. See *Hinkle v. Railroad*, *supra*; *Capehart v. Railway*, 81 N. C. 438, 31 Am. Rep. 505.

The present case comes clearly within the rule stated in *Everett's Case*, *supra*, and I therefore concur in the decision made, but have deemed it not improper to write a separate opinion, with a view of showing that the second headnote in *Gardner's Case* is not a correct digest of that decision, and should not be considered as the law applicable to contracts of this character.

## SEEGAR v. STOVALL.

(Supreme Court of Georgia. Nov. 11, 1908.)

## REVIEW ON APPEAL.

No error of law being complained of, and there being sufficient evidence to support the verdict, a new trial is refused.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action between L. K. Seegar, administratrix, and M. A. Stovall. From the judgment, Seegar brings error. Affirmed.

H. J. Brewster and Cobb & Erwin, for plaintiff in error. Geo. C. Grogan, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., disqualified.

## DILLARD v. STATE.

(Supreme Court of Georgia. Nov. 11, 1908.)

## 1. SUFFICIENCY OF EVIDENCE.

The verdict was supported by the evidence.

## 2. HOMICIDE (§ 319\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where, in a criminal case, one ground of a motion for new trial was based on newly discovered evidence of a witness who would testify to facts in conflict with evidence introduced by the state, and in his affidavit in support of the ground the movant showed that he knew of the presence of the witness at the scene of the homicide, and that the witness had seen the difficulty, but that movant had forgotten his name and did not know of his whereabouts until he was informed thereof on the day when he made the affidavit in support of the motion, there was no error in overruling the motion based on such ground.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 687; Dec. Dig. § 319.\*]

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

George Dillard was convicted of a crime, and he brings error. Affirmed.

R. N. Holtzclaw and Nottingham & McClellan, for plaintiff in error. John P. Ross, Wm. Brunson, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

## MORMAND v. CARLISLE.

(Supreme Court of Georgia. Nov. 11, 1908.)

## 1. INJUNCTION (§ 231\*)—VIOLATION—REVIEW OF JUDGMENT OF CONTEMPT.

A judgment rendered by a judge of the superior court against the contemnor on a hearing in a proceeding for contempt for the alleged violation of a decree for injunction will not be

disturbed by the Supreme Court, when there is evidence to warrant such judgment.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 517; Dec. Dig. § 231.\*]

## 2. SUFFICIENCY OF EVIDENCE.

The judgment rendered in this case was amply supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between E. T. Mormand and R. M. Carlisle. From the judgment, Mormand brings error. Affirmed.

L. D. Moore, for plaintiff in error. Hall & Hall, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

## SCHRECK v. BLUN et al.

(Supreme Court of Georgia. Nov. 11, 1908.)

## 1. EASEMENTS (§ 17\*)—WAY—SALE OF PLATTED LAND—ESTOPPEL.

Where a grantor sells a lot of land, and in his deed describes the land as bounded by a street or way not expressly defined in the deed, but shown upon a plat therein referred to, as laid out over the grantor's land, he is estopped to deny the grantee's right to the use of the street or way as delineated on such plat.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 46, 47; Dec. Dig. § 17.\*]

## 2. EASEMENTS (§ 17\*)—WAY—SALE OF PLATTED LAND—ESTOPPEL.

The grantee's right to the use of the entire street or way delineated on the plat is not affected by the fact that at the time of the grant the grantor was maintaining a gate thereon. The grantor being seised and possessed of the whole premises, including the street or way, there was nothing in the appearance of things upon the premises inconsistent with the terms of his deed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 46, 47; Dec. Dig. § 17.\*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by V. G. Schreck against Henry Blun and others. Judgment for defendants, and plaintiff brings error. Reversed.

This controversy is between two adjacent land proprietors over a certain passageway between their respective tracts. The plaintiff, V. G. Schreck, owns a part of the Champion Falligant land. The origin and nature of the controversy will appear from the following statement: Champion G. Falligant at the time of his death was seised and possessed of a parcel of land located within the corporate limits of the city of Savannah, known as a part of the "Springfield Plantation." Immediately south of this tract, and adjoining it, but without the city limits, is a tract known as the "Wayne land," of which latter tract the subdivision lots 1, 3, 5, 7, 9, and 11 belong to Henry Blun. In 1894 the Falligant land was partitioned among his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

heirs, and one of the lots was assigned to Ruth M. Canty. In 1901 Ruth M. Canty sold and conveyed to Henry Blun the land awarded to her in the partition proceedings, and described in her deed as follows: "All that certain lot, tract, or parcel of land situate, lying and being in the city of Savannah, county of Chatham and state of Georgia, containing three and sixteen one-hundredths ( $3\frac{16}{100}$ ) acres, and known on the map of said city as a portion of lot number forty-four (44) Springfield Plantation, the said portion hereby conveyed being bounded on the north by a portion of said lot number forty-four (44) conveyed by the said Ruth M. Canty, October 31st, 1899, to the Georgia Construction Company, on the east by lot number forty-five (45) Springfield Plantation, on the south by Gwinnett street extended, and on the west by the portion of said lot number forty-four (44) awarded in the partition proceedings above mentioned to the said Ruth M. Falligant, now the said Ruth M. Canty, and the children of the said Champion G. Falligant as heirs at law of the said Champion G. Falligant, all of which will more fully appear by reference to the map attached to the award of the appraisers in the partition proceedings above mentioned, and also to the plat of said property hereto attached." This deed was recorded in 1901.

Upon the attached plat was delineated the whole Falligant property, with the different subdivisions, showing an extension of Gwinnett street 60 feet in width, a short distance beyond the Falligant property. This street was not laid off in the plat on the Falligant property, but on the adjacent Wayne land. In 1906 Henry Blun sold and conveyed the land purchased from Mrs. Canty to V. G. Schreck, and described the land in his deed as follows: "All that certain lot, tract, or parcel of land situate, lying and being in the city of Savannah, county of Chatham, and state of Georgia, containing three and seventeen one-hundredths ( $3\frac{17}{100}$ ) acres, and known on the map of said city as a portion of lot number forty-four (44) Springfield Plantation, the said portion hereby conveyed being bounded on the north by a portion of said lot number forty-four conveyed by Ruth M. Canty, October 31, 1899, to the Georgia Construction Company, on the east by lot number forty-five (45) Springfield Plantation, on the south by Gwinnett street extended, and on the west by a portion of said lot number forty-four awarded to Ruth M. Falligant and her children in partition proceedings in the superior court of Chatham county, Georgia, December 17th, 1894, the said property hereby conveyed to the said Henry Blun by Ruth M. Canty by deed dated February 15th, 1901, and recorded in the office of the clerk of the superior court of Chatham county, Georgia, Book of Deeds H, folio 37; together with all and singular the houses, yards, gardens, easements, hereditaments, rights, members, and appurtenances to the

same belonging or in any wise appertaining." Attached to this deed, though not therein referred to, was a plat of the Canty lot, on which was given Gwinnett street as a southern boundary. The street was represented as a single line with no width stated. In 1906 Schreck filed his petition against Blun to enjoin him from obstructing the passageway described on the plat annexed to the deed from Canty to Blun by maintaining gates over the passageway in front of his land at the southeastern corner thereof. On the hearing it appeared that at the time Blun sold to Schreck he was the owner of subdivisions 1, 3, 5, 7, 9, and 11 of the Wayne land, over which the passageway is claimed; that Gwinnett street, if extended according to the Canty plat, would be outside of the limits of Savannah, and would terminate in the land of Blun, not connecting on the western extremity with any avenue, road, or outlet; that at the time of his conveyance to Schreck Blun had leased the Wayne land, and his tenant was maintaining the gate now claimed as an obstruction; that plaintiff's land would be much more valuable if the whole of Gwinnett street extended as delineated on the plat was kept open; that Gwinnett street in the city as shown by the official map was 35 feet wide at the city limits. The plaintiff affirmed and the defendant denied that the purchase was made on the faith that Gwinnett street extended was as represented on the plat attached to the deed. The court in his second order, which rescinded and abrogated the first, adjudged that Schreck was entitled to have ingress and egress to and from the lot purchased from Blun by means of a right of way continuous from Gwinnett street east in front of his lot not less than 35 feet in width, but no further; and enjoined the defendant from obstructing a passageway 35 feet wide in front of plaintiff's lot. The plaintiff excepts to this order, and contends that the defendant should have been enjoined from interfering with or obstructing any portion of the way delineated on the map attached to the deed from Canty to defendant, and referred to in the deed from the defendant to the plaintiff.

E. S. Elliott, for plaintiff in error. George W. Owens, for defendants in error.

EVANS, P. J. (after stating the facts as above). It will not be seriously disputed that a person conveying premises by description in terms bounding them by a street of a specified width, the title to which he also owns, ordinarily gives his grantee the right to insist upon the existence and enjoyment of such street. So, where an owner of land had it surveyed and laid off into lots, caused a plat of the same to be made which referred to a designated strip of land as a street, and sold the land with reference to such plat, a right of way over the strip of land designated in the plat as a street passes to

every purchaser at that sale, and the seller of the lots is estopped either from closing up the strip, or maintaining an obstruction in it existing at the time of the sale. *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144. In that case it was clearly recognized that the right of purchasers of lots abutting on a right of way over the street as delineated on the plan was not dependent on whether there was either an express or implied dedication of the street to the public. If it be a street laid out by the grantor over land which he sells in lots, there is necessarily an implied covenant that he will open it at least for the use of his grantees. And, if a grantor sells a lot of land, and in his deed bounds it upon a private way over his land, he will be estopped by his deed from denying the existence of the way for its entire length as clearly indicated and prescribed. *Tobey v. City of Taunton*, 119 Mass. 404; *Kenyon v. Hookway*, 17 Misc. Rep. 452, 41 N. Y. Supp. 230. Some of the considerations inducing the purchase may have been the probability of having neighbors, particular uses to which the purchased premises might be put because of the street, and the prospect of an advance in value from buildings to be erected on other lots. The purchaser has a right to rely upon the plan which the grantor promulgated, and on which he acted. The same rule of estoppel applies to a deed where the street is not expressly defined, but shown upon a plat therein referred to. In such a case all the particulars upon the plat are to be regarded as if expressly recited in the deed. *Derby v. Ailing*, 40 Conn. 410; *Fox v. Union Sugar Refining Co.*, 109 Mass. 292. In the cases cited the land was located in a municipality, but the location of the land, whether inside or outside of a town or city, does not affect the principle of estoppel or its application.

It is argued that the Gwinnett street extension as delineated on the map is but a cul-de-sac; and that, as the court adjudged the plaintiff was entitled to a way of access from Gwinnett street by a projection of it along the width of his property, he has been accorded all that he could properly contend for under his deed. It is immaterial that the western end of the street as delineated does not connect with another way. The purchaser had the right to rely on the representation of his grantor as contained in the plat; that the grantor had defined a specific part of his land as a street for the use of himself and his grantees. The right of the purchaser to have the way kept open for his use is not limited to the extent of the land conveyed to him. *Rodgers v. Parker*, 9 Gray (Mass.) 445.

Nor do we think that the plaintiff's right to have the entire way open is affected by the physical condition of the right of way at the time he purchased. In view of the fact that the defendant, at the time of the grant

to the plaintiff, possessed and owned the whole premises, including the street, there was nothing in the appearance of things upon the premises at all inconsistent with the terms of the deed granting a right of way over Gwinnett street extension, as described in the deed. *Ford v. Harris*, supra.

We have reached the conclusion that the court erred in limiting the plaintiff's right to use Gwinnett street extension to the extent stated in his order; and the judgment is reversed because, under the facts appearing on the hearing, the defendants should have been temporarily enjoined from obstructing any part of Gwinnett extension as delineated in the deed and plat.

Judgment reversed. All the Justices concur.

### YOUNG v. STATE.

(Supreme Court of Georgia. Nov. 11, 1908.)

#### 1. HOMICIDE (§ 250\*)—EVIDENCE—SUFFICIENCY—MURDER.

The evidence was sufficient to support the verdict.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 515, 516; Dec. Dig. § 250.\*]

#### 2. CRIMINAL LAW (§ 918\*)—REMARKS BY COURT—EXPRESSION OF OPINION AS TO WEIGHT OF EVIDENCE.

That the court remarked, in admitting certain testimony, "I will admit it, and let the jury pass upon it for what it is worth," will not require the grant of a new trial on the ground that the remark made by the court contained an expression or intimation of opinion by the court as to the weight which the jury should give to the evidence referred to.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2182; Dec. Dig. § 918.\*]

#### 3. CRIMINAL LAW (§ 941\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

The newly discovered evidence, purely cumulative in character, will not require the grant of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.\*]

(Syllabus by the Court.)

Error from Superior Court, Dooly County; W. V. Whipple, Judge.

Jim Young was convicted of murder, and he brings error. Affirmed.

Watts Powell and M. P. Hall, for plaintiff in error. W. F. George, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

BECK, J. Jim Young was indicted for the offense of murder; the person alleged to have been murdered being one Bolsey Walker. The trial resulted in a verdict finding the accused guilty of the offense of murder. A motion for a new trial was made, and overruled, to which ruling he excepted.

1. Counsel for plaintiff in error insist that under the evidence in the case a verdict against the defendant finding him guilty of the offense of murder was unauthorized. An

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

examination of the evidence, however, discloses that the testimony of the witnesses for the state, especially the testimony of the eyewitness Bill Peavy, who had full opportunity of seeing and hearing all that occurred between the deceased and his slayer at the moment when the fatal shot was fired, and just previously to the time of firing the shot, was such as to authorize the jury to find the killing to be murder, unprovoked and without any circumstances to palliate the crime. The testimony of the witness referred to is corroborated by that of other witnesses introduced by the state. This testimony the jury had a right to credit and give effect to, although it was in sharp conflict with the testimony of certain witnesses introduced by the defendant.

2. The defendant upon the trial insisted that the homicide occurred during the progress of a mutual combat between the deceased and the plaintiff in error, and that the latter shot the former in self-defense; and introduced testimony to show that the deceased was advancing towards and attempting to strike the accused with an open knife at the time the pistol was discharged. There was a question made by the evidence as to whether or not the deceased had a knife at that time, and it was material to the defense to show that their affirmative contention in regard to this question was true. And the defendant offered certain evidence tending to show that, as a matter of fact, the deceased had the knife at the time he was shot, and, in support of this contention, the evidence of one Pattishal was offered. This testimony was at first repelled by the court upon objection of state's counsel, but subsequently, after the introduction of other testimony, making more clear the relevancy and materiality of that which had been repelled, the court admitted the testimony which he had at first excluded. This would undoubtedly have cured the error, if there was error in excluding the testimony. Plaintiff in error contends that the court committed error in remarking in the hearing of the jury, when the evidence just referred to was admitted, that "the court would admit it and let the jury pass on it for what it was worth," and it is insisted that in making the remark quoted the court "did reflect his opinion as to the importance of the evidence set out, and, in a manner, reflected on said evidence." We do not think that the remark made by the court would bear the construction placed on it by counsel for the plaintiff in error. The remark did not contain an expression or intimation of opinion as to the weight the jury should give to the testimony in question. And, if the remark in any "manner reflected on said evidence," the court afterwards explained to the jury that the remark should not be construed by them as containing any intimation on his part as to the

weight the jury should give to the evidence. It would have been better for the court to have admitted the testimony and omitted making the observation complained of; but we do not think that any injury resulted to the defendant on trial by the remark made by the court.

3. The alleged newly discovered evidence upon which one ground of the motion for a new trial was based is purely cumulative, and that ground consequently presents no reason for setting aside the verdict and ordering a new trial.

Judgment affirmed. All the Justices concur.

#### VAUGHN v. NELSON. (No. 1,030.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

EXECUTION (§ 20\*)—"PROPERTY" SUBJECT—Dogs.

A dog is such property as to be subject to levy and sale for the debts of his owner.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 20.\*

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by J. G. Nelson against one Hegge. Judgment for plaintiff in attachment, and on levy R. J. Vaughn interposed claim. Judgment for plaintiff in attachment, and defendant brings error. Affirmed.

Alexander & Edwards, for plaintiff in error. Oliver & Oliver, for defendant in error.

RUSSELL, J. The only question involved in the present writ of error is whether a dog under the laws of Georgia is such property as to be subject to levy and sale. In the present case Nelson sued out an attachment against Hegge upon the ground of nonresidence to recover the purchase price of a dog. This attachment was levied upon "one white and liver and ticked pointer bitch named Maud," as the property of the defendant in the attachment. The plaintiff in error, Vaughn, filed a claim setting up that the dog was his property. Upon the allegation that the custody of the dog was expensive and risky on account of the tendencies of the dog to escape (and the claimant not having replevied the property), an order of sale was obtained under which she was sold. She was purchased by the defendant in error Nelson. Upon the trial of the claim case, Vaughn moved to dismiss the attachment and the entire proceedings based thereon, upon the grounds, first, "that dogs are not property under the laws of Georgia, and are not liable to attachment, levy, and sale"; second, "that the entire proceeding based upon the attachment was a nullity, and of no legal effect." This

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

motion having been overruled, and the judge of the superior court having, upon certiorari, sustained the finding of the court below, and adjudged that the dog in question was subject to attachment, levy, and sale, the bill of exceptions in the present case was sued out to review that judgment.

We are of the opinion that the ruling of the judge of the superior court was correct, and that dogs are as much the subject of property right as are other domestic animals, and therefore, as property, may be levied on and sold. The ruling in *Jemison v. Southwestern R. R. Co.*, 75 Ga. 444, 58 Am. Rep. 476, has frequently been invoked, as it is by the learned counsel in the present instance, to sustain the contrary view, and uphold the contention that dogs are in no sense property. As we view the *Jemison* Case, it is binding as a precedent only in so far as the ruling upon the exact point involved is concerned, and no further. The exact point decided by the Supreme Court in that case is that the presumption of negligence did not arise against a railroad company where a dog was killed by a railroad train, as in cases of injury to persons or property. But the opinion in the *Jemison* Case recognized that even at that time one could have a qualified property in a dog; for it was expressly ruled that, while a right of action for a negligent killing by a railroad company could not be maintained, the owner could recover on an action *vi et armis* for the wanton and malicious killing of his dog. After having decided the point which was particularly involved in the *Jemison* Case, Judge Hall proceeded to say *arguendo*: "Dogs are not property in such a sense as makes them assets belonging to an estate of a deceased person, and are never inventoried and appraised, however numerous or valuable, nor are they subject to levy and sale so far as we are informed."

We think that this obiter is not binding for two good reasons at least. In the first place, we consider the expression "so far as we are informed" as not without great significance when used by so learned and exact a judge as Judge Hall. It indicated that he was merely expressing an offhand opinion upon a subject which he recognized was not involved in the adjudication then before him, for, if the point had been involved, he would have been informed, and would have ruled according to his information with unmistakable clearness and directness. In the second place, the statement of Judge Hall which we have quoted above was made with reference to the state of affairs with regard to dogs at that time, and since then, in the evolution of dogology, it is a matter of common knowledge that dogs now have a market value, and that many persons earn a livelihood by either raising, buying, selling, training, or exhibiting dogs. On page 446 of the opinion in the *Jemison* Case (75 Ga. [58 Am. Rep. 476]), Judge Hall says: "Dogs seem to have no

market value, and the rule of damages in the case of live stock killed by the running of trains could not be applied to them." It is clear that the decision in the *Jemison* Case resulted from judicial notice of what was perhaps at that time (1885) the fact that dogs had no market value, and from the fact that in the particular case no amount of care could have prevented the killing of the dog, and the ruling was based upon the decision in a South Carolina case—*Wilson v. Railroad Co.*, 10 Rich. Law, 52—Judge Hall saying that "it is precisely in point and leaves nothing to be added." Since the decision in the *Jemison* Case, the Supreme Court, while declining to overrule it, has continuously tacked away from it, and it can safely be said (as much so as if it had been expressly so held by that court) that the *Jemison* case is not to be extended beyond its peculiar facts.

In *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323, the judgment of the superior court, holding that the owner of a dog had such property in it as would enable him to maintain an action in trover for its recovery, was affirmed. We consider the decision in the *Graham* Case, unlike that of the *Jemison* Case, as direct authority upon the question involved in the case at bar. If one can by trover recover a dog as his property, and if, as plaintiff, he has the alternative of recovering a money verdict for the value of the property and its hire, then it cannot be said either that the dog is not property, or that it is not property having a value. It would seem strange in actual practice to allow a plaintiff in trover to recover a money verdict for the value of his dog, and yet allow the defendant to take the dog, under the plaintiff's very eyes, from the courtroom where the verdict was rendered, protected by immunity from levy of the execution issued upon the judgment. It is true that an allusion is made in the opinion in the *Graham* Case to the fact that the action of trover was originally a special action on the case in behalf of any person who had either a general or a special property in goods as against any person who wrongfully withheld them from his possession, but the ruling upon which the Supreme Court affirmed the judgment of the lower court is broadly stated to be that "at common law and under our statutes the owner has property in his dog, and not only so, but such property right is sufficient to maintain a civil action to recover its possession." And the decision is said to be based on the authorities cited which include, among others, decisions of the courts of the District of Columbia, Kansas, Texas, Connecticut, Tennessee, Michigan, Nebraska, and Utah, in which dogs have been held to be property, as well as 4 Blackstone, 236, and Schouler on Personal Property, § 49.

The decision in the *Graham* Case was the

first step towards adjusting the law to the changed condition of affairs with regard to dogs as property of value; and this was followed as a matter of judicial history, if nothing more, in *Strong v. Ga. Ry. & Elec. Co.*, 118 Ga. 515, 45 S. E. 366. While the ruling in the *Strong Case* went no further than to reaffirm the ruling in the *Jemison Case* upon the exact point involved, still the concurring opinion of Justices Cobb and Fish, in which the opinion of Judge Lumpkin, now Justice Lumpkin, is quoted at length, clearly indicates, as we think, the limited scope of the ruling in the *Jemison Case*. As conclusive of the fact that the decision in the *Jemison Case* is not in point as to the question here raised, Justice Beck in delivering the opinion in *Columbus R. Co. v. Woolfolk*, 128 Ga. 631, 58 S. E. 152, 10 L. R. A. (N. S.) 1136, 119 Am. St. Rep. 404, and in ruling that one is liable for the wanton and malicious killing of a dog, stated the fact that the identical question now before us—that is, whether a dog is property subject to levy and sale—has never been before the Supreme Court. We therefore have this question presented to us for the first time in Georgia with no binding authority upon the exact point. This being true, we see no reason why dogs, many of which are admittedly objects of great value, may not be levied upon and sold as property of a debtor.

The writer is not prepared to bemoan the evil associations and untimely death of old Tray, and has had but little association with Fido or Trip, and therefore can take but little part in the settlement of the question raised by the briefs as to the value of the faithful watch dog as a boon of priceless worth, nor is he prepared to give his sanction to the maledictions pronounced upon the worthless cur. We leave this view of the subject to abler pens. If one is interested in the dog pensive, watchful, mythological, historic, or philosophic, he will find all phases of this many sided animal portrayed in the opinion of Judge Lumpkin of the Atlanta circuit, as quoted by Judge Cobb in the *Strong Case*, supra. We view the dog only from the standpoint of the well-recognized fact, to which we cannot shut our eyes, that he is daily bought and sold, raised for profit, trained for profit, exhibited for profit. He may not bear burdens like the famous Flemish dogs of Holland, and draw the peddlers' heavy carts, described by Ouida, until his withers are unstrung, and he drops fainting by the wayside. He may not be valuable as a draft horse. But that he may have value, be it much or little, and therefore must be property, is well evidenced by the facts of this case. The attachment was taken out for the purchase price of the dog, showing

that he was originally sold. He was claimed by the defendant in error, which implied value; and when sold under judicial process, which is attacked as null and void for the reason that a canine cannot be of value, he again brought, even upon the block, a "fancy" figure. For authority in other jurisdictions holding that the dog is property, see *Mullaly v. People*, 86 N. Y. 365, in which it is said: "Large amounts of money are now invested in dogs, and they are largely the subject of trade and traffic. In many ways they are put to useful service, and, so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." In *Michigan* "dogs have value and are the property of their owner, as much as any other animal which one may have or keep." *Ten Hopew v. Walker*, 96 Mich. 236, 55 N. W. 657, 35 Am. St. Rep. 598. In *Lynn v. State*, 33 Tex. Cr. R. 153, 25 S. W. 779, it is held that a homicide even may be justified in the possession or protection of a dog by its owner. There is diversity of opinion and conflict of authority among the courts of different states as to whether a dog can be killed in the exercise of police power, and the owner thus be deprived of his dog without a trial of his right of property guaranteed by the Constitution, but it cannot seriously be questioned that the owner may maintain trover, replevin, or trespass against any one taking his dog and converting it to his own use. Many of the decisions holding that a dog is not property are based upon the character of the dog, and the assumption that he is an animal *feræ naturæ*. The Supreme Court of this state, however, in *Wilcox v. State*, 101 Ga. 563, 28 S. E. 981, 39 L. R. A. 709, held that a dog was classed in the Constitution of this state as a domestic animal; and this ruling was distinctly reiterated in the *Strong Case*, supra. Not only was the dog property under the common law, but in New York, Kansas, Texas, North Carolina, Indiana, New Hampshire, Michigan, Massachusetts, and Missouri dogs have been held to be the subject of property right.

Following the rational trend of modern authority, we are compelled to hold that in Georgia a dog, whether he be a remote descendant of the small spaniel who changed the current of modern history by saving the life of William of Orange, or carries in his veins the blood of the faithful St. Bernard who rescues the lost traveler from the storm-swept crest of the beetling Alps, may be sold in this state to satisfy even the humblest debt of his owner.

For full citation of authority on this subject, see the very copious notes in 40 L. R. A. 503 et seq.

Judgment affirmed.

**JONES et al. v. POOLE.** (No. 1,108.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. APPEAL AND ERROR (§ 66\*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO FINAL JUDGMENT—NECESSITY.**

This case is practically identical as to its facts with that of *Anderson v. Hall*, 3 Ga. App. 535, 60 S. E. 294, and the writ of error must be dismissed. There is no exception to a final judgment in the court below. It does not appear from the record that a final judgment was rendered. Furthermore, the exceptions to the refusal of the amendment were not preserved pendente lite, nor would a different result have been reached, had the trial judge allowed the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 66.\*]

**2. APPEAL AND ERROR (§ 66\*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS TO FINAL JUDGMENT—NECESSITY.**

This court is without jurisdiction to consider a direct bill of exceptions to a ruling made pendente lite, unless there be at least a general exception to the final judgment. *Lyndon v. Ga. Ry. & Elec. Co.*, 129 Ga. 361, 58 S. E. 1047.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 66.\*]

**3. COSTS (§ 260\*)—DAMAGES FOR DELAY—RIGHT TO.**

When a writ of error is dismissed in this court, damages for delay are not recoverable.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 984; Dec. Dig. § 260.\*]

(Syllabus by the Court.)

Error from City Court of Cordele; D. L. Henderson, Judge.

Action between B. R. Jones and others and D. L. Poole. From the judgment, Jones and others bring error. Writ of error dismissed.

Land & Hall, for plaintiffs in error. Crum & Jones, for defendant in error.

**RUSSELL, J.** Writ of error dismissed.

**MAYOR, ETC., OF CITY OF SAVANNAH v. KILEY.** (No. 1,161.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**REVIEW ON APPEAL.**

The evidence sustained the verdict. The exceptions to the charge present no reversible error.

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Anna Kiley against the mayor, etc., of Savannah. Judgment for plaintiff, and defendants bring error. Affirmed.

Samuel B. Adams, for plaintiffs in error. Edmund H. Abrahams and Osborne & Lawrence, for defendant in error.

**POWELL, J.** We are of the opinion that the evidence is sufficient to sustain the verdict. Certain inaccuracies in the charge are complained of. There would be no profit

in discussing these exceptions, as they present no point of general interest. They were carefully considered by Judge Freeman, the successor to Judge Norwood, who tried the case and who delivered the charge in question. The opinion filed by him in connection with the judgment overruling the motion for a new trial expresses the view entertained by us after our consideration of the same matters.

Judgment affirmed.

**MORRIS v. STATE.** (No. 1,244.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**CRIMINAL LAW (§ 549\*)—APPEAL—EVIDENCE.**

Reasonably construed, the testimony in the record makes it clear that the question as to whether the defendant was present at the time of the criminal transaction and did the act he is alleged to have done rests on hearsay only.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 549.\*]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Dock Morris was convicted of crime, and brings error. Reversed.

George & Anderson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

**RUSSELL, J.** Judgment reversed.

**LONG v. STATE.** (No. 1,407.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**CRIMINAL LAW (§ 552\*)—CIRCUMSTANTIAL EVIDENCE.**

The evidence in behalf of the state was wholly circumstantial, and, not being inconsistent with a reasonable hypothesis of the defendant's innocence, the conviction of the defendant was unauthorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1261; Dec. Dig. § 552.\*]

Powell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Griffin; T. E. Patterson, Judge.

Mike Long was convicted of crime, and brings error. Reversed.

Thos. W. Thurman, for plaintiff in error. Wm. H. Beck, Sol., for the State.

**RUSSELL, J.** The only evidence introduced against the defendant in the court below on his trial for adultery and fornication was proof that he was found in the same room with an unmarried woman at about 9 o'clock at night, that the lamp in the room was turned low, and that neither of them had on shoes. It was also in evidence that an inside door connecting with an adjoining room, as well as the outside door,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



was closed. There were two beds in the room, but the cover had not been turned down on either, though one bed, as testified to by the policeman, appeared somewhat rumpled, and the pillow was indented and felt warm. The woman who was alleged to have participated in the adultery and fornication was introduced as a witness, and testified that neither on the occasion in question nor at any other time had the defendant ever had carnal knowledge of her person. There is no evidence that she was of unsavory reputation.

We think that the court erred in not granting a new trial, for the reason that the evidence is insufficient to remove every other reasonable supposition than that of the defendant's guilt. The circumstances are such as to raise perhaps a violent suspicion; but this is all. From the proved facts the inference is as likely that the parties were about to commit the offense alleged in the accusation, and were prevented by the arrival of the two policemen, as that the act had already been consummated. The fact that the parties were in a room adjoining another room and connected with it by a door, in which were three other persons who knew of the presence of the defendant and the woman in question, in the absence of proof of bad character on her part, could not be sufficient to raise a presumption inconsistent with innocence and that the sole purpose of his presence with her was to commit the act of adultery and fornication.

We recognize the well-settled rule that illicit intercourse may be inferred from the presence of a man at a house of ill fame, or from his exclusive presence in a closed room with a woman of an established reputation for lewdness. The evidence in this case, however, does not show that the house in question bore an evil reputation, or that the female bore other than a good reputation. Our decision is controlled by the ruling of the Supreme Court in the case of *Weems v. State*, 84 Ga. 461, 11 S. E. 501, and our ruling in *Murray v. State*, 2 Ga. App. 620, 58 S. E. 1060.

Judgment reversed.

POWELL, J. (dissenting). That rumpled bed and warm pillow to my mind speak more strongly of consummation experienced than of mere preparation thwarted.

#### WRIGHT v. STATE. (No. 1,413.)

(Court of Appeals of Georgia. Nov. 10, 1908.)  
CRIMINAL LAW (§ 1159\*)—APPEAL—CIRCUMSTANTIAL EVIDENCE.

The evidence is circumstantial only, and is not legally sufficient to support the verdict.

[Ed. Note.—For other cases, see Criminal Law. Cent. Dig. § 3080; Dec. Dig. § 1150.\*]

(Syllabus by the Court.)

Error from City Court of Covington; W. H. Whaley, Judge.

Essex Wright was convicted of crime, and brings error. Reversed.

A. D. Meador, for plaintiff in error. R. W. Milner, Sol., for the State.

POWELL, J. Judgment reversed.

#### HABER-BLUM-BLOCH HAT CO. v. FRIESLEBEN. (No. 1,134.)

(Court of Appeals of Georgia. Nov. 10, 1908.)  
ESTOPPEL (§ 68\*)—DEFENSES—CHANGE OF THEORIES.

When a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position through a judgment of the court, or through the acquiescence of the opposite party to his prejudice, he will not thereafter be permitted to assume as to the same subject-matter and against the same adversary a contrary position.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 166; Dec. Dig. § 68.\*]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by A. Friesleben against the Haber-Blum-Bloch Hat Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Friesleben sued the hat company for the breach of a contract of employment as a traveling salesman at \$115 per month payable monthly, the employment extending from October 1, 1903, to October 1, 1904, and alleged that in the latter part of the month of May the defendants "dispensed with his services, in effect discharging him, thereby committing a breach of said contract." The hat company pleaded that they were adjudicated bankrupts on May 27th and discharged on August 5th. The pleadings and evidence made the following case: On May 27th the hat company were adjudicated bankrupts, and on June 7th Friesleben filed his proof of claim against the bankrupts in the sum of \$575 for the months of May, June, July, August, and September. The bankrupts prepared written objections thereto, denying that Friesleben was a creditor in manner and form as alleged, and denying that he had any provable claim against them or the estate in bankruptcy, except for his salary from May 1st to May 27th at the rate of \$115 per month; and, though these objections were not formally filed, arguments of counsel for both parties were heard thereon. Friesleben, on an intimation from the referee that he would sustain the position of the bankrupts, and, as the record states, upon the referee's order, withdrew this proof of claim and on July 13th filed another, wherein he claimed only salary from May 1st to June 1st. This claim was allowed, and dividends were paid there-

on. It was agreed at the time that no point should be made because the claim included the four days in May following the 27th. After the bankrupt's discharge in bankruptcy, Friesleben sued on the same contract for the wages of the months of June, July, August, and September, and was met by a plea of discharge in bankruptcy. He obtained a judgment, and the hat company excepts.

Hardeman, Jones & Johnston, for plaintiff in error. Nottingham & McClellan, for defendant in error.

POWELL, J. (after stating the facts as above). Friesleben's claim for salary from June to September, inclusive, was not discharged in bankruptcy, unless it was a provable debt. Whether it was a provable debt, within the meaning of the national bankruptcy act, is a question of serious doubt; but we do not think it is necessary to decide it. We are of the opinion that since the bankrupts appeared before the referee, and urged that these damages were not provable, and obtained an intimation or ruling from the referee to that effect, in which Friesleben acquiesced to his prejudice in that court, it does not now lie in the mouths of the bankrupts to say that these damages were provable. "It may be laid down as a general proposition that when a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 689, 15 Sup. Ct. 555, 39 L. Ed. 578; *Philadelphia, etc., Railroad v. Howard*, 13 How. 336, 337, 14 L. Ed. 157; *Luther v. Clay*, 100 Ga. 241, 28 S. E. 46, 39 L. R. A. 95; *Vaughn v. Strickland*, 108 Ga. 660 (2), 34 S. E. 192; *Waldrop v. Wolff*, 114 Ga. 619-620, 40 S. E. 830; *Niagara Ins. Co. v. Williams*, 1 Ga. App. 604, 605, 57 S. E. 1018.

Judgment affirmed.

### ALSTON v. FRENCH & MORTON. (No. 1,090.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

#### 1. ESTOPPEL (§ 115\*)—ISSUES, PROOF, AND VARIANCE.

A plea of estoppel based upon the ground that a party to a suit told another party to go ahead, and furnish supplies to his tenant, that he would not furnish the tenant with supplies or money to make a crop, and was willing for the other party to do so, is not tantamount to a plea that the party who said this is estopped because he did not disclose that the tenant was already indebted to him, or that he had stated that his tenant was not, in fact, indebted to him at all.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 115.\*]

#### 2. ESTOPPEL (§ 115\*)—ISSUES, PROOF, AND VARIANCE.

Estoppels are not favored, and must be proved as pleaded. Where it is alleged that a landlord is estopped from setting up his lien because a merchant was induced to supply his tenant upon the statement of the landlord that he would not furnish his tenant with any money or supplies to make the crop during the year in question, a verdict setting up the estoppel is not supported by evidence that the landlord stated that the tenant was not indebted to him in any amount, and that by this statement the merchant was induced to furnish the tenant.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 115.\*]

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Rule between French & Morton, mortgagees, and N. C. Alston, claiming a landlord's lien, to determine the priority in a fund arising from a sale of a crop sold under a *fi. fa.* issued on the mortgage. Judgment for French & Morton, and Alston brings error. Reversed.

G. Y. Harrell, for plaintiff in error. J. B. Hudson, for defendant in error.

RUSSELL, J. French & Morton foreclosed a mortgage in Stewart county court, and the mortgage *fi. fa.* was levied on the crops of one Warren which had been raised in the year 1906. Warren was the tenant of N. C. Alston, and Alston foreclosed a landlord's lien for supplies furnished his tenant to aid in making the crop. The crop was sold under the mortgage *fi. fa.* by the sheriff of Stewart county, and Alston claimed that the funds raised from the sale should be first applied to the payment of his lien. Thereupon French & Morton ruled the sheriff, who in his answer set up that several *fi. fas.* had claimed this fund, and he asked the direction of the court. Thereupon French & Morton tendered issue upon the answer, and alleged that Alston was estopped from claiming the fund in priority to their mortgage *fi. fa.* for the reason that he had told them to go ahead and furnish supplies to Warren, the tenant, for the purpose of making the crop for the year 1906, and had told them that he would not furnish Warren any supplies or money to make said crop; that he told them he was willing for them to furnish Warren, and he would not do so; and, after this statement by Alston, they, in pursuance of said request and consent, furnished Warren supplies to make his crop, and took and recorded the mortgage in question. The jury found the issue in favor of the mortgagees, and that the landlord was estopped from claiming the fund under his lien. The landlord made a motion for a new trial, which was overruled, and he excepts.

Upon the trial W. B. French, over the objection of Alston's attorney, was permitted to testify as follows: "I took it up with Dr.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Alston about furnishing Warren supplies, and asked him the question if Mr. Warren owed him anything, and he said he did not, and I told him if he did not owe him anything, and he wanted us to furnish him, we would do it. I asked Dr. Alston if he [Warren] would owe him anything at the end of the year besides his rent, and he said he would not owe him anything but the rent." The objection made to the evidence was that there was no pleading authorizing the admission of this evidence, for the reason that the plea of estoppel filed by French & Morton did not contain the allegation that Alston represented that Warren did not owe him anything at the time of the conversation between the parties.

The plaintiff in error also objected in the court below to the testimony of W. B. French that Alston said that Warren did not owe him anything, and that Alston was told that if Warren did not owe him anything, and he wanted them to furnish Warren, they would do so; "Dr. Alston having said that Warren would not owe him anything but the rents if we furnished him supplies." The objection to this evidence was that it was irrelevant, because there was no such allegation in the plea of estoppel. The same objection was made in a different form to other testimony delivered by the witness French. There is no question but that the verdict was authorized under the evidence of Mr. French. The point in the case is whether the plea, as filed, was broad enough to include the testimony admitted, and which was duly objected to. We do not think that the testimony that Dr. Alston said that Warren did not owe him anything, and that Warren would not owe him anything but the rents if French & Morton furnished him with supplies, should have been admitted under the allegations of the amendment to the rule which sought to estop the landlord. According to the plea of estoppel filed by French & Morton, Dr. Alston had promised not to furnish supplies to his tenant for the year 1906. That is the only inference that could be drawn from the language that he had promised not to furnish supplies to his tenant for that year. If, on the faith of that promise, French & Morton advanced supplies to his tenant, they would have the right to claim priority over any lien arising in his favor for supplies furnished in violation of his promise. As estoppel must be specially pleaded and proved as pleaded, the evidence should have been restricted to that point, and the objection of counsel for the plaintiff in error was timely, and should have been sustained. The proof that French & Morton were misled by Dr. Alston's false statement that Warren did not owe him anything at the time, while it would have been good ground for estopping Alston, was not the case presented by the pleadings, and any evidence upon that subject was irrelevant to

the issue. Estoppels are not favored by the law, and for this reason there should be no relaxation of the rules controlling strictness in pleading and relevancy in the testimony in support of the pleadings. In the present case the defendants in error made one case upon paper and another in the proof. The facts did not fit the pleadings, and the resultant verdict is a legal misfit.

Judgment reversed.

#### GANNT v. STATE. (No. 1,402.)

(Court of Appeals of Georgia. Nov. 10, 1908.)  
CONTRACT LABOR LAW—VIOLATION.

This case is practically identical with the case of Barnes v. State, 3 Ga. App. 333, 59 S. E. 937.

(Syllabus by the Court.)

Error from City Court of Lexington; Joel Cloud, Judge.

John Gantt was convicted of obtaining money or other thing of value, on a contract to perform services, with intent to defraud, and he brings error. Affirmed.

E. P. Shull, for plaintiff in error. Hamilton McWhorter, Jr., Sol., for the State.

RUSSELL, J. Judgment affirmed.

#### CHARLESTON & W. C. RY. CO. v. BOYD. (No. 1,217.)

(Court of Appeals of Georgia. Nov. 10, 1908.)  
CARRIERS (§§ 245, 314\*) — DAMAGES (§ 143\*) — INJURIES TO PASSENGERS—ACTION — PLEADING PETITION.

The court did not err in overruling the general demurrer. Some of the special demurrers were meritorious, and should have been sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1275, 1275½, 1278; Dec. Dig. §§ 245, 314\*; Damages, Cent. Dig. § 410; Dec. Dig. § 143.\*]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by James Boyd against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

The petition, omitting formal and immaterial parts, is as follows: "(2) That on the 17th day of September, 1906, plaintiff was a passenger on one of the regular passenger trains of the said defendant, which train was traveling over the defendant's line of road in the state of South Carolina. (3) That plaintiff had purchased a ticket to Woodlawn, S. C., which is a station at which the said train upon which plaintiff was traveling was regularly scheduled to stop for the reception and discharge of passengers. (4) That as said train approached the said station,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and was apparently slowing down to stop at said station, and was traveling at a slow rate of speed not exceeding four or five miles an hour, plaintiff went out upon the platform preparatory to alighting at the said station. (5) That, when plaintiff was so situated, the agents and servants of the said defendant in charge of the movements of the train caused the said train, without warning, and with a sudden, violent, unexpected, and negligent jerk, to quicken its speed. (6) That plaintiff, by reason of said jerk, was thrown heavily to the ground. (7) That as a result of said fall plaintiff's ankle was shattered [and certain enumerated injuries ensued]. (8) That in matters and things herein related plaintiff was in the exercise of all reasonable care and diligence, and was free from fault. (9) That the said fall was due wholly to the defendant's negligence."

Besides the general demurrer, the following special demurrers were urged by the defendant: "To paragraph 3, because plaintiff fails to aver the place where he purchased a ticket over the defendant's road, and where and when he became a passenger on defendant's train. To paragraph 4, because plaintiff fails to state his position on the train before he went out upon the platform; also, because he fails to aver any sufficient reason for riding on the platform; also, fails to aver the character of the platform, whether it had a railing around it or not; also, fails to aver his exact position on the car; also because he fails to aver how far the train was from the station when he went out on the platform. To paragraph 5, because plaintiff fails to aver whether or not the train stopped at Woodlawn station. To paragraph 6, because plaintiff fails to aver how far the train was from the station when he was thrown to the ground. Because the allegations of paragraph 7 are too uncertain for defendant to deny or traverse the same. To paragraph 8, because it alleges a conclusion, and not the facts upon which it is based. To paragraph 9, because plaintiff fails to allege wherein the negligence of this defendant consisted." The court overruled all the demurrers, and the defendant excepts.

W. K. Miller, for plaintiff in error. Austin Branch and A. L. Franklin, for defendant in error.

POWELL, J. (after stating the facts as above). The court did not err in overruling the general demurrer. *Central of Georgia Railway Co. v. Forehand*, 128 Ga. 547, 58 S. E. 44, and citations. We think, however, that some of the special demurrers should have been sustained, and that the plaintiff should have been required to furnish the information demanded by them. Despite our impatience with frivolous objections to pleadings, we must recognize that a reasonable special

demurrer is very valuable to a party where his opponent has put loose and indefinite allegations in his pleadings. It is frequently helpful to the court itself, in that it is available to compel the pleader to set out his case with such fullness as to disclose whether he really has the right he has asserted in general terms. We do not think the defendant evinced inordinate curiosity when it asked the plaintiff to state where he purchased his ticket, and when and where he became a passenger. This information, if imparted, would probably enable the defendant's trainmen who will likely be its witnesses to better identify the particular passenger, and perhaps even to deny that there was any such passenger.

The demurrers aimed at paragraph 4 of the petition are none of them well taken, except the one that alleges a failure to aver how far the train was from the station. Under several decisions of the Supreme Court in similar cases, this is a very material point. There is no merit in the demurrer to the fifth paragraph. The demurrer to the sixth paragraph is well taken. The critic is itself chargeable with imperfections so far as it attempts to challenge the sufficiency of paragraph 7, and was therefore properly overruled. The demurrer to the eighth paragraph is not well taken. Most important of all the demurrer to the ninth paragraph is well taken. This paragraph contains a mere general allegation of negligence. If the petition had charged that the jerk alleged in the fifth paragraph was unusual and unnecessary, the general allegation of the ninth paragraph taken in connection therewith would be held to be sufficient; but no such allegation appears anywhere in the petition. *Augusta Ry. & Elec. Co. v. Lyle*, 4 Ga. App. 113, 60 S. E. 1075.

For the failure to sustain such of the special demurrers as are herein stated to be meritorious, the judgment is reversed.

#### SPERLING v. FIRST NAT. BANK OF WAYNESBORO. (No. 1,300).

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### 1. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

##### 2. ASSIGNMENTS OF ERROR—SUFFICIENCY.

None of the assignments of error to rulings upon the admission of testimony are sufficient in form to present any question for adjudication. (Syllabus by the Court.)

Error from City Court of Waynesboro; H. J. Fullbright, Judge pro hac.

Action between N. Sperling and the First National Bank of Waynesboro. From the judgment, Sperling brings error. Affirmed.

Lawson & Scales, for plaintiff in error. Brinson & Davis, for defendant in error.

POWELL, J. Judgment affirmed.

**MINCHEW v. NAHUNTA LUMBER CO.**  
(No. 1,277.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. CORPORATIONS (§ 514\*)—ACTIONS—PLEADING.**

Corporate name connotes corporate entity. This is applicable to both civil and criminal cases. *Van Winkle Gin Works v. Mathews*, 2 Ga. App. 249, 58 S. E. 396; *Ager v. State*, 2 Ga. App. 158, 58 S. E. 874; *Foley & Williams Mfg. Co. v. Bell*, 4 Ga. App. 448, 61 S. E. 856; *Charles v. Valdosta Company*, 4 Ga. App. 733, 62 S. E. 493.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2052; Dec. Dig. § 514.\*]

**2. PLEADING (§ 46\*)—NAMES OF PARTIES—INITIALS.**

An action may be properly instituted by employing the initials, instead of the full Christian name, of the defendant. "In this state men are commonly known by the initials of their Christian names, as well as they are by those names in full." Any common-law rule of practice to the contrary does not exist in this state, because of lack of suitability to our conditions. *Eaves v. State*, 113 Ga. 755, 39 S. E. 318; *Minor v. State*, 63 Ga. 318; *Turner v. Thompson*, 58 Ga. 271, 36 Am. Rep. 297.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 102; Dec. Dig. § 46.\*]

**3. APPEAL AND ERROR (§§ 970, 971\*)—REVIEW—DISCRETION OF LOWER COURT—ORDER OF EXAMINATION OF WITNESSES—LEADING QUESTIONS.**

The order of the examination of witnesses and the allowance of leading questions are matters so largely in the discretion of the trial judge as to warrant no interference except in cases of manifest abuse. There was no abuse of discretion in the present case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3851, 3855; Dec. Dig. §§ 970, 971.\*]

**4. EVIDENCE (§ 568\*)—EVIDENCE OF VALUE.**

The question of the value of an article is peculiarly for the jury, and that body is not absolutely bound by the opinions or estimates of the witness on that subject. *Morris Storage Co. v. Wilkes*, 1 Ga. App. 752, 58 S. E. 232; *Atlantic Coast Line R. Co. v. Harris*, 1 Ga. App. 667, 57 S. E. 1030.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2392; Dec. Dig. § 568.\*]

(Syllabus by the Court.)

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action between C. P. Minchew and the Nahunta Lumber Company. From the judgment, Minchew brings error. Affirmed.

Francis H. Harris, for plaintiff in error. Bennet & Conyers, for defendant in error.

POWELL, J. Judgment affirmed.

**BROXTON, H. & S. R. CO. et al. v. ROOKS.**  
(No. 1,213.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**REVIEW ON APPEAL.**

The evidence authorized the verdict. None of the errors assigned as to the charge of the court are meritorious. No reason appears for granting a new trial.

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Action between Henrietta Rooks and the Broxton, Hazlehurst & Savannah Railroad Company and others. From the judgment, the railroad company and others bring error. Affirmed.

Rosser & Brandon and McDonald & Quincey, for plaintiffs in error. F. G. Boatright and B. J. Reid, for defendant in error.

POWELL, J. Judgment affirmed.

**HOLMES v. STATE. (No. 1,340.)**

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. HOMICIDE (§ 55\*)—WRONGFUL ARREST—RIGHT TO RESIST.**

Every person has the right to resist an illegal arrest, whether attempted by an officer or by a private individual, and in resistance to use as much force as is necessary, and no more, for the purpose of resistance.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 79; Dec. Dig. § 55.\*]

**2. ARREST (§ 68\*)—RIGHT TO SHOOT IN MAKING—VIOLATION OF ORDINANCE.**

An officer has no right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation of a municipal ordinance in order to prevent his escape, even though the offender cannot be taken otherwise.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. § 166; Dec. Dig. § 68.\*]

**3. HOMICIDE (§ 55\*)—WRONGFUL ARREST—RIGHT TO RESIST.**

If a person attempts to avoid an illegal arrest by flight, and is shot at by an officer or other person who is attempting to make the illegal arrest, the former may shoot the latter if it reasonably appears to him that it is necessary to do so either to prevent his illegal arrest, to save his life, or to protect himself from serious bodily injury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 79; Dec. Dig. § 55.\*]

**4. HOMICIDE (§ 55\*)—WRONGFUL ARREST—RIGHT TO RESIST.**

A private citizen who joins in a felonious attempt by an officer to make an illegal arrest occupies no better position than the officer himself. If the party whom the officer was attempting illegally to arrest would have been justifiable in killing the officer, he would be also justifiable in killing a private citizen who was actually assisting the officer in the commission of the felonious act.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 79; Dec. Dig. § 55.\*]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Julius Holmes was convicted of voluntary manslaughter, and he brings error. Reversed.

W. D. McNeill and J. E. Hall, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

HILL, C. J. Julius Holmes was indicted for murder and was convicted of voluntary

manslaughter, and sentenced to 20 years in the penitentiary. His motion for a new trial was overruled, and the case is here on review.

The material facts are as follows: A negro woman made complaint at police headquarters in Macon that Julius Holmes had cursed her, and she wanted him arrested for disorderly conduct. The day after this complaint was made Rogers, a policeman, went to the house where Holmes and the woman both lived for the purpose of arresting him as requested by her. He reached the house about dark, and found Holmes in his room, cooking his supper. The officer notified Holmes that he "had come after him to arrest him." Holmes had a knife in his hand and a pistol on his bed. When the officer appeared in the room and told Holmes that he had come to arrest him, Holmes tried to get the pistol on the bed, but the officer got it first, and put it in his pocket. Holmes went back in a corner of the room, and said to the officer: "I will be God damned if I will be arrested." The officer replied: "There is no use of nothing like that. I have come for you, and I am going to carry you if it takes the whole police force." And Holmes said: "You had just as well send for them. I will die before I will be arrested." The officer told the woman who had made the complaint the day before, and who was in the house, to telephone to headquarters for another policeman. Pending the arrival of this policeman, Rogers and Holmes stood in the room, talking. Rogers told Holmes that he had been making a disturbance there, and the people wanted him arrested. Holmes asked Rogers "to give him a subpoena to come to court next day, and said he would come, but he would not be arrested." During this time Rogers was standing in the door, and Holmes made several attempts to get out by him, but the officer "pushed him back with his bare arm," not drawing his pistol. In about 20 minutes Jobson, the other policeman who had been telephoned for, got to the house. The two officers went into Holmes' room, took hold of him, and "pulled him out of the room on to the ground." He struggled to get loose, declaring that "it would take the whole damned police force to carry him." He finally jerked loose, and went back into the house. Jobson testified that while struggling to get loose from the officers "he did not make any effort to cut either of us. He could have cut us when he jerked loose." This officer also testified: "He was in his room about a minute, and I ran up to the door to push it open. When he opened the door, I was away from the steps, about four steps, I think. He stepped on the first step, and jumped off and turned the corner of the house. He had a double-barrel shotgun by the stock and barrel. I did not shoot until he wheeled and pointed it at me about half way from the corner of the house to the front fence. I fired twice at him in the

yard. I shot in all five times." Rogers, the other officer, testified: "We were standing in front of the door when Julius came out again. We got to the end of the house where he came by. Mr. Jobson fired the first shot when Julius was nearly to the other end of the house. He had already passed him, Jobson, and was running away from us. He turned around to shoot Jobson with the shotgun. He was passing Jobson when he threw the gun up. Then he started down the alley." Both officers pursued the negro, and were joined in the pursuit by Mr. Wimberly, the deceased. Wimberly was ahead of Jobson, and Jobson "holloed at him not to run up on him he had a double-barrelled shotgun. And about that time he wheeled and fired. Mr. Wimberly was about 25 feet behind him, and I was about 60 feet behind Wimberly. He shot one time and Mr. Wimberly fell. I don't know why Mr. Wimberly joined the chase after the negro, but he was right behind him, and was running. The defendant was also running."

Lucy Cole, the woman who had made the complaint the day before against Holmes, testified that she did not swear out any warrant, but reported him to police headquarters the night before the shooting because "he cursed me and raised a disturbance in his room, cursing me through the partition between our rooms." She also testified that, when the officers were struggling with the negro in the yard, they both had their pistols, and he had his knife in his hand, but made no effort to use it; that the negro ran out of the house and the officers ran after him. The crowd "holloed 'Get him!' 'Shoot him!'" before Wimberly was shot. The defendant introduced no evidence. His statement in no wise affects or illustrates the conclusion we have reached from a consideration of the evidence for the state.

1. We do not see how the verdict in this case can be sustained by any theory of the law under the facts shown by the state. It is true that the general rule is that it is manslaughter to kill an officer or other person to prevent an illegal arrest. *Jenkins v. State*, 3 Ga. App. 146, 59 S. E. 435; *Thomas v. State*, 91 Ga. 206, 18 S. E. 305. But this general rule is subject to exceptions. Two may be mentioned: First, when the person who kills in resisting the illegal arrest uses no more force than is necessary; and, second, when the officer or other person making the illegal arrest uses more force than is necessary to overcome the resistance, and puts the person to be arrested in fear of his life or great bodily harm. Here, under the admitted facts, the arrest or attempted arrest was illegal. There was no warrant. The defendant was not "wanted for a state offense, felony or misdemeanor." The offense for which he was wanted was a trivial violation of a municipal ordinance. This trivial offense was not committed in the presence of the arresting officers, but the day be-

fore a complaint was made by the negro woman that the defendant had cursed her "through the partition between their rooms." If this information was sufficient on which to base an arrest, it was sufficient on which to base a warrant. There was no want of time or opportunity for either the complaining woman or the arresting officers to procure a warrant. The defendant was not endeavoring to escape to avoid an arrest, and there was no pressing emergency for his arrest. There seems to have been absolutely no reason for not having procured a warrant and for attempting an arrest without one. A policeman under these circumstances cannot be allowed to dispense with a warrant when making or attempting an arrest any more than other officers of the law. When the policemen went into the defendant's house to arrest him without a warrant, they were trespassers in a double sense—trespassers upon the sacred right of personal liberty, and trespassers upon the right of domicile. The defendant had a legal right to resist both trespasses, and to use in resistance as much force as was necessary to make resistance effective.

2. When the officers attempting to make the illegal arrest of the defendant forcibly pulled him from his house and endeavored to handcuff him, they were guilty of an assault and battery. The defendant, thus wrongfully and illegally deprived of his liberty, had the right to regain it, and to use all force necessary for that purpose. If he succeeded in jerking loose from the officers, ran into his house, got his gun, and attempted to escape, the officers had no right to shoot him to prevent his escape. In the language of Chief Justice Bleckley: "Every man, however guilty, has a right to shun an illegal arrest by flight." *Thomas v. State*, 91 Ga. 204, 18 S. E. 305. If, in fleeing to prevent such illegal arrest, he is pursued and shot down by an officer who is attempting to make the illegal arrest, such killing would be felonious. Even with a warrant an officer cannot legally kill one who flees from him to avoid an arrest for a misdemeanor. *Croom v. State*, 85 Ga. 725, 11 S. E. 1035, 21 Am. St. Rep. 179. The law values human life too highly to give an officer the right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation of a municipal ordinance in order to prevent his escape, even though the offender cannot be taken otherwise. *Miers v. State*, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

3, 4. The officer who shot at the defendant five times and hit him twice testified that, as the defendant jumped out of the door and turned the corner of the house, he called upon him to stop, and the defendant wheeled to shoot, and "I shot him." If this was true,

we are not prepared to say that it would furnish any justification for this one shot by the officer attempting to make the illegal arrest. It certainly could furnish no excuse or justification for the four other shots fired at the negro when he was fleeing from the officers for his liberty, and apparently for his life. But, according to the testimony of the other officer, when this first shot was fired at the defendant, "he was running away from us." Now, the undisputed evidence is that the defendant while fleeing from the officers to avoid an illegal arrest was shot at by one of the officers four times; that he was hit twice, the bullet in each case going clear through his arm, and one of them penetrating his side. The positive evidence for the state, in addition to this undisputed evidence, is that the crowd cried, "Get him!" "Shoot him!" If, under these circumstances, the fleeing negro turned and shot back at his pursuers, can it be doubted that the facts were sufficient to justify the fears of a reasonable man that his life was in danger, or that he was threatened with serious bodily injury? If, acting under these fears, he shot at his pursuers and killed, not one of the officers, but one who had joined the officers in their felonious pursuit, can it be doubted that the killing was justifiable homicide? Certainly, if the defendant had shot and killed the officer who was pursuing and shooting him, under the circumstances of this case he would have been entirely justifiable. How could he be less justifiable because he shot and killed a private citizen who was more eager in the pursuit than the officer himself? For this officer declares that the deceased ran ahead of him after the negro. The principles of law which we have announced in the foregoing opinion are not new. They come down to us from the common law. They are well settled both by the statutes and the decisions of the Supreme Court of this state. The learned judge in the trial court gave these principles to the jury in an able and lucid charge. But, after a most careful consideration of the evidence as presented by the state, we are forced to the conclusion that the jury misapplied this law to the facts, and that the verdict is wholly unsupported by any evidence. This court fully understands and appreciates the delicate, difficult, and sometimes dangerous duties which police officers are called upon to perform, and it will uphold and protect them in the legal discharge of all their duties. But to approve the verdict in this case would be in our opinion a violation of the sacred right of personal liberty, and a disregard of the right of self-defense which the law guarantees to every citizen, whatever his color or condition.

The other assignments of error made in the record we do not consider necessary to decide.

Judgment reversed.

**COLLINS v. STATE. (No. 1,400.)**

(Court of Appeals of Georgia. Nov. 10, 1908.)

**CONTRACTS OF EMPLOYMENT—FAILURE TO PERFORM.**

This case is controlled by *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022.  
(Syllabus by the Court.)

Error from City Court of Miller County;  
C. C. Bush, Judge.

Will Collins was convicted of fraudulently obtaining advances under a contract of employment, and brings error. Reversed.

W. I. Geer, for plaintiff in error. N. L. Stapleton, Sol., for the State.

**POWELL, J.** Judgment reversed.

**JEFFRIES v. LUKE. (No. 1,293.)**

(Court of Appeals of Georgia. Nov. 10, 1908.)

**JUSTICES OF THE PEACE (§ 210\*)—BOND—LIABILITY.**

Upon the dismissal of a certiorari bond by a claimant, he and his security upon the certiorari bond are liable for the costs; but it is error in a claim case to include in the judgment dismissing the certiorari a judgment against the principal in the certiorari bond and his security for the amount of the *fi. fa.* which has been levied upon the property adjudged not to be the claimant's. The liability of the principal and security on a certiorari bond for the eventual condemnation money in a claim case extends only to the costs and such damages as may by a jury be assessed against the claimant by reason of his interposition of the claim.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 829; Dec. Dig. § 210.\*]  
(Syllabus by the Court.)

Error from Superior Court, Irwin County;  
U. V. Whipple, Judge.

L. L. Luke having obtained a *fi. fa.* against one Chester, C. B. Jeffries interposed a claim to the property levied on. Upon the trial in a justice's court, the justice found the property subject, and Jeffries sued out a writ of certiorari, which was dismissed by the judge of the superior court, and Jeffries brings error. Affirmed, with direction.

C. H. Martin and McDonald & Quincey, for plaintiff in error. R. M. Bryson, for defendant in error.

**RUSSELL, J.** Luke obtained a *fi. fa.* against Chester, which was levied upon a certain top buggy to which Jeffries, the plaintiff in error, interposed a claim. The claimant gave, not only a claim bond, but the statutory bond for the forthcoming of the property. Upon the trial of the case in a justice's court, the justice found the property subject. Thereupon Jeffries sued out a writ of certiorari, which was dismissed by the judge of the superior court. The judge of the superior court also entered judgment against him as principal, and against one

Floyd as his security, for the amount of the *fi. fa.* against Chester, with interest, and exception is taken to this judgment. The material part of the judgment of the judge of the superior court was as follows: "It is \* \* \* adjudged by the court that the certiorari be dismissed, and that the defendant in certiorari shall have judgment against the plaintiff in certiorari, C. B. Jeffries, as principal in certiorari bond and J. T. Floyd as security, for the sum of \$90 as principal, and \$13.77 interest to March 10, 1908, and all further interest on said principal at 7 per cent. per annum, and the further sum of \$—, and — cents for costs of suit proceeding."

We think the judge of the superior court very properly dismissed the certiorari, because it is clear from the answer that the magistrate was fully authorized by the evidence to find that the buggy levied upon was the property of the defendant in *fi. fa.* In the view of the evidence most favorable to the claimant, the defendant in *fi. fa.* had merely bought the buggy on credit and owed the claimant for it. The title in the buggy, however, had passed to the defendant in *fi. fa.* For this reason, we will affirm the judgment dismissing the certiorari. It appears from the record that the certiorari could well have been dismissed upon the ground that no valid certiorari bond was given for the reason that Floyd, the security on the certiorari bond, was already security on both the claim bond and the forthcoming bond. But, though the court was right in dismissing the certiorari, it was error to enter judgment against the claimant and the security on the certiorari bond for the amount of the *fi. fa.* which had been levied prior to the interposition of the claim. The only issue involved in the trial of the claim case was the determination of the question whether the buggy levied upon was the property of the claimant or of the defendant in *fi. fa.* The liability of Jeffries and his security was fixed by the terms of the claim bond; for, while the certiorari bond bound Jeffries and Floyd for the payment of the eventual condemnation money, the term "eventual condemnation money" in a claim case must relate back to the obligation of the claim bond which is to pay the plaintiff in *fi. fa.* "all damages which the jury, on the trial of the right of property, may assess against him, in case it should be made to appear that said claim was made for delay only." Civ. Code 1895, § 4612. The damages, if any, in claim cases, are recoverable upon the bond itself, but we know of no rule under which the obligation of a claim bond can be enforced by the judgment of the superior court upon a certiorari which only seeks to review a judgment concerning the right of property. Section 4652 of the Civil Code of 1895 provides that the judge of the superior court may render

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



final judgment and have it executed in the case without sending it back to the tribunal below, where there is no question of fact involved, but merely an error of law which must finally govern the case. The judge of the superior court was in error in rendering judgment against the petitioner in certiorari (the claimant) and the security for the amount of the *fi. fa.* for two reasons: In the first place, no question of law was involved; the issue in the justice's court being one purely of fact. And in the next place, even if the judge had been exercising the duty required of him by section 4652, *supra*, the judgment rendered, as above stated, was not proper in this case where the only issue involved was that of title. In *Taylor v. Gay*, 20 Ga. 77, and *Holton v. Hendley*, 75 Ga. 847, where, as in the present instance, the title alone was involved, the Supreme Court held that there was no eventual condemnation money except the costs. The trial judge should have likewise construed the same term in the certiorari bond in the case at bar, and should not have extended his judgment beyond matters not involved in the certiorari. To impose upon a claimant, no matter how bona fide his claim, liability for the debt of the defendant in *fi. fa.* in case his claim for any reason is not sustained has not yet been contemplated by our law.

The judgment dismissing the certiorari will be affirmed, with direction, however, that the judgment be amended by striking so much thereof as relates to the judgment against the plaintiff in error and his security for principal and interest.

Judgment affirmed, with direction.

#### GEORGIA SOUTHERN & F. RY. CO. v. WALKER. (No. 1,284.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

NEGLIGENCE (§ 134\*)—EVIDENCE (§§ 474, 501\*)—SUFFICIENCY—OPINION EVIDENCE—VALUE OF SERVICES.

The evidence authorized the verdict and the errors complained of are not of sufficient materiality to require the grant of a new trial.

(a) Evidence which is sufficient to rebut the presumption of negligence may itself be discredited by proof of physical facts and circumstances which show such testimony to be incredible. *Western & A. R. R. Co. v. Clark*, 2 Ga. App. 346, 58 S. E. 510; *Atlantic & Birmingham Ry. Co. v. Clute*, 3 Ga. App. 508, 60 S. E. 277.

(b) Any witness may give his opinion after having given the facts upon which he bases it, so as to enable the jury to determine the probative value of this opinionative evidence. The value of services rendered may be proved in this way.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 134\*; *Evidence*, Cent. Dig. §§ 2216, 2292; Dec. Dig. §§ 474, 501.\*]

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action by W. C. Walker against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bule & Knight, J. E. Hall, and J. I. Hall, for plaintiff in error. Alexander & Gary, for defendant in error.

RUSSELL, J. Judgment affirmed.

#### BROWN v. ROME MACH. & FOUNDRY CO. (No. 1,257.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

1. MASTER AND SERVANT (§ 163\*)—DUTY TO FURNISH ADEQUACY OF COMPETENT SERVANTS.

One of the nondelegable duties of a master is to furnish an adequacy of competent servants to do the work in hand.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 328; Dec. Dig. § 163.\*]

2. MASTER AND SERVANT (§§ 102, 122, 203, 217, 250\*)—CONTRACTS (§ 168\*)—FOUNDATION OF LIABILITY FOR INJURIES—DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK—ASSUMPTION OF RISK.

An action brought by a servant against his master for damages resulting from personal injuries received through a breach of one of the master's duties under the relationship between them presents a case of tort in which the broken duty "flows from relations created by contract." In such cases the duty and the right of action for its breach are modified by the terms, express or implied, of the underlying contract.

(a) Every contract is enforceable to the extent, not only of its express terms, but also of its connotations.

(b) Under the usual contract of employment the law raises an implied warranty on the part of the master that he will keep and maintain the place of work and its appurtenances free from hidden dangers so far as he knows of them, or, in the exercise of ordinary diligence, can anticipate or discover them. Similarly it implies an agreement on the part of the servant to assume the risk of such dangers as are within his knowledge, or as he can discover and foresee by the exercise of ordinary care.

(c) Assumption of risk when pleaded to an action *ex delicto* by a servant against a master is a defense growing out of the contract which gave existence to the relationship on which the action is based.

(d) Viewed as the basis of an action *ex delicto* by the servant, "the duty of a master to use ordinary care to keep his premises and to conduct his business in such manner that his servants may perform their duties in safety is but a phase of the broader and more anciently recognized doctrine of the common law that every person who expressly or impliedly invites another to come upon his premises, or to use his instrumentalities, is bound to use ordinary care to protect the invited person from injury."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 173, 174, 232, 538, 574-600; Dec. Dig. §§ 102, 122, 203, 217, 250.\* *Contracts*, Cent. Dig. § 751; Dec. Dig. § 168.\*]

3. NEGLIGENCE (§ 80\*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

The fact that the plaintiff by his own negligence contributed to bringing about the injury which he claims to have received through the negligence of the defendant is always good in defense of an action *ex delicto*. Contributory

negligence does not relieve the defendant by denying the wrongfulness of his conduct or omission, but by so inculcating the plaintiff that the courts through motives of public policy raise a barrier against him.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 84; Dec. Dig. § 80.\*]

**4. MASTER AND SERVANT (§§ 208, 227\*)—“ASSUMPTION OF RISK”—“CONTRIBUTORY NEGLIGENCE” DISTINGUISHED.**

The assumption of the risk by the servant is a matter purely of contract, and is governed by the canons of contract. Contributory negligence is a matter relating solely to torts, and is governed by the principles peculiarly applicable to that branch of jurisprudence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 208, 227.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 589-591; vol. 8, pp. 7584-7585; vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

**5. MASTER AND SERVANT (§ 288\*)—ACTIONS FOR INJURIES TO SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK.**

Assumption of risk, being contractual, implies choice and freedom of consent. Before choice can be implied, there must be an opportunity to choose.

(a) Where the allegations of the petition show that the plaintiff was placed in a dangerous emergency by a sudden negligent act of his master and was injured, it will not be adjudged on demurrer that he assumed the risk of continuing to work in the face of this increased hazard when it appears that the injury followed so quickly upon the negligent act that he did not have a fair opportunity of reasonably exercising any choice in the matter.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1076; Dec. Dig. § 288.\*]

**6. MASTER AND SERVANT (§ 289\*) — ACTIONS FOR INJURIES TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.**

The question of the plaintiff's contributory negligence is under the allegations of the petition issuable and solely for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action for personal injuries by M. R. Brown, by next friend, against the Rome Machine & Foundry Company. Judgment for defendant, and plaintiff brings error. Reversed.

The petition as amended alleged substantially as follows: Plaintiff was, when injured, an employé of defendant, in the capacity of an apprentice moulder, whose duties were the same as those of a moulder, except that the class of work is not as good, for the reason that he was learning the trade. He did learn the work of making forms, poured and carried iron, and did similar work in the defendant's foundry at which castings were made. The plaintiff, with two other men, was carrying molten iron in a ladle and pouring it into a flask for the purpose of making a casting. The ladle was an iron bucket, about 18 inches high, and about 10 inches in diameter inside. "It is suspended in the middle of an iron rod, which

is a pole about four feet long at one side of the bucket, and at the other a pair of shafts extending about three feet from the bucket. The general appearance of the flask is a box 3½ feet high, 6 feet wide, and about 10 feet long;" the weight of the casting being made was about 1,800 pounds. As the plaintiff and the two men were about to carry the ladle to the flask, the defendant's foreman in charge, W. A. Duncan, called one of the men with the plaintiff away from the work, and put him at other work, directing the plaintiff and his other helper to carry and pour the iron, as they had started to do. Duncan was in direct charge of the room in which the plaintiff was working, and directed all of the men in the foundry what work to do. He was the immediate superior of the men in the foundry, and superintended the work therein. The ladle was full of iron, and the plaintiff and the two men had picked it up by means of the pole and shafts above mentioned. The plaintiff was behind between the shafts, holding them in his hands, and the other two men were in front, one on each side of the pole. This ladle of iron was to be carried to the flask, a distance of about 12 feet, and poured into the flask on top of molten iron already poured; and Duncan, after calling one of the men, ordered the plaintiff and his helper to proceed. This the plaintiff and his helper undertook to do; and, while so doing, the helper became overbalanced by his load, and the ladle struck against the end of the flask, and splashed some of the molten iron into the plaintiff's left eye. The helper became overbalanced by reason of the weight he was carrying by the pole, which, as it had to be carried to one side of him, had a tendency to disturb his balance. By reason of being overbalanced, the ladle swung out from him against the side of the flask, and struck against the flask, and the impact caused the iron to splash as aforesaid. The ladle weighs about 100 pounds, and holds about 300 pounds of molten iron. The ladle should be and is intended to be carried by three men. On account of the weight of the ladle and its contents, and the dangerous character thereof, it should always be and is customarily carried by three or four men. The business of carrying and pouring molten iron has to be conducted rapidly, to prevent the iron from cooling and solidifying. The defendant was negligent in failing to furnish a sufficient force to conduct the work with reasonable safety. The plaintiff was free from fault or negligence in and about the transaction by reason of the facts stated. He was working under the immediate orders of a superior foreman, was in the line of his duty and scope of his employment, and was intently engaged in his work, which had to be conducted with great rapidity as aforesaid; so that he did not have time to, and did not,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

realize the risk and danger of performing the work with only two men as aforesaid. By reason of the rapidity of action required, he was acting in an emergency, and did not assume or understand the increased hazard of the work. The defendant was negligent in increasing the hazard and risk of the plaintiff's employment without due warning, and without giving him time to realize the increased danger. The injury is the direct and proximate result of the defendant's negligence hereinbefore alleged. The judge sustained a general demurrer, and the defendant excepts.

Seaborn & Barry Wright, for plaintiff in error. Smith, Hammond & Smith and Dean & Dean, for defendant in error.

POWELL, J. (after stating the facts as above).

1. As originally drawn, the petition was subject to dismissal on demurrer. It did not show a cause of action. It merely alleged that, at the time one of the two necessary helpers was called away, the plaintiff and his fellow laborers were about to carry the ladle of molten iron to the flask, not that they were already in the act of carrying it. As thus set forth, the transaction was clearly covered by the cases of *Worlds v. G. A. R. Co.*, 99 Ga. 283, 25 S. E. 646, and *Freeman v. Savannah Electric Co.*, 130 Ga. 449, 60 S. E. 1042. It would also be easily distinguishable from the case of *King v. Seaboard Air Line Railway*, 1 Ga. App. 88, 58 S. E. 252, for it could fairly have been said that the plaintiff, with no other emergency before him than that the ladle was ready to be moved, with no other duty to claim his care than the doing of the very work by which he was injured, and with no other engrossing task claiming his attention so as to distract it from an appreciation of what was involved in the act he was about to attempt, assumed the danger by going forward with the work, knowing that one of his fellow workmen had been called away. The amendment states that the necessary third man was called away after the three were already in the very act of carrying the ladle full of hot molten iron. This presented an emergency. It puts the case where we cannot say that the plaintiff, under his duty to his employer, or under that duty to use ordinary care and diligence for self-protection which the law imposes on every man when confronted with another's negligence, should have attempted to rid himself of the dangerous emergency by putting down the ladle just as the third man turned it loose, instead of going on to the flask with it, which means, of course, that we cannot say that the plaintiff either assumed the risk or was guilty of contributory negligence. It is well recognized now that one of the nondelegable duties of the master is to furnish an adequacy of competent fellow servants to do the work in hand. *Labatt, Master & Servant*, § 573; *Cheeny v. Ocean*

*Steamship Co.*, 92 Ga. 726, 728, 19 S. E. 33, 44 Am. St. Rep. 113; *Savannah, F. & W. Ry. Co. v. Goss*, 80 Ga. 524, 5 S. E. 777; *Moore v. Dublin Mills*, 127 Ga. 610 (3), 56 S. E. 839, 10 L. R. A. (N. S.) 772; *Dennis v. J. S. Schofield's Sons Co.*, 1 Ga. App. 489, 57 S. E. 925. The petition alleges such a delinquency on the part of the master as an efficient proximate cause of the injury; and therefore the case turns upon the questions whether the risk was assumed by the servant, and whether he was guilty of contributory negligence.

2. Our young friend who has presented the case for the plaintiff in error frankly confesses his inability to distinguish between the defenses of assumption of risk and contributory negligence in master and servant cases. Perhaps the very simplicity of the distinction has confused him. The statement of homely facts in technical terminology frequently confuses. In my earlier days, when I was an attaché of a newspaper office in my home town, with that facetiousness which is not always unbecoming to the journalistic craft, I contributed an article stating, with much circumstantiality of detail, that on the western edge of the county might be found a large quantity of a very valuable substance known as protoxide of hydrogen, "an article largely used in the arts and sciences, and almost indispensable to navigation." Local real estate men and capitalists suffered the keenest curiosity until they discovered that protoxide of hydrogen is mere water, and that the large quantity referred to is the Chattahoochee river. The meaning of the two expressions "assumption of risk" and "contributory negligence" and the distinction between them is simple, though the application to particular cases is frequently difficult.

The relation of master and servant arises through a contract made for the common benefit of both parties. The business of getting the work done is the master's. The business of getting the work to do and of doing it is the servant's. Each expects to get a benefit. So they contract that the master will have the work done, and that the servant will do it. Every contract has implied obligations in addition to those which are express, and the contract between the master and the servant is no exception. If a retail merchant in Atlanta makes a contract with a wholesale merchant in New York for a bill of goods, and nothing is said expressly as to how they are to be shipped, the law finds in the contract in addition to the express language certain connotations; for instance, that the goods are to be shipped by the usual means of transportation, and that the carrier shall be the purchaser's agent to receive them from the seller. In sales, if the parties omit the expression of the terms of warranty, the law implies certain terms. These implied obligations and assumptions which the law adds to the express agreements in all contracts are familiar to law-

yers and laymen alike. They are simply inferences which the courts draw from the transaction, on the ground that the parties naturally must have intended them. When the relation of master and servant is about to arise, the parties usually agree expressly as to what work shall be done by the servant, and what pay he shall receive. The law adds other things by implication. Nothing to the contrary being expressly said, the law presumes in usual cases that the parties intend to agree that the master shall furnish the place to work, the fellow workmen, the thing on which the work is to be performed, and the machinery, tools, and other necessary instrumentalities, and, if the work is a part of a complex system, that the master will organize and maintain the system. If the servant is contracting in ignorance of the actual condition of these things, he is authorized to infer that the master's place of work and system are safe, so far as ordinary care and diligence could make them so, and that the master will use the same degree of care to keep them so. He has the right to make the same inference as to the competency and number of fellow servants furnished, and as to the tools, machines, instrumentalities, etc., with which he is expected to come into contact in doing the work. It would be a *prima facie* violation of the master's contract of employment if he offered to put a servant who had contracted in ignorance of actual conditions to do work which was unsafe by reason of the system organized or maintained, or of the condition of the place, ways, instrumentalities, etc., if by ordinary care on the master's part they could be made reasonably safe. Confronted with the proposition of being required to work under an unsafe system at an unsafe place, with incompetent fellow servants, or with unsafe instrumentalities, the servant would have the right of abandoning the contract and suing the master for breaching it as to this material, though implied, portion of it. However, if he knows the actual condition of things when he contracts, or if he subsequently discovers it, he may not choose to refuse to work. The doing of the work may be such a privilege that he is willing to take the chances of getting hurt, so that he in the one case by actually contracting with knowledge of the danger or in the other case by refusing to abandon after knowledge, and thereby waiving the master's breach, raises an implied agreement against himself that he will not hold the master to the obligation of furnishing any safer place, ways of work, servants, or appliances than what already he sees to exist, or, as we say in juridic terminology, he assumes the risk of the delinquencies, and thereafter the law reads this implied agreement or assumption on his part into the contract of employment as a part of it.

The contract of employment being one of mutual benefits, the servant's assent and con-

sent to work with a defective instrumentality of his master gives the transaction very much the same color as if the servant were expected to use one of his own tools, as is sometimes the case, and he himself should bring one that is defective. Let us get clearly fixed in our minds just here the idea that the subject-matter of the contract between the parties (the doing of the work in contemplation) is one in which the servant has a proprietorship, so to speak, as well as the master. He is engaged in the business of laboring just as the master is engaged in the business of having labor done. The master's plant, tools, etc., are instrumentalities which he (the servant) adopts and contracts for as a part of the occupation he wishes to carry on—the occupation of working for reward. If he were working for himself and not for a master, he would have the legal right to buy defective tools or use an unsafe workshop of his own. So, too, he has the similar legal right to make a contract to work for his master in which he undertakes to use the master's defective tools or to work in the master's unsafe plant. So far as the procuring of instrumentalities and place of work are concerned, the laborer's choice and his right to hold some one else responsible for defects are decidedly similar in the two cases, whether he buys the tools, machines, etc., or procures them as a part of his contract with the master. If he is working for himself and buys his tools, machinery, etc., in the usual market, he cannot hold the one who sells them to him liable for injuries arising from the fact that they are defective, if they are bought or accepted as imperfect; nor can he hold the seller liable, even though they are bought under such circumstances that the law raises an implied warranty, unless they contain hidden defects which the seller knew, or from his opportunities for discovery should have known, and which the buyer did not know, and in the exercise of reasonable diligence could not discover. It is only upon similar conditions that he could maintain liability against a contractor who had built a workshop for him. He could not recover for injuries from defects unless they were hidden and the contractor knew or ought to have known of them, and he (the assumed plaintiff) did not know of them, and by ordinary diligence could not discover them. Likewise, when the laborer, instead of working for himself and buying his tools, machines, house, etc., makes a contract with his master, and as an implied incident to that contract procures the house, plant, fellow servants, tools, machines, and other instrumentalities necessary to the doing of the work, this contract gives him no higher theoretical right as to the condition of these things than he would have if he had obtained them under a contract of purchase. Hence we say that the servant cannot recover from the master for injuries arising from defects in those things which under the law the

master is to furnish as a part of his contract, unless the master knew or ought to have known of the defects, and unless the servant did not know and by the exercise of ordinary care could not have known thereof. Assumption of the risk—that is to say, the risk of using the master's works, ways, servants, instrumentalities, etc., in the condition in which the servant knows, or by ordinary care should know them to be—is a contractual incident implied by the law from the very nature of the contract itself. Being a contractual implication, it may be destroyed by an express agreement to the contrary or even by a repugnant implication arising from particular extraordinary transactions or communications between the parties. For an example and a discussion of this phase of the question, see *Bush v. West Yellow Pine Co.*, 2 Ga. App. 295, 58 S. E. 529. The action of the servant against the master for injuries received through defects in the latter's works, ways, means, instrumentalities, etc., however, almost invariably sounds in tort. It is elementary that a broken duty arising from a relation created by contract may furnish the basis for an action *ex delicto*. See *Civ. Code 1895*, §§ 3807 (3), 3810; *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968. In such cases the contract tends to assist in defining the duty, and frequently limits it or the right to sue for a breach of it when otherwise there would be no such limit. This principle, that a right of action *ex delicto*, because of the breach of a duty springing from a contractual relationship, is subjected to the terms of the contract, is familiar. For example, when a member of the public makes with a telegraph company a contract for the transmission of a message, a relationship arises between the parties and a public duty on the company's part attaches to the transaction; and for the breach of this duty a cause of action *ex delicto* exists, but it may be modified or defeated by the terms of the underlying contract, as, for instance, by the usual stipulation that immediate notice of the damages shall be given, and that no suit shall be brought except within a limited period of time.

The prime gist of the servant's action against the master is very much akin to that in cases where an invited visitor comes upon the premises of another. "The duty of a master to use ordinary care to keep his premises and to conduct his business in such manner that his servants may perform their duties in safety is but a phase of the broader and more anciently recognized doctrine of the common law that every person who expressly or impliedly invites another to come upon his premises, or to use his instrumentalities, is bound to use ordinary care to protect the invited person from injury." *Seaboard Air Line Railway v. Chapman*, 4 Ga. App. 706, 62 S. E. 488. The law implies an invitation from the landowner to come upon his premises as to every one with

whom he has such business relations as to warrant such an implication. *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060. We have shown above that the servant has such an interest in the very doing of the work as to entail responsibilities and assumptions upon him. The master also has an interest in the same subject-matter. The rule that an invitation to use the proprietor's premises, instrumentalities, etc., will be implied where he assumes such a relation as to make that use a benefit contemplated by him in assuming the relationship, is of direct application when a master hires a servant. See the quotation from *Sweeny v. Old Colony R. Co.*, 92 Mass. (10 Allen) 373, 87 Am. Dec. 644, in *Mandeville Mills v. Dale*, supra. Whenever such an invitation is implied, the principle contained in *Civ. Code 1895*, § 3824 (a common-law principle), becomes applicable, and the law raises against the proprietor immediately the duty that he shall have and maintain his premises, instrumentalities, etc., in a safe condition for the purposes contemplated so far as ordinary care and diligence on his part will keep them so. It is therefore usually stated in general terms that the master owes to the servant the duty of using ordinary care to see that his plant is safely kept and maintained, so far as system and place of work, instrumentalities, competency, and adequacy of servants, and other appurtenances to the doing of the labor are concerned. This duty springing as it does from a relationship arising by contract is modified and limited by the terms, express and implied, of the contract itself. Hence assumption of risk is always a good defense to a suit for a breach of this general duty, whenever according to the contract and the implied obligations which the law reads into it the servant has assumed the risk of working in or with the thing that has caused his hurt.

3. We come now to the defense of the servant's contributory negligence. It is a rule of the common law of almost universal application that a plaintiff loses his right to claim damages (except in cases where the statute provides for a diminution only and allows a comparison of the negligence of the respective parties) if it appears that his own negligence contributed in any way to the bringing about of the injury, notwithstanding that negligence of the defendant may be shown also to have been a proximate cause. Contributory negligence may consist in the plaintiff's knowledge, or in careless ignorance of existing conditions likely to subject him to risk of danger. Hence in cases where the servant has entered the employment knowing that an unsafe condition exists, or continues to face the danger when he has discovered it or in the exercise of ordinary care should have discovered it, not only is assumption of risk a good defense, but contributory negligence would be also. There are cases where under the contract, or under some mu-

tual abrogation of the usual terms, the servant has not assumed the risk or has been relieved of it; and in these cases, though the defense of assumption of risk is not open to the defendant, the defense of contributory negligence may remain so; for the defense of contributory negligence is a barrier which the law itself has raised as a part of public policy. It is the law itself that closes the door of the courts to those who by their own carelessness have occasioned their own hurt, though the defendant sought to be held liable may also have been at fault. *Bush v. West Yellow Pine Co.*, supra. It is, of course, contributory negligence for a person to fail to use ordinary care to avoid the consequences of another's negligence, when it becomes apparent. A risk may arise which the servant cannot fairly be said to have assumed and which he in no wise contributed to bringing about, a risk, however, in which the servant might extricate himself from danger if only he should use ordinary care. In such a case, if he fails to use that care and is hurt, the defense of contributory negligence is applicable though the defense of assumption of risk would not be.

4. The foregoing discussion is elementary and not comprehensive. We have endeavored to give a sectional view, so to speak, of the foundations of the reciprocal rights and duties of the parties to each contract of employment so far as the system and place of work and the appurtenances, animate and inanimate, are concerned. We have not attempted to display the whole structure that has been built upon these foundations. There are many subordinate principles, special applications, and corollary doctrines running all through this branch of the law; but all these trace back to, are founded on, and are absolutely governed by, these fundamentals. We hope that we have made it clear that assumption of risk is a defense which arises only from the contract that creates the relationship essential to the duty upon the breach of which the plaintiff's cause of action rests. Theoretically speaking, contributory negligence has no different meaning in actions by the servant against the master from that which it universally has in suits based on torts.

These foundations of liability and of defense, when reduced to final analysis, are but phases of well-recognized common-law principles. If we bear in mind that assumption of risk finds its origin in the law of contract and is governed by the usual canons of construction applicable in the field of contract law, and that contributory negligence finds its origin in the law of torts and is governed by its cardinal canons, and that both defenses may arise from the same set of circumstances, though they do not necessarily do so, we ought to be able to deal with them without confusion. The opening state-

ment in Labatt's wonderful work on the Law of Master & Servant, that "the doctrines which define the extent of a servant's right to recover damages for personal injuries received in the course of his employment represent, broadly speaking, the result of a compromise between the principle that a servant agrees to assume all the risks incident to the work undertaken by him, and the principle that a master is answerable for the consequences of any negligent acts which may be committed by himself or his agents," is not strictly accurate. It is not so much a case of compromise as it is a case of harmonious joint application of the principles of tort and contract to which we have had reference in the foregoing discussion. While there is no reported common-law case in which the servant sued the master for injuries received pending the employment, still every doctrine applicable to this (now generally considered separate) branch of jurisprudence is merely some familiar common-law principle adjusted to the special facts.

5. Under the allegations of the petition before us, it can hardly be said that the plaintiff assumed the risk of carrying the ladle of hot iron without the assistance of the third man. Assumption of risk, being contractual, denotes choice, freedom of consent. The law would hardly imply against the plaintiff under the circumstances detailed a waiver of the defendant's breach of duty in leaving him unaided in the task from the fact that he carried the ladle for the few feet that intervened between the flask and the point where the third man was called away before he attempted to put it down, instead of letting it fall to the ground and abandoning it immediately. Before we can infer that there was a free choice, it must appear that there was a reasonable opportunity to choose.

6. Whether the defendant was guilty of contributory negligence or not depends upon whether a reasonably prudent man situated as he was would have done as he did or not. Assumption of risk respects consent, the act of the will. Contributory negligence respects assent, the act of the judgment, and conduct thereunder. *Burdick on Torts*, 170; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. For a discussion of the difference between consent and assent, see *Williams v. Fain & Stamps*, 2 Ga. App. 136, 58 S. E. 307. If he went on with the attempt when prudence required him to stop, or if he carelessly or negligently conducted himself pending the dangerous situation, if by the exercise of ordinary care he could have avoided the injury, he was guilty of contributory negligence. The liberal attitude which the courts assume toward men when confronted with an emergency demanding such quick action as to rob the judgment of all or a material part of its activity requires us to hold that

the plaintiff's contributory negligence under the circumstances alleged is peculiarly a question for the jury.

Judgment reversed.

### JACKSON v. STATE. (No. 1,416.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

#### 1. USURY (§ 31\*) — USURIOUS CONTRACTS — SALES OF PROPERTY.

The act of the General Assembly approved August 15, 1908 (Acts 1908, p. 83), makes it a misdemeanor "to reserve, charge or take for any loan or advance of money \* \* \* any rate of interest greater than five per cent. per month, either directly or indirectly, by way of commission for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees, or by any contract, or contrivance or device whatever." The sole purpose of the act is to make it penal "to reserve, charge, or take" interest for the use of money in excess of 5 per cent. per month under any contract where the relation of debtor and creditor is created or survives. The absolute sale of property is not included within the terms of the act.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 31.\*]

#### 2. USURY (§ 31\*) — USURIOUS CONTRACTS — SALES OF PROPERTY.

The facts set out in the accusation showing a real, absolute, and unconditional sale and transfer of personal property, where no money was loaned or advanced, where the purchase price was in fact paid, and no interest was "reserved, charged or taken," the trial court erred in not sustaining the demurrer and quashing the accusation, and the judge of the superior court erred in not granting the writ of certiorari.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 31.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

R. R. Jackson was convicted in the criminal court of Atlanta for a violation of Act Aug. 15, 1908 (Acts 1908, p. 83), making it a misdemeanor to charge a greater rate of interest than 5 per cent. per month on a loan. He thereupon presented his petition for certiorari to the judge of superior court, which was refused, and he brings error. Reversed.

Rosser & Brandon, J. D. Kilpatrick, and R. B. Blackburn, for plaintiff in error. Lowry Arnold, Sol., C. D. Hill, Sol. Gen., and D. K. Johnston, for the State.

HILL, C. J. Jackson was tried and convicted in the criminal court of Atlanta for a violation of the act approved August 15, 1908 (Acts 1908, p. 83). He thereupon presented his petition for certiorari to the judge of the superior court of Fulton county. The writ was refused, and, the judgment refusing the writ of certiorari, is brought to this court for review. The act in question is entitled "An act to make it a misdemeanor to charge any rate of interest greater than five per cent. per month, either directly or indirectly, and for other purposes." In the body

of the act it is provided that "It shall be a misdemeanor \* \* \* for any person \* \* \* to reserve, charge, or take for any loan or advance of money \* \* \* any rate of interest greater than five per cent. per month, either directly or indirectly, by way of commission for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees, or by any contract, or contrivance, or device whatever."

The first count in the accusation sets out in substance the following as constituting a violation of the statute: On August 19, 1908, J. D. Lindsay made a written application to sell to Jackson an account due Lindsay by the Southern Railway Company for wages or salary at that time due and already earned by Lindsay in the capacity of coal crane engineer. In this application Lindsay warranted, in order to induce Jackson to purchase the account, first, that he was employed by the Southern Railway Company as a coal crane engineer during the month of July, 1908; second, that while so employed he earned as salary \$58.06; third, that there were no offsets or counterclaims against this salary or wage account; fourth, that there were no orders, drafts, garnishments, or judgments outstanding in any way affecting the account; and, fifth, that the account was just, true, and unpaid, and had not theretofore been sold or transferred. In the written application it was alleged by Lindsay, first, that the transaction between himself and Jackson was an absolute and unconditional sale, and not a loan or advance of money, nor a discount; second, that he, Lindsay, the seller of said account, was not a debtor to Jackson, the purchaser of the account; third, that the transaction was an original one, and was not a renewal or an extension of any kind. It was also agreed by Lindsay in his application, first, that he would take as the purchase price for the account offered for sale \$52; second, that he authorized Lindsay, the purchaser of the account, in his name and stead and as his attorney in fact, to collect the account and to sign any and all checks, receipts, and acquittances necessary and proper to be signed in order to collect the account. Upon an acceptance, in writing, by Jackson of Lindsay's proposition, Lindsay made to Jackson a written transfer of the account referred to in substance as follows: "In consideration of the sum of \$52.70 cash in hand paid, the receipt of which is hereby acknowledged, I hereby sell, transfer, and assign to R. R. Jackson \* \* \* my account for salary or wages, already by me earned, and amounting to \$58.06, and due me by the Southern Railway Company. \* \* \* This is an absolute and unconditional sale of the account, and is not a loan or advance of money, and is not a discount. I am not a debtor to the purchaser. This is an original transaction, and not a renewal or ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tension of any kind." (Here follow statements and warranties similar to those contained in the foregoing application made by Lindsay to Jackson.) After consummating the above contract, Jackson on August 21, 1908, in Fulton county, presented to the Southern Railway Company the transfer and assignment above stated, and received from that company \$58.08, being the amount due by it to Lindsay for wages earned during the month of July, 1908. The second count of the accusation is in all respects similar in its allegations to the first count, except that in this count it is alleged that Lindsay sold to Jackson a promissory note made by one A. S. Bond, dated August 18, 1908, and payable on or before August 25, 1908, to Lindsay, the note being in the usual form, with interest from maturity at 8 per cent., including 10 per cent. attorney's fees, if collected by law or through an attorney. It is alleged that the consideration which Jackson paid to Lindsay for this note was \$8 in cash, and that Jackson collected from the maker of the note \$10 in payment thereof.

The defendant filed a demurrer to both counts of the accusation on the ground that no offense was charged therein, and that the acts of the defendant as therein alleged were not within the prohibition of the statute upon which the accusation was framed. Other grounds of the demurrer make an attack upon the constitutionality of the act in question for various reasons. The view that we take of the case makes it unnecessary to set out these objections. The court overruled the demurrer, and the defendant was thereupon tried by the presiding judge without the intervention of a jury on an agreed statement of facts, and found guilty on both counts. In the agreed statement of facts it is expressly stipulated that the allegations set out in the first and second counts of the accusation speak the truth of the transactions. The controlling question presented for the decision of this court is as to the correctness of the judgment overruling the demurrer.

The allegations of the accusation in the first count, tersely stated, show that the defendant bought from the prosecutor an account for wages which had been earned by the prosecutor as an employé of the Southern Railway Company, the purchase being for the stipulated price which was paid in cash to the prosecutor as the seller of the account, and that, in consideration of the payment of this sum, the account was duly transferred in writing by the prosecutor to the defendant. The allegations in the second count of the accusation show an exactly similar transaction, except that the subject-matter of the sale therein described was a promissory note payable to the prosecutor. Both the account and the note were purchased by the defendant for sums less than their face value by more than 5 per cent. It will be seen that there is no allegation that either transaction was other than the facts as set

out purport. It is not alleged that either transaction was a pretense or subterfuge to cover usury; and therefore, for the purpose of deciding the questions made by the demurrer, we treat the transactions described in the accusation as genuine transfers of the account and the note as made by the prosecutor to the defendant in good faith and based upon a valuable consideration. Does the act of 1908 make criminal bona fide transfers of accounts for wages due and earned at the date of the transfer, or the transfer of promissory notes? In construing the act in question, the caption or title thereof illustrates the legislative intent. *United States v. Palmer*, 3 Wheat. 631, 4 L. Ed. 471; *Etowah Milling Co. v. Crenshaw*, 116 Ga. 408, 42 S. E. 700. The caption of the act is as follows: "To be entitled an act to make it a misdemeanor to charge any rate of interest greater than five per cent. per month, either directly or indirectly, and for other purposes." There is certainly no intimation in the language of this caption of a legislative intent to make penal the purchase of personal property or choses in action under any circumstances or at any price no matter how low. The misdemeanor indicated by the title of the act is the reserving, charging, or taking of usury or excessive interest for money loaned or advanced at a greater sum than 5 per cent. per month. In a bona fide sale and transfer of property for a cash consideration there is no interest or usury, and the relation of debtor and creditor is not created, and does not survive the transaction. Only when the relation of debtor and creditor exists can the question of interest, excessive or otherwise, arise.

The use of the general words "and for other purposes" does not authorize the introduction in the body of the act of a new subject-matter. The title of an act should state in a brief and comprehensive form the purposes of the act and the subject-matter to be dealt with, and the words "and for other purposes," contained in the title, relate only to those provisions in the body of the act which are germane and pertinent to the general subject-matter. *Banks v. State*, 124 Ga. 16, 52 S. E. 74, 2 L. R. A. (N. S.) 1007. In the apt and forceful language of the learned counsel for the plaintiff in error, "the prohibition of sale, whether of personal property or choses in action, is not germane in the sense in which that word is used in decisions on the general subject-matter of prohibition of excessive interest. There is no possible relationship between sales and the taking of interest, moderate or excessive. The very mention of the one excludes the other. In legal geography the boundary of the one does not overlap that of the other." The words, "and for other purposes," which occur in the title of the legislative act, do not constitute a dragnet cast by the Legislature for the purpose of catching all kinds of fish, but only a precautionary net for the



purpose of holding more securely the one fish caught. To make this matter perfectly plain, the Constitution of our state declares that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." Civ. Code 1895, § 5771. Giving these words their widest legal significance, therefore, there is in the title of the act in question but one general subject-matter, to wit, the making penal the taking of excessive interest, directly or indirectly, or by any contrivance, devise, or subterfuge whatsoever. The body of the act makes it a misdemeanor for "any person \* \* \* to reserve, charge, or take for any loan or advance of money \* \* \* any rate of interest greater than five per cent. per month either directly or indirectly, by way of commission for advances, discount, exchange, purchase of salary or wages, by notarial or other fees, or by any contract, contrivance, or device whatever." Now, the use of the words "the purchase of salary or wages," in the body of this act under which the accusation was evidently framed, was not intended to prohibit the purchase of salary or wages legally capable of being sold, however low might be the price paid therefor.

There is nothing whatever in the allegations of the accusation indicating that Jackson made to the prosecutor any loan or advance of money, or that the transaction described in the accusation was any subterfuge for what was in reality a loan of money, or that the transaction therein described was any contrivance or device to cover usury. Neither is there in any of the allegations of the accusation any suggestion that such was, in fact, the case. The only construction which can be legitimately placed upon the allegations set out in the accusation as descriptive of the transactions between the defendant and the prosecutor is that there was a bona fide sale by the prosecutor to the defendant of his property for a valuable consideration. The prosecutor, as the seller of the account and the note, parted absolutely with the title for a money consideration which he then and there received without any condition and without any obligation to repay. It is perfectly clear that the Legislature intended only to prohibit and to make penal the taking of usurious interest greater than 5 per cent. per month by whatever means such usury or excessive interest might be taken, whether "by way of commissions for advances, discounts, exchange, the purchase of salary or wages by notarial or other fees." It is only when these things, otherwise legitimate and valid, are used as devices for the exaction of usury beyond this fixed amount that they fall within the prohibition of the act. The Legislature never intended to revolutionize the general law on

the subject of sales of property, or the right of every man to sell what he owned for any price he desired, or to prohibit any man from buying any sort of property for any price for which he could purchase it. "The policy of our law is against restrictions upon the alienation of property. It is woven in the warp and woof of all of our laws, concerning the disposition of property, that an adult shall be unrestricted in the disposition of his property." *Singleton v. Close*, 130 Ga. 720, 61 S. E. 724. And Justice Speer in the case of *Lamar v. Jennings*, 69 Ga. 392, declares that any "restriction upon the free alienation of property by the owner is contrary to public policy." The assignment of his earned wages by the prosecutor to the defendant, described in the first count of the accusation, has been expressly authorized by the act of 1904 (Acts 1904, p. 79), and the transfer of the note described in the second count of the accusation is fully within the terms of section 3077 of the Civil Code of 1895, which provides "that all choses in action arising upon contract may be assigned so as to vest the title in the assignee." But we deem it profitless to extend this discussion. The whole matter may be summed up in the statement that it never entered into the mind of the Legislature to conceive that the statute which has for its sole purpose to make it a misdemeanor to reserve, charge, or take for any loan or advance of money a rate of interest greater than 5 per cent. per month, either directly or indirectly, under pretense or guise of a purchase of salary or wages, or by any contract, contrivance, subterfuge, or device whatever, could possibly be construed as restricting the fundamental right of the citizen to make, by sale or transfer, a free disposition of his property.

For these reasons, we think that the demurrer should have been sustained and the accusation quashed by the trial court; and the writ of certiorari should have been granted. This decision makes it unnecessary to certify to the Supreme Court the constitutional questions made in the record.

Judgment reversed.

#### BENDROSS v. STATE. (No. 1403.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### 1. SUNDAY (§ 13\*)—VALIDITY OF CONTRACTS—CONTRACT FOR SERVICES.

A contract between employer and laborer that the laborer will work in the employer's regular business is void if made on Sunday.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 36; Dec. Dig. § 13.\*]

##### 2. MASTER AND SERVANT (§ 67\*)—FRAUDULENT CONTRACTS FOR SERVICES—CRIMINAL PROSECUTIONS.

Such a Sunday contract will not support a prosecution under the act of August 15, 1903 (Laws Ga. 1903, p. 90), especially where no novation of it has come about by affirmative ac-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion under it on any secular day. A contract with a minor is not void, but is binding until repudiated. An illegal Sunday contract is void, and is not enforceable until its terms have become binding by something affirmatively done by way of novation on a secular day. See *Calhoun v. Phillips*, 87 Ga. 483, 13 S. E. 593. By this difference this case is distinguished from *Vinson v. State*, 124 Ga. 19, 52 S. E. 79, and *Anthony v. State*, 128 Ga. 632, 55 S. E. 479.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 87.\*]

### 3. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS.

It is error to charge the jury that the defendant admits an essential element of the state's case which he has not in fact admitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1983; Dec. Dig. § 814.\*]

### 4. FRAUDULENT CONTRACTS FOR SERVICES—CRIMINAL PROSECUTIONS.

Except as herein indicated, the conviction is sustainable.

(Syllabus by the Court.)

Error from City Court of Miller County;  
C. C. Bush, Judge.

Vince Bendross was convicted of procuring money on a contract for services with intent to defraud, in violation of Act Aug. 15, 1903 (Laws 1903, p. 90), and he brings error. Reversed.

W. I. Geer, for plaintiff in error. N. L. Stapleton, Sol., for the State.

POWELL, J. Judgment reversed.

## LEAKE v. J. R. KING DRY GOODS CO. (No. 1,012.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

### 1. EVIDENCE (§ 588\*)—WITNESSES (§ 360\*)—TRIAL (§ 68\*)—CREDIBILITY—FILING PAUPER AFFIDAVIT—RIGHT TO REBUT DISCREDITING EVIDENCE—REOPENING CASE FOR ADDITIONAL EVIDENCE.

The fact that one who has been shown to be the owner of valuable property has appealed upon an affidavit in forma pauperis is a circumstance which may be considered by the jury in determining as to the affiant's credibility as a witness in the case.

(a) Where, in order to discredit such a party as a witness, it is sought to disprove the statements of his pauper affidavit by testimony that he is the owner of valuable property, and is fully able to pay the costs, he has the right to rebut such testimony by proof of the truth of his affidavit.

(b) It is a matter within the discretion of the trial judge whether, after the testimony has been closed, the case shall be reopened for the purpose of allowing testimony upon this as upon any other point in the case, and this discretion is not abused by the refusal to open the case during the argument for the purpose of proving by parol, instead of by written evidence of title (which is not shown to be either lost or destroyed), that the party whose credibility is attacked had parted with the title to certain realty which had previously been alluded to in the testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2437; Dec. Dig. § 588;\* *Witnesses*, Cent. Dig. §§ 1165, 1166; Dec. Dig. § 360.\* *Trial*, Cent. Dig. § 160; Dec. Dig. § 68.\*]

### 2. EVIDENCE (§ 315\*)—HEARSAY.

While hearsay testimony is sometimes competent as explanatory of conduct, the statement of a husband (who was not shown by the testimony to be the agent of his wife) that "the account was his wife's account" should have been excluded, especially in view of the fact that this statement was made several months after the purchase of the articles embraced in the account, and could not in any sense be considered as a part of the res gestæ of the purchase.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1180; Dec. Dig. § 315.\*]

### 3. PARENT AND CHILD (§ 3\*)—LIABILITY OF WIFE FOR CONTRACTS OF CHILD.

In the absence of express assumption of liability therefor, a wife who is living with her husband is not liable for any contract of their minor child. If the indebtedness created by the child be for necessities, the husband and father may for that reason be liable, but the mother, while she is a feme covert, cannot be held therefor, unless she so contracts to be bound. The evidence showing, without contradiction, that a portion of the account for which the verdict was rendered in favor of the plaintiff was purchased by the daughter of the defendant without the defendant's authority, and upon the credit of the daughter herself, a new trial should have been granted.

[Ed. Note.—For other cases, see *Parent and Child*, Dec. Dig. § 3.\*]

(Syllabus by the Court.)

Error from Superior Court, Cobb County;  
Geo. F. Gober, Judge.

Action by the J. R. King Dry Goods Company against Mrs. J. P. Leake. Judgment for plaintiff, and defendant brings error. Reversed.

J. E. Mozley, for plaintiff in error. Griffin & Attaway, for defendant in error.

RUSSELL, J. The plaintiff, in the court below brought suit against Mrs. Leake upon an account for certain dry goods sold to her and to her daughter. It does not appear whether the daughter was of full age or a minor at the time she purchased a portion of the goods, but it is undisputed that the defendant is a married woman, living with her husband, the child's father. The jury rendered a verdict in favor of the plaintiff for the full amount; whereupon the defendant moved for a new trial. The motion for new trial was based upon the general grounds and upon certain objections to the testimony, and exception is also taken to the ruling of the court upon the argument of plaintiff's counsel.

1. Counsel for the plaintiff in his concluding argument stressed the point that the defendant had filed a pauper affidavit, although she owned and was living in a \$5,000 mansion on Church street, in the city of Marietta. Counsel for the defendant objected to this argument, and asked the court to order it stopped, for the reason that this line of argument was improper and unfair. This motion the court overruled. Counsel for the defendant thereupon asked the court to allow

him to reopen the case and reintroduce Mrs. Leake, and to show by her that the house and lot referred to by counsel for the plaintiff had long since passed out of her, and that the same was incumbered with a loan deed in favor of W. S. N. Neal for an amount almost equal to the entire value. The court asked the defendant's counsel if he had the deed passing the title out of the defendant in court. He answered that he had not. Thereupon the court overruled the motion to reopen the case and to allow the movant to testify that she had deeded the property to secure a loan.

We cannot say that the court erred in the ruling complained of in this ground of the motion for new trial. It appears from the record that a witness for the plaintiff, without any objection being made to the competency of such evidence, had testified that the defendant owned the dwelling house worth between \$4,000 and \$5,000, and it also appears that the defendant appealed her case in forma pauperis. The pauper affidavit constituted a part of the pleadings in the case, and was for the inspection of the jury; and, while no one's rights should be prejudiced in the slightest degree by his poverty, if he, indeed, be poor, still, if one who has considerable property nevertheless files a pauper affidavit, the jury may consider this circumstance (apparently contradictory) as affecting the credit of the witness. In other words, a witness who would swear falsely to an affidavit in forma pauperis, when, in fact, the witness is able to pay the costs, may thereby be discredited in the eyes of the jury. We think, therefore, that the court properly overruled the objection to the argument of the plaintiff's counsel. But, while this is true, the defendant had the right to show, if she could, that the affidavit in forma pauperis was the truth, and that the property referred to in the testimony was incumbered to the full amount of its value, or, indeed, was not her property at all. The court recognized this by asking if the deed evidencing a transfer of title was in court, but, when the counsel replied that it was not, the judge refused to reopen the case for the purpose of allowing parol testimony upon the subject. In this we think the ruling of the court was again correct. After the evidence has been closed, it is wholly within the discretion of the trial judge whether the case shall be reopened for the introduction of additional testimony which may have been overlooked. In this case the judge did not abuse his discretion because he first satisfied himself that the written muniment of title was not in court, and the parol evidence of Mrs. Leake that she had deeded the property to W. S. N. Neal was clearly incompetent and inadmissible.

2. We think the objection to the testimony

of J. R. King that Mr. Leake said the account was his wife's account, but that, if he (King) would make it out and send it to him, he would pay it, was well taken. This testimony was clearly hearsay. Hearsay testimony is admissible in certain instances as explanatory of conduct. In the present instance it could not perform that office. The suit was not against Mr. Leake, but against his wife. If he was her agent, and if that fact appeared plainly from the testimony, the principal would be bound by his statements only so far as pertinent thereto, and, if made in the course of the transaction under consideration, *dum ferveat opus*. His statement in such event would be admissible then as part of the *res gestæ* of the transaction. Here was an account, however, every item of which had been purchased some time previously, not by Mr. Leake, the agent, but by Mrs. Leake herself and by their daughter. The statement of the account had been forwarded several times, and several months had elapsed. The issue in the case was whether the husband or the wife was the real debtor. Certainly the voluntary statement of the husband (which naturally was prejudicial to the defendant) that it was his wife's account could not be considered as a statement made by him as an agent *dum ferveat opus*, or as being in any better position than that ordinarily occupied by hearsay, which generally is without probative value. The objection to this testimony should have been sustained.

3. Upon the ground that the verdict was contrary to the evidence, a new trial should have been granted; for, if the plaintiff was entitled to recover, the recovery was too large. It appears without contradiction in the evidence that items of the account amounting to \$27.85 were purchased by a daughter of the defendant. Not only so, but the plaintiff sent three statements of the account to this daughter, made out in her own name, and Mr. King, of the plaintiff company, testified that he sold her the goods. It may be inferred from the fact that the statements were sent to her that perhaps the daughter is of full age. If so, no liability would attach to Mrs. Leake by reason of the relationship. But if the daughter is a minor, and if the articles furnished were necessities, there being no evidence that Mrs. Leake authorized her daughter to buy any of these articles, liability for them would attach, not to the mother, but to the father.

Judgment reversed.

EBERHART v. STATE. (No. 1,401.)  
(Court of Appeals of Georgia. Nov. 10, 1908.)  
CRIMINAL LAW (§ 30\*)—JURISDICTION—FELONY.

Where the defendant was tried and convicted in the city court of Hall county on an

indictment for the offense of pointing a pistol at another, the undisputed evidence on his trial showing that the act of pointing a pistol was simply a part of and preceded the consummated act of shooting at another, or assault with intent to murder, the city court was without jurisdiction to try the case, as the misdemeanor was merged into the felony. The refusal to grant a new trial is therefore reversed, with directions that the judge of the city court commit the defendant to abide the further action of the grand jury. *Harris v. State*, 3 Ga. App. 457, 60 S. E. 127; *Oglesby v. State*, 1 Ga. App. 195, 57 S. E. 938.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 32-34; Dec. Dig. § 30.\*]  
(Syllabus by the Court.)

Error from City Court of Hall; J. C. Boone, Judge.

Gower Eberhart was convicted of pointing a pistol at another in the city court, and brings error. Reversed.

B. P. Gaillard, Jr., for plaintiff in error.  
Fletcher M. Johnson, Sol., for the State.

HILL, C. J. Judgment reversed.

#### GROVES v. SEXTON. (No. 1,305.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### 1. PAYMENT (§ 60\*)—PLEADING—SUFFICIENCY.

A plea of payment which fails to allege with reasonable certainty when, how, and to whom the payment was made is insufficient, and, unless amended, should be stricken upon demurrer, timely filed, specifically pointing out these defects.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 144; Dec. Dig. § 60.\*]

##### 2. PLEADING (§ 8\*)—CONCLUSIONS—FRAUD.

In pleading fraud the specific facts constituting fraud must be stated. The averment of fraud must not depend upon conclusions, but the conclusion must arise from the full, certain, and explicit statement of the facts relied upon to show fraud.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. § 8.\* Fraud, Cent. Dig. § 37.]

3. There was no error in sustaining the demurrer.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action between Mrs. N. O. Groves and M. W. Sexton. From the judgment, Mrs. Groves brings error. Affirmed.

John R. Cooper, for plaintiff in error.  
Walter J. Grace and E. W. Maynard, for defendant in error.

RUSSELL, J. Judgment affirmed.

#### MINTER & RADNEY v. BUSH. (No. 1,169.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### 1. JUSTICES OF THE PEACE (§ 91\*)—PLEADING.

Strictness of pleading is not required in setting out the cause of action in a case in-

stituted in a justice court. *G. S. & F. Ry. Co. v. Barfield*, 1 Ga. App. 203, 58 S. E. 236.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 308; Dec. Dig. § 91.\*]  
2. TRIAL (§ 333\*)—VERDICT—EVIDENCE TO SUPPORT.

It is no objection to a verdict in a suit for injury to personality that it is less than the lowest amount of damage proved by the plaintiff, and higher than the highest amount shown by the defendant's proof on that subject. *Town of Wrens v. Sammons*, 129 Ga. 755, 59 S. E. 776, and citations; *Hawley Down Draft Furnace Co. v. Van Winkle Works*, 4 Ga. App. 85 (2), 60 S. E. 1008 (2).

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 784; Dec. Dig. § 333.\*]

##### 3. REVIEW ON APPEAL.

The trial was free from error. The evidence authorized the verdict.

(Syllabus by the Court.)

Error from Superior Court, Miller County; W. C. Worrell, Judge.

Action by E. B. Bush against Minter & Radney. Judgment for plaintiff, and defendants bring error. Affirmed.

W. I. Geer, for plaintiffs in error. R. W. Grow, for defendant in error.

POWELL, J. Judgment affirmed.

#### MITCHELL v. CASTLEN. (No. 1,191.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### SALES (§§ 303, 318\*)—RETENTION OF MORTGAGE LIEN—FORECLOSURE—TROVER—ELECTION OF REMEDIES.

The seller of personal property may retain the title as security for any unpaid portion of the purchase price, and may in the same instrument also contract that he shall have a mortgage lien upon the property, and that, if the debt is not paid, he shall have the election of proceeding by mortgage foreclosure or trover. However, if he proceeds by mortgage foreclosure against the property, he cannot thereafter maintain trover for any portion of it which the officer failed to seize under the levy upon the foreclosure.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 849, 898; Dec. Dig. §§ 303, 318.\*]

(Syllabus by the Court.)

Error from City Court of Forsyth; W. M. Clark, Judge.

Action by Robert Mitchell against C. C. Castlen. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff sold the defendant two mules, and took from him an instrument which, so far as is material to the case, is as follows: "By October 1, 1908, \* \* \* I promise to pay Robert Mitchell or order \$195; \* \* \* this note being for the purchase money for [described mules]. Title to above described property to remain in Robert Mitchell till this note is paid in full. And Robert Mitchell reserves, and I grant him, the right to collect this note by foreclosure of mortgage or action of trover. The death, loss, or injury of said property shall not invalidate the obliga-

tion. Now to better secure the payment of said note I hereby mortgage to said Robert Mitchell the above described property." In November, 1906, this instrument was foreclosed as a mortgage, and one of the mules was sold thereunder. The sheriff returned that the other mule could not be found. Thereafter the plaintiff instituted bail trover for the mule not found. The court directed a verdict for the defendant, on the ground that, having elected to proceed by mortgage foreclosure, the plaintiff estopped himself from proceeding by trover; the two remedies being inconsistent.

**Persons & Persons, for plaintiff in error.**  
**Cabaniss & Willingham, for defendant in error.**

**POWELL, J.** We recognize that persons financially weak could oftentimes buy property on credit more easily if sellers were always afforded a safe, speedy, and inexpensive remedy by which they could be sure that they would either get back the property or be paid for it. We see the expediency of allowing the seller of personal property to contract that he shall hold a lien thereon as well as the title thereto, and that he shall have the choice of employing either or both of the remedies of mortgage foreclosure and trover. Therefore we have considered the question carefully to see if we could not find some way of sustaining the present action. We cannot do it without overturning time-honored and well-established principles; and we are unwilling to pose as iconoclasts even for the sake of so good a cause.

We are sure that it was competent for the parties to agree that the payee might have an election of remedies, and this right of election the courts will recognize. The plaintiff was to retain the title to the mules until they were fully paid for. Upon default of payment of any part of the price, he had the right to bring trover and recover the property with its reasonable hire subject to the defendant's right to set off any sums he may have paid on the debt. *Hays v. Jordan*, 85 Ga. 742 (2), 11 S. E. 833, 9 L. R. A. 373. However, the suit in trover would have rescinded the sale and have so far destroyed the obligation to pay that no action could thereafter be maintained on the note as an evidence of indebtedness, or upon the mortgage. *Glisson v. Heggie*, 105 Ga. 30, 31 S. E. 118. On the other hand, the plaintiff might have sued his note to judgment without impairing his right thereafter to maintain trover; for it was agreed that he was to retain the title as security for the debt until it was paid, and judgment is not payment but merely means of enforcing payment. *Civ. Code* 1895, §§ 5432, 5434; *Hines v. Rutherford*, 67 Ga. 607 (4); *Dykes v. McVay*, 67 Ga. 502 (4); *Bowen v. Frick Co.*, 75 Ga. 786; *Jones v.*

*Snider*, 99 Ga. 276, 25 S. E. 668; *Canadian Typograph Co. v. Macgurn*, 119 Mich. 533, 78 N. W. 542. If he had taken a mortgage on additional property, he might have foreclosed the mortgage without prejudicing his right to assert by trover or otherwise the title he retained as further security. But, when he proceeded to foreclose the mortgage, not merely against the defendant's equity under the conditional contract of purchase, but against the whole interest in and title to the property, the necessary legal effect of his action was to declare the title to be in the defendant and to waive the retention of it. A party cannot maintain inconsistent remedies. An election once made, though unwisely made, is irrevocable. 15 Cyc. 257 (a); 15 Cyc. 262 (vii); *Rowe v. Welchselbaum Co.*, 3 Ga. App. 504, 60 S. E. 275; *McLendon Bros. v. Finch*, 2 Ga. App. 421 (3), 58 S. E. 690. The plaintiff may still sue his note to common-law judgment for the sum remaining due upon it after crediting the proceeds of the mortgage foreclosure. Cf. *Hughes v. Mt. Vernon Bank*, 4 Ga. App. 23, 60 S. E. 809.

Judgment affirmed.

**GULLEDGE v. SEABOARD AIR LINE RY.**  
 (Supreme Court of North Carolina. Oct. 28, 1908.)

**1. CONSTITUTIONAL LAW (§ 107\*)—VESTED RIGHTS—SUPREME COURT DECISIONS—LIMITATIONS—CONSTRUCTION.**

A party can acquire no vested right in an adjudication of the Supreme Court construing a limitation in a suit to which he is not a party.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 246-251; Dec. Dig. § 107.\*]

**2. ACTION (§ 10\*)—CONDITIONS PRECEDENT—STATUTES—CREATING NEW RIGHT—FAILURE TO SUE—EXCUSE.**

Where a statute created a new right of action, and imposed a limitation which was a condition to the exercise of such right, no explanations as to why suit was not brought within the specified time would avail to excuse the default, in the absence of a saving clause in the statute.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 10.\*]

On petition for rehearing. Petition dismissed.

For former opinion, see 147 N. C. 234, 60 S. E. 1134.

**BROWN, J.** The petition of the learned counsel for the plaintiff, asking us to reconsider our decision in this case, seems to be based upon the idea that we have overruled a decision in which by some means the plaintiff had acquired a vested right. *Williams v. B. & L. Association*, 131 N. C. 267, 42 S. E. 607. For the reasons so clearly stated by Mr. Justice Hoke in *Mason v. Nelson* (at this term) 62 S. E. 625, the plaintiff could acquire no vested right in such an adjudication as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

*Williams v. B. & L. Association*, had we in fact overruled it. We do not think we have modified, much less overruled, it. In that case the court was construing the usury statute of 1895 (Laws 1895, p. 75, c. 69), containing provisions different from section 59 of the Revisal of 1905, and does not bear upon the question involved in this case. Nor have we overruled *Meekins v. Railroad*, 131 N. C. 1, 42 S. E. 333, in which the original action was brought within one year after death. The plaintiff was nonsuited, and brought his new action within 12 months after the nonsuit in the original action. This court held that section 166 of the Code, authorizing the new action after nonsuit, applied to all cases. The present Chief Justice, speaking for the court, says: "This statute (Code, § 166) contains no exception of cases under section 1498, or of any other cases, where the time prescribed for bringing the original action might not be strictly a statute of limitations." *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997, is cited and approved in that opinion. This is one of the cases cited in our opinion in this case, wherein it is held by this court that the one-year clause in section 1498 is not a statute of limitation, but a condition annexed to the cause of action, and that the plaintiff must prove that he has commenced his action within the time required by the act.

In view of the great weight of authority sustaining them, we do not feel justified in overruling the well-considered decisions of this court, which we followed in deciding this case. Those cases are supported by an unbroken line of decisions in other jurisdictions. 8 *American and English Ency. Law* (2d Ed.) p. 875, cites cases from a large number of states in support of the statement in the text that, "as the statutes confer a new right of action, no explanations as to why suit was not brought within the specified time will avail, unless the statutes themselves provide a saving clause." Among the recent cases to the same effect will be found: *Poff v. Telephone Co.*, 72 N. H. 164, 55 Atl. 891, citing *Taylor v. Iron Co.*, 94 N. C. 525; *Rodman v. Railroad*, 65 Kan. 652, 70 Pac. 642, 59 L. R. A. 704, citing same case; *Navigation Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649, construing the New Jersey statute; *Williams v. Steamship Co.* (D. C.) 126 Fed. 591. This case last cited holds that no action based on the New York statute can be maintained after the time limited; "nor is the time extended to cover the appointment of an administrator." Judge Adams says: "The language of the act is explicit: 'Such an action must be commenced within two years after the decedent's death,' and, in view of the plain language, the time to commence an action can not be extended by construction." 13 Cyc. p. 339, says: "Where the statute giving a right of action for death by wrongful act

limits the time within which such action must be brought to a certain designated period, and contains no saving clause, an action sought to be brought after the expiration of such period is barred, and no excuse will be recognized for such delay." The text is supported by authorities from the states of Alabama, Iowa, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Virginia, and Wisconsin. Mr. Tiffany, in his work on *Death by Wrongful Act* (section 121), relies upon and cites the decisions of this court in support of his text, wherein he says: "The limitation is not merely of the remedy, but is of the right of action itself"—citing *Taylor v. Cranberry Iron Co.*, supra, and *Best v. Kinston*, supra. In the case of *Kill v. Supervisors*, 119 N. Y. 344, 23 N. E. 921, the Court of Appeals of New York says of this cause of action: "It must be evident that, as this action is brought under a special law and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all." See, also, *Eastwood v. Kennedy*, 44 Md. 563; *O'Shields v. Railway*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; *Pittsburg v. Hine*, 25 Ohio St. 629; *Hanna v. Railroad*, 32 Ind. 118; *Rugland v. Anderson*, 30 Minn. 388, 15 N. W. 676; *Word on Lim.* § 9.

In conclusion we will quote from the Supreme Court of the United States. In *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 147, 30 L. Ed. 358, it is said: "The statutes create a new liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right." In deference to the opinion of the learned gentlemen who certify that they think our decision was erroneous, we have given the matter careful consideration, and we quote some of the many authorities which sustain our judgment.

Petition dismissed.

#### LEAK v. BANK OF WADESBORO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. CHATTEL MORTGAGES (§ 6\*)—CONTRACTS—REGISTRATION.

An instrument reciting that the owner thereby turned over to the sheriff of a county to be held for, and delivered to, a bank chattels

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

described to cover checks drawn by the owner on the bank, purports on its face to be a sale of the chattels, not a chattel mortgage, and effects an absolute transfer of the property, so that the instrument need not be registered as against a subsequent mortgagee of the owner.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6.\*]

## 2. SALES (§ 233\*)—CONTRACTS—REGISTRATION.

Where testimony impeaching a sale, evidenced by a writing executed by the seller prior to his execution of a chattel mortgage covering the goods, was offered, evidence that the property had been turned over to the buyer in satisfaction of an existing claim was admissible in support of the buyer's title.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 233.\*]

Appeal from Superior Court, Anson County; E. B. Jones, Judge.

Action by J. A. Leak against the Bank of Wadesboro. From a judgment for plaintiff, defendant appeals. Reversed.

The following issues were submitted and responded to by the jury:

"(1) Is plaintiff the owner and entitled to the possession of the horse described in the complaint? Ans. Yes.

"(2) What is the value of the horse? Ans. \$150."

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Robinson & Caudle, for appellant. McLendon & Thomas, for appellee.

**PER CURIAM.** The plaintiff offered in evidence a chattel mortgage on the horse in question to secure a note of \$100.30, duly registered in Anson, the proper county, on the 2d day of September, 1907. The defendant offered in evidence the following paper writing, the execution of which was properly proven, and as of the date appearing on the face, August 31, 1907, and proved the delivery of the property described in the paper to the sheriff of Anson county on the day of its execution: "Albemarle, N. C., Aug. 31, 1907. I, E. B. Dunlap, do hereby freely of my own will and volition, turn over, surrender, and deliver to J. D. Love, sheriff of Stanly county, to be held by him for the Bank of Wadesboro, N. C., and to be delivered by him to said bank, one bay mare, one Henderson Ruff rubber tire top buggy, the harness and bridle, collar with same, all now in the livery stable of S. B. Klutz at Albemarle, N. C., also one new suit of clothes now at my father's home in Anson county. This property is delivered to said bank to partly cover some checks on said bank which I have drawn on E. C. Dunlap's account. This August 31st, 1907. E. B. Dunlap. Witness: R. L. Smith." This paper has not been registered. Defendant further offered evidence tending to show the existence of a valid demand existent in favor of defendant bank against the said E.

B. Dunlap, and that the property in question was turned over in satisfaction of this claim. The court, after hearing the testimony, on motion excluded the same, holding that the testimony admitted, tending to show that there had been a sale of the property to defendant, was inadmissible, that the paper writing under which defendant claimed the property was on its face a chattel mortgage or an assignment requiring registration, and, not having been registered, same was invalid as against the plaintiff's claim, and charged the jury, if they believed the testimony, to answer the first issue "Yes." Defendant excepted.

The court is of opinion that there was error in the ruling of the court below. The paper writing on its face purports to be a sale effecting an absolute transfer of the property, and, so far as the evidence now discloses, no registration of same is or was required. This sale having taken place prior to the registration of plaintiff's mortgage, the title of defendant to the horse is good, unless and until the same is in some way impeached. And the testimony offered by defendant, which was first admitted by the court and afterwards struck out for the reasons indicated, would be relevant in support of defendant's title in case impeaching testimony is offered.

There is error, and a new trial is awarded. New trial.

**FANNING v. J. G. WHITE & CO. et al.**  
(Supreme Court of North Carolina. Oct. 28, 1908.)

## 1. NUISANCE (§ 3\*)—PUBLIC NUISANCE—STORING EXPLOSIVES.

Defendants stored dynamite, used by them in the construction of a railroad, in a shanty on the railroad right of way, 50 feet from the track, about 180 feet from a county road, 20 feet from a river, and about 1 mile from a village and within the corporate limits thereof. When the river was high, the shanty was isolated; but at other times the river bank was used as a walk. There was no warning on the building; but the door was open and the window out, so that the boxes of dynamite therein, with warnings printed thereon, could be seen by one looking in. *Held*, that the storing of the dynamite was not a nuisance, and did not violate any duty to persons coming on the premises without a license.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 15; Dec. Dig. § 3.\*]

## 2. EXPLOSIVES (§ 8\*)—PERSONAL INJURY FROM EXPLOSION—PROXIMATE CAUSE.

Defendants stored dynamite, used by them in the construction of a railroad, in a shanty on the railroad right of way, and plaintiff's companion, by shooting into the building while passing near it, caused an explosion by which plaintiff was injured. *Held* that, as defendants owed no duty to anticipate injury caused by trespassers under such circumstances, the wrongful trespass of plaintiff's companion was the proximate cause of plaintiff's injuries, and not the storing

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the dynamite, even if defendants were negligent in so storing the dynamite.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 8.\*]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by P. W. Fanning against J. G. White & Co. and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Plaintiff sues the defendant railroad company and White & Co., contractors, for damages by reason of injuries alleged to have been sustained by the negligence of defendants. The testimony showed that defendants White & Co. were, on and before May 14, 1907, engaged in constructing a railroad for defendant Norfolk & Southern Railroad Company from Newbern to Washington, N. C.; that while so engaged defendants White & Co. stored in an old shanty a large quantity of dynamite, in boxes upon which were painted or printed the words "Handle with care—Dynamite." There was no sign or warning on the shanty. The shanty was rotten, the window was torn out, and the door open on the side next to the river. The back end was nailed up. It was about 20 feet from the Neuse river, about 180 feet from the county road, and 50 feet from the railroad track on the right of way. There was a little shanty about 70 yards away. The county road led to the bridge over the river to the city of Newbern, about a mile distant. The village of Bridgeton had lately been incorporated, and included the location of the shanty. It is about one-half to three-fourths of a mile from the foot of the county bridge to the railroad bridge. The principal buildings in Bridgeton are located "right at the foot of the county bridge." The growth around the shanty was gallberry bushes. The shanty was at an isolated place when the tide was high; when low, a good place to walk on the banks of the river. Plaintiff had resided about 200 yards away from the shanty for about two weeks, but did not know that dynamite was in it. On Sunday morning, May 14, 1907, plaintiff, in company with McGhee, went to the river for the purpose of bathing. On their return they passed near the shanty, back of it near the river. McGhee had a pistol, and had fired four or five times at trees. He said that he had one more ball, and asked plaintiff to show him something to shoot at. While plaintiff was looking around, McGhee shot at the shanty. The ball passed through a hole and struck the dynamite, causing an explosion, blowing up the shanty, trees, etc., and injuring plaintiff. The shanty 70 yards away was injured, and several houses in Bridgeton shaken and window lights broken. The same effect was felt in Newbern. The plaintiff did not direct or advise his com-

panion to shoot at the shanty. At the conclusion of the evidence introduced by the plaintiff, defendants moved for judgment of nonsuit. Motion allowed. Plaintiff excepted and appealed.

D. E. Henderson and D. L. Ward, for appellant. Moore & Dunn, for appellees.

CONNOR, J. The injuries sustained by plaintiff resulted from the shooting by McGhee into the shanty, as set out in the record in McGhee v. Railroad, decided at the last term of this court and reported in 148 N. C. —, 60 S. E. 912. In that case the defendant demurred to the complaint, in which it was charged that the shanty containing the dynamite was a public nuisance. It was then strongly insisted, and in the dissenting opinion maintained, that the demurrer admitted the allegation. His honor, on the trial of this case, heard the plaintiff's testimony, from which it appears that the shanty was 60 yards from the public highway, and that the window was "torn out," the door stood open, and the boxes containing the dynamite were so marked as to give warning to any person who would take the trouble to look into the door, or the open place in which the window had been. The majority of the court thought, for the reasons given in the opinion, that, conceding the truth of the allegation in the complaint that the dynamite stored in the shanty was a public nuisance, the plaintiff could not recover. Without repeating what we have so lately said, we are of the opinion that the testimony here falls far short of showing that defendants were maintaining any nuisance. To store dynamite being used for a legitimate purpose, necessary for the construction of a railroad, on its own right of way, in a shanty with the door open and the window torn out, affording any person ample opportunity to see the danger, with the warning written or printed on the boxes, cannot violate any duty owing to a person going upon the premises without a license, either express or implied. The basis of the decision in McGhee's Case being that defendant owed no duty to him in regard to storing the dynamite, and that it could not, by any reasonable provision, have foreseen that any one would shoot into the shanty, we are unable to perceive any ground upon which the plaintiff's case can be distinguished. If, as we then held, the explosion of the dynamite was not the result of any actionable negligence on the part of the defendants, but of the wrongful act of an independent, intelligent agent, we do not see how any liability can attach for the injuries sustained by plaintiff. If I have an article or a structure on my premises, entirely harmless unless interfered with by a trespasser, and I have no reasonable ground to anticipate that a trespasser will come

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upon my premises and interfere with the structure, and two trespassers, in company, come together, and one of them, by interference, causes injury to the other, the law will attribute the injury to the interference of the intelligent, intervening agent, and not to the condition created by me. This principle is illustrated by the decision in *Harton v. Telephone Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956. It is there said that, assuming the pole to have fallen by defendant's negligence, the act of Carpenter in replacing it in a dangerous position was the *causa causans* of the injury sustained by plaintiff's intestate. In what respect, upon principle, does this case differ from that? Conceding that defendant was negligent in storing the dynamite, which we do not hold, it would never have injured the plaintiff but for the interference of McGhee, his co-trespasser. As we held that the pole, lying across the road by defendant's negligence, could never have fallen upon the plaintiff's intestate unless Carpenter had interfered with it, so here the dynamite was absolutely harmless; but for McGhee's act of shooting into the shanty. As it now appears, by walking a few steps, he would have seen that it contained boxes marked "Dynamite."

Without pursuing the subject further, we entertain no doubt that his honor, both upon principle and authority, correctly directed judgment of nonsuit.

There is no error.

CLARK, C. J. (dissenting). The plaintiff having been nonsuited, his evidence must be taken as true, with the most favorable inferences which a jury could have drawn therefrom. *Stone v. Railroad*, 144 N. C. 221, 56 S. E. 952. It appears therefrom that the defendants stored a quantity of dynamite in an old two-room shanty, about 60 yards from the county road and 50 feet from the railroad track over which a half dozen trains passed daily. The rear end of the shanty, towards the public road and railroad track, was nailed up. At the other end, next to the river, the door was sometimes open, and one of the windows was broken out. There was nothing to indicate that a dangerous explosive was stored there. The plaintiff and one McGhee were strolling there, when, without any notice to plaintiff or participation by him, McGhee fired his pistol at a knot hole in the rear end of the shanty. Neither McGhee nor plaintiff had any suspicion that dynamite was stored there. The shanty was located within the corporation limits of the town of Bridgeton, which contains 300 or 400 inhabitants, and not far from the bridge from Newbern over Neuse river, and within 70 yards of a flag station on the railroad. Upon the firing of the pistol, an explosion followed which cut down the trees 100 yards around, excavated a hole 12 feet deep and 16 feet square, moved the railroad track 12

to 15 inches, blew the end out of a house 70 yards off, and knocked the plaintiff 20 or 25 feet, burying sticks in his face an inch deep. Not a splinter of the house was left. The explosion occurred about 15 minutes before the passenger train was scheduled to pass. The dynamite was stored in the rear room, where no one would be likely to see it. A covey of partridges were picked clean by the explosion, and a dog was blown up into a tree. The explosion was decidedly felt in Newbern, across the river. It was also in evidence that the defendants White & Co., the contractors who placed the dynamite in this house, had not worked in that vicinity for six months; their railroad work being completed and trains were running regularly.

It ought not to require any argument to prove that it was the grossest negligence to deposit a high-powered explosive, in a quantity capable of producing the above effects, in a house within 50 feet of a railroad track over which passenger trains were running, and within 60 yards of a much-traveled public road leading from a large town like Newbern, which was near by, without any notice posted on the house or other indication of the deadly power concealed within. More especially was this so when the party who had placed the dynamite there had removed from the vicinity for six months, and there was no purpose for which the dynamite could longer be used, and no one could suspect, in the absence of all notice or warning, that there was any dynamite in the vicinity. Indeed, the passenger train by only some 15 minutes missed this explosion, which moved the railroad track bodily sideways 12 to 15 inches. It was not only negligence, but criminal negligence, to leave the dynamite in such a house, unguarded and without any notice posted, for six months after its owners had left, in such close proximity to a railroad track and a public road.

If it be conceded that McGhee was guilty of contributory negligence (which would debar him from recovery), the plaintiff was an innocent bystander, and in no wise responsible therefor. The plaintiff could not have been injured by the negligence of McGhee in firing his pistol without the concurring (and far greater) negligence of the defendants. They were, as to the plaintiff, joint tort-feasors, and at his option he could sue either or both. Had this been a spring gun, the owner of the premises who had left it there for six months without any notice would be liable for any damage resulting. For a stronger reason he is liable when it is 1,600 pounds of dynamite. "The owner of a farm leased small parcels in the middle of it to laboring men. A farm road approached the holdings, but did not reach them. Towards the leased parcels from the end of the road the lessor stored a box of dynamite, with cartridge exploders, under a low shed made against a stump, and only partially inclosed, and in a rough bound box, not always kept

covered and never securely fastened. A child of one of the lessees, who had been at work in the field, went into the shed, broke one of the cartridges from the box, and, striking it with a stone, exploded it and was injured. Neither he nor his father knew what was kept in the shed, or knew of any danger there, or of any reason for keeping away from it; and there was no warning on or about the shed, except the word, "powder" written on the box, which neither of them could have read. Held, that the lessor was responsible." Cooley, C. J., in *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, 160.

It is useless to cite further cases. The bare statement of the above facts is the statement of gross negligence. "*Res ipsa loquitur*." Without such negligence on the part of the defendants, the plaintiff would not have been injured. McGhee would not have fired, if he had had any reason to suppose there was any dynamite stored in such close proximity to the public road and passing trains on the railroad. The want of any notice, the six months' absence of the owners of the dynamite, and the completion of the railroad work in which it had been used were enough to put him off his guard. But, even if McGhee was guilty of negligence, the negligence of the defendants concurred in producing the injury, and both are liable to the plaintiff.

HOKE, J., concurs in dissenting opinion.

#### TEAL et al. v. TEMPLETON.

(Supreme Court of North Carolina. Nov. 5, 1908.)

##### 1. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT IN CONTROVERSY—HOW DETERMINED.

Where there is no written complaint, the sum demanded in the summons is the test of a justice's jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 157; Dec. Dig. § 44.\*]

##### 2. JUSTICES OF THE PEACE (§ 43\*)—JURISDICTION—AMOUNT IN CONTROVERSY—MORE THAN ONE CAUSE OF ACTION.

A justice has jurisdiction of causes of action for breach of contract, where the total sum demanded is \$200.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 149; Dec. Dig. § 43.\*]

##### 3. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT DEMANDED—REMITTITUR ON APPEAL.

If, on appeal to the superior court from a justice's judgment for plaintiff, the sum demanded, as affecting the justice's jurisdiction, was doubtful, a remittitur of all above \$200, sustained the jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 170, 171; Dec. Dig. § 44.\*]

##### 4. JUSTICES OF THE PEACE (§ 90\*)—PLEADING—NECESSITY FOR REPLY.

Defendant in a justice's court was not entitled to judgment on his counterclaim because

no reply was filed, where the pleadings were oral.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 90.\*]

##### 5. TRIAL (§ 419\*)—TAKING CASE FROM JURY—MOTION FOR NONSUIT—WAIVER.

Defendant waived his motion for nonsuit by introducing evidence and not renewing the motion at the close of all the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 982; Dec. Dig. § 419.\*]

##### 6. FRAUDS, STATUTE OF (§ 58\*)—LEASES.

A lease for three years or less need not be written.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Dec. Dig. § 58.\*]

##### 7. FRAUDS, STATUTE OF (§ 58\*)—ESTOPPEL TO ASSERT.

A buyer of timber, having accepted it, cannot refuse to pay for it on the ground that the contract of sale should have been in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 90; Dec. Dig. § 58.\*]

##### 8. CONTRACTS (§ 32\*)—FORMAL REQUISITES—FAILURE TO REDUCE TO WRITING.

Though it was agreed that a contract to sell timber should be reduced to writing, failure to do so did not invalidate the contract, merely affecting the mode of proving it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 159; Dec. Dig. § 32.\*]

##### 9. APPEAL AND ERROR (§ 197\*)—WAIVER OF ERROR—FAILURE TO EXCEPT.

Defendant cannot complain because plaintiff was allowed to prove a greater value of certain timber than was alleged, where he did not except to the proof, since, had he done so, plaintiff might have been allowed to amend.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 197; \* *Pleading*, Cent. Dig. §§ 1428-1432.]

Appeal from Superior Court, Anson County; E. B. Jones, Judge.

Action by D. E. Teal and others against R. A. Templeton. From a judgment of the superior court for plaintiff, on appeal from a judgment of a justice of the peace, defendant appeals. Affirmed.

Action begun before a justice of the peace. The sum demanded in the warrant is "\$200, due by breach of contract for rent of farm and sale of timber." There was no written complaint, but on justice's docket the cause of action was stated: "Plaintiff complains that in October, 1905, he rented his farm to defendant for year 1906 for \$250, and sold him a lot of timber to cut on certain land, the defendant to cut all trees that would measure 8 inches at the stump, at 22½ cents per tree, and that the defendant had broken said contract." The defendant denied the contract of renting, pleaded counterclaim for overpayment as to trees, and demurred to jurisdiction. The justice gave judgment for plaintiff. On appeal in the superior court, the defendant moved to dismiss for want of jurisdiction. The plaintiff stated that he had at no time demanded in excess of \$200, and as further precaution entered a remitter of all above that sum. His evidence showed

a renting of land to defendant for \$250, breach of contract, and plaintiff renting to another for \$150. The jury found this to be so, and gave the plaintiff verdict for \$100. It also found that the defendant had broken the contract as to cutting the timber, but that there was nothing due the plaintiff on that above what he had been paid. Judgment. Appeal by defendant.

McLendon & Thomas for appellant. Robinson & Caudle and J. W. Gullledge, for appellees.

CLARK, C. J. The objection to jurisdiction was properly overruled. There being no written complaint, the "sum demanded" in the summons is the test. Both causes of action were for breach of contract, and the total sum demanded was \$200. The justice, therefore, had jurisdiction. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836; *McPhail v. Johnson*, 115 N. C. 302, 20 S. E. 373; *Revisal 1905*, §§ 1419, 1445. Had it been doubtful as to the sum demanded, the remitter made it clear, even if it had been retroactive. *McPhail v. Johnson*, 115 N. C. 302, 20 S. E. 373, and cases there cited; *Brantley v. Finch*, 97 N. C. 91, 1 S. E. 535. But it is clear the plaintiff was suing for breach of contract and not for the \$250 due for rent if contract had not been broken.

The defendant was not entitled to judgment for the counterclaim filed in justice's court on the ground that no reply had been there filed; for the pleadings were oral, and, besides, the trial in the superior court was *de novo*, and the judge in his discretion allowed a reply to be filed. There was no ground for motion to nonsuit. Besides, the defendant waived it by introducing evidence and not renewing motion at the close of all evidence.

The exception that the contract was not in writing cannot avail. A lease for three years or less is not required to be in writing. The statute of frauds was not pleaded. Besides, the defendant could not take the timber and refuse to pay for it. But if the statute of frauds were pleaded, it would not necessarily have affected jurisdiction of justice of the peace, for "title to land" was not drawn in controversy. There was no recovery on this cause of action.

Both parties testified that it was agreed that the contract should be reduced to writing, but failure to do so did not invalidate the contract. It only affected the mode of proving the contract. In fact, it was put in writing; but the defendant refused to sign it.

No exception was taken on the trial to proving value of the timber in excess of 22½ cents per tree. Had this been done, the judge would doubtless have allowed plaintiff to amend his allegation.

No error.

**AMERICAN NAT. BANK v. FOUNTAIN.**  
(Supreme Court of North Carolina. Oct. 28, 1908.)

**1. BILLS AND NOTES (§ 497\*)—ACTIONS—BURDEN OF PROOF—GOOD FAITH AND PAYMENT FOR VALUE—"HOLDER IN DUE COURSE."**

Under *Revisal 1905*, § 2201, defining a "holder in due course" as one who takes a negotiable instrument, complete and regular on its face, before it is overdue and without notice of dishonor, in good faith and for value, and who at the time of transfer had no notice of any infirmity in it or defect in the title of the person negotiating it, and section 2208 thereof, providing that every holder is deemed *prima facie* a holder in due course, but, when it is shown that the title of any one negotiating the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course, etc., where fraud in procuring the note has been established, or there is a defect in the title of one negotiating it, the burden is on one suing thereon to show that he or one under whom he claims was a holder in due course, as defined by section 2201.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3320.]

**2. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.**

In an action on a note by an indorsee, the defense being that it was procured by misrepresentation by the payee, plaintiff's indorser, an instruction that, the evidence of fraud having placed the burden on plaintiff to show that he was a holder in due course, and he having responded by showing that he acquired the note in good faith, for value, etc., his *prima facie* case was restored, was error, as assuming that plaintiff's evidence was true and withdrawing this question from the jury, though, if no reasonable inference to the contrary was admissible under the evidence, an instruction to find for plaintiff, if the jury believed the evidence, would have been proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

**3. BILLS AND NOTES (§ 537\*)—ACTIONS—QUESTION FOR JURY.**

In an action by an indorsee of a promissory note, the defense being that it was procured by fraud, and evidence being offered to establish fraud, the good faith of plaintiff's purchase and the credibility of the evidence upon the issue were for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. § 537.\*]

**4. PLEADING (§ 372\*)—PLEAS—NOT GUILTY—SCOPE OF ISSUES—CREDIBILITY OF EVIDENCE.**

The plea of not guilty puts in issue the credibility of the testimony, even if it is uncontradicted.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 372.\*]

**5. COURTS (§ 89\*)—ADJUDICATION—PREVIOUS DECISIONS AS PRECEDENTS—DECISIONS ON FACTS.**

A judicial decision is to be considered as authority only in connection with the facts on which it was decided.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 89.\*]

Appeal from Superior Court, Nash County; Neal, Judge.

Action by the American National Bank against S. K. Fountain. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The action was to recover the balance due on a promissory note for the purchase price of an automobile, given by defendant to one B. A. Blenner, and by said Blenner indorsed to plaintiff. The defendant resisted recovery on the ground that the note was procured by false and fraudulent representations on the part of Blenner, the vendor. The jury found that the note sued on was procured by misrepresentations and fraud on the part of Blenner, the vendor, and that the plaintiff was indorsee for value before maturity, and without knowledge or notice of any infirmity affecting the validity of the note. There was motion for a new trial on exceptions properly noted, which was overruled. Defendant excepted. Judgment on verdict for plaintiff, and defendant excepted and appealed.

T. T. Thorne and Jacob Battle, for appellant. Bunn & Sprull, for appellee.

HOKE, J. Our statute on negotiable instruments (Revisal 1906, c. 54, § 2201) defines a "holder in due course" as one who takes a negotiable instrument that is (a) complete and regular in its face; (b) before it was overdue and without notice that it had been previously dishonored (if it had been); (c) in good faith and for value; (d) and at the time it was negotiated to him he had no notice of any infirmity in the instrument or any defect in the title of the person who negotiated it. And section 2208 of same chapter provides as follows: "That every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as holder in due course," etc. These sections of the statute are, to a great extent, a codification of certain general principles of mercantile law, applicable to the subject, established by well-considered decisions of the court in this country and England, notably *Tatam v. Haslar* and *Others*, 23 Q. B. Div. (1889) 345; *National Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *Giberson v. Jolly*, 120 Ind. 301, 22 N. E. 306; etc.

There is some conflict of authority as to the extent and proper application of the burden which the law casts upon a plaintiff, where fraud has been established, or when there has been evidence offered tending to establish it, which is thus referred to in *Norton on Bills and Notes*, 834: "In the cases of illegality the rule is the same, and for the same reason. The burden is cast up-

on the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. If value and notice are disputed as facts, they must be passed upon by the jury." The author, in note 92, cites several additional cases in support of the text. In *Tatam v. Haslar*, supra, it was held "that when fraud is proved the burden of proof is on the holder to prove both that value has been given, and that it has been given in good faith, without notice of the fraud." In *Vosburgh v. Diefendorf*, supra, it is held: "(1) Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a bona fide purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value. He must show that he had no knowledge or notice of the fraud."

The statute, then, having enacted into a law the doctrine sustained by these authorities, the rule established by the statute must be observed, to the effect that when fraud has been established in procuring the note, or in the title of any one who has negotiated the instrument, the burden is on the plaintiff to show that he, or some one under whom he claims, acquired the title as a holder in due course; that is, that he acquired the title (1) before maturity, (2) in good faith and for value, (3) without notice of any infirmity or defect in the title of the person negotiating it. And where the facts established call for its application, the rights of the parties must be determined under the rule as to the burden of proof which the statute provides. We are inclined to the opinion that the defendant was not given the full benefit of this principle in the charge of the court below; but, if it should be conceded that, when taken in connection with the testimony offered, there was no reversible error in the respect suggested, certain it is that the charge erroneously invades the province of the jury in assuming, as it does, the truth of the evidence offered by the plaintiff on the essential facts of the transaction. Thus, after properly placing the burden on the plaintiff, by reason of evidence offered tending to establish fraud, the charge proceeds: "But the plaintiff having responded by showing that it acquired the note bona fide, for value, in the usual course of business, and while it was still current, and before its maturity, the prima facie case of

the plaintiff is restored." And again: "The court further charges you that the prima facie case of the plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity, and without notice of any vice in it," etc.

It may be that when fraud is established in procuring the instrument, or there was evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby appear, with no evidence to the contrary, and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity, and without notice, the court could properly charge the jury, if they "believed the evidence," or if they "found the facts to be as testified," a more approved form of expression, they would render a verdict for plaintiff. But here, the fraud having been established, or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase was the material question in the controversy; and both the issue and the credibility of the evidence offered, tending to establish the position of either party in reference to it, was for the jury and not for the court. *State v. Hill*, 141 N. C. 771, 53 S. E. 311; *Riley's Case*, 113 N. C. 651, 18 S. E. 168. As said by the court in this last case, the "plea of not guilty disputes the credibility of the evidence, even when uncontradicted."

His honor below, therefore, had no right to say to the jury, on this very material question: "The prima facie case of plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity and without notice of any vice in it." For this assumes that the statement of the president is to be taken as true, and withdraws that matter from the jury. The precise question was presented in the case of *Bank v. Iron Works et al.*, 159 Mass. 158, 34 N. E. 93, and in that case it was held: "(1) In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of 'doing a brokerage business in commercial paper, stocks, bonds, and other property,' from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by them in good faith and for value before maturity, and the defendant introduced no testimony to contradict these officers. Held, that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud."

The trial court was probably misled by the language of the opinion in *Bank v. Burgwyn*, 110 N. C. 273, 14 S. E. 623, 17 L. R. A. 326, making a quotation from *Daniel on Negotiable Instruments*, § 819, without advertent to the facts stated in the case on appeal, and it is in reference to such facts that a decision is to be considered authority, from which it appears that the trial court in that case had submitted the question of the bona fides of plaintiff's purchase to the jury, and had not undertaken to determine it, as was done in the present case. The statement of the law contained in this section of Mr. Daniel's valuable work on *Negotiable Instruments* (section 819) has been subjected to adverse comment in the decisions on the subject which we have adopted as law by our statute, and there is doubt if, since the enactment of this statute, it can be regarded as correctly expressing the rule for trial of causes affected by this section of the statute in reference to the burden of proof.

As heretofore stated, when fraud is proved, or there is evidence tending to establish it, the burden is on the plaintiff to show he is a bona fide purchaser for value, before maturity, and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff; the burden in such case having been clearly rebutted. But the issue itself, and the credibility of material evidence relevant to the inquiry, is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury.

There will be a new trial, and it is so ordered.

New trial.

#### WHARTON et al. v. CITY OF GREENSBORO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 863\*)—INDEBTEDNESS—LIMITATION.

There is no constitutional limitation upon the indebtedness of municipal corporations; the only limitation being *Revisal 1906*, § 2977, which the General Assembly may repeal in toto, or from the provisions of which it may except any particular municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 863\*)—ILLEGAL CONTRACTS—VALIDATION BY LEGISLATURE.

Where a municipal corporation has made a contract not within its statutory powers, but within the powers which the Legislature might have legally conferred upon it, the Legislature

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may subsequently legalize the contract; and, where an issue of city bonds was invalid because increasing the city debt to more than 10 per cent. of the assessed value of property in the city, in violation of Revisal 1905, § 2977, the Legislature had power to legalize the issue by a subsequent act irrespective of the limitation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1948; Dec. Dig. § 933.\*]

Appeal from Superior Court, Guilford County; J. L. Webb, Judge.

Action by H. W. Wharton and others against the city of Greensboro, to restrain the issuing of bonds. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 59 S. E. 1043.

Shaw & Hines, for defendant.

BROWN, J. This action was originally brought to restrain the issuing of certain bonds. The judge below refused to grant a restraining order to the hearing and on appeal this court held that the \$30,000-bond issue was illegal because such issue would make the debt of the city in excess of the limitation imposed by section 2977, Revisal 1905, and remanded the cause that an injunction might be granted enjoining the issue of said bonds. *Wharton v. Greensboro*, 146 N. C. 356, 59 S. E. 1043. The special session of the Legislature held in 1908 passed an act (Priv. Laws 1908, p. 8, c. 7) legalizing the said \$30,000-bond issue, which act is set out in the printed record. At the February term, 1908, of Guilford superior court, the defendant filed a supplemental answer, setting out the above-mentioned act, and alleging that said act legalized the school bond issue. The cause came on for final judgment, and it was held by the court below that the act above mentioned had legalized the bond issue, and the court refused to grant an injunction restraining the city from issuing said bonds. The plaintiff excepted to the ruling of the court, and appealed. This raises the only question presented for our decision.

The bonds in question were declared invalid by the court for the sole reason that the debt to be created thereby would exceed the statutory limit provided in section 2977 of the Revisal of 1905. And it is to be observed that such limitation is in this state a legislative, and not a constitutional, limitation. In the Constitution of many states of the Union there are limitations upon the amount of indebtedness which a municipal corporation may lawfully contract. And it is to be regretted that there is no such wise and protective provision in our Constitution. As in this state the limitation is legislative only, it follows that the General Assembly can repeal it in toto, or except any particular municipality from its operation. In this case the defendant had authority under its charter to contract the debt, but subordinate

to the general law (Revisal 1905, § 2977), which we held was not repealed by implication, and therefore so much of the issue as was in excess of the limitation we enjoined. So far as defendant is concerned, and as to this special issue, the limitation is removed by the act of 1908. The question is, can the Legislature subsequently legalize the contract of a municipal corporation which it had no power to make at the time it attempted to do so? The general rule seems to be that, where a municipal corporation has made a contract, not within its statutory powers, but within the powers which the Legislature might have lawfully conferred upon it, the Legislature may subsequently legalize such contract. *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462; *Thompson v. Lee County*, 70 U. S. (3 Wall.) 327, 18 L. Ed. 177; *Single v. Marathon County*, 38 Wis. 364; *Kenosha v. Lamson*, 76 U. S. (9 Wall.) 477, 19 L. Ed. 725; *Redland v. Brooks*, 151 Cal. 474, 91 Pac. 150; *Current Law, Advance Sheets*, p. 877; 25 Am. & Eng. Enc. 1228; 6 Am. & Eng. Enc. 942, and cases cited. The following cases hold that the Legislature by a curative act may subsequently validate the bonds of a municipal corporation issued by it without the power so to do. *Noland County v. State*, 83 Tex. 183, 17 S. W. 823; *Knapp v. Grant*, 27 Wis. 147; *Rogers v. Keokuk*, 18 L. Ed. 74; *Bank v. Yankton County*, 101 U. S. 129, 25 L. Ed. 1046; *Deyo v. Otoe County* (C. C.) 37 Fed. 246; *McMillen v. Boyles*, 6 Iowa, 304; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87. Most of the authorities on this question are to be found in the note to *Erskine v. Nelson County*, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696. From the foregoing authorities it seems to be settled that the Legislature may subsequently legalize any contract of a municipal corporation if it could previously have authorized it. We are of opinion that the bond issue is valid.

We take pleasure in acknowledging our indebtedness to the excellent brief of Judge Shaw, of counsel for the defendant, for the numerous and pertinent authorities cited.

The judgment of the superior court is affirmed.

PORTER et al. v. ABERDEEN & R. F. R. R.  
(Supreme Court of North Carolina. Oct. 28, 1908.)

1. EMINENT DOMAIN (§ 309\*)—OCCUPATION OF LAND — OWNER'S REMEDY — "PERMANENT DAMAGES."

Where a railway company has entered land under a claim of right to do so, and has constructed a road thereon, and is operating it under a legislative charter, ejectment does not lie to oust it, and it cannot be subjected to successive actions of trespass; the owner's remedy being an award of permanent damages including recovery for the entire wrong, past, present, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prospective, and, on payment of such damages, an easement passes to the company as in condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 825; Dec. Dig. § 309.\*]

**2. TRESPASS (§ 29\*)—DAMAGES—BY WHOM RECOVERABLE.**

The right to recover for a trespass is personal to him owning the land at the time, and does not pass to his grantee.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 68; Dec. Dig. § 29.\*]

**3. EMINENT DOMAIN (§ 289\*)—REMEDY OF LANDOWNER—TRESPASS—PARTIES.**

In an action against a railway company for trespass upon land in constructing and operating a road over it, all who have an interest in the recovery and whose presence is necessary to protect the company from other and further recoveries for the same cause should be parties; since permanent damages must be adjudicated, on the payment of which an easement passes to the company as in condemnation proceedings and hence, one who owned and was in possession of the land at the wrongful entry, and who holds the present title, and others who owned the land when the action was brought, are necessary parties, though such other persons will not be required to file a complaint.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 789-796; Dec. Dig. § 289.\*]

Appeal from Superior Court, Cumberland County; Long, Judge.

Action by John Porter and others against the Aberdeen & Rock Fish Railroad. From a judgment dismissing the action, plaintiff John Porter appeals. Reversed.

The action was to recover damages against defendant company for unlawfully entering upon lands of the plaintiffs, and wrongfully occupying same in the exercise of a right of way. The plaintiffs H. B. and C. B. Porter having failed to file any complaint, the action as to them was dismissed, and the cause proceeded with as between plaintiff John Porter and the defendant. Said plaintiff developed his case, and offered evidence tending to show that he was the owner and in possession of the land at the time of the alleged unlawful entry thereon, and that he owned and was in possession of same at the time of trial. It further appeared that said plaintiff had no title to the land in question at the time the action was instituted, to wit, on August 18, 1904, having at that time conveyed the portion of land affected by defendant's entry and occupation to his sons and coplaintiffs, H. B. and C. B. Porter, who reconveyed to their father, John Porter, after the action was instituted. When it was disclosed on the cross-examination of plaintiff John Porter that he had no title to the land at the time of action instituted, the cause was dismissed by the court; the judgment entered being as follows: "This cause coming on to be heard at this term of the court before the court and a jury, and it appearing from the testimony and evidence introduced by plaintiffs that at the time of the institution of this action H. B. Porter was

seised and possessed of one part of the land described in the complaint, and that C. B. Porter was seised and possessed of another portion of the land described in the plaintiff's complaint, being the lands occupied by defendant for its roadbed and right of way, and that the plaintiff John Porter was not at the time of the commencement of this action seised or possessed of any portion of the strip of land described in the complaint, and it further appearing that no complaint was ever filed in this action by said H. B. Porter or by C. B. Porter, who were joined as parties plaintiff in the summons, it is now on motion of Robinson & Shaw, attorneys for defendant, considered and adjudged: That this action be dismissed as to H. B. Porter and C. B. Porter, and that it further appearing that, since the commencement of this action, the said H. B. Porter and C. B. Porter have conveyed said land to the plaintiff John Porter, who was not seised or possessed of the same at the time of the commencement of this action, it is further considered and adjudged that this action be dismissed as to the plaintiff John Porter, and that the defendant, the Aberdeen & Rock Fish Railroad Company, go hence without day and recover of the plaintiffs and the sureties upon their prosecution bond the cost of this action, to be taxed by the clerk." Plaintiff excepted and appealed.

Sinclair & Dye, J. Sprunt Newton, and C. W. Broadfoot, for appellant. Robinson & Shaw, for appellee.

HOKE, J. (after stating the facts as above). While the facts are not fully developed, we think from a perusal of the pleadings and the evidence stated in the case on appeal it appears by fair intendment that in 1902 the defendant company entered on the lands in question, claiming the right to do so, and have constructed their railroad, and are operating the same, under and by virtue of a legislative charter, and on facts substantially similar we have held in *Beasley v. Railroad*, 147 N. C. 362, 61 S. E. 453, that, under the circumstances indicated, a railroad company cannot be ousted from the land by action of ejectment on the part of the owner, nor subjected to successive and repeated actions of trespass; but the remedy for the wrong, if one has been committed by the entry and occupation of the land, is to be redressed by an award of permanent damages. On a former appeal in that same cause, reported in 145 N. C. 272, 278, 59 S. E. 62, Connor, J., speaking to this same question, delivered the opinion of the court as follows: "The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same manner, for the same purpose, and to the same extent as if it had acquired the easement by condemnation." It was formerly held as indicated in Beasley's second appeal, reported in 147 N. C. 362, 61 S. E. 453, that where the damages suffered by the owner would be included under an assessment in condemnation proceedings, and such a method of redress was provided by the charter or the general law, such method should be pursued. This was so held chiefly for the reason that it was considered unwise and improper that an enterprise of this character, in which the public as well as the stockholders had a vital interest, should be harassed and hindered, and have its success jeopardized by numerous and repeated actions, when full redress could be afforded in one and the same proceeding. At the time of those decisions, such a result could only be reached by condemnation proceedings, provided usually by charter or the general law. Since the same result is now accomplished by confining the owner, when suit is brought for the injury done to recovery of permanent damages for the entire wrong, there is no longer any reason why either method of redress should not be pursued. The intimations to the contrary therefore in Beasley's second appeal may be considered as withdrawn. Again, it was held in Beasley's second appeal that, while the term "permanent damages" includes damages for the entire injury done the property, present, past, and prospective, there is no good reason why this amount should not be ascertained by a verdict on different issues, when occasion requires that such a course should be taken. And it is further a well-recognized position with us that when there has been a wrongful entry and trespass on an owner's land, and such owner afterwards conveys the land to another, the right to recover for this wrong is personal to him who owned the land when the same was committed, and does not pass to the grantee. *Liverman v. Railroad*, 114 N. C. 692, 19 S. E. 64; *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539.

A proper application of these principles to the facts presented requires that the order made by the judge below, dismissing the action as to H. B. and C. B. Porter for want of a complaint, and dismissing the action of John Porter as on judgment of nonsuit, should both be reversed. The court having decided that permanent damages, including recovery for the entire wrong, past, present, and prospective, should be had in one action; and that, on payment of such recovery, an easement should pass to the road as in proceedings in condemnation, all who have an interest in the recovery, and whose presence is necessary to protect the railroad from other and further recoveries for the same cause, should be made and retained as parties. John Porter has an interest in such a

recovery, and is a necessary party, both as being owner and in possession at the time of the original and wrongful entry and as present holder of the title, and H. B. and C. B. Porter are entitled to share in such recovery for the portion of the injury suffered while they were owners. The court will not require them to file a complaint if they do not care to insist on their claim, but their presence in the suit is necessary to protect the defendant road from other and further litigation. When the road pays the permanent damages, the easement should pass, and, as stated, all whose presence is necessary to insure this result and protect the company from further action concerning it should be parties. The order dismissing the action as to C. B. and H. B. Porter is reversed, and these persons will again become parties of record; and the order dismissing the action as on judgment of nonsuit is reversed, and the cause will be proceeded with in accordance with law.

Reversed.

#### RABON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

##### 1. EVIDENCE (§ 171\*)—BEST EVIDENCE—COLLATERAL ISSUES.

In an action under Revisal 1905, § 2634, imposing a penalty for a carrier's failure to adjust and pay a claim for loss of freight within a certain time, provided that unless the consignee recover the full amount claimed, no penalty shall be allowed, plaintiff, having already filed and recovered his claim for loss of the goods, could testify to that fact in the action for the penalty without producing the notice itself, as the contents of the notice of claim were collateral to such action, and defendant, having it in his possession, was able to contradict plaintiff, if necessary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.\*]

##### 2. CARRIERS (§ 20\*)—REGULATION—PENALTIES—ACTIONS—BURDEN OF PROOF.

In an action under Revisal 1905, § 2634, imposing a penalty for a carrier's failure to adjust a claim for loss of freight within a certain time, provided that, unless the consignee recover the full amount claimed, no penalty shall be allowed, the burden is on defendant to prove that the claim was not filed, or that it was excessive.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.\*]

##### 3. CARRIERS (§ 20\*)—REGULATION—PENALTIES—ACTIONS—DEFENSES—PAYMENT FOR LOSS.

The purpose of the proviso in Revisal 1905, § 2634, imposing a penalty for a carrier's failure to adjust a claim for loss of freight within a certain time, provided that, unless the consignee recover the full amount claimed, no penalty shall be allowed, being to prevent unjust claim for losses, the fact that defendant voluntarily paid the claim for loss upon judgment for plaintiff, and while an appeal therefrom was pending, did not prevent a recovery of the penalty for delay in adjusting the claim.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 20.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Appeal from Superior Court, Columbus County; Lyon, Judge.

Action by H. W. Rabon against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Junius Davis, for appellant.

CLARK, C. J. The facts are thus stated in the defendant's brief: "On December 12, 1906, Wingo, Ellett & Crump shipped from Richmond two cases of shoes, valued at \$58.93, to the plaintiff at Chadbourn, N. C. The shoes were lost and never delivered to the plaintiff, and on January 9, 1907, he filed a claim in writing with the agent of the defendant at Chadbourn for the price of the shoes. The claim was not paid or adjusted within 90 days after it was filed with defendant's agent, as provided in section 2634 of the Revisal of 1905. In June, 1907, plaintiff brought two suits against the defendant before a justice of the peace, one to recover the value of the lost shoes and the other for the penalty given by the statute above mentioned. Judgment was given by the justice in favor of the plaintiff in both cases, and defendant appealed to the superior court in both cases. Three or four months afterwards, and while these two actions were still pending in the superior court, the defendant paid plaintiff \$58.93, amount claimed by him as the value of the shoes, and also the costs which had accrued in the suit before the justice of the peace, brought by the plaintiff to recover for the loss of the shoes. Upon the trial of this action judgment was given against the defendant for the penalty of \$50."

The defendant excepted (1) because the plaintiff was allowed to testify that he filed his claim in writing with defendant's agent, and was subsequently paid by the defendant the amount which he claimed. This was a fact as to which the plaintiff could testify. The contents of the paper were collateral to this controversy, and it was not necessary to produce the paper. *Andrews v. Grimes*, 62 S. E. 519 (at this term), and *Ledford v. Emerson*, 138 N. C. 503, 51 S. E. 42, and cases there cited. Besides, the paper was in the defendant's possession, who could have produced it to contradict the plaintiff if necessary. The requirement being a "proviso" in the section, the burden was on the defendant to prove that the claim was not filed, or was excessive. *State v. Norman*, 13 N. C. 222; *State v. Downs*, 116 N. C. 1064, 21 S. E. 689.

The defendant further excepted (2) on the ground that the plaintiff, having accepted payment for the lost goods, could not recover the penalty for delay to "adjust and pay" said loss within the time prescribed by the statute. Revisal 1905, § 2634. This point has been held adversely to the defendant's

contention. Walker, J., speaking for the court, in *Albritton v. Railroad*, 62 S. E. 597 (at this term). The proviso in section 2634, "unless such consignee recover in such action the full amount claimed, no penalty shall be recovered," is to be stressed on the words "full amount claimed." The section means that if goods are lost or damaged, and a claim in writing is filed, upon failure to pay in the prescribed time, the carrier can be sued, not only for the loss or damage, but for a penalty of \$50 for failure to "adjust and pay" the same, with a proviso that, if the plaintiff shall sue and fails to recover judgment for the full amount of the sum specified in his written claim, he shall recover no penalty. Voluntary payment by defendant is as full guaranty against excessive demands as an involuntary judgment. The object was to prevent consignees from filing claims for excessive amounts and harassing the carrier with suits therefor, when, if a claim for a just amount were filed, it might have been paid. The intention is to give a penalty only when payment of a just claim is delayed. It was not intended to prevent parties accepting payment of the amount of their loss or damage when payment has been delayed beyond the prescribed time. The object of the law is not to discourage settlement for losses, but suits for excessive demands. In this case the plaintiff did in fact "recover judgment" for the full amount of his claim, but, after the appeal was taken, the defendant thought better of it, and paid the full amount of such judgment and costs. This is plenary admission, and not a denial of plaintiff's right to recover the penalty. The defendant relied upon *Best v. Railroad*, 72 S. C. 479, 52 S. E. 223, but counsel had not seen *Albritton v. Railroad*, *supra*, in which this court declined to follow *Best v. Railroad*, and adopted the views expressed in the dissenting opinion in that case as the better reason. *Eller v. Railroad Co.*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225, has no application, for the penalty is a separate cause of action, and not a part of the damages.

No error.

#### CUTHBERTSON v. MORGAN.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. REFORMATION OF INSTRUMENTS (§ 46\*)—EVIDENCE—QUESTIONS FOR JURY.

Though the evidence must be clear and convincing to entitle a party to reform a written instrument, the court cannot withhold the case from the jury where there is more than a scintilla of evidence, for that amount of evidence cannot be said as a matter of law to be insufficient.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 194; Dec. Dig. § 46.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. REFORMATION OF INSTRUMENTS (§ 45\*)—MISTAKE—EVIDENCE—SUFFICIENCY.**

Evidence held to support a verdict that a stipulation in a contract for the sale of real estate was omitted by mistake from the written instrument evidencing the contract, justifying reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 159; Dec. Dig. § 45.\*]

**3. REFORMATION OF INSTRUMENTS (§ 37\*)—DEFENSES—COUNTERCLAIM—REFORMATION OF CONTRACT.**

A defendant in an action for the specific performance of a contract may, by way of defense or counterclaim, invoke the aid of equity to reform the contract.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 147; Dec. Dig. § 37.\*]

**4. SPECIFIC PERFORMANCE (§ 131\*)—DEFENSES—COUNTERCLAIM—REFORMATION OF CONTRACT.**

Where, in an action for the specific performance of a contract, plaintiff refuses to submit to a decree for reformation as prayed for by defendant, and to perform the contract as reformed, the court may dismiss the action.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 131.\*]

**5. REFORMATION OF INSTRUMENTS (§ 37\*)—COUNTERCLAIM.**

Under the rule that he who seeks equity must do equity, a defendant in an action for specific performance of a contract may by counterclaim ask the court to reform the contract, and permit him to perform it as reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 147; Dec. Dig. § 37.\*]

**6. EQUITY (§ 66\*)—MAXIMS—EXCEPTIONS.**

The counter equity which the court will enforce under the rule that he who seeks equity must do equity must grow out of the transaction in respect of which equitable relief is invoked.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 189; Dec. Dig. § 66.\*]

**7. EQUITY (§ 24\*)—FORFEITURES—CONTRACTS—CONSTRUCTION.**

The law will, when possible, so construe an instrument as to avoid forfeitures, and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroy the rights of parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69, 70; Dec. Dig. § 24.\*]

**8. REFORMATION OF INSTRUMENTS (§ 47\*)—FORFEITURES—WAIVER.**

Where, by the terms of a contract for the conveyance of real estate, as reformed by the court at the request of the vendor, the purchaser had forfeited, not only his rights under the contract, but the amount expended in permanent improvements on the premises, the vendor should be required to waive the forfeiture as a condition to the reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 47.\*]

**9. REFORMATION OF INSTRUMENTS (§ 48\*)—DECREES.**

An owner contracted to convey half of a tract of land reserving a life estate, and requiring the purchaser to support him for life. The contract, by mistake, omitted the agreement as to support, and the court at the request of the owner reformed it by inserting the agreement. Held, that the provision as to support was not a condition, but a covenant, performance of which should be secured by declaring it a charge

on the purchaser's interest in the premises, enforceable in a manner determined by the court.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 48.\*]

**10. CONTRACTS (§ 147\*)—CONSTRUCTION—INTENTION OF PARTIES.**

It is not the province of the courts to make contracts for parties or to change those made by them, but the courts must so construe them that, so far as can be ascertained, the purpose and intention of the parties are effectuated.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. § 147.\*]

Appeal from Superior Court, Union County; E. B. Jones, Judge.

Action by J. M. Cuthbertson against Enoch Morgan. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

The pleadings, evidence, and verdict disclose the following case: Defendant, Enoch Morgan, was the owner of the tract of land described in the complaint, on which he resided for many years. He married the feme defendant, Esther, the mother of the plaintiff by a former marriage. Plaintiff was at that time about 5 years of age, and lived with defendants on the land in controversy until he was about 18 years of age. On March 27, 1902, defendant, Enoch Morgan, executed his note to Chas. N. Simpson for \$248.35, and, to secure the payment thereof, he, with his wife, executed a mortgage on said land. On August 24, 1903, the defendant Enoch Morgan, with his wife, and plaintiff, executed a contract in writing, whereby the defendants agreed to convey to plaintiff the portion of said land described in the contract, being one-half of the tract, reserving to themselves and the survivor a life estate. Plaintiff, in consideration of said promise to convey, agreed to pay off and discharge the note and mortgage to Simpson in annual installments of \$40. It was further agreed, and so written in the contract, that, if plaintiff was unable to pay said debt at the time Simpson demanded payment, he should find some one to carry it, and, "if it should be necessary to that end, said Enoch Morgan and wife are to renew the note and mortgage." The contract concludes with these words: "Now on payment of said note and mortgage, or any renewal or renewals thereof, the said Enoch Morgan and wife Esther are to execute and deliver to said J. Madison Cuthbertson a deed in fee simple for said tract of land, reserving a life estate for them and the survivor of them in that portion above mentioned, and then this contract shall be fully performed." The contract was duly proven and recorded. Plaintiff paid \$40 on the debt and borrowed from L. S. Griffin the sum of \$300, with which to pay the balance, executing to H. B. Adams, Esq., a deed in trust on the said land for the purpose of securing the payment of said \$300. The following words are indorsed on the note: "Paid in full by J. Madison

Cuthbertson, January 5, 1907. C. N. Simpson." Plaintiff demanded that defendant execute a deed to him or join in the mortgage to secure the amount borrowed to take up the Simpson note, which defendant refused to do. Defendant claimed that, in addition to paying the Simpson note, plaintiff was to maintain and support his wife and himself, and that this promise was a part of the consideration for the conveyance of the land. He also claimed that this part of the agreement was omitted from the contract by the mistake or inadvertence of the draftsman. The defendant at all times continued to live on the land, cultivating or renting it, and using the produce made thereon. He made no demand upon plaintiff for any support. Morgan says: "I gave it to him to pay Mr. Simpson a little money that was between me and him—no other consideration. He was to take care of me and my wife, and see that we don't suffer for anything." There was testimony tending to sustain and also to contradict the defendant's contention in respect to the agreement to take care of him. Mr. Simpson, who drew the contract, testified: That all of the parties were present, that he drew the contract at the request of Enoch Morgan. "They all rehearsed what they agreed to do, and asked me to fix the paper. I drew the paper, and asked them if that was what they wanted, and they all agreed to it. I had them all then to sign it, and I witnessed it. I just read it over to them. They told me what they wanted, and they agreed to the paper that I drew. This clause about providing for a renewal of mortgage in case I did not want to wait was really a suggestion of mine, but they approved that part of it and readily assented to it." He says he did not suggest to plaintiff to go into it; knew nothing about it until they came to him. He did not remember that anything was said about plaintiffs supporting defendants. Defendant Esther Morgan corroborated plaintiff and Simpson in regard to the agreement and what occurred when it was written. There was evidence that plaintiff put permanent improvements on the land. Upon issues submitted the jury found that the contract was executed and written, and that defendant had refused to execute the mortgage in renewal of the one held by Simpson; that it was a part of the consideration of the contract that plaintiff should maintain and support the defendant, as alleged in the answer; that this part was omitted from the contract by mistake or inadvertence of the draftsman; that plaintiff had not complied with his part of the contract, and that the value of the improvements put upon the land by plaintiff was \$300. The plaintiff moved for judgment upon the verdict, that the contract be reformed in accordance with the verdict. Refused, and plaintiff excepted. He then moved for judgment for the value of his improvements. Refused, and plaintiff excepted. His honor rendered judgment that plain-

tiff was not entitled to a conveyance of the land; that the debt due L. S. Griffin of \$300 be declared a lien upon the land; and that defendants execute a mortgage to secure same. Plaintiff excepted. There were other exceptions to the admission and rejection of testimony and to instructions to the jury. Plaintiff appealed.

Adams, Jerome & Armfield, for appellant.  
Redwine & Sikes, for appellee.

CONNOR, J. (after stating the facts as above). We have examined the record and the exceptions in regard to the conduct of the trial, including his honor's instructions to the jury, and find no prejudicial or reversible error. His honor instructed the jury upon the issue directed to the alleged mistake in the contract in accordance with the decisions of this court. It must, we think, be conceded that the evidence in this respect was not so "clear, cogent, and convincing" as would have been required by a chancellor under the procedure prevailing prior to the change in our system of administering equitable remedies. The weight of the evidence, conceding that all of the witnesses were speaking truly, was against the contention of the defendant in that respect; having held, however, that, although the evidence must be "clear, cogent, and convincing" to entitle a party to correct or reform a written instrument, the court had no right to withhold the case from the jury. If there was more than a scintilla of evidence, we cannot hold as a matter of law that the evidence is not "clear, cogent and convincing"; that being for the jury. *Lew v. Hewett*, 130 N. C. 22, 40 S. E. 769. The protection which the law theoretically throws around the rights of parties who have reduced their contracts to writing is made of but little practical value when the jury may set aside the written word upon testimony which a chancellor would consider entirely insufficient. In this record it appears without serious contradiction that the parties voluntarily went to an intelligent, disinterested draftsman, stated their agreement, and, after having it read to them, expressed themselves as satisfied and executed it. Two of the parties and the draftsman testified to this, and upon the testimony of the other party an additional provision is inserted in the contract. It will be observed that only half the land is to be conveyed, and in this defendants reserve a life estate; hence the plaintiff does not come into possession of any property from the proceeds of which he can pay the Simpson debt and provide support for defendants. The defendants knew that plaintiff was a man of small means, and contemplated that he would be unable to pay the debt at once, providing that he should pay it in annual installments of \$40 and, providing, further, that if Simpson demanded payment prior to the time plaintiff was to pay, according to the contract, that they would execute mortgage in renewal of the

one to Simpson. The plaintiff was therefore entitled to have them execute the mortgage under the terms of the contract as written and executed. The defendant, Enoch Morgan, refused to carry out his part of the contract in respect to executing the new mortgage, alleging that as an additional consideration for conveying the land plaintiff was to support him and his wife, and "see that they did not suffer for anything," and this provision was omitted by mistake. To avail himself of this contention, he was compelled to invoke the aid of a court having equitable power, or the equitable power of the court. Until the contract was reformed, they were unable to resist the plaintiff's equity to compel them to execute the mortgage. The fact that they invoked the aid of the court, by way of defense or counterclaim, is not material. If, after the facts were found, the plaintiff had refused to submit to a decree for reformation and specific performance, of course, the court would have dismissed his action. He, however, asks the court to reform the contract and permit him to perform his part of it as reformed. This, we think, he had a right to do under the maxim, "He who asks equity must do equity." In regard to this well-established equitable maxim Prof. Pomeroy says: "Whatever may be the nature of the controversy between two definite parties, and whatever the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party and growing out of, or necessarily involved in, the subject-matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect to the subject-matter of the suit." Pom. Eq. § 385. It will be observed that one of the limitations of the doctrine is that the counter equity which the court will enforce in such cases must be involved in, or grow out of the transactions in respect to which the equitable relief is invoked, or, as said by the same author: "According to its true meaning, the terms imposed upon the plaintiff as the condition of his obtaining the relief must consist of the awarding, or securing, to the defendant something to which he is justly entitled by the principles and doctrines of equity." Id. 386. The court will not arbitrarily impose conditions or require him to pay for the relief by doing or abstaining from doing something demanded by the other party against whom the relief is granted, separate and distinct from the transaction involved in the litigation out of which the demand for relief grew. For instance, if the plaintiff will seek to enjoin the sale of his property under mortgage, be-

cause of usury charged for the loan of the money secured, the court will grant the relief upon condition that he pay the debt with lawful interest, or, if one seek to redeem his land from a tax sale for irregularities sufficient to entitle him to relief, it will be granted upon payment of the lawful taxes paid by defendants, and this is true independently of any statutory requirement. In *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754, it is said: "When a plaintiff seeks to correct a deed in his own favor, the court will refuse its aid unless he is willing that the other mistakes therein should be corrected which would be against his interest." He who asks equity must do equity. It would seem that, applying this maxim of equity to the facts before us, the defendants should be required before, or, as a condition to having the contract reformed, to specifically perform on their part when the plaintiff expresses a willingness to perform his covenants. It would be unjust to the plaintiff to grant relief to the defendants by reforming the contract, and at the same time construe the inserted language as a condition precedent and declare a forfeiture of all rights under it. It has always been the pride of equity that it so moulds its decrees that perfect and complete justice is done in cases where the law by reason of its rigid, stringent, rules is incapable of doing so. The law will, when possible, so construe an instrument as to avoid forfeitures and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroying the rights of parties. It was upon this principle that courts of equity created the equity of redemption and preserved the mortgage which at law was a dead pledge into a living security for the debt, and saved to the debtor the right to redeem his land, which, according to the terms of his solemn deed, was forfeited upon failure to pay, to the uttermost farthing, on the day named. If it be conceded that, by the terms of the contract, as reformed, the plaintiff had forfeited not only his rights under the contract, but the amount expended in permanent improvements, we think that the defendants should have been required as a condition to having the contract reformed to waive the forfeiture.

But we are of the opinion that, as reformed, the provision in regard to support was not a condition but a covenant, the performance of which should be secured by declaring it a charge on plaintiff's interest in the land to be enforced in such way as the court may determine. We had occasion to consider a similar question in *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415, and upon a rehearing in 137 N. C. 206, 49 S. E. 110. Following the line of thought and the authorities cited in that case, it is apparent that if the language, very indefinite and uncertain, is construed to be a condition the plaintiff might, probably would, find that, upon paying the incur-

brance on the land and performing the terms of the condition for many years, he would be subjected to loss of his money and the land up to the last moment of the lives of defendants. To so construe the contract, as reformed, would be to administer equity to the defendants, and at the same time apply to plaintiff the rigid rules of the law, because a condition precedent must at law be fully complied with, or the party upon whom the performance of the terms of the condition is imposed loses all of his rights under the contract. Of course, if the contract clearly imposes a condition, the law will enforce it. It is neither the duty nor the province of courts to make contracts for parties or to change those which they have made, but to so construe them that, so far as can be ascertained, their purpose and intention are effectuated. There are no words of condition in this contract. The language of Smith, C. J., in *McNeely v. McNeely*, 82 N. C. 183, in a similar case, is applicable here. Speaking of a covenant to support persons incorporated in a deed, he says: "The words are in themselves vague and indefinite, and, if an essential and defeating condition of the gift, would be very difficult of application. What is meant by a 'seeing to the widow,' and what neglect falls short of that duty?" In *Gray v. West*, 93 N. C. 442, 53 Am. Rep. 462, the language in the deed was "that A. should have support out of the land." Held, that the support was a charge on the rents and profits. *Misenheimer v. Sifford*, 94 N. C. 592, and other cases cited in *Helm's Case*, supra. In that case it was insisted that the language in the deed should be construed a condition precedent. While in this case the plaintiff has but an executory contract, it confers upon him rights corresponding to the duties assumed by him which a court will protect and enforce. He cannot call for a deed until he pays the amount due on the Simpson debt, or relieves the defendants and their land of any liability therefor, but, according to the terms of his contract, he is entitled to require the defendants to execute a mortgage in renewal of the Simpson mortgage or by way of substitution of it. The defendants are entitled to have their support or the amount which is reasonably sufficient therefor, under the conditions, age, health, etc., fixed and charged upon plaintiff's interest in the land. So far as the failure of the plaintiff to support the defendants since the making of the contract is concerned, it seems that no demand was made of him, and neither party treated the contract as imposing such duty upon plaintiff. The defendants had all that was made on the land, and do not appear to have suffered. If so desired, a reference may be had to ascertain what, if anything is due on that account. We are quite sure that in the light of our decision the intelligent counsel representing both par-

ties will be able to draw a decree which will protect the interest of the parties. The contract is unusual in some of its provisions, and some adjustment and concessions will probably have to be made to prevent further expensive litigation. It is to the interest of all concerned to do so. The judgment must be modified as indicated in this opinion. It is so ordered.

Modified and affirmed.

### WILKINSON v. DUNBAR.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. DAMAGES (§ 28\*)—GROUNDS OF COMPENSATION—PROSPECTIVE DAMAGES—BREACH OF ENTIRE CONTRACT.

Where there has been an absolute breach of an entire contract, all damages, both present and prospective, suffered by the injured party may, and usually must, be recovered in one action.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 70; Dec. Dig. § 28.\*]

#### 2. DAMAGES (§ 40\*)—GROUNDS OF COMPENSATION—PECUNIARY LOSSES—LOSS OF PROFITS.

Profits, as an element of damages for breach of contract, are not excluded because of anything inherent in their nature, but usually because they are remote and contingent, as in case of anticipated profits from collateral engagements of the parties, or from current sales dependent on the uncertainty of trade and fluctuations of the market; but where profits may be determined with certainty, or are the direct or immediate results of the contract, so that they may be fairly said to have been in contemplation of the parties, they are recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 76; Dec. Dig. § 40.\*]

#### 3. DAMAGES (§ 184\*)—NATURE—CERTAINTY AS TO EXTENT.

In an action for damages, while plaintiff must prove the amount of his loss, absolute certainty is not essential, and substantial damages may be recovered though plaintiff only shows his loss proximately; but both the cause and the amount of loss must be shown with reasonable certainty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 502; Dec. Dig. § 184.\*]

#### 4. DAMAGES (§ 28\*)—GROUNDS OF COMPENSATION—PROSPECTIVE DAMAGES—BREACH OF CONTRACT.

Under an agreement to pay at a certain rate per thousand feet for cutting timber and delivering it at a certain place, on a breach thereof before all the timber was cut, prospective, as well as present, damages could be recovered, within the rule requiring prospective damages to be shown with reasonable certainty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 70; Dec. Dig. § 28.\*]

#### 5. DAMAGES (§ 120\*)—MEASURE—BREACH OF CONTRACT—ENTIRE CONTRACT—PROSPECTIVE DAMAGES.

On a breach of an agreement to pay a certain sum for cutting and hauling timber, while the measure of the damages accruing up to the time of the breach would be the difference between what was agreed to be paid and the cost of performance, where it appeared that the contract would have required some years after its breach to complete performance, the

proper measure of the prospective damages arising after the breach would be the present value of the difference between the contract price and the cost of performance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.\*]

**8. DAMAGES (§ 120\*)—GROUND OF COMPENSATION—PROSPECTIVE DAMAGES—BREACH OF ENTIRE CONTRACT.**

There can be but one recovery for present and prospective damages arising from breach of an entire contract, based on the values as they existed at the time of breach, but, in fixing the amount of a present recovery for prospective damages, allowance should be made on account of fluctuations likely to occur.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 120.\*]

**7. DAMAGES (§ 175\*)—EVIDENCE—ADMISSIBILITY—BREACH OF CONTRACT—PROSPECTIVE DAMAGES.**

In an action for present and prospective damages arising from breach of an entire contract, evidence of changes in the market values or the cost of materials, etc., after the breach is inadmissible; the recovery being based on the values at the time of the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 460-471; Dec. Dig. § 175.\*]

**8. EVIDENCE (§ 498\*)—OPINION EVIDENCE—CONCLUSIONS AND MATTERS OF OPINION—VALUE.**

In an action for breach of a contract to pay defendant so much per thousand feet for cutting and hauling timber, where witnesses had stated the estimated cost per thousand feet of cutting and delivering the timber, their testimony as to the profits per thousand feet, though stated in the form of an opinion, was, in effect, an estimate of the difference between the cost of performance and the contract price, and was admissible within the general rule admitting opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2289; Dec. Dig. § 498.\*]

**9. EVIDENCE (§ 474\*)—OPINION EVIDENCE—SPECIAL KNOWLEDGE AS TO SUBJECT-MATTER—VALUE—PROFITS.**

Opinion evidence will be admitted, where the witness has personally observed the facts and conditions testified to, though it is not strictly expert testimony, it being in the nature of expert testimony on the facts; and, on a claim for breach of contract to pay a certain sum for cutting and delivering timber, experienced lumbermen, having personal observation and knowledge of the facts and conditions, can give their opinions as to the profits per thousand feet in doing the work.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2219; Dec. Dig. § 474.\*]

**10. APPEAL AND ERROR (§ 1177\*)—DISPOSITION OF CAUSE—REVERSAL—NEW TRIAL.**

Where, in an action for breach of contract, the questions of liability and of the amount of recovery were submitted in the same issue, the instruction as to the latter being incorrect, a new trial will be ordered on the entire issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4598; Dec. Dig. § 1177.\*]

Appeal from Superior Court, Hyde County; O. H. Allen, Judge.

Action by W. H. Wilkinson against W. H. Dunbar. From a judgment for defendant on his counterclaim, plaintiff appeals. Reversed and remanded for new trial.

Plaintiff instituted suit against defendant, and declared on four causes of action for alleged breach of different contracts on part of defendant, and claiming damages therefor in amounts varying from \$500 to \$100. Defendant answered, denying the allegations of the complaint, and alleging, by way of counterclaim, breach of contract on part of plaintiff, under which plaintiff had contracted and agreed to pay defendant \$3.50 per thousand feet to cut and haul the timber from two certain tracts of land, the timber amounting to several million feet. Plaintiff replied, denying the alleged counterclaim. On issues submitted there was a verdict for plaintiff on his first cause of action, the jury assessing plaintiff's damages at \$428.99, with interest from May 19, 1902. And there was verdict for defendant on his counterclaim for \$4,000. Objection was made to the ruling of the court which allowed defendant and some other witnesses, known to be familiar with the tract of land, and lumbermen of experience, to give their opinion as to the cost of cutting the timber and delivering same to the tugboat pursuant to the stipulations of the contract, and the profit per thousand feet to accrue according to the contract price. Exceptions were also made to allowing the jury to award prospective damages, the plaintiff contending that, under the terms of the contract and the attendant facts and circumstances, these damages were too indefinite, and uncertain to be made the basis of legal demand, and excepting further to the rule laid down by the court under which such damages were to be admeasured. There was judgment on the verdict for defendant, and plaintiff excepted and appealed.

S. S. Mann and Small, MacLean & McMullen, for plaintiff. Ward & Grimes and W. M. Bond, for defendant.

HOKE, J. (after stating the facts as above). It was chiefly objected to the validity of defendant's recovery that the profits of the contract claimed and allowed as damages on defendant's counterclaim, involved too many elements of uncertainty to be made the basis of a legal award of prospective damages, and the same should have been rejected, on the ground that they are "speculative" and "contingent," but we are of opinion that the objection cannot be sustained. It is well established that, where there has been definite and absolute breach of a contract which is single and entire, all damages, both present and prospective, suffered by the injured party may, and usually must, be recovered in one and the same action; and, when prospective damages are allowed, they must be such as were in reasonable contemplation of the parties, and capable of being ascertained with a reasonable degree of certainty. This requirement as to the certainty of damages re-

coverable is frequently said to exclude the idea of profits, but this statement must be understood to refer to the profits expected by reason of collateral engagements of the parties, or the profits of a going concern to arise from current sales and bargains which are yet to be made and dependent to a great extent on the uncertainty of trade and fluctuations of the market. Accordingly it has been held that profits of an old established business may sometimes be allowed as damages, when they can be ascertained with a reasonable degree of certainty, and, under like circumstance, the prospective profits to arise directly from the contract declared on are also recoverable. The doctrine is stated in *Hale on Damages*, as follows: "In an action for damages the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered, though plaintiff can only give his loss proximately." *Hale on Damages*, p. 70, quoted with approval by this court in *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044. And, further, on page 71: "A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented, but absolute certainty is not required. Compensation for prospective losses may be recovered when they are such as, in the ordinary course of things, are reasonably certain to ensue. Reasonable certainty means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed." On this subject the same author (pages 72, 73) quotes with approval from the opinion of Selden, J., delivered in the case of *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718, as follows: "It is a well-established rule of the common law that damages recoverable for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should, per se, prevent their allowance. Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent are not. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation—and they must be certain, both in their nature and in respect to the cause from which they proceed." And *Sunderland on Damages*, speaking on this subject, says: "It is not necessary that

such damages shall be shown with mathematical accuracy." The same principle is well stated by Chief Justice Nelson, in the notable case of *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, as follows: "When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements, entered into on the faith and in expectation of the performance of the principal contract. The performance or nonperformance of the latter may, and doubtless often does, exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And, besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed than if it had been made with one in prosperous or affluent circumstances. Dom. b. 3, tit. 5, 2, art. 4. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must therefore abide the hazard. Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages." The doctrine so clearly defined and stated by these authorities, is approved and applied in decisions of our own court, and well-considered cases in other jurisdictions. *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302; *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Fall and Miles v. McRee*, 36 Ala. 61; *Nilson v. Morse*, 52 Wis. 240-255, 9 N. W. 1; *Richmond & Jackson v. Railway*, 40 Iowa, 264-277.

A proper application of these principles to the facts presented fully support the ruling of his honor below in submitting the question of prospective damages for the consideration of the jury, these facts affording all the data for an award of such damages with reasonable certainty. While we agree with his honor that, for breach of this contract, recovery for both present and prospective damages is permissible, we are of opinion that there was error to the plaintiff's prejudice in the rule by which a substantial portion of the damages was directed to be ascertained. On this question his honor charged the jury that, in case a breach of contract was established, as claimed, the defendant was entitled to recover as damages the difference between the amount the plaintiff had agreed to pay for the work and the cost of performance. This was the entire statement of the trial judge in reference to the rule by which the damages should be admeasured, and, though somewhat general in its terms, is a correct rule as to all the damages which had been occasioned at the time of breach; but there was evidence offered tending to show that this contract would have required some years in its performance beyond the time when a breach was established. And, as to this prospective damage—that to arise in the time required for performance after such breach—the correct rule would be the present value of the difference between the contract price and the cost of performance. We hold, as stated, that recovery for this prospective damage can be had, but defendant is only entitled to the present value of his contract, and, in so far as such damage is allowed by anticipation, proper allowance should be made for the fact that present recovery is had for damage that would only have accrued at a future time. This position as to the correct rule for determining values to arise and accrue in the future, when a present recovery is allowable, is very well illustrated in the case of *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 284, 30 L. R. A. 257, 53 Am. St. Rep. 611. In that case, and on the question indicated, it was held: "(7) In an action for a negligent killing an instruction that the expectation of one 17 years old would be  $44\frac{2}{10}$  years, and that the measure of damages would be the net moneyed value of intestate's life to those dependent on him had he lived out his appointed time, is erroneous, because it leaves uncertain the date which should be the basis of the final calculation, instead of informing the jury that it is the present value of such net moneyed value which should be considered." And while the authorities hold that one recovery is to be had for the entire damage, predicated on values as they existed at the time of the breach of the contract, and that it is error to admit testimony as to actual changes in the market values, or the cost of labor and material, that may arise after that date,

see *Hawk v. Lumber Co.* (at the present term) 62 S. E. 752. We deem it not amiss to say that competent witnesses who speak to this question should always be sufficiently advertent to the fact that such fluctuations are not unlikely to occur, and courts and juries should be careful to see that proper allowance is made on that account in fixing the amount of a present recovery by reason of such damage. Speaking to this question, and in support of the view that the principle referred to is of the substance, and to be given its proper weight by the jury, Nelson, Chief Justice, in *Masterton's Case*, supra, said: "The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Objection was further made that the defendant and other witnesses were allowed to give to the jury their opinion of the profits per thousand feet. These witnesses, or some of them, had given their statement and estimate of the cost per thousand feet to cut and haul and deliver these logs at a point where the tugboat could get them, and the testimony objected to, while in the form of an opinion, was nothing but an estimate by them of the difference between the costs of performance and the contract price, making their testimony nothing really but an estimate of value, and thus bringing the same clearly within the general rule by which opinion evidence is available. *Sedgwick, Damages*, § 1294. But, apart from this, it will be noted that the witnesses who gave this testimony had personal observation and knowledge of the facts and conditions, and they were all said to be experienced lumbermen. Testimony of this kind, from such a source, is coming to be more and more allowed in investigations of this character, and the courts are disposed to admit "opinion evidence" when the witnesses have had personal observation of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. While not expert testimony in the strict sense of the word, it is



coming to have a recognized place in the law of evidence. McKelvey speaks of it as "expert testimony as to facts" (McKelvey on Evidence, p. 230), and, in reference to it, this author says that it is nothing more than ordinary testimony as to facts given by witnesses specially qualified by observation and experience to give it. And, further on (page 231): "There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who, by reason of special opportunity for observation, are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observation. For example, one who had had opportunity to observe the running of trains may testify as to the speed of an ordinary train. Such witnesses are really not experts in the strict sense of the term. They are only specially qualified witnesses. Any person, having been placed in the same position, and having had the same opportunity for observation, could give like testimony." The testimony offered comes clearly within this principle, and its admission has been sanctioned by authoritative decisions here and elsewhere. *Britt v. Railroad* (present term) 61 S. E. 601; *Taylor v. Security Co.*, 145 N. C. 385, 59 S. E. 139; *Sikes v. Paine*, 32 N. C. 280, 51 Am. Dec. 389; *Eldredge v. Smith et al.*, 13 Allen (Mass.) 140; *Salvo v. Duncan et al.*, 49 Wis. 151-157, 4 N. W. 1074; *Stark v. Alford*, 49 Tex. 261.

The questions of plaintiff's liability and the amount of recovery were submitted to the jury in one and the same issue, and for the error indicated in the opinion a new trial is directed on the entire issue.

New trial.

#### HAWK v. PINE LUMBER CO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. DAMAGES (§ 120\*)—EVIDENCE—BREACH OF CONTRACT—ADMISSIBILITY—MEASURE.

In an action for present and prospective damages, arising from defendant's breach of a contract to pay plaintiff so much per thousand feet for cutting and delivering timber, since the prospective damages should be determined on the basis of the values at the time of the breach, it was error to admit testimony that the cost of logging after the breach had increased, though the fact that the market will fluctuate as to the cost of labor, etc., may be considered generally in estimating the prospective damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291, 292; Dec. Dig. § 120.\*]

#### 2. DAMAGES (§ 218\*)—INSTRUCTIONS—MEASURE.

In an action for present and prospective damages, arising out of a breach of defendant's contract to pay plaintiff so much per thousand feet for cutting and delivering timber, where the contract would have required several years for performance after the time of breach, an instruction to find the cost to plaintiff of cutting and delivering the logs at the time they were

to be delivered under the contract, when taken in connection with the erroneous admission of evidence of an increase in the cost of doing the work after the breach, was erroneous, as the prospective damages were allowable only on the basis of the values at the time of the breach.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 218.\*]

#### 3. APPEAL AND ERROR (§ 1178\*)—DISPOSITION OF CAUSE—ORDERING NEW TRIAL.

Though an error affected only a part of the issues, where it appeared that the facts might be more fully developed on a new trial, and the questions more clearly presented, and that injustice might be done unless a new trial was granted, a new trial will be ordered on all the issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by G. E. Hawk, against the Pine Lumber Company. From a judgment for plaintiff, and for defendant on its counterclaim, plaintiff appealed. Reversed, and new trial ordered.

See, also, 58 S. E. 603, 145 N. C. 48.

The plaintiff alleged that, on January 4, 1902, he had entered into a contract with the defendant to log certain timber lands owned by it, the defendant to furnish the necessary equipment; to provide the means for performing the contract, which were to be charged to the plaintiff, who was credited each month with the logs delivered by him. Statements were furnished each month showing the balance due. The plaintiff further alleged that the land was well timbered, and the contract, if performed, would have enabled him to realize a profit of \$100,000. There were allegations as to the respective duties and obligations of the parties, and evidence to sustain the same. The essential facts are stated in *Hawk v. Lumber Co.*, 145 N. C. 48, 58 S. E. 603. The contract was of course unperformed at the time of the breach, and the evidence tended to show that it would have taken several years to complete the work under it. The breach occurred in November, 1903. The estimates as to the quantity of timber on the land varied considerably; the plaintiff's evidence tending to show that there were between 150,000,000 and 200,000,000 feet of timber, and 20,000 acres of land while the evidence of the defendant tended to show that there were only 5,000 acres, and from 30,000,000 to 40,000,000 feet of timber. The court permitted a witness, Benjamin Moore, over the objection of the plaintiff, made in apt time, to testify as follows: "It would not have cost less than \$4.50 or \$5, at least, to log the land in 1904, 1905, 1906, and 1907, and that wages had increased since 1903 something like 50 per cent." Other witnesses were permitted to testify to the same facts. The plaintiff requested the court to charge the jury as follows: "If the jury shall find that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant wrongfully broke its contract with the plaintiff he is entitled to have his damages assessed upon the conditions as they existed at the time of the breach, and they will not consider whether the expense of logging has increased since that time or decreased, but they will estimate his damages upon the conditions then existing, and the estimate should be based upon the present value of the contract at the time of the breach." This instruction was refused, and the plaintiff excepted. The court charged the jury as follows: "(1) The sixth issue is, what damage has the plaintiff sustained by reason of the wrongful breach of the contract? The burden of this issue is on the plaintiff. Should you answer the first, second, and third issues 'Yes,' the plaintiff will be entitled to recover the difference between the contract price, which it is agreed was \$3 per thousand feet, and the cost of cutting, hauling, and loading the logs on the cars of the Norfolk & Southern Railway Company at Croatan, of all the merchantable timber that was left on the land at the date the plaintiff stopped work for the defendant company." Plaintiff excepted to this part of the charge. "(2) You must find the quantity of timber on the land that was embraced in the contract, the number of feet, and the amount that it would cost the plaintiff to deliver said logs on board the cars of the Norfolk & Southern Railway Company at Croatan, at the time or times said logs were to be delivered, under the terms of the contract. Should you find that it would cost \$3 per thousand feet, or more, the plaintiff would not be entitled to recover any amount on account of said logs, for there would be no profit in it to him." The plaintiff excepted to each of these instructions. The issues and the answers thereto were as follows: "(1) Did plaintiff and defendant enter into the contract as alleged in the complaint? Answer. Yes. (2) Did the plaintiff perform the contract on his part as fully as he was permitted to do by the defendant? Answer. Yes. (3) Did the defendant wrongfully break the contract, and prevent the plaintiff from further performance thereof? Answer. Yes. (4) Did the defendant wrongfully convert the personal property of the plaintiff as alleged in the complaint? Answer. Yes. (5) What damage has plaintiff sustained by the wrongful conversion of his personal property? Answer. \$1,359. (6) What damage has plaintiff sustained by the wrongful breach of the contract? Answer. Two thousand two hundred and fifty dollars, with interest on same. (7) Have the matters and things complained of been heretofore adjudicated as to the conversion of the personal property, as alleged in the answer? Answer. Yes. (8) Have the matters and things alleged in the complaint, other than the conversion of the personal property, been heretofore adjudicated as alleged in the answer? Answer. No." The plaintiff moved for a new trial, which was

refused, and judgment was entered upon the verdict. He then excepted and appealed.

W. D. McIver and D. L. Ward, for appellant. W. W. Clark, Simmons, Ward & Allen, and Moore & Dunn, for appellee.

WALKER, J. We are of the opinion the judge erred in admitting the testimony of Benjamin Moore and other witnesses as to facts supervening the breach of the contract—that is, the cost of logging after the breach and the increase in the rate of wages—and also in refusing the plaintiff's prayer for instructions. This case, in respect to the damages recoverable for the breach of the contract, is governed by *Wilkinson v. Dunbar* (decided at this term) 62 S. E. 748. We held there that, while the entire damage must be assessed, present and prospective, the measure of damages is the value of the contract at the time of the breach. Justice Hoke for the court says in that case: "There was evidence offered tending to show that this contract would have required some years in its performance beyond the time when a breach was established; and, as to this prospective damage—that to arise in the time required for performance after such breach—the correct rule would be the present value of the difference between the contract price and the cost of performance. We hold, as stated, that recovery for this prospective damage can be had, but defendant is only entitled to the present value of his contract, and, in so far as such damage is allowed by anticipation, proper allowance should be made for the fact that present recovery is had for damage that would only have accrued at a future time. This position as to the correct rule for determining values to arise and accrue in the future, when a present recovery is allowable, is very well illustrated in the case of *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611." He cites the leading and authoritative case of *Masterton v. Mayor*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, in which it was held: "(a) When one party to an executory contract puts an end to it by refusing to fulfill, the other party is entitled to an equivalent in damages for the gains and profits which he would have realized from performance. (b) The measure of damages, in respect to so much of the contract as remained wholly unperformed at the time of the breach, is the difference between what the performance would have cost the plaintiff and the price which the defendant had agreed to pay. (c) In estimating what the performance would have cost the plaintiff the court and jury should be governed by the price of labor and material at the time of the breach, paying no attention to subsequent fluctuations of the market." This, of course, means actual fluctuations.

The language of Chief Justice Nelson (afterwards a justice of the Supreme Court of

the United States) is especially applicable to our case. He says: "Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present as in actions predicated upon a failure to perform at the day." The concurring opinion of Bronson, J., is equally as strong and explicit in stating the same principle. The rule, as now formulated by this court, and governing in such cases as this one, is well supported, not only by *Masterton v. Mayor*, supra, but by the other cases which will be found in the learned and forceful opinion of Justice Hoke. We need not refer to them seriatim, and make special comment upon the reasons assigned therein for the conclusion reached by the courts of Alabama, Iowa, Wisconsin, and Illinois, and by this court in *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302, as it will suffice to say, generally, that they fully and conclusively sustain the rule, as one both simple in its application, certainly less speculative than any other, and eminently just and proper. We again commend its wisdom, as it fixes a sure standard for assessing the damages, and prevents a jury from entering into the field of uncontrolled conjecture and speculation, which might result in many cases most disastrously to the offending party. He surely should not complain of it, and his adversary has no ground for criticism of it as a proper criterion of what he should receive, as he gets, under it, all that he could have contemplated that he would receive, and he also receives a benefit from the fact that we exclude from the consideration of the jury vague surmise and conjecture as to what the future market, with respect to the cost of labor and material, and other elements of damages, will actually be. The fact that the market will fluctuate, and that prices will rise or fall, may be considered in estimating the damages, but not any particular or actual change which may have occurred in future conditions. The presumption is that he estimated his profit upon the basis of the conditions existing at the time of the breach, if there should be one, or that is at least as close an approximation as we can possibly make, with reference to what was in the minds of the parties and within their reasonable expectation, when they made the contract. This ruling entitles the plaintiff to a new trial. The instructions of the court (Nos. 1 and 2) would seem to be somewhat

inconsistent, though it is possible we may be mistaken as to this, and not clearly understand them, with reference to each other, so as to be able to reconcile them. The last instruction was erroneous under the rule laid down by us, especially when considered in connection with the incompetent evidence admitted and the instruction asked by the plaintiff, which was rejected.

We think that, under the peculiar circumstances of this case, the new trial which we award should extend to all the issues, for the reason, among others which are controlling, that the facts of the case may be more fully developed, and the questions intended to be presented more clearly presented. To do otherwise might result in injustice to one or both of the parties. We grant the new trial generally in the exercise of the discretion which belongs to this court, as has been so often decided. *Burton v. Railroad*, 84 N. C. 192; *Holmes v. Godwin*, 71 N. C. 306; *Merony v. McIntyre*, 82 N. C. 103; *Strother v. Railroad*, 123 N. C. 197, 31 S. E. 386; *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Nathan v. Railway*, 118 N. C. 1066, 24 S. E. 511.

Let there be a new trial as to all the issues.

New trial.

#### HAWK v. PINE LUMBER CO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

##### 1. TRIAL (§ 140\*)—TAKING QUESTION FROM JURY—CREDIBILITY OF WITNESSES.

An issue whether the matters alleged had been already adjudicated, as alleged in the answer, having been submitted, a requested instruction that upon the whole evidence the jury should answer the issue in the affirmative was properly refused, as it prevented the jury from passing on the credibility of the witnesses.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 335; Dec. Dig. § 140.\*]

##### 2. JUDGMENT (§ 956\*)—PLEADING—FORMER ADJUDICATION—BURDEN OF PROOF.

Where the answer alleged that certain matters alleged in the complaint had been adjudicated in a prior suit, the burden was on defendant to prove the prior adjudication.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1822; Dec. Dig. § 956.\*]

##### 3. APPEAL AND ERROR (§ 792\*)—DISMISSAL—REVIEW UNNECESSARY.

Where both plaintiff and defendant appeal, and a new trial is ordered on all the issues on plaintiff's appeal, defendant's appeal becomes unnecessary, and will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8139; Dec. Dig. § 792.\*]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action for breach of contract by G. E. Hawk against the Pine Lumber Company. From a judgment for plaintiff, and for de-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant on its counterclaim, defendant appealed. Appeal dismissed.

See, also, 58 S. E. 603.

The answer stated that the matters alleged in the complaint had been previously adjudicated in a prior action between the parties, and the eighth issue submitted was whether the matters alleged in the complaint had been previously adjudicated as alleged in the answer.

W. W. Clark, Simmons, Ward & Allen, and Moore & Dunn, for appellant. W. D. McIver and D. L. Ward, for appellee.

**WALKER, J.** This is an appeal by the defendant from the refusal of the court to grant a new trial, because the court refused to give the jury, as requested to do by his counsel, the following instruction: "Upon the whole evidence, you will answer the eighth issue 'Yes.'" The issues are set out in the plaintiff's appeal, and reference is made thereto. The request was not in proper form, as it deprived the jury of the right to pass upon the credibility of the witnesses. *Manufacturing Co. v. Railroad*, 128 N. C. 284-285, 38 S. E. 894, and cases cited; *Merrill v. Dudley*, 139 N. C. 57, 51 S. E. 777. The burden of the eighth issue was upon the defendant. But we will not decide the case upon the inaccurate and disapproved form of prayer. If we did so, it would affirm the judgment in this appeal. In the plaintiff's appeal we have directed a new trial as to all the issues, and this appeal, therefore, becomes unnecessary, for the defendant will get what it is asking for by our giving a new trial in that appeal. Therefore the proper course now is to dismiss this appeal.

Appeal dismissed.

**STATE v. ATLANTIC COAST LINE R. CO.**  
(Supreme Court of North Carolina. Nov. 5, 1908.)

**1. SUNDAY (§ 29\*)—OPERATION OF RAILROADS—PROSECUTION—BURDEN OF PROOF.**

Under Revisal 1905, § 3844, prohibiting a railroad company from permitting the running of certain trains on Sunday, permission is an essential ingredient of the offense, and, though the mere running of a train may support a conviction, proof of that fact does not place the burden upon the company to show that the train was run without its permission; the jury being bound to consider all the evidence, and find beyond a reasonable doubt that permission existed.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 70; Dec. Dig. § 29.\*]

**2. CRIMINAL LAW (§§ 763, 764\*) — INSTRUCTIONS—INVASION OF JURY'S PROVINCE.**

An instruction in a prosecution of a railway company for permitting a train to run on Sunday that, if a train passed through a specified point on a specified Sunday pulled by an engine belonging to the company, the company should be convicted, unless defendant's evidence showed that the train was run without its permis-

sion, was error, since the ultimate fact of guilt was for the jury, and not the court, to declare.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1735; Dec. Dig. §§ 763, 764.\*]

**3. CRIMINAL LAW (§ 1128\*) — APPEAL—MATTERS NOT OF RECORD.**

The Supreme Court cannot refer to matters not stated in the record.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2951-2953; Dec. Dig. § 1123.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Wilson County; Lyon, Judge.

The Atlantic Coast Line Railroad Company was convicted of permitting a train to run on Sunday, in violation of Revisal 1905, § 3844, and it appeals. New trial granted.

This is an indictment for permitting a train of cars to be run on Sunday between sunrise and sunset, contrary to section 3844 of the Revisal 1905, which is as follows: "If any railroad company shall permit the loading or unloading of any freight car on Sunday, or shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad (except the trains specified in the section), such railroad company shall be guilty of a misdemeanor in each county where such car, train of cars or locomotive shall run, or in which any such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than five hundred dollars for each offense." The evidence introduced by the state tended to show that on Sunday, May 19, 1907, a freight train passed through Wilson, it being a "solid coal train," with an engine and tender on which were the letters "A. C. L.," they being the initial letters of the defendant's corporate name. The train was going south between 5 and 6 o'clock p. m. The defendant objected to this evidence in apt time, because it was alleged in the indictment that the train was "run" on May 1, 1908; whereas, the proof is that it was "run" on May 19, 1907. The objection was overruled, and the defendant excepted. The evidence of the defendant tended to show that those having the authority to supervise and control the movement of trains on the defendant's road had positively forbidden the operation or running of any train on Sunday, contrary to the provisions of the statute. This evidence was in the form of special instructions to subordinates in the service, who had the immediate charge of the operation of trains, whose duty it was to obey all orders received from their superiors. It was also in evidence that the train mentioned in the indictment was run without the knowledge or consent of the defendant, and in violation of previous orders issued by it. The court charged the jury as follows: "If you find that the freight train loaded entirely with coal passed through Wilson on May

19, 1907, before sunset, pulled by an engine belonging to the defendant, then you should find the defendant guilty, unless the evidence offered on the part of the defendant satisfies you that said train was running without the permission of the defendant. The burden of proof on the question whether the train was run by the permission of the defendant is on the defendant." To this instruction the defendant excepted. The court further instructed the jury that the ownership of the coal and the purpose for which it was transported was immaterial. Defendant excepted. The defendant was convicted. A motion for a new trial having been overruled and judgment pronounced upon the verdict, the defendant appealed.

F. A. & S. A. Woodard and Aycock & Daniels, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). The offense created by the statute in question consists in the running of trains on Sunday by permission of the railway company. The statute is not so worded as to withdraw from its operation, by exception or proviso, trains which are run without the consent of the railway company, but the permission of the company is made an essential ingredient of the offense, and, under well-settled rules of criminal pleading, the state is called upon to show the permission in order to convict the defendant. This is not imposing upon the state a burden of proof which it is impossible to carry or requiring it to prove a fact, the existence of which can be more easily established by the defendant, for the plain reason that, when the state has shown that the train was actually run on a Sunday, it has adduced evidence sufficient to warrant the jury to infer that it was done with the defendant's permission. It is a circumstance sufficient, at least, to support a conviction. It cannot be said, though, that the defendant is guilty simply because the train was drawn by one of the defendant's locomotives, for this would be taking evidence of the fact that it was run with the permission of the defendant for the fact itself. Instead of charging the jury as he did, the judge should have instructed them, not that the burden was on the defendant to show that the train was run without its permission, which was telling them practically that the burden was on the defendant to acquit itself of the charge, but he should have charged that they should consider all of the testimony and find as a fact beyond a reasonable doubt that the defendant had permitted the train to be run on Sunday before they could convict. The permission of the defendant is as necessary to the completeness of the offense as the running of the train itself. It is of the very substance of the crime. Instead of thus charging the jury, the court

excluded the doctrine of reasonable doubt from their consideration by making the verdict of guilty to depend upon the finding of a single evidentiary fact, and placing the burden of disproving the leading constituent element of the crime upon the defendant. The court, under this statute, misplaced the burden of proof. It was upon the state and did not shift during the trial. The distinction is between a fact which is made an essential element of the crime by the statute, and one which, by virtue of a proviso or otherwise, merely withdraws the particular case from its operation, or excludes it from the prohibited class. Many illustrations of it are to be found in our decisions.

The instruction in this case is not substantially different from the one given in *State v. Railway*, 145 N. C. 570, 59 S. E. 1048. If the judge had submitted the case to the jury upon the entire evidence, giving the defendant the benefit of the doctrine of reasonable doubt, and then told them that if they found the two essential facts, that the train was run on Sunday and with the permission of the defendant, the charge would have been in accordance with our ruling in that case. That was not done, but the defendant was erroneously placed at a disadvantage by being required virtually to disprove the fact of permission. The jury must find the fact of guilt. The judge only declares the law. In *State v. Simmons*, 143 N. C. 618, 619, 56 S. E. 703, we said: "The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of fact resulting therefrom. The evidence may in the opinion of the court have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt, without any suggestion from the court, direct or indirect, as to what that finding should be. *State v. Lilly*, 116 N. C. 1049, 21 S. E. 563. The presumption of innocence and the doctrine of reasonable doubt (alike) require that method to be pursued, and it is clearly enjoined by the statute we have cited (Revisal 1905, § 535), the restraining words of which define clearly the respective functions of court and jury in the trial of causes."

Upon the other question, as to the burden of proof, we need only refer to a few recent cases decided by this court. "The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged, must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice, and so forcibly has it commended itself by its wisdom and humanity to the consideration of this court that it has never felt willing, whatever circumstances of difficulty might

attend any given case, to disregard it." *State v. Wilbourne*, 87 N. C. 532. That case was approved in *State v. Connor*, 142 N. C. 700, 55 S. E. 787. Even if the burden of proving that there was no permission to run the train was upon the defendant, the charge is still erroneous, because the ultimate fact of guilt was for the jury to find from all the evidence, and not for the court to declare. *State v. Woody*, 47 N. C. 276; *State v. Evans*, 50 N. C. 250; *State v. McDaniel*, 84 N. C. 803. The last three cases are cited with approval in *State v. Wilbourne*, supra.

It is suggested that the court should have charged the jury that, if they believed the evidence, they should convict the defendant. The court could not well have instructed the jury to this effect without disregarding material evidence in the case which tended to show the defendant's innocence. It is quite true that there was evidence of the defendant's guilt, but it was for the jury to say at last whether they were convinced of the defendant's guilt by that evidence, when weighed with the other evidence in the case. We are not permitted to refer to matters not stated in the record, nor could the court below or the jury consider them. The statute under which the indictment was found is a very wise and wholesome one, and should be obeyed by the railway companies and enforced by the courts, but a defendant is entitled to have the question of its violation determined by the well-settled rules of law, and, in any view we can take of the proceedings in the court below, we think this was not done, and hence there was error.

New trial.

CLARK, C. J. (dissenting). The conduct denounced by the statute (Revisal 1905, § 3844) is "permitting any car, train of cars, or locomotive to be run on Sunday" between certain hours (with certain exceptions which are matters of defense and which besides clearly do not arise on the evidence in this case). The evidence is uncontradicted that on 19 May, 1907, which was Sunday, before sunset between 5 and 6 p. m., a solid coal train passed through Wilson on defendant's road, the engine and tender marked with defendant's name. It was in evidence by defendant's witness, W. H. Newell, its superintendent of transportation, that at the term of the court ending Saturday May 18, 1907, the defendant had pleaded guilty to two indictments under this statute, and a nol. pros. was entered in another case upon the "agreement" of defendant not to "run its trains on Sunday in violation of law." The same witness testified that the coal in the above train was the property of the defendant, and was being transported to Florence, S. C., for its use. Another witness for defendant, G. B. McClellan, its district superintendent, testified that this train was made up and sent out of Rocky Mount by E. D. Gordon, local agent, H. E. Bruffey, train master, E. S.

Dodge, chief train dispatcher, and A. E. McKeathan, yardmaster, who "had charge of the Rocky Mount depot and yard, and the trains sent out from Rocky Mount were made up by these parties." Thus there is proof from the defendant that this train running on Sunday in violation of law was made up and sent out by the officials charged with that duty. Upon this evidence, the court should have charged the jury: "If you believe the evidence, you will find the defendant guilty." How else could the defendant send out its trains, except by its officials charged with that duty? If the defendant is not responsible for their acts, acting within the scope of their duties, what would make a corporation liable? If they did it, the question of "permitting" it to be done does not arise. In *State v. Railroad*, 119 N. C. 819, 25 S. E. 862, 56 Am. St. Rep. 689, an indictment upon this very statute, where there was no evidence whatever, except the fact that the defendant's freight train was running on Sunday after 9 a. m., the judge charged the jury, "If you believe the testimony, the defendant is guilty," and on appeal Avery, J., speaking for a unanimous court, found no error. There has been no change in the statute, and no reason is given why a charge which was correct then has become erroneous now. Upon the above evidence by the higher officials of the defendant that the train was sent out from Rocky Mount by the four officials "having charge of the Rocky Mount depot and yard, and the trains sent out from Rocky Mount were made up by these parties," the jury could draw no other inference "if they believed the evidence" than that the defendant was guilty. *State v. Riley*, 113 N. C. 651, 18 S. E. 168. It is true Mr. McClellan adds: "It was the duty of these parties to have obeyed the order sent them," which he says was sent by himself, not to send trains out before sunset, and that it was sent out without his knowledge or consent. Mr. Newell says he wrote Mr. McClellan that "it was out of the question to run any solid coal trains on Sunday, even if there be a congestion. In view of the fact we have additional power to handle the business currently, it should not be necessary to run trains of this nature on Sunday. We have recently had some complication on this account, and I hope you will see that these instructions are enforced." But, taking the defendant's own evidence to be true, the instructions were not enforced, and the train was permitted to be made up and sent out from Rocky Mount, and was run on Sunday by Wilson and on towards Florence. It was "permitted" because the official who could have prevented it and who could and should have stopped the train did not do so. *State v. Probasco*, 62 Iowa, 400, 17 N. W. 607; *Territory v. Stone*, 2 Dak. 155, 4 N. W. 697; *Commonwealth v. Curtis*, 9 Allen (Mass.) 266. It was his duty to do so for he says he was

instructed to enforce the order. His failure to do so "permitted" the train to run. The "permitting" the train to run by Newell and McClellan was "permitting" by the company —If their conduct had been all that made the corporation liable. But there was more than permission. There was the willful act of the company when its four officials at Rocky Mount "charged with the duty of making up and sending out trains" from that point sent out this train. Their act was the act of the company. The state cannot be called on to prove that an act was done by a defendant's permission, when it shows that it was the intentional act of the defendant itself. A corporation acts by its agents. Their willful act in the discharge of a duty intrusted to them is the act of the corporation. If they disobeyed an imperative order from those "higher up," it was permissive as to those higher officials, who did not supervise their department and enforce their orders, but none the less is the company responsible. There is no explanation why the four officials at Rocky Mount should have broken their own rest on Sunday and violated the law by breaking the rest of the engineer and train crew on that holy day, with no possible motive suggested for risking their positions by disobedience of orders. No reprimand or punishment is suggested to have fallen upon these four officials. Not only did they, in the scope of their powers, send out this train without let or hindrance from McClellan and Newell (and therefore by their "permitting" it to be done), but the engineer and crew in running the train were acting in their sphere, and under the orders of those charged with the duty of ordering them. Their intentional act, in the scope of their duties, is the intentional act of the company. No "permitting" need be shown when the running was intentional. The train passed through Elm City only by the act of another agent of the company, acting within his sphere in turning the white or safety end of the switch out and permitting the train to pass, and the same is true of the agent at Wilson, and possibly of the agent at Sharpsburg. *Stewart v. Railroad*, 141 N. C. 271, 53 S. E. 877. Thus agent after agent of the defendant company, acting in the scope of his duties, concurred in starting and running this train on Sunday. They did this act, not merely by permission, but the engineer and crew did so under orders, and for the conduct of its agents the defendant is responsible. If there had been injury by the negligence of either one of these numerous agents, the company would have been liable for that reason. Taking cognizance of the matters and knowledge "acquired by their observation and experience in every day life," as we hold a jury can do (*Wright v. Railroad*, 127 N. C. 227, 37 S. E. 221; *Lloyd v. Railroad*, 118 N. C. 1013, 24 S. E. 805, 54 Am. St.

Rep. 741; *Deans v. Railroad*, 107 N. C. 693, 12 S. E. 77, 22 Am. St. Rep. 902), this jury might well infer that other and higher officials had cognizance of and caused this train to start and keep on. There must have been reports by telegraph to Wilmington and response from the office at the headquarters there to avoid collision with other trains. *Stewart v. Railroad*, supra.

As to these two officials, Newell and McClellan, while they testified to having given orders, they do not testify to any effort whatever to put the order in force. The running of the trains which it was their duty to know of and prevent without any effort shown on their part to prevent was "permitting" it, by the corporation, so far as the conduct of these officials was concerned, who could have stopped it and did not. This law was enacted in 1879, nearly 30 years ago, to secure to some part of the employees of railroads a rest for a part—8 or 9 or 10 hours, according to the season—on the Sabbath Day. These employees cannot move to secure their rights under this law with safety to their positions. They are helpless before so great powers as these great corporations can exert, unless the law comes to their aid. This jury from common observation knew that this was not an accidental train, by mistake run before sunset, on that Sunday. It was in evidence before them, in this very case, that the defendant was an habitual criminal in this respect, for at the court ending the day before this train was run the defendant was convicted on two indictments for this offense and a nol. pros. was entered on a third indictment on defendant "agreeing" to stop "running its trains on Sunday in violation of law."

The charge of the court, therefore, was not error; for, if defendant's own evidence alone was believed, this train was run by orders of those empowered to send out trains, and by the permission of those who could have stopped it, and did not.

#### LUTTERLOH et al. v. CITY OF FAYETTEVILLE.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. INJUNCTION (§ 150\*)—CONTINUANCE OF INJUNCTION — DETERMINATION — QUESTIONS PRESENTED.

In a suit to enjoin the collection of taxes by a city from the residents of annexed territory on hearing of a motion to continue a temporary restraining order, it was proper to decide the case on the merits, and not merely the necessity of continuing the injunction pending the suit, there being no question of fact involved, since the propriety of continuing the injunction could not be intelligently decided without determining the issues raised by the pleadings.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 150.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. MUNICIPAL CORPORATIONS (§ 979\*)—TAXATION—REMEDIES OF TAXPAYERS—INJUNCTION.**

A suit for a perpetual injunction is the proper remedy to prevent the collection of illegally levied taxes from citizens of territory annexed to a municipal corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2120; Dec. Dig. § 979.\*]

**3. APPEAL AND ERROR (§ 1008\*)—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.**

In a suit to enjoin the collection of taxes in territory annexed to a city, a finding of the trial court, upon testimony of the surveyor, which is made part of the findings, as to the boundaries of the annexed territory as fixed by the annexing act, and that they embrace plaintiffs' property, *held* conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3955; Dec. Dig. § 1008.\*]

**4. MUNICIPAL CORPORATIONS (§ 29\*)—TERRITORIAL EXTENT—STATUTORY DESIGNATION OF BOUNDARIES—CERTAINTY.**

Priv. Laws 1907, p. 1292, c. 489, § 1, enlarging the corporate limits of a city and stating the boundary of the annexed territory, *held* not void on its face for uncertainty of description.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 29.\*]

**5. STATUTES (§ 19\*)—ENACTMENT—PASSAGE OF BILLS—ENTRY OF VOTE—LAWS IMPOSING TAXES.**

Priv. Laws 1907, p. 1292, c. 489, ratified March 11, 1907, entitled "An act to enlarge the corporate limits of the city of Fayetteville," and annexing certain territory, is not within Const. art. 2, § 14, prohibiting laws permitting cities, etc., to impose any tax, unless the bill is read on three several days, and the aye and no votes taken and recorded; the city having power, under its previously granted charter, to levy taxes within its boundaries wherever they might be located.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 19.\*]

**6. MUNICIPAL CORPORATIONS (§ 34\*)—ANNEXATION—SUBMISSION OF QUESTION TO VOTERS—PERSONS ENTITLED TO VOTE.**

Priv. Laws 1907, p. 1292, c. 489, ratified March 11, 1907, annexing certain territory to the city of F., by section 1 describes the annexed territory, and provides that no part of the city limits, as now existing, shall be eliminated from the city when so enlarged. Section 3 provides for an election of "all persons embraced within the described boundaries," and also provides for "a registrar of voters living in the city of F., including said above-described territory," and requires him to register "such persons in the city and said above-described territory as may present themselves for registration and are qualified to vote in city elections and not at present registered." *Held*, that qualified voters, in both the old and the annexed territory, were entitled to register and participate in the election held to ratify the annexing act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 98; Dec. Dig. § 34.\*]

**7. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE CONTROL—SCOPE.**

Municipal corporations, in the absence of constitutional restrictions, are subject to the control of the Legislature in its discretion; the sole object of such control being the common good.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 156; Dec. Dig. § 64.\*]

**8. MUNICIPAL CORPORATIONS (§ 29\*)—ANNEXATION—POWER TO MAKE.**

The enlargement of municipal boundaries by annexing new territory and the consequent extension of the corporate jurisdiction, including that of taxation, is within the legislative power, and, in the absence of constitutional restrictions, the extent of such enactments, both as to the terms of the annexation and the manner in which it is made, rests in the legislative discretion, and cannot be controlled by the courts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 71; Dec. Dig. § 29.\*]

**9. CONSTITUTIONAL LAW (§ 119\*)—OBLIGATION OF CONTRACTS—STATES AND MUNICIPALITIES—ANNEXATION OF TERRITORY.**

The compulsory annexation of territory to municipalities, so as to subject the property in the annexed territory to taxation, involves no contract between the state and the citizens of the annexed territory.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 119.\*]

Appeal from Superior Court, Cumberland County; Long, Judge.

Action by H. L. Lutterloh and others against the city of Fayetteville, to restrain defendant from collecting taxes out of the residents in the territory in the extension of city limits, or from exercising any jurisdiction over persons or property resident in the extension, under chapter 489, p. 1202, Priv. Laws 1907, entitled "An act to enlarge corporate limits of the city of Fayetteville," ratified March 11, 1907. A temporary restraining order issued, being heard upon the pleadings, affidavits, and exhibits, the court found the material facts, dissolved the injunction, and plaintiffs appealed, and filed exceptions to said findings and judgment affirmed.

C. W. Broadfoot, George M. Rose, and John W. Hinsdale, for appellants. J. Sprunt Newton and Sinclair & Dye, for appellee.

BROWN, J. 1. The plaintiffs contend that the judge should have passed solely upon the necessity for continuing the injunction to the hearing, instead of going fully into the case and deciding the entire controversy. As the only relief asked for in the complaint is a perpetual injunction restraining the defendant's authorities from exercising any jurisdiction within the territory recently included within the municipality, it would have been impossible intelligently to determine whether to continue the restraining order without considering and determining the legal issues presented in the pleadings. There seems to be no controverted issue of fact raised therein necessary to be submitted to a jury. An action for a perpetual injunction is the proper remedy in controversies of this character (28 Cyc. 212); and, where the judge refuses to enjoin the exercise of jurisdiction over the annexed territory, he must necessarily determine the case on its merits.



2. It is contended that the boundaries given in the act of 1907 cannot be located, and that they are indefinite, uncertain, and void. There appears to have been an omission of certain words in enrolling the act of 1907, which error has been cured by the act of the special session of 1908 (Priv. Laws 1908, p. 25, c. 22), but independent of the effect of this latter act, the judge below finds, upon the testimony of the surveyor, that the boundaries of the city, including the extension under the act of 1907, have been located, and that they embrace plaintiffs' property. The surveyor testifies that locating the boundaries under the act of 1907 covers the same territory as those included in the amendatory act of 1908, except a small vacant and unimproved space, containing  $1\frac{9}{10}$  acres of land. This testimony of the surveyor is adopted by the judge as a fact, and made a part of his findings. We think that settles the question so far as this court is concerned, as the first section of the act setting out the boundaries is certainly not void on its face.

3. It is contended that the act of 1907 was not read on three several days, and an aye and nay vote taken and recorded, as required by Const. art. 2, § 14, and that therefore the act is void, and can confer no power to levy a tax within the annexed territory. For this position plaintiffs rely on the case of *Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488. The charter of the city of Fayetteville, as at present organized, was enacted in 1893, and contains full authority for the levying of taxes within the municipal boundaries, however those boundaries may be extended by subsequent legislation. The *Waxhaw* Case is authority for the position that a municipal charter conferring power to levy a tax must be enacted in accordance with that section of the Constitution. It is not contended that the charter of Fayetteville enacted in 1893 is void for such reason. The act of 1907 does not purport to authorize the levying of any tax, or the contracting of any debt, and there is nothing on its face which could indicate to the General Assembly that it is one of those bills coming within the purview of section 14, art. 2, of the organic law. It is not a city charter, but only an act annexing territory to a chartered municipality already in existence.

4. The plaintiffs except to the following ruling of the court: "That, although the terms of the act of March 11, 1907, do not prescribe, with such definite clearness as they might have done, who were qualified voters under the act, nevertheless, construing all of the parts thereof, it would seem that the Legislature intended to provide that the voters of the old town and the annexed district were all entitled to vote in said election. But the act itself is made a part of this finding." The plaintiffs contend that the intention of the Legislature was to confine the election to the voters of the annexed

district. The language of the act would seem to give color to such contention; but, taking the entire act as a whole, a careful reading of it, we think, justifies his honor's interpretation. Section 1 of the act describes particularly the territory to be annexed, then adds: "Provided that no part of the city limits as now existing shall be eliminated from said city when so extended." Section 3 provides for an election of "all persons embraced in the above-described boundaries," in which must necessarily be included all parts of the city as then existing; and it also provided "for a registrar of voters living in the city of Fayetteville, including said above-described territory." The same section requires the registrar to register "such persons in said city, and in said above-described new territory as may present themselves for registration and are qualified to vote in city elections and not at present registered." These last words indicate clearly that the legislative intent was that all qualified voters in the old and new territory should be allowed to register and participate in the election.

5. Another and final objection made to the act of annexation is that the object sought to be accomplished by it, in the mode provided, is beyond the power of the General Assembly, because it authorizes annexation, and consequently taxation, without the consent of those who are affected by it. We have held, in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson*, 62 S. E. 549, and *Perry v. Commissioners*, 62 S. E. 608, both at this term; *Manly v. Raleigh*, 57 N. C. 372. Consequently it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety, or justice, we have naught to do.

It has therefore been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large unprovided for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation. *Powers v. Wood Co.*, 8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96; *Richards v. Cincin.*, 62 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 746, and cases cited in note. In the first cited case the Supreme

Court of Ohio says that there is no constitutional provision on the subject, and that "it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts until the owners of such territory were paid a compensation, in money, for a proportional part of such debt," and further "that it is not to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited." In the *Richards Case*, supra, it is said: "It is not perceived how the amount or nature of the municipal indebtedness can affect the right of annexation if it be otherwise legal; for the power to bring into a municipal corporation by annexation property not theretofore subject to taxation for municipal purposes, and lay taxes upon it to raise funds for the payment of any previously existing municipal debt, necessarily includes the power to do so for the payment of every such debt lawfully incurred. Persons thus brought into the annexing corporation and their property, like all of its other inhabitants and their property, receive and enjoy the benefits of all local improvements, and should share the burdens existing when the enjoyment commences." See, also, *St. Louis v. Russell*, 9 Mo. 507; *Smith v. McCarthy*, 58 Pa. 359; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *New Orleans v. Cazelar*, 27 La. Ann. 156; *Montpellier v. East Montpellier*, 29 Vt. 12, 67 Am. Dec. 748. Judge Dillon in his work on *Municipal Corporations* (4th Ed.) § 185, cites an array of authority in support of his text: "Not only may the Legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, annex or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or in the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subjected to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the Legislature to determine." Such legislative enactments involve no sort of a contract between the General Assembly on the one part and the citizens of the locality to be annexed on the other part. This was settled in this state as long ago as 1850, in *Mills v. Williams*, 33 N. C. 558, and reiterated in *Manly v. Raleigh*, supra, and subsequent cases. The doctrine of those cases was acted upon by the Supreme Court of the United States in the *Memphis Case*, 97 U. S. 284, 24 L. Ed. 937, when it held that: "The characters and constituent acts of public and municipal corporations are not, as we have seen

before, contracts, and they may be changed at the pleasure of the Legislature, subject only to the restraints of special constitutional provisions, if any there be." And the same position is affirmed in the recent case of *Hunter v. City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151, wherein it is said: "There is no contract between the citizens and the taxpayers of a municipal corporation and the corporation itself that the former shall be taxed only for the uses of the enlarged municipality formed by annexation, under the authority of the Pennsylvania act of February 7, 1906 (P. L. 7), to an adjoining and larger municipality. Citizens and taxpayers of a lesser municipality, annexed under authority of this act to an adjoining and larger municipality, are not deprived of their property without due process of law, by reason of the burden of additional taxation resulting from consolidation, although the method of voting prescribed by the statute has permitted the voters of the larger city to overpower the voters of the smaller one, and compel the union without their consent and against their protest." Upon a review of the entire record, the judgment of the judge below is affirmed.

#### COX v. HIGH POINT, R. & S. R. CO.

(Supreme Court of North Carolina. Nov. 11, 1908.)

##### 1. TRIAL (§ 333\*)—VERDICT—FORM—SUFFICIENCY.

The omission of the word "dollars," in a verdict for a money recovery, does not affect the validity of the judgment, where it is manifest that dollars were meant, though it is more regular to amend the verdict before judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 786; Dec. Dig. § 333.\*]

##### 2. TRIAL (§ 340\*)—VERDICT—AMENDMENT.

Courts freely exercise the power of amending verdicts to correct manifest errors of form and substance, and make them conform to the intention of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.\*]

##### 3. TRIAL (§ 339\*)—VERDICT—AMENDMENT.

On the jury, in an action for a money recovery, returning in open court a verdict defective because of the omission of the word "dollars," the judge should call the omission to the attention of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 792; Dec. Dig. § 339.\*]

##### 4. TRIAL (§ 339\*)—VERDICT—AMENDMENT.

Where, in an action for a money recovery, the verdict was, by consent, rendered to the clerk, and the verdict was defective because of the omission of the word "dollars," the judge, on the matter being called to his attention, should on the reassembling of the court call the jury together.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 339.\*]

##### 5. TRIAL (§ 333\*)—VERDICT—SUFFICIENCY.

Where, in an action for wrongful death, the complaint was for \$30,000, the evidence as to damages was expressed in dollars, the judge

in his charge stated that plaintiff was entitled to as many dollars as would compensate for the life, a verdict for "five thousand," was, in the absence of any exception in apt time, sufficient to authorize the court to render judgment for \$5,000.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 786; Dec. Dig. § 333.\*]

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by J. H. Cox against the High Point, Randleman & Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 61 S. E. 183.

Wilson & Ferguson, for appellant. Justice & Broadhurst, Murphy & Wright, and R. O. Strudwick, for appellee.

CLARK, C. J. Action for damages for wrongful death. In response to the issue as to damages the jury responded "five thousand." The court entered judgment for "five thousand dollars." This was not error. Damages are necessarily found in money values. The only words that could be entered after "five thousand" were either "dollars" or "cents," and no one ever says "five thousand cents." Rev. St. U. S. § 3563 (U. S. Comp. St. 1901, p. 2375), provides that the "dollar," not "cent," shall be the unit of value.

Besides, the verdict, like the charge, must be construed with reference to the trial. The complaint was for \$30,000. The evidence as to damages was expressed in dollars. The judge charged the jury that the plaintiff's contention was that he was entitled to recover "a certain amount of damages; I mean a certain amount of compensation, so many dollars to compensate for the value of his life." The evidence for plaintiff's intestate was that his income was \$1,000 per year. The table of expectancy showed 28 9/10 years. The judge submitted to the jury the proper rule for damages, and also left to them the defendant's contention for reductions. The whole controversy before the jury on this issue was in terms of "dollars," not "cents," and the verdict must be construed in that connection. In *Stevens v. Smith*, 15 N. C. 292, where the plaintiff sued on a note for "four hundred and forty-seven dollars and sixty-six cents," this court held (Gaston, J.) that it was not a variance that by the instrument put in evidence the defendant promised to pay "four hundred and forty-seven and sixty-six cents," saying that, the note being for the payment of money, it was payable in our currency, and "dollars" were meant, unless "cents" were named, because Act Cong. April 2, 1792, c. 16, § 20, 1 Stat. 250 (How. Rev. St. § 3563 [U. S. Comp. St. 1901, p. 2375]), makes the dollar the unit; that all other coins were recognized as multiples or fractional parts thereof, and that the same was true of our state act of 1809, c. 775,

adding "this note could not be understood by the parties, by a court, or by a jury, in any other sense than as stipulating for the payment of four hundred and forty-seven dollars (or units) and sixty-six cents (or hundredth parts thereof). This case is cited and approved in *State v. Keeter*, 80 N. C. 474. "The omission of the word 'dollars' in a verdict for a money recovery does not affect the validity of the judgment, when it is manifest that dollars were meant, though it would be more regular to amend the verdict before judgment." *Hopkins v. Orr*, 110 U. S. 513, 8 Sup. Ct. 590, 31 L. Ed. 523; *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Beall v. Territory*, 1 N. M. 519; *Railroad v. Fink*, 4 Tex. Civ. App. 269, 23 S. W. 330. "From the earliest period the courts have freely exercised the power of amending verdicts so as to correct manifest errors, both of form and of substance, to make them conform to the intention of the jury." 2 Thompson, Trials, § 2642, and cases cited. Of course, if the verdict had been returned in open court, the judge should, and doubtless would, have called the omission of the word "dollars" to the attention of the jury. *State v. Godwin*, 138 N. C. 585, 50 S. W. 277. But we learn that by consent, the verdict was rendered to the clerk. If the matter had been called to the attention of the judge on the reassembling of the court, he would have called the jury together. *Petty v. Rousseau*, 94 N. C. 362, and cases there cited. But they may have dispersed. At any rate the matter does not appear to have been called to the attention of the judge by exception in apt time, nor indeed at all. The case is presented here simply by the appeal and assignment of error, both of which could have been entered at any time within 10 days after court had adjourned.

In view of the pleadings, the evidence, the nature of the case, the contentions of the parties as arrayed by the judge in his charge, his instructions to the jury, and the absence of any exception in apt time, it would be "sticking in the bark" indeed to hold that the verdict was not meant to be expressed in dollars.

Affirmed.

RICH et ux. v. MORISEY et al.  
(Supreme Court of North Carolina. Nov. 5, 1908.)

1. TRIAL (§ 352\*)—INSTRUCTIONS—ISSUES SUBMITTED—FORM—DISCRETION OF COURT.

While every issuable controverted fact must be found by the jury upon appropriate issues, the form of submitting the issues lies largely in the discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 840; Dec. Dig. § 352.\*]

2. APPEAL AND ERROR (§ 1170\*)—REVIEW—HARMLESS ERROR—MATTERS OF FORM.

Where all the essential facts upon which the parties' rights depend appear upon the plead-

ings, or have been found by the jury, an appellate court will not, upon a mere question of form, set aside the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

**3. COSTS (§ 132\*)—SECURITY—ACTIONS IN FORMA PAUPERIS—PERSONS ENTITLED TO SUE OR DEFEND.**

A plaintiff may sue in forma pauperis under the direct provisions of Revisal 1905, § 451, by showing that he has a good cause of action, and making affidavit that he is unable to give the bond or make the deposit required by section 450, while defendant, before answering without filing the defense bond, must, under section 454, make affidavit that he is not worth the amount of the undertaking in any property, and is unable to give the bond.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 507-510; Dec. Dig. § 132.\*]

**4. JUDGMENT (§ 654\*)—CONCLUSIVENESS—ORDER DISMISSING ACTION IN FORMA PAUPERIS.**

An order at a former term dismissing an action in forma pauperis, on motion to "dispauper" was not a judgment on the merits, and hence not res judicata of an application to sue as a pauper made three years later.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.\*]

**5. COSTS (§ 132\*)—SUING IN FORMA PAUPERIS—SUCCESSIVE APPLICATIONS.**

While a dismissal of an action in forma pauperis on motion to "dispauper" does not estop plaintiff from bringing a second action, the fact of dismissal should be considered, when he again applies to sue as a pauper.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 132.\*]

**6. MORTGAGES (§ 597\*)—ATTEMPTED SALE—RATIFICATION.**

If the heir of a mortgagor whose property had been acquired by the mortgagee under an attempted mortgage sale, and who was devised part of it by the mortgagee, entered upon and accepted the land under the will, knowing of the mortgage, the attempted sale, and that the mortgagee had devised it to her, she ratified the sale, and could not redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1744; Dec. Dig. § 597.\*]

**7. MORTGAGES (§ 597\*)—ATTEMPTED SALE—RATIFICATION—EVIDENCE.**

There being no evidence that an heir of the mortgagor knew of the attempted foreclosure sale or of the conveyance of the land to the mortgagee, who later devised part of the premises to her, she could not as a matter of law be held to have ratified the attempted sale so as to estop her from claiming a right to redeem.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 597.\*]

**8. WILLS (§ 718\*)—LIABILITIES OF DEVISEE—ESTOPPEL BY ACCEPTANCE OF DEVISEE.**

The equitable doctrine of election between inconsistent benefits applies only where a testator attempts to devise A.'s property to B., and at the same time gives his own property to A., and is not applicable where a mortgagee holding the legal title to land devised part of it to one holding the equity of redemption, especially where the devisee was a feme covert, and thus entitled, before being put to her election, to a full disclosure of the value of the land and of her right to redemption.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1719; Dec. Dig. § 718.\*]

**9. HUSBAND AND WIFE (§ 62\*)—ESTOPPEL OF WIFE—CLAIM TO LAND.**

To estop a married woman from alleging a claim to land, there must have been some positive act of fraud, or something done upon which one dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely, to his injury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 284; Dec. Dig. § 62.\*]

**10. WILLS (§ 718\*)—RIGHTS OF DEVISEES—ESTOPPEL BY ACCEPTANCE OF DEVISEE.**

The fact that a married woman who held the equity of redemption in land entered upon part of it under a devise from the mortgagee did not constitute fraud, so as to estop her to assert her claim to redeem, as against devisees of other portions of the land who appear to have had an equal knowledge regarding the title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1719; Dec. Dig. § 718.\*]

**11. ESTOPPEL (§ 55\*)—EQUITABLE ESTOPPEL—RELiance BY ADVERSE PARTY.**

She was not estopped as against one who purchased part of the land from a devisee after a voluntary nonsuit had been entered in a prior action by her to redeem; that being sufficient to put him upon inquiry as to her claim.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 138; Dec. Dig. § 55.\*]

**12. MORTGAGES (§ 617\*)—ACTION TO REDEEM—ADMISSIBILITY OF EVIDENCE.**

In an action to redeem land purchased by a mortgagee at his own sale under the mortgage, after the mortgagor's death, evidence of the insolvency of the mortgagor when he died was irrelevant.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 617.\*]

**13. APPEAL AND ERROR (§ 1057\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

The exclusion of the evidence was not prejudicial, where the final account of the mortgagor's administrator, in evidence and unimpeached, clearly showed the insolvency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4196; Dec. Dig. § 1057.\*]

**14. APPEAL AND ERROR (§ 230\*)—PRESENTATION OF GROUNDS OF REVIEW—SUBMISSION OF ISSUES.**

Where no issue of limitations was tendered nor the court requested to submit one, the objection to the court's failure to do so comes too late after verdict under Code, § 395, providing that issues must be made up before or during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230.\*]

**15. WILLS (§ 847\*)—PURCHASER FROM HEIR OR DEVISEE.**

An action brought against the executor and devisees of a deceased mortgagee to redeem the mortgaged land is not an action to collect a debt from the executor, and the statute protecting a purchaser without notice from an heir or devisee two years after the death of the ancestor or devisor from liability for such an indebtedness does not apply.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 847.\*]

**16. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR—FAILURE TO SUBMIT ISSUE.**

The failure to submit an issue whether a defendant, purchaser from an heir, two years after the death of the ancestor, was protected by limitations from liability for an indebtedness of the estate, because without notice thereof,

was not prejudicial to defendant, where the jury found that he had no notice of any such debt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. § 1068.\*]

**17. MORTGAGES (§ 362\*)—SALES—PURCHASE BY MORTGAGEE AT OWN SALE.**

A sale of property by the mortgagee under a power in the mortgage and a purchase by himself is void or voidable at the election of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1081; Dec. Dig. § 362.\*]

**18. MORTGAGES (§ 362\*)—SALE UNDER POWER BY MORTGAGEE.**

A mortgagee in exercising a power of sale in the mortgage is a trustee, and the rule prohibiting a trustee from purchasing the property held by him in trust and acquiring title as against the cestui que trust applies.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1081; Dec. Dig. § 362.\*]

**19. MORTGAGES (§ 619\*)—REDEMPTION—SETTLEMENT OF ACCOUNT BETWEEN PARTIES.**

Where the right of the heir of a deceased mortgagor to redeem as against the estate of the deceased mortgagee and his devisees of the land was adjudged, the court could order a reference to ascertain the status of the account between the parties, or could ascertain the facts from the pleadings and questions submitted to the jury.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1851, 1852; Dec. Dig. § 619.\*]

**20. MORTGAGES (§ 600\*)—REDEMPTION—TACKLING UNSECURED DEBT TO MORTGAGE DEBT.**

While a mortgagee cannot tack an unsecured debt to the mortgage debt and demand payment of both as a condition of redemption, yet, where an heir at her father's death could have redeemed land which had been mortgaged by him and illegally sold under the mortgage, and it could have been sold after redemption to pay the mortgagor's debts, she must, upon subsequently repudiating the sale and claiming the right to redeem, do equity by paying such debts as her father would have been bound for, and to which the land could have been subjected.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1761; Dec. Dig. § 600.\*]

**21. EXECUTORS AND ADMINISTRATORS (§ 506\*)—DOCUMENTARY EVIDENCE—FINAL ACCOUNT OF ADMINISTRATOR.**

The final account of an administrator duly verified and filed is prima facie correct.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2177; Dec. Dig. § 506.\*]

**22. MORTGAGES (§ 600\*)—SALE—SETTING ASIDE.**

While an illegal mortgage sale will be set aside and redemption allowed, the one redeeming must account for the purchase money, at least to the extent that the land has been exonerated from the claims upon it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1764; Dec. Dig. § 600.\*]

Appeal from Superior Court, Sampson County; W. R. Allen, Judge.

Suit by H. T. Rich and wife against J. K. Morisey, executor of D. G. Morisey, and others, to redeem mortgaged land. From the judgment, both parties appeal. Affirmed.

The facts disclosed by the pleadings and verdict of the jury are: O. B. Morisey, the ancestor of feme plaintiff, being the owner of the tract of land in controversy, contain-

ing 140 acres, on the 30th day of December, 1874, executed a mortgage thereon to D. G. Morisey to secure the payment of a note for \$627. During the year 1883 said O. B. Morisey died intestate, leaving the feme plaintiff, an infant, his only heir at law. D. G. Morisey duly qualified as his administrator, and sold the personalty for the sum of \$151, of which he made due return to the clerk of the superior court. During the month of February, 1884, said D. G. Morisey, pursuant to the power of sale in said mortgage, sold the land at public auction for \$1,500. At the sale one A. F. Johnson bid in the land, but no deed from said Morisey to Johnson appears of record. He bought for, and at the request of, said D. G. Morisey, and paid no money on account of his bid. A. F. Johnson conveyed to Morisey, who went into possession of said land, and remained therein until his death, during the year 1901. On March 19, 1901, said D. G. Morisey, as administrator of O. B. Morisey, filed in the clerk's office his final account, wherein he charged himself with the sum of \$151, proceeds sale of personalty, and \$1,500, proceeds sale of the land. He credited himself with the mortgage debt and the sum of \$614.97, "amount retained on account." The debit and credit items, including interest and expenses of administration, left in his hands \$12.11, which he retained as commissions. The account was duly verified before the clerk. The feme plaintiff was married to her coplaintiff November 3, 1898, before arriving at full age. D. G. Morisey died on the ——— day of ———, 1901, having first made and published his last will and testament appointing defendant Jas. K. Morisey executor thereto. In his said will D. G. Morisey devised to feme plaintiff, Penny O. Rich, the portion of the land in controversy, upon which her father lived, containing 50 acres, and \$50 in money. The remaining 90 acres of land was devised to his nieces, the defendants Walker Morisey and Annie Hubbard. The will was read to all of the devisees, including the plaintiffs. In a short time thereafter, January 1, 1902, the 50 acres devised to feme plaintiff was surveyed by direction of the executor and with the assent of plaintiff, and she, with her husband, took possession thereof, and has remained in possession thereof to the time of the trial. The devisees other than plaintiff sold and conveyed the land so devised to them subsequent to October, 1905, to defendant John B. Moore for full value. Upon issues submitted to them, the jury find that defendant Moore was a purchaser for value, and without notice of any debt due by D. G. Morisey; that he was not a purchaser without notice of plaintiff's "claims"; that the value of the land at the time of the sale under the mortgage was \$1,500; that plaintiffs have not ratified and affirmed the mort-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

gage sale; that the value of the personal estate of said O. B. Morisey was, as shown by the record, \$151; that the annual rental value of the land from the time D. G. Morisey took possession until his death was \$125; that the annual rental value, after cutting off the 50 acres devised to feme plaintiff, is \$50. His honor, upon the foregoing findings, directed the jury to answer the issue in regard to the right of plaintiffs to redeem in the affirmative. A number of exceptions were lodged by plaintiffs and defendants to the issues submitted and to the refusal to submit others tendered. No issues were tendered regarding the statute of limitations. Upon the verdict plaintiffs and defendants tendered judgments, each of which his honor declined to sign. He signed the judgment set out in the record reciting the verdict upon the issues, and such other facts as were not controverted, which are hereinbefore set out. He thereupon rendered the following judgment: "(1) That the plaintiff is entitled to redeem said land. (2) That the final account of said administrator, until impeached, is *prima facie* correct. (3) That said land being charged in said final account at the sum of \$1,500, and the same being used in the payment of debts of the said O. B. Morisey, and to that extent having exonerated the interest of the plaintiff in the lands in controversy from the payment of debts, that the plaintiff upon the statement of the account between her and the defendants is chargeable with said sum of \$1,500 as of February 27, 1884, and that the rents and profits as found by the jury should be applied thereto. It is thereupon considered and adjudged that the defendant J. B. Moore holds the title to said land in trust for the plaintiff Penny O. Rich, and that, upon the payment of the sum of \$164.13, the balance after applying the rents to said sum of \$1,500 by the said Penny O. Rich, with interest from December 9, 1907, that he convey the same to her in fee. It is further considered and adjudged that upon failure of the said Penny O. Rich to pay said sum of \$164.13, with interest from December 9, 1907, within 90 days, that the clerk of the superior court of Sampson county, W. F. Sessoms, who is now appointed a commissioner for that purpose, sell said land at public outcry, at the courthouse door in Clinton, after due advertisement for the payment of said sum, and that he report his proceedings to this court. It is further considered and adjudged that the plaintiffs recover of the defendants their costs."

Both parties excepted and appealed.

J. D. Kerr, for plaintiffs. Faison & Wright, H. A. Grady, and F. R. Cooper, for defendants.

#### Defendant's Appeal.

CONNOR, J. (after stating the facts as above). Before proceeding to discuss the exceptions directed to the merits of the case,

it is proper to say that, in our opinion, the issues submitted by his honor present every phase of the controversy proper to be passed upon by the jury. While it is true that, in regard to some of the issues, there are no specific allegations in the pleadings, yet it is obvious that no decree adjusting the rights of the parties could have been rendered until the court was informed, either by the findings of the jury or upon the report of a referee, in regard to the matters involved in such issues. Under the system of procedure which prevailed with us prior to the adoption of the Code, the plaintiffs would have sought relief by a bill in equity. While it is true that every issuable controverted fact, as distinguished from mere evidentiary facts, must be found by the jury upon appropriate issues, it is equally true that to a large extent the form of the issues is within the sound judicial discretion of the court. *Emery v. Railroad*, 102 N. C. 209, 9 S. E. 139, 11 Am. St. Rep. 727; *Springer v. Shavender*, 116 N. C. 12, 21 S. E. 397, 33 L. R. A. 772, 47 Am. St. Rep. 791; *Paper Co. v. Chronicle Co.*, 115 N. C. 147, 20 S. E. 367. When it is manifest that all of the essential facts upon which the rights of the parties depend appear upon the pleadings or have been found by the jury, this court will not, upon a mere question of form, set aside the judgment, and subject the parties to a new trial involving delay and expense. In questions of procedure, errors, if found to exist, must appear to be prejudicial to appellant to entitle him to a new trial. It is evident that his honor grasped the scope of the litigation, and has by the verdict of the jury, together with the admissions in the pleadings, rendered a decree which puts an end to the litigation in regard to matters and transactions which occurred 24 years ago. Two nonsuits have been taken. Delays have been had during which transactions and the character of men who have passed away are attacked. A purchaser for full value from the devisees of D. G. Morisey, more than two years after his death and after the present plaintiffs by acquiescence and acceptance of a devise of a portion of the same land, and after two judgments of nonsuit had been rendered, finds his title brought into litigation. It will be convenient to discuss the defendant's appeal first.

It appears that plaintiffs instituted an action in forma pauperis based upon the same allegations, and asking the same relief to the spring term, 1902, of the superior court of Sampson. Defendants, upon affidavit, moved to "dispauper" them, whereupon they submitted to a judgment of nonsuit at October term, 1902. They brought a second action within a year, and at October term, 1905, upon the motion of defendants, for the same reason the court dismissed the action, from which no appeal was taken. On July 6, 1906, they brought this action in forma pauperis. Defendants moved, before Judge Jones, to

dismiss, for that it appeared that the feme plaintiff owned 50 acres of land worth more than \$200; that the second action was brought more than a year after the first nonsuit; that plaintiffs were estopped by the order dismissing the action at October term, 1905, by which they were "dispaupered." Upon this motion Judge Jones found that plaintiffs were not able to give a prosecution bond and refused to dismiss. They rely upon section 451, Revisal 1905. This section permits a party to sue in forma pauperis by showing to the judge or clerk that he has a good cause of action, and makes affidavit that he is unable to give the bond or make the deposit required by section 450. It differs from section 454, which requires the defendant, before answering without filing the defense bond, to make affidavit "that he is not worth the amount of said undertaking in any property whatsoever, and is unable to give the bond." While the dismissal of the action by one judge does not estop plaintiff from bringing a second action, the fact of such dismissal should be considered by the clerk or judge and given due weight when the party makes the second application. To permit repeated actions to be brought, under section 451, to the annoyance and expense of parties, hindering them in the enjoyment and sale of property, would be an abuse of a privilege which the law confers upon poor persons acting in good faith. It is very easy to obtain the certificate of counsel who hear but one side of the case in the not unnatural coloring of the party desiring to sue. The exception to the refusal of Judge Jones to dismiss the action cannot be sustained. The action of the judge who dismissed at a former term was not a judgment upon the merits, and therefore was not *res judicata* in respect to a second application to sue.

The defendants except to the refusal of his honor to submit an issue, tendered by them, inquiring whether feme plaintiff accepted the 50 acres of land and went into possession thereof under the will of D. G. Morisey before the commencement of this action. The defendants insist that, if this issue was answered affirmatively, the feme plaintiff would be thereby estopped; that she would not be permitted to take the 50 acres under the will, and claim the right to redeem the entire tract as heir of her father. His honor submitted an issue pointed to the question of ratification of the attempted sale under the mortgage which covers the contention of defendants. He instructed the jury that the only evidence of a ratification was that of her conduct in respect to the 50 acres; that, to constitute a ratification, the acts relied upon must have been done with a knowledge of the facts; that is, of the attempted sale, etc. He further instructed them that if she knew of the mortgage and the sale thereunder, and that D. G. Morisey had given her the 50 acres of land in his will, and with a knowledge of these facts she en-

tered upon and accepted the land under said will, this contract on her part would be a ratification. To this instruction defendants excepted. The issue presented, and, in the light of the instruction, the jury passed upon, the question of her acceptance of the devise. We think the instruction correct. We do not find in the testimony sent up any evidence that the feme plaintiff had any knowledge or information respecting the sale by D. G. Morisey and the conveyance to him by Johnson. She was a small child when her father died and when the sale took place. It may well be that she knew that her uncle held a mortgage on the land, and that he had taken possession of it. However this may be, the question was left to the jury, in as favorable light as defendants were entitled to, and they have found for her. His honor could not as a matter of law have held that she had elected, and ratified a void or voidable sale, thereby foreclosing her right to redeem. It is suggested that she was put to her election to accept the 50 acres, and thereby surrender her right to redeem the entire tract, or to reject the devise and assert her claim. The equitable doctrine of election between inconsistent benefits is well settled by numerous decisions of this court, and all works on equity jurisprudence. It is applied when a testator attempts to devise the property of A. to B., and at the same time gives his own property to A. If both the elements do not combine, the doctrine is not invoked, or, as it is said, there is no case for an election. *Bispham, Eq. 298*. It is very doubtful whether the facts before us present a case in which the plaintiff, *if sui juris*, is put to her election. Morisey owned as mortgagee the entire tract, and plaintiff, as heir of her father, was entitled to redeem. The devisor held the legal title to the whole, and the plaintiff had the equity of redemption in the same property. These facts do not bring the case within the doctrine. Again, the plaintiff was a feme covert, and, before being put to her election, was entitled to have a full disclosure of the value of the property and of her right to redemption, to the end that she might have a full opportunity to exercise her election, if required to make one, before suing, and to act advisedly. The general rule is that, "to estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely, and was thereby injured." *Towles v. Fisher*, 77 N. C. 437; *Weathersbee v. Farrar*, 97 N. C. 106, 1 S. E. 616; *Wells v. Batts*, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506. It was certainly not fraudulent as against the other devisees for plaintiff to enter upon the 50 acres. They had, so far as the record shows, the same knowledge regarding the condition of the title as she did. They took under the will of D. G.

Morisey, and are not purchasers for value. It cannot be seen how they were misled or parted with anything of value, or surrendered any right, by reason of her conduct. In regard to defendant John B. Moore, he purchased after the nonsuit. This should have put him upon inquiry as to her claim, and the jury find that he was not a purchaser for value without notice thereof. The exception of defendant to his honors' ruling in this respect cannot be sustained.

The defendants except to his honor's refusal to permit them to show that O. B. Morisey was insolvent at the time of his death. We see no error in this. It was not relevant to, and could not affect the verdict upon, any issue. Besides, with the final account of the administrator in evidence, unimpeached, insolvency was clearly shown.

Exception is taken because his honor failed to submit any issue upon the statute of limitations. It is sufficient to say that as no such issue was tendered, nor the court requested to submit one, it is too late after verdict to assign the failure to do so as error. Clark's Code, § 395, where the cases are collected sustaining his honor. No statute is pleaded except by defendant John B. Moore, who relies upon the statute protecting a purchaser from the heir or devisee two years after the death of the ancestor or deviser, without notice of the indebtedness. This statute has no application here. The plaintiff is not seeking to enforce the collection of a debt from the executor of Morisey. The jury find that defendant Moore had no notice of any debt against Morisey; hence that question in any point of view is eliminated. His honor upon the finding of the jury and the pleadings held that the feme plaintiff was entitled to redeem, and so instructed the jury, or so answered the issue himself. Defendants excepted. It is well settled, both upon principle and uniform authority, with us that a mortgagee cannot foreclose the equity of redemption by a sale of the property under the power and a purchase by himself. Such sale and attempted purchase is void or voidable, at the election of the mortgagor. The mortgagee in respect to the exercise of the power of sale is a trustee, and the well-settled rule which prohibits a trustee from purchasing the property conveyed to, or held by him in trust, from acquiring title as against the cestui que trust, has been uniformly applied. In *Froneberger v. Lewis*, 79 N. C. 426, Judge Bynum reviews the decisions of this court, showing that they are uniform in this respect. In *Jones v. Pullen*, 115 N. C. 465, 20 S. E. 624, *Shepherd, C. J.*, says: "There is no question, according to our authorities, that, if a mortgagee with power to sell indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made, and for a reasonable price. This is

an inflexible rule, and it is not because there is, but because there may be, fraud." His honor's ruling in this respect is in conformity with the uniform decisions of this court and the well-settled principles of equity. We reserve the exception to the refusal of his honor to sign the judgment tendered by defendants until we have examined and disposed of the exceptions lodged by plaintiffs.

#### Plaintiff's Appeal.

The plaintiff introduced the final account of D. G. Morisey, administrator of O. B. Morisey, deceased, filed March 19, 1901, by which it appears that he charged himself with proceeds of sale of personalty \$150 and proceeds of sale of land \$1,500. He credits himself with the mortgage debt and "amount retained on account," \$614.97, clerk's fees and amount paid attorneys, \$20, leaving a balance of \$12.11, which he retains as commissions. No evidence was introduced tending to impeach the account. His honor, having adjudged that the feme plaintiff was entitled to redeem, may have ordered a reference to ascertain the status of the account between D. G. Morisey's estate and plaintiff, or, as he did, ascertain the facts from the pleadings and issues or questions submitted to the jury. The principle upon which the adjustment of the account was to be stated was correctly adopted by his honor. Plaintiff was required to pay the indebtedness of her father for which the land was liable, subject to a reduction of the rents and profits, for which the mortgagee in possession was liable.

Plaintiffs have filed a large number of assignments of error. Many of them are technical, and do not affect the merits of the case or the rights of the parties. The amount of the mortgage debt is fixed, and the jury have fixed the amount of the annual rents to the time of D. G. Morisey's death and subsequent thereto. To this extent there is no complication. It is true that a mortgagee has no right to tack an unsecured debt to the mortgage debt, and demand payment of both as a condition to redemption. In this case, upon the death of O. B. Morisey, his heir has a right to redeem by paying the mortgage debt. Immediately upon his doing so, the land was liable to be sold by the administrator to make assets to pay any other indebtedness, subject, of course, to the widow's dower and the homestead rights of the infant children. These are eliminated because the widow is dead and the plaintiff is now of full age. While the feme plaintiff elects to repudiate the sale and claims the right to redeem the land, she must do equity by paying such debts as her ancestor would have been bound for to which the land could have been subjected. His honor correctly held that, in the absence of any impeachment, the duly verified final account of D. G. Morisey, administrator, was to be treated as



correct. In *Allen v. Royster*, 107 N. C. 275, 283, 12 S. E. 134, 135, Davis, J., says: "The statute makes such account thus examined, indorsed, and filed in the office of the clerk of the court prima facie evidence of its correctness." It shifts the burden of proof, as to the correctness of what it contained, to him who alleged the contrary. In *Collins v. Smith*, 109 N. C. 468, 14 S. E. 88, the same justice says: "There is no allegation of any fraud or mistake in the final account so audited, nor is it attacked in any way by plaintiff, and it is at least prima facie correct." *Coggins v. Flythe*, 113 N. C. 103, 18 S. E. 96. This being so, his honor adopted the amount charged by the administrator as proceeds of the land, which was found by the jury to be its full value. He credits him with the mortgage debt and the account which he held against his brother, O. B. Morisey. Unless this course is pursued, the plaintiff will recover the land, free from the amount due by account, and, in addition, the rents and profits from 1884 to 1901 at \$125 annually, and since 1901 to the present at \$50, she having received the rents from the 50 acres devised to her. Upon this recovery, the executor, J. K. Morisey, would be entitled to bring suit on the account, and, upon recovering judgment, have the land subjected to the payment thereof. In that suit the plaintiff, or the personal representative of O. B. Morisey, would be entitled to have rents of the land credited on the account, all of which would after long and expensive litigation bring the parties to the same result reached by his honor. We do not find any evidence of actual fraud on the part of D. G. Morisey. He paid off a debt which was a lien on his brother's land in 1874, and indulged him until his death, 1883. In the meantime he credits his brother on account to the amount of \$614. He buys the land at its full value, and at his death gives to his brother's only child evidently the most valuable part of it and a small pecuniary legacy. The plaintiff could not be permitted to plead the statute of limitations against the account. *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432. The plaintiff asks the equitable aid of the court and is given the land, with rents for 28 years. The loss falls upon innocent persons who have purchased the land for full value. She is required to pay the honest debts of her father, etc. To decree her the land and rents without this condition would be inequitable and unjust. This court has uniformly held that while it will, in such cases, set aside the sale, it will require the party

in whose behalf the equity is enforced to account for the purchase money, at least to the extent that the land has been exonerated from the claims upon it. *Card v. Finch*, 142 N. C. 140, 54 S. E. 1009. In *Scott v. Dunn*, 21 N. C. 425, 30 Am. Dec. 174, the executor under a mistake in regard to his power sold the land of his testator. The sale was set aside at the suit of the devisee. The purchase money had been applied to the payment of debts of the testator. It was held that the purchaser was subrogated to the rights of the creditor, and the amount paid on the debts must be accounted for. *Gaston, J.*, after declaring the equity, says: "As all parties are before the court, complete justice may be done by deciding direct relief to the plaintiff. \* \* \* The doctrine of substitution, which prevails in equity, is not founded on contract, but, as we have seen, on the principles of natural justice. Unquestionably the devisees are not to be injured by the mistake of the executor as to the extent of his power over the land; but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of his testator; and his erroneous belief that he could indemnify himself in a particular way should not bar him from obtaining indemnity by legitimate means. It is not a question here whether a mistake of law shall confer any rights, but whether such mistake shall be visited with a forfeiture of rights, wholly independent of that mistake." *Perry v. Adams*, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326.

His honor, having all of the parties before him, has adjusted their rights upon fair equitable principles all in conformity to the decisions of this court. We are also of the opinion that the principle upon which the rents were applied is correct. After a careful examination of the record in both appeals, we find no error in the judgment. The feme plaintiff gets a tract of land upon the payment of \$164, upon which her father permitted a mortgage for \$627 to stand for 10 years, paying no interest and contracting an account for \$614. We do not find any evidence of actual fraud on the part of D. G. Morisey. By his mistake as to his right to buy the land, he has discharged it practically from indebtedness, and his niece to whom he gave 50 acres "comes to her own," while the defendant Moore sustains the loss. Neither party will recover the amount paid for printing.

The judgment in both appeals must be affirmed.

## McKEITHEN v. BLUE.

(Supreme Court of North Carolina. Nov. 11, 1908.)

## 1. JUDGMENT (§ 853\*)—DORMANT JUDGMENT.

An execution not sent out of the clerk's office, but only filled up by the clerk and memorandum of "execution," made on the docket, is not issued as required by the statute, and does not prevent the judgment from becoming dormant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1567; Dec. Dig. § 853.\*]

## 2. JUDGMENT (§ 863\*) — ISSUANCE — OBJECTIONS.

A judgment defendant in a dormant judgment after issuance of execution may move either before the clerk or before the superior court, on rehearing of the homestead appraisalment after the reversal of a judgment of allotment of homestead, that the judgment be adjudged dormant; there being nothing in the opinion of the court on the reversal of the judgment forbidding such a course.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 863.\*]

## 3. EXECUTION (§ 275\*) — ISSUANCE — TIME TO ISSUE—NOTICE—STATUTES.

Under Revisal 1905, §§ 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger purchasing without notice title to the property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 793; Dec. Dig. § 275.\*]

## 4. EXECUTION (§ 102\*) — ISSUANCE — IRREGULARITY—WAIVER.

Where a judgment defendant appeared before the superior court in homestead appraisalment proceedings and moved to set the same aside on the ground that he had not been notified of the time or place of appraisalment without asserting that the execution was defective, he waived the irregularity that it was issued without notice to him, as required by Revisal 1905, § 620.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 102.\*]

## 5. EXECUTION (§ 102\*)—ISSUANCE—IRREGULARITY—WAIVER.

Where a judgment defendant waived the irregularity in the issuance of an execution arising from the failure to give him notice, as required by Revisal 1905, § 620, he could not repudiate the waiver without establishing the fact of payment of the judgment or some other defense on the merits, especially where the life of the judgment would otherwise expire.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 102.\*]

Appeal from Superior Court, Moore County; Peebles, Judge.

Action by N. A. McKeithen against N. A. Blue. There was a judgment for plaintiff, and defendant appeals. Affirmed.

J. McN. Johnson, J. W. Hinsdale, Jr., and H. F. Seawell, for appellant. U. L. Spence, W. J. Adams, and T. H. Calvert, for appellee.

HOKE, J. The facts relevant to this controversy seem to be that in 1896 plaintiff ob-

tained a judgment against defendant for the sum of \$610, and some interest, and same was duly docketed in Moore county on February 27, 1896. From the entry in the clerk's docket in said county, it appeared that executions were issued on this judgment at regular intervals, and within three years of each other, until December 30, 1905, when a final execution issued and was placed in the hands of the sheriff of said county, who proceeded to summons appraisers to lay off and allot defendant his homestead, as required by law. These appraisers allotted said homestead, finding an excess, and made return of their action pursuant to the statute. Thereupon defendant filed exceptions to said allotment, claiming that same was made in his absence, and without any notice to him of such proceedings. The exception was, in effect, overruled by the judge on a hearing had, and defendant appealed to this court. On such appeal it was held that the substantial wrong had been done defendant in allotting his homestead without giving him proper notice and opportunity to be present, and that the same amounted to reversible error and should be corrected. See McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285. This opinion having been properly certified down, the matter came on for hearing at May term, 1907, of the superior court, before his honor, Peebles, J., when defendant, by his attorneys, moved, in effect, that the judgment be declared dormant and all executions therein be recalled, for that no executions had in fact issued on said judgment previous to that of December 30, 1905, since the rendition of the judgment, but that same had only been filled out by the clerk and filed in his office as memorandum, made on docket, execution, etc., from time to time, as indicated in the record, but that same had never been delivered to the sheriff or other executive officer, nor to any one for them. His honor, Judge Peebles, declined to consider this motion or suggestion, holding that the same was not relevant to any proceedings before him, and entered judgment pursuant to the opinion of the Supreme Court, setting aside the appraisalment and appointing three commissioners to reallocate the homestead. A writ therefore issued. The homestead was reallocated finding no excess of property subject to sale, and return made to court, and defendant filed exceptions to this reallocation, alleging various irregularities in the proceedings. In the meantime the defendant moved before the clerk to declare the judgment dormant, and to recall all executions issued on same, which was heard before the clerk in August, 1907, when judgment was rendered denying the motion, and defendant excepted and appealed to the judge. The cause then came on for hearing, as stated, before his honor, Jones, J., at January term of the superior court, and was heard and determined both on the ex-

ceptions entered to the reallocation of the homestead made pursuant to Judge Peebles' order, and on the appeal from the judgment of the clerk, refusing to declare the judgment dormant, and, on the hearing before his honor, he affirmed in all things the proceedings had reallocated the homestead and the judgment of the clerk, and defendant, as stated, appealed to this court.

Both the clerk and the judge find that the executions purporting to have been issued previous to that of December 30, 1905, were not sent out of the clerk's office, or issued therefrom, but were only filled up by him and memorandum of "execution" made on the docket as indicated. On this statement and finding the authorities are to the effect that this was no sufficient or proper issuing of an execution, as contemplated and required by the statute to prevent, and the judgment was therefore dormant at the time the execution was issued on December 30, 1905, and being the one under which the defendant's homestead was first allotted. Webster v. Sharpe, 116 N. C. 466, 21 S. E. 912; 8 Ency. Pl. & Pr. 433. In this last citation it is said: "The writ while it remains in the clerk's office is not issued, but it must be actually or constructively delivered to the sheriff before it can be properly said to have been sued out with intent to have it executed." This being the correct position, we are inclined to the opinion that it would be open to defendant to make his motion either before the clerk, as he did, or before the superior court on the rehearing of the appraisal, as he endeavored to do; for we do not think that there is anything in the former opinion of the court which conclusively forbids such a course. But, notwithstanding this, we are of opinion that no reversible error appears in the record to the defendant's prejudice, for the reason that there is no claim on the part of defendant nor evidence tending to show that he or any one else has paid the judgment, or any part of it, and there is therefore no substantial merit in his application; for the judgment, though dormant, was not dead, and, while the statute addressed to this question, Revisal 1905, §§ 619, 620, requires that notice be issued to defendant before leave of execution shall be allowed, when there has been no execution issued within three years next preceding the application. As a matter of fact, the clerk did issue the execution of December 30, 1905, and his having done so without notice is very generally held to have been at most an irregularity. If there had been no objection made and the officers had proceeded to sell the excess found in the first appraisal, a stranger purchasing without notice would have acquired the title. Lytle v. Lytle, 94 N. C. 683.

The execution, therefore, though issued without notice, was in no sense a nullity, and defendant having appeared before the su-

perior court in the appraisal proceedings and moved to set the same aside for that he was not notified of the time or place of appraisal, and having contested the proceedings under the execution on that ground alone, making no assertion or claim that the execution was in any way defective, and the defect being, as stated, only an irregularity, we are of opinion, and so hold, that this should be considered a waiver of irregularities not specified, and the defendant should not be allowed to repudiate this waiver and avoid its effects without any assertion or claim of payment or other substantial defense. Process formally issued and acted on, and only defective by reason of irregularities of this character, are not as a rule recalled, and the results under it set aside or disturbed on showing that such irregularities existed without more. It is nearly always required that in addition there should be claim or evidence which reasonably tends to establish merit in the application. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074; *Le Duc v. Slocumb*, 124 N. C. 347, 32 S. E. 726. And we think this is a case which clearly calls for an application of this principle. The plaintiff, having a judgment against defendant, duly docketed, and with only two months of its existence remaining, and being under the impression from the entries on the clerk's docket that executions had been issued at regular and proper intervals, caused a final execution to issue, under which defendant's homestead was allotted. On the return of the appraisers, defendant appeared, as he had a right to do, and excepted, for that he had not been notified of the time or place when his homestead was allotted. He contested the allotment on this ground alone, and succeeded in having a reallocation of his homestead; all the time recognizing the validity of the execution. And we are of opinion, as stated, that in the absence of any claim of payment, or any evidence tending to establish it, and when the life of plaintiff's judgment would have otherwise expired, defendant should not now be allowed to change his position, and avoid the effect of his waiver.

There is no error in the judgment of the court below that the reallocation be in all things affirmed, and be registered according to law.

Affirmed.

LITTLE v. DUNCAN et al.  
(Supreme Court of North Carolina. Nov. 11, 1908.)

CLERKS OF COURTS (§ 66\*)—PROCEEDINGS BEFORE CLERK—APPEAL TO JUDGE—DUTY OF COURT ON ACQUIRING JURISDICTION—STATUTORY PROVISIONS.

Revisal 1905, §§ 610, 611, provide for an appeal to the superior judge from a decision of the clerk on an issue of law or legal inference,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and it is made the duty of the clerk by section 612 to prepare a statement of the case and send it to the judge. Section 717 provides that, when a party shall plead any defense or ask any relief in the pleadings, the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. *Held*, that where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of it on the merits, and had no power to merely reverse the clerk's action and remand the case to him, though there may have been irregularities in the proceedings before the clerk, especially where no partition had been made, and hence nobody prejudiced.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 66.\*]

Appeal from Superior Court, Union County; E. B. Jones, Judge.

Partition by S. M. Little against Oscar Duncan and others before the clerk of the superior court. The clerk on defendant's motion transferred the proceeding to the superior court for trial of issues raised by the pleadings, and plaintiff appealed from his decision to the superior court, which reversed the clerk's ruling, and remanded the case. Defendants appeal. Reversed.

J. E. Little, A. M. Stack, and R. W. Lemmond, for appellants. Adams, Jerome & Armfield, for appellee.

**WALKER, J.** This is a special proceeding for partition of land, which was commenced before the clerk of the superior court. The defendants answered and alleged certain matters, which they insisted raised issues of law and fact, and they, therefore, moved that the case should be transferred to the superior court for the trial and adjudication of the same. Among other things they averred that certain advancements had been made to some of the parties, and that an account of them was necessary before any partition could be made. The clerk overruled the motion and ordered a partition of the land, issuing a writ to the sheriff for that purpose. The defendants excepted and appealed. The clerk afterwards reversed his decision and recalled the writ, and directed the proceeding to be docketed in the superior court for the trial of the issues raised by the pleadings. The plaintiffs excepted and appealed to the superior court. The latter court, Judge E. B. Jones presiding, reversed the ruling of the clerk, and remanded the case for further proceedings therein, according to law, upon the ground that the defendants had lost their appeal from the first decision of the clerk by their laches.

By Revisal 1905, §§ 610, 611, an appeal lies to the judge from any decision of the clerk on an issue of law or legal inference, and it is made the duty of the clerk by section 612 to prepare a statement of the case, as therein provided, and to send the same to the judge, and by section 717, when a party shall plead any equitable or other defense, or ask

for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. If the clerk found that he had committed an error in ordering a partition of the land prematurely, we do not see why he did not have the power to correct the mistake and comply with the statute. Revisal 1905, § 901(9). But, however that may be, the case was finally brought before the judge in term, and he should have proceeded to dispose of it upon its merits, instead of remanding it to the clerk. If an issue of law or legal inference was raised by the pleadings, he should have passed upon it, and, if issues of fact were presented, they should have been tried by a jury. The superior court had acquired possession of the case in term, even though there may have been irregularity in prior proceedings, and that court had full power to dispose of it. The clerk, after reconsideration, simply, did what the law bound him to do, and, if it appeared to the judge when the case was presented to him that there were either issues of law or of fact raised by the pleadings, he should have proceeded to have them determined in the proper way without further delay and regardless of the irregular procedure, if there was such, before the clerk. If there were irregularities, no partition of the land had been made, and nobody, therefore, can be prejudiced by a compliance with the mandate of the statute. If there are no issues of law or of fact raised by the pleadings, the judge should have so decided, upon consideration of the matter, and then remanded the case for further proceedings according to law. There was error in reversing the action of the clerk for the reason stated.

Error.

#### HARRISS v. CANNADY.

(Supreme Court of North Carolina. Nov. 11, 1908.)

#### SALES (§ 445\*)—WARRANTY.

Whether a sale of a horse by defendant to plaintiff was with a warranty is a question for the jury, on evidence that, during the negotiations, plaintiff asked if the horse was "all right," and defendant replied "Yes; he is—sound and all right, and nothing the matter with him, except he has a little distemper, but is young and will soon get over that"—and plaintiff said, "From what you say about the horse, and what I see of him, I will give you — for him," a certain amount, which offer was accepted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1304; Dec. Dig. § 445.\*]

Appeal from Superior Court, Granville County; Webb, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Isaac H. Harriss against W. E. Cannady for damages for breach of warranty in the sale of a horse. From a judgment on a verdict for plaintiff, on appeal from a justice, defendant appeals. Affirmed.

Civil action, to recover damages for breach of warranty in the sale of a horse. On issues submitted the jury rendered the following verdict: "(1) Did the defendant warrant the horse sold to plaintiff to be sound and all right? Answer. Yes. (2) Was the said horse sound and all right? Answer. No. (3) What damage has plaintiff sustained? Answer. \$115."

A. A. Hicks, for appellant. Graham & Devin, for appellee.

HOKE, J. (after stating the facts as above). At the last term of the court, in the case of Wrenn v. Morgan, 148 N. C. —, 61 S. E. 641, the court held, on this question of warranty, as follows: "(1) To hold a bargainor in a sale responsible for a warranty it is not necessary that the warranty should be given in express terms; but an affirmation of a material fact, made by a seller at the time of the sale, and as an inducement thereto, and accepted and relied on by the buyer, will amount to a warranty"—citing, to same effect, *Tiffany on Sales*, 162; *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840; *Horton v. Greene*, 66 N. C. 596; *Baum v. Stevens*, 24 N. C. 411. In this last case, it was held: "(1) To make an affirmation at the time of a sale a warranty it must appear upon evidence to have been so intended, and not be a mere matter of opinion and judgment. (2) Whether an affirmation in a parol contract of sale amounts to a warranty is a matter of fact, to be left to the jury, with instructions from the court according to the above rule." And Ruffin, Chief Justice, speaking to this question, said: "Besides, much may have depended upon the tone and emphasis, as well as on the words of the party and the period of his uttering them. These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that, if they collected, the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty, otherwise not." *Baum v. Stevens*, 24 N. C. 413. In this case there was evidence of the plaintiff to the effect that, during the bargain and sale of the horse in question, the defendant was asked by plaintiff if the horse was "all right," and defendant replied, "Yes; he is sound and all right, and nothing the matter with him, except he has a little distemper, but he is a young horse and will soon get over that." That plaintiff said: "From what you say about the horse, and what I see of him, I will give you \$115 for

him." Defendant replied: "That is not enough, but I have too many horses, and you can take him at that, and if you find him worth more, you can pay me \$10 additional"—and plaintiff said he would take him. On this testimony the court properly submitted the question of warranty to the jury, and the exception chiefly urged for error that his honor declined to dismiss the case as on judgment of nonsuit is not approved. The charge of the court is in substantial compliance with the principles stated in the authorities cited, and there is no error in the record which gives defendant any just cause of complaint.

The judgment is therefore affirmed.

No error.

#### SMITH v. THOMAS et al.

(Supreme Court of North Carolina. Nov. 11, 1908.)

#### 1. MALICIOUS PROSECUTION (§ 24\*)—PROBABLE CAUSE—CONVICTION.

Probable cause for a prosecution, barring an action for malicious prosecution, is conclusively established by a conviction, on a confession of guilt, before a justice having jurisdiction of the offense, though there was a reversal on appeal; it not being necessary, in order that the conviction may have this effect, that the trial be before a jury.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 52; Dec. Dig. § 24.\*]

#### 2. WORDS AND PHRASES—"CONVICTION."

The word "conviction" means the ascertainment of defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury, or, under the Constitution and statute, by the judgment of a justice of the peace, where a jury trial is waived, provided the justice has final jurisdiction of the offense.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, pp. 1584-1591.]

Appeal from Superior Court, Anson County; E. B. Jones, Judge.

Action by J. W. Smith against C. D. Thomas and others. Judgment for defendants. Plaintiff appeals. Affirmed.

This is an action for malicious prosecution. The plaintiff was charged before a justice of the peace with the commission of a criminal offense upon the accusation and affidavit of the defendant C. D. Thomas. At the trial, as the record shows, he pleaded guilty, and afterwards appealed to the superior court from the judgment of the justice, which was reversed by that court. At the close of the plaintiff's testimony, the court, on motion of the defendant, entered a judgment of nonsuit against the plaintiff, whereupon he excepted and appealed.

J. W. Gullede, for appellant. Robinson & Caudle, J. A. Lockhart, and H. H. McLendon, for appellees.

WALKER, J. (after stating the facts as above). The reason for the decision of the court below was that the plaintiff had been convicted, upon his own confession of guilt,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the justice, and that the conviction was conclusive evidence of probable cause for the prosecution, although it was reversed in the superior court. In this ruling we concur with the judge who presided at the trial in the superior court.

However the question may have been decided in the courts of the other states, and their decisions do not appear to have been entirely harmonious, this court has held in at least two previous adjudications that a conviction of the defendant in the criminal prosecution by a court of competent jurisdiction is conclusive in an action by him for malicious prosecution upon the question of probable cause. It was so held in *Griffis v. Sellars*, 19 N. C. 492, 31 Am. Dec. 422. In that case it is said in support of the principle that "as evidence of probable cause a conviction by verdict and judgment is as convincing, and therefore ought in law to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that court, and is the highest evidence, namely, a judicial sentence of record, that apparently the accused was guilty. It is true that the law in its benignity allows the convict to show on appeal to another court that he is really not guilty. But that does not show, nor can it be shown, against the facts of the first verdict and judgment that there was no just and probable cause of accusation." It is true that Chief Justice Ruffin refers in the opinion to a conviction by verdict and judgment, but a trial by jury is not essential to the conclusive effect of the conviction, for the latter word means in law the ascertainment of the defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury, or, under our Constitution and statute, by the judgment of a justice of the peace, where a jury trial is waived, provided the justice has final jurisdiction of the offense. *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699; *People v. Adams*, 95 Mich. 543, 55 N. W. 461; *U. S. v. Watkins* (C. C.) 6 Fed. 158; *Egan v. Jones*, 21 Nev. 433, 32 Pac. 930. This court in *Price v. Stanley*, 128 N. C. 38, 38 S. E. 33, has approved the decision in *Griffis v. Sellars*, and expressly holds that the principle, as settled by that case, is applicable to a conviction by a justice having jurisdiction of the offense, even without a jury trial. The court says in regard to a reversal of the conviction: "If by any means a trial had been afterwards had in the superior court, and the same had resulted in an acquittal of the plaintiff Price, nevertheless the conviction in the justice's court—a court of competent jurisdiction—established probable cause for the prosecution." The case of *Griffis v. Sellars* was before this court a second time; it being reported in 20 N. C. 315, and the former decision was approved. "This

case differs," says the court, "from that which was before the court a year ago between the plaintiff's brother and the same defendant (19 N. C. 492, 31 Am. Dec. 422) only in showing more explicitly the innocence of the plaintiff, and the malignant motive of the defendant. But the same principle governs both, notwithstanding that difference in the detail of the circumstances. The principle is that probable cause is judicially ascertained by the verdict of the jury and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court. Our opinion being that probable cause is judicially established by those means, it follows that no evidence is competent to disprove it."

The court also assigns cogent reasons why the plaintiff in the suit for malicious prosecution should not be permitted to go behind the judgment of conviction for the purpose of showing how it was obtained, or that it was unjust or contrary to law, as the prosecutor should be given the same privilege in order to offer fuller proof of the defendant's guilt, and the result would be the interminable prosecution of the same litigation between the parties, alternately changing sides. The final conclusion of the court is stated as follows: "So in the present state of the case another ingredient of the action, namely, the want of probable cause, which is as essential to the plaintiff's action as is his innocence, is completely negated, because the proof that satisfied the jury and court then trying the plaintiff that he was guilty must, upon the ground already adverted to, be deemed by another court to establish that there was then probable cause. The judgment in the county court justifies the institution of the prosecution in that court." Newell in his work on Malicious Prosecution, at pages 253 and 254, comments with approval on *Griffis v. Sellars*, 19 N. C. 492, 31 Am. Dec. 422, and cites cases decided in other states which sustain the same doctrine as therein settled. In *Cooley on Torts* (2d Ed.) p. 185, we find it stated that "if the defendant is convicted on the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause." In the comparatively recent case of *Crescent City L. S. Co. v. Butchers' Union, etc., Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614, the subject is learnedly discussed with a full citation and consideration of the authorities, and among others which sustain our conclusion in this appeal is cited *Griffis v. Sellars*, supra, as a leading case upon the question. The court adopts as correct the principle declared in that case.

Our decision as to the effect of the conviction of the plaintiff by the justice in the criminal proceeding against him makes it unnecessary to consider the other question discussed by counsel, as to whether there was

any evidence that the defendant T. V. Hardison participated in the prosecution.  
No error.

**RICE v. McADAMS et al.**

(Supreme Court of North Carolina. Nov. 5, 1908.)

**1. LIBEL AND SLANDER (§ 74\*)—SLANDER—ACTION—JOINT DEFENDANTS.**

As a general rule, an action of slander may not be maintained jointly against two or more, in the absence of allegations showing a conspiracy, as the words of one are not the words of the other.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 171; Dec. Dig. § 74.\*]

**2. APPEAL AND ERROR (§ 154\*)—RIGHT OF REVIEW—COMPLIANCE WITH RULING—JUDGMENT ON DEMURRER.**

Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial court, he acquiesced in the judgment, and cannot assign it as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 960; Dec. Dig. § 154.\*]

**3. ACTION (§ 60\*)—SEVERANCE.**

In slander against two persons jointly, where a demurrer to the complaint was sustained on the ground of misjoinder, plaintiff could have requested the court to divide the actions, and try them separately.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 701; Dec. Dig. § 60.\*]

**4. LIBEL AND SLANDER (§ 101\*)—JOINT LIABILITY—CONSPIRACY—ACTIONS—BURDEN OF PROOF.**

In an action against two defendants for slander, alleging a conspiracy between them to defame plaintiff, the burden was on plaintiff to show a conspiracy.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 101.\*]

**5. LIBEL AND SLANDER (§ 101\*)—MALICE—WORDS IMPUTING CRIME—LARCENY.**

Malice will be presumed from the use of words charging that plaintiff stole defendants' wheat.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 101.\*]

**6. LIBEL AND SLANDER (§ 101\*)—ACTIONS—BURDEN OF PROOF—JUSTIFICATION.**

In slander for uttering words actionable per se, the burden of justifying the charges and of showing that they were true was on defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 280; Dec. Dig. § 101.\*]

**7. CONSPIRACY (§ 22\*)—CIVIL LIABILITY—CONSPIRACY TO SLANDER—EVIDENCE.**

In an action against two defendants for slander, alleging a conspiracy between them to defame plaintiff, unless the jury believe by the greater weight of the evidence that a conspiracy or combination was formed by defendants to speak the slanderous words alleged, the jury should find for defendants.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 26; Dec. Dig. § 22.\*]

**8. TRIAL (§ 203\*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

Where a complaint charging slander against defendants jointly was amended so as to charge a conspiracy to slander, and the case was tried on the theory of conspiracy, but the special issues submitted to the jury were not framed

on that theory, the trial court properly instructed that plaintiff charged defendants with conspiracy to slander him, which defendants denied, that the burden was on plaintiff to show a conspiracy, and, unless the jury were satisfied by the greater weight of evidence that there was a conspiracy to utter the slanderous words, they should find for defendants; the instruction being necessary to prevent the jury from being misled by the form of the issues submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477, 478; Dec. Dig. § 203.\*]

Appeal from Superior Court, Orange County; Webb, Judge.

Action by W. J. Rice against William McAdams and another. From a judgment for defendants, plaintiff appeals. Affirmed.

These issues were submitted without exception:

"(1) Did the defendants falsely and maliciously speak of the plaintiff to Jacob Douglass the words set out in section 2 of the complaint, or words of same substance? Answer. No.

"(2) Did the defendants in the home of Will Tate and John Tate falsely and maliciously speak of the plaintiff the words set out in section 3 of the complaint, or words of same substance? Answer. No.

"(3) Did defendant falsely and maliciously speak to Thomas Lynch concerning the plaintiff the words set out in section 4 of complaint, or words of same substance? Answer. No."

John W. Graham and Paul C. Graham, for appellant. Winston & Bryant and S. M. Gattis, for appellees.

BROWN, J. 1. In the complaint as originally drawn the plaintiff undertook to join these two defendants for uttering different slanderous words as to him. The defendants demurred ore tenus to the complaint upon the ground of a misjoinder. We are not favored by plaintiff with any authorities which we think sustain his contention that a joint action may be maintained against two or more persons for words spoken, unless the defendants are connected by allegation and proof of a common design and purpose. As a general rule such an action cannot be maintained, for the words of one are not the words of the other. 25 Cyc. 434, and cases cited. But, however that may be, Judge Council, then presiding, sustained the demurrer, and the plaintiff did not except, but sought and obtained leave to amend his complaint, and did amend it by interlining words charging a conspiracy between the two defendants to jointly defame and slander the plaintiff. It was upon this amended complaint and the original answer denying the charge that the case was tried. If plaintiff was dissatisfied with the ruling, he should have excepted and appealed. *Gattis v. Kilgo*, 125 N. C. 135, 34 S. E. 246. Or, better still, for an expeditious hearing, he could have asked the court to divide the actions, and try

them separately. *Street v. Tuck*, 84 N. C. 605. Instead of doing either, the plaintiff acquiesced in the ruling of the court, and amended the complaint to accord with his honor's views. We take the law to be that where after judgment upon demurrer, as in this case, the plaintiff does not except, but amends his complaint, so as to meet the views of the court, he acquiesces in the judgment upon the demurrer, and will not be permitted to assign it for error upon appeal. 2 Cyc. p. 645, and cases cited.

2. There are no exceptions to evidence, and the assignments of error relate to a part of the charge of his honor as follows: "This is an action for slander, charging the defendants combined and conspired to slander the plaintiff; that the plaintiff contends that the defendants combined and conspired to utter the words set out in the complaint and to do him an injury; that the defendants contended that there was no conspiracy, no combination, no malice, no understanding to utter the words complained of; that the burden was on the plaintiff to show a conspiracy; that malice would be presumed from the use of the words set out in the complaint, and the burden of justifying the charges or showing that they were true would be upon the defendants; that, unless the jury was satisfied by the greater weight of the evidence of a conspiracy or combination formed and entered into by the defendants to speak the words set out in the complaint and to charge the plaintiff with larceny of wheat, then the jury will answer the first three issues 'No,' and need not consider the fourth issue as this would be the end of the case." We find no error in this instruction. It is true the issues were not framed upon the theory of a conspiracy, but the case was tried upon that theory, and no other, and properly so in deference to the previous ruling of Judge Council. It became the duty of Judge Webb to try the case upon the amended pleadings, as he did do, and to instruct the jury, as he did, so they would not be misled by the form in which the issues were drawn.

Upon a review of the entire record, we find no error.

# McCLINTOCK v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Nov. 5, 1908.)

## 1. JUSTICES OF THE PEACE (§ 189\*)—APPEAL—DISMISSAL—FAILURE TO PROSECUTE.

A motion to docket and dismiss an appeal has the same effect as a motion to docket and affirm under Revisal 1905, § 607, permitting appellee, if appellant fails to docket his appeal from a justice, as required by law, to have it docketed, and the judgment shall be affirmed on motion.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 728; Dec. Dig. § 189.\*]

## 2. JUSTICES OF THE PEACE (§ 161\*)—APPEAL—PROCEEDINGS FOR TRANSFER—DOCKETING.

Under Revisal 1905, § 608, providing that, when return is made on appeal from a justice, the clerk of the appellate court shall docket the case at the ensuing term, such appeal must be docketed at the ensuing term, if it is more than 10 days after judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 593; Dec. Dig. § 161.\*]

## 3. APPEAL AND ERROR (§ 1092\*)—DECISIONS OF INTERMEDIATE COURT—DISCRETION—ALLOWING APPEAL TO BE DOCKETED.

Revisal 1905, § 607, provides that, if appellant fails to have his appeal from a justice docketed as required by law, appellee may have the case docketed and, on motion, the judgment shall be affirmed, and section 608 requires the clerk of the appellate court to docket the case at the ensuing term. An appeal from a justice's judgment was taken in September, 1906, and a transcript sent to the clerk of the superior court, but, the appeal not having been docketed at the August term, 1907, after five terms of the court had been held, appellee's motion to docket and dismiss was allowed. Appellant did not pay the clerk's fees, or request him to docket prior to the motion to dismiss, but the clerk ordinarily did not require payment of fees for docketing, and was in bad health during the time, and the docket was crowded. *Held*, that the superior court's refusal to allow the appeal to be docketed was not reviewable under the circumstances.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1092.\*]

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by George McClintock against the Life Insurance Company of Virginia. Judgment for plaintiff, and defendant appeals, and, from an order allowing a motion to docket and dismiss the appeal, defendant appeals. Affirmed.

Judgment was taken before a justice of the peace in September, 1906. An appeal was taken in open court, and the transcript on appeal was promptly sent to the clerk of the superior court. At August term, 1907, the appeal not having been docketed (though in the interim five terms of the superior court had been held), the appellee moved to docket and dismiss. This motion was continued from term to term till January term, 1908, when it was allowed. At no time prior to August term, 1907, did the appellant ask to docket the appeal, nor for a recordari.

King & Kimball and Stedman & Cooke, for appellant. Scott & McLean, for appellee.

CLARK, C. J. Revisal 1905, § 607, provides: "If the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed." The dismissal of the appeal had the same effect. Revisal 1905, § 608, required this appeal to be docketed "at the ensuing term" of the appellate court if



more than 10 days after judgment. *Pants Co. v. Smith*, 125 N. C. 588, 34 S. E. 552.

It is true the judge finds that the clerk was in the custom of docketing such appeals without requiring payment of fees, that the clerk was in bad health, and the docket was crowded. For these reasons the judge in his discretion might (if the delay in docketing was not too gross) have allowed a motion to docket nunc pro tunc. *Marsh v. Cohen*, 68 N. C. 283; *West v. Reynolds*, 94 N. C. 333. Here the appellant neither paid the clerk's fees nor requested him to docket the appeal, nor paid any attention to it for 11 months during which time there were five terms of the superior court. If it were conceded that, after such laches, the judge could in his discretion have allowed the appeal to be docketed, it is clear that his refusal to do so is not reviewable. This has been held lately by *Brown, J.*, in *Lentz v. Hinson*, 146 N. C. 81, 59 S. E. 144, and by *Walker, J.*, in *Blair v. Coakley*, 136 N. C. 409, 48 S. E. 804, citing many cases. In *Johnson v. Andrews*, 132 N. C. 876, 43 S. E. 926 (relied on by appellant), the fees were paid to the clerk, and he was requested to docket the appeal, and the clerk later informed the appellant that he had done so.

As this court has often stated, "if a person has a case in court, the best thing he can do is to attend to it." *Pepper v. Clegg*, 132 N. C. 316, 48 S. E. 906.

Affirmed.

### HOUSER v. W. R. BONSAI & CO.

(Supreme Court of North Carolina. Nov. 5, 1908.)

#### 1. JUSTICES OF THE PEACE (§ 43\*)—JURISDICTION—TORTS.

Under the Constitution, providing that the General Assembly may give to justices of the peace jurisdiction of civil actions wherein the value of property in controversy does not exceed \$50, and the statute giving jurisdiction to justices in like terms, a justice of the peace has jurisdiction of an action for personal injuries negligently inflicted, where the amount demanded is \$50 or less.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 151; Dec. Dig. § 43.\*]

#### 2. INFANTS (§ 80\*)—ACTIONS—NEXT FRIEND—APPOINTMENT.

Under Revisal 1905, §§ 405, 1473, providing that, in actions where there is no general guardian, infant plaintiffs may appear by their next friend, and providing that the chapter on Civil Procedure, respecting parties, etc., shall apply to justices' courts, and Sup. Ct. Rules No. 16 (140 N. C. 683, 53 S. E. xiv), requiring the superior court, in actions by infants, to appoint the next friend, etc., a judgment, in an action in justice's court, is not a nullity because plaintiff, an infant, appeared by next friend appointed by the clerk of the superior court, and not by the justice trying the case.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 210, 211; Dec. Dig. § 80.\*]

#### 3. INFANTS (§ 80\*)—ACTIONS—NEXT FRIEND—APPOINTMENT.

The defect, if any, in the appointment of a next friend for an infant plaintiff in justice's court, arising from the failure of the justice to adopt and ratify the action of the superior court appointing the next friend, is not jurisdictional, but is only an irregularity.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 80.\*]

#### 4. JUDGMENT (§ 522\*)—JUDGMENT OBTAINED BY FRAUD—DIRECT ATTACK.

Since the abolition of the distinction between law and equity, and the grant of power to administer full relief in the same action, where all the parties in interest are before the court, and a judgment set up in bar is directly assailed as procured by fraud, it is a direct, and not a collateral, attack and authorizes full relief.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 522.\*]

#### 5. JUDGMENT (§ 518\*)—JUDGMENT OBTAINED BY FRAUD—REMEDY.

Where, in an action in the superior court for a personal injury negligently inflicted, defendant pleaded in bar a judgment rendered in justice's court, and plaintiff alleged that such judgment was obtained by fraud, and all the parties to be affected by any decree were before the court, the judgment was assailed in a direct proceeding, requiring the court to submit the issue of fraud to the jury.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 518.\*]

Appeal from Superior Court, Anson County; E. B. Jones, Judge.

Action by George Houser, by next friend, Lizzie Oakes, against W. R. Bonsal & Co. From a judgment of dismissal, plaintiff appeals. Reversed.

Plaintiff filed his complaint, and alleged that plaintiff had been injured by the wrongful negligence of the defendants, to his damage, \$5,000. Defendants answered, denying negligence on their part, alleging that the damage suffered, if any, was nowhere near the amount alleged. Defendants further answered, and averred that plaintiff, by his next friend, Robert Houser, who was father of plaintiff, had instituted an action to recover damages for the alleged wrong and injury before W. F. Long, a justice of the peace, in the county of Richmond, having jurisdiction of the claim, the amount demanded having been stated at \$50, and that recovery for said sum was had in that action against the defendants, and same had been paid, and defendants pleaded said judgment in bar of any other or further recovery for the same wrong and injury. Plaintiff replied, and averred that said judgment had before the justice of the peace was void: (1) For that, plaintiff being a minor, Robert Houser, appearing in that action as next friend of plaintiff, had been appointed to that office, for that suit, by the clerk of the superior court, and not by the justice who tried the cause; (2) because said judgment was obtained and procured by fraud. On the hearing the judge dismissed plaintiff's action, holding: (1) That

the justice of the peace had jurisdiction of the cause in which the judgment had been entered by him; (2) that the judgment of said justice, as it then stood, was a bar to any other and further recovery by plaintiff; (3) that same could only be assailed or impeached by direct proceeding instituted for the purpose. The plaintiff excepted and appealed.

J. W. Gullede and W. E. Brock, for appellant. Morrison & Whitlock, for appellee.

HOKE, J. In *Duckworth v. Mull*, 148 N. C. 461, 55 S. E. 850, it was held that the clause in the Constitution which provided that "the General Assembly may give to justices of the peace jurisdiction of other civil actions, wherein the value of the property in controversy does not exceed fifty dollars," and the statute giving jurisdiction to justices of the peace in like terms operates to confer upon said justices jurisdiction concurrent with that of the superior court of all actions of tort wherein the amount demanded in good faith for plaintiff's injury did not exceed the sum of \$50, the court in that case, construing the words "property in controversy" as meaning "the value of the injury complained of, and involved in the litigation." And the opinion further decides that, where a plaintiff, in good faith, states or limits his demand, in actions of that character, at \$50 or less, the justice has such concurrent jurisdiction, citing with approval *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880; *Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419. No valid objection, therefore, can be made to the judgment of the justice of the peace, which rests solely on exceptions to his jurisdiction of the cause. And we are of opinion that the objection to the judgment, by reason of the method by which the next friend was appointed for the infant plaintiff, is not of itself sufficient ground to justify the court in treating the said judgment as a nullity, or in ignoring its effect on the rights of these parties, while it stands as the judgment of the justice's court. The Revisal of 1905, chapter Civil Procedure, title Parties, § 405, provides that in all actions or proceedings where there is no general or testamentary guardian, or when the suit is against such guardian, infant plaintiffs may appear by their next friend. And section 1473 provides: "That the chapter on civil procedure, respecting forms of actions, parties to actions, the time of commencing actions, and the service of process, shall apply to justice's courts." But in neither section, nor elsewhere in the statute law, so far as we can discover, is the special method indicated by which such next friend must be appointed. For this reason, no doubt, the superior court, acting under section 1541, Revisal 1905, conferring upon this court the right, for time to come, to prescribe rules of practice for the superior courts, have established a way by which the "next friend" shall be appointed in that court

as follows: "In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed." 140 N. C. 683, 53 S. E. xiv, Rules of Practice of Superior Courts, No. 16. As stated, this is the rule to be followed in regard to actions and proceedings in the superior court; and we think the same care and circumspection required for such appointments in the superior court, as indicated in this rule, should be followed in courts of justices of the peace. But in reference to actions before justice's court, we think both the investigation into the fitness of the next friend, and the order appointing him, should be made by that officer. If it should be conceded however, that this is faulty procedure, and that the action of the justice of the peace in the present instance was not an adoption and ratification of the action of the clerk, the defect is only an irregularity, and the judgment entered, having been paid in full, the obligation is of itself, and on that ground, no longer of the substance. Why set aside a judgment for irregularity, at instance of plaintiff, which was rendered to the full limit of a justice's jurisdiction, and has already been paid? And, so far as we have examined, the authorities are uniform that the defect suggested, in reference to the appointment of the next friend, is at most only an irregularity. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176; *Fowler v. Poor*, 93 N. C. 466, 14 Ency. Pl. & Pr. 1016; 22 Cyc. 641.

In 14 Ency. Pl. & Pr. supra, it is said: "Where the proceedings are conducted without the intervention of a next friend, or a guardian ad litem in a case where one is required, or where the appointment is irregular, the judgment is irregular and voidable. But, while a failure to appoint a next friend or guardian ad litem, or to sue by one, is irregular, it is only that. The defect is not a jurisdictional one, and hence the judgment is not void." And the reference to Cyc. is to like effect. In the case of *Tate v. Mott*, supra, it was held that, "where an infant appeared by attorney, and had no next friend or guardian, the judgment is not void, but only voidable." Even if the next friend in the present case, therefore, was not appointed according to the course and practice of the court, the judgment is not on that account void, as contended by plaintiff; and his position, in that respect also, was properly overruled by the trial judge. We do not, however, approve of his honor's view that, on the pleadings and in this case, it was not open to plaintiff to assail the judgment had before the justice of the peace, on the ground that the action was

instituted, and judgment procured, by fraud, and with the purpose of depriving plaintiff of his just demands. Though the judgment may have been to some extent irregular, it stood as the final deliverance on the rights of the parties in this case; and, that being true, and particularly as it had been paid and satisfied, if it was obtained and procured by fraud, an independent action to set the same aside by reason of the fraud, and declare the entire proceedings a nullity, was the proper and only proceedings by which he could obtain relief. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Smith v. Fort*, 105 N. C. 446, 10 S. E. 914; *Mock v. Coggin*, 101 N. C. 366, 7 S. E. 899. In *Mock v. Coggin* the doctrine is stated as follows: "(1) Any error committed, or fraud perpetrated, in the conduct of an action which has regularly terminated cannot be remedied by a motion in the cause, but relief must be sought by an action to impeach the former proceedings; and this action is only open to the parties to the original suit. (2) Where persons, who were not parties to the original suit, are the contestants in an issue of fraud, alleged to have been perpetrated in the course of the progress of the cause, the remedy must be sought in an independent action." And this, being relief obtainable under our former system by original bill in equity, is now to be asserted by action in the superior court. True, as contended by defendant, the authorities are to the effect that such relief must be obtained, if at all, by direct proceedings instituted for the purpose. But on the pleadings in this case, and the facts therein alleged, this is the direct and proper proceedings for the purpose indicated.

The defendant, having in his answer set up the judgment in bar of plaintiff's demand, the plaintiff replied, alleging fraud in impeachment of the judgment. All the parties in interest are before the court. The reply is according to the course and practice of the court. The defendant is fully apprised of the objection made to the validity of the judgment, and the proceedings are as direct as they can well be made. There is some confusion and apparent conflict in the decisions as to this term "direct proceedings," frequently used in reference to the method by which a judgment may be attacked. It arises, to some extent, from the fact that under an old system, when courts, law and equity, were separate, legal and equitable relief were administered on different sides of the docket. In an action at law relief for fraud against a judgment could not be, as a rule, awarded, because such relief, as stated, was only obtainable in equity, and consequently, when a party to such action at law endeavored to set up fraud against the validity of a judgment, relief was denied, because it had to be sought by direct and proper proceeding by "bill in equity." But under our present sys-

tem, where courts are empowered to administer full relief in one and the same action, when all the parties to be affected by the decree are before the court, and a judgment is set up in bar and directly assailed in the proceeding for fraud, this is a direct and proper proceeding to determine its validity. When a final judgment is assailed for fraud aliunde, the direct proceeding is by action, and if its validity is embraced within the scope and purpose of the action, and the issue is raised by pleadings germane to the relief demanded, the proceeding does not cease to be direct because other issues may be also involved. In *Earp v. Minton*, 138 N. C. 202, 50 S. E. 624, being an action of claim and delivery for personal property, the plaintiff, Dorinda Earp, claiming to be the owner, sought to impeach a judgment for fraud which established the title of the property in one Cranor, who had sold to defendant. There was no claim of allegation made in the pleadings that the judgment was obtained by fraud; nothing to apprise the defendant that the validity of the judgment on which his title rested was questioned, till the evidence was offered on the trial, and, further, defendant's vendor, whose interest would be affected by a decree, was not a party. Apart from this, the action had been commenced before a justice of the peace, and that court having no jurisdiction to hear and determine the question of fraud in the judgment, the plaintiff was compelled to rely on the legal title under the facts and conditions as they existed, and the court properly held that the action could in no sense be held a direct proceeding to assail the judgment for fraud. In this case, however, the court is of opinion, as stated, that, the judgment before the justice of the peace having been set up in bar of plaintiff's demand, and plaintiff having replied according to the course and practice of the court, alleging that the judgment was procured by fraud, and all parties to be affected by the decree being before the court, the present action should be considered and held as a direct proceeding to assail the judgment, and the issues arising on the pleadings should have been submitted to a jury. The authority cited from another jurisdiction, apparently contrary to this view, is not approved.

There was error in dismissing plaintiff's action, and the judgment below, in that respect, is reversed.

Reversed.

#### VANSTORY CLOTHING CO. v. STADIEM et al.

(Supreme Court of North Carolina. Nov. 5, 1908.)

##### 1. TRIAL (§ 350\*)—SUBMISSION OF ISSUES.

The court properly refuses to submit tendered issues which are evidential in their char-

acter, and under which the amount of damages, the true matter in dispute, cannot be determined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-832; Dec. Dig. § 350.\*]

2. SALES (§ 339\*)—REFUSAL TO PAY—DAMAGES.

Where a purchaser refuses to perform his contract by paying for the goods, and the seller exercises his option to treat them as the buyer's, and retake and resell them for him, he may recover of him the contract price, less what is obtained on a fair resale, and in addition the cost of storage, interest, and an allowance for his time as agent in reselling.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 924, 925; Dec. Dig. § 339.\*]

Appeal from Superior Court, Guilford County; E. B. Jones, Judge.

Action by the Vanstory Clothing Company against D. Stadlem and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff on August 15, 1906, sold the defendants a stock of goods for \$6,900 cash. The defendants gave a check for \$500, but it was protested, and, no part of the purchase money being paid, the plaintiff retook possession of the goods, after the defendants had held them 10 days. The evidence for plaintiff is that it held the goods till October 25, 1906, subject to defendants' orders, and then, after due notice, it sold them for \$5,500; that the defendants left the goods in bad condition and torn up, many being on the floor; that the goods were worth \$1,500, more on August 15th than when resold; that the plaintiff lost the use of storeroom two months and 10 days, storage being worth \$20 to \$25 per month; that plaintiff used every effort, after defendants' refusal to pay for the goods, to sell them at the best possible price, writing many letters to parties in and out of the state who were likely to buy, and inducing some of them to come to Greensboro to examine the goods; that the defendants were notified that, if they did not take the goods, the plaintiff would sell them, and the defendants paid no attention to the notice. The defendants offered no evidence. The defendants tendered as issues: "(1) Did the plaintiff resell the goods within a reasonable time, and did he use reasonable diligence in effecting a sale? (2) Was the sale a fair one?" The court submitted instead: "(1) Did the plaintiff and defendants enter into a contract for sale of the goods at the price of \$6,900? (2) Did the defendants refuse and fail to comply with the contract of sale? (3) What damage, if any, has the plaintiff sustained by the breach of the contract of sale?" The jury responded "Yes" as to the first two issues, and \$1,500 to the third.

Stedman & Cooke, for appellants. John A. Barringer and W. P. Bynum, Jr., for appellee.

CLARK, C. J. (after stating the facts as above). The exception of the defendant as to issues cannot be sustained. Those they tendered were evidential in their nature. Those submitted by the court were proper. Besides, under the issues offered by defendants, the amount of damages, the true matter in controversy, could not have been determined.

The only other exception requiring our consideration is the refusal of the court to give the following request to charge: "If the jury shall find from the evidence that the market value of the goods was \$6,900 at the time of the breach of contract, the plaintiff would be entitled to recover nothing, and you will answer the third issue, 'Nothing'; that is to say, if the goods were worth what plaintiff sold them to defendants for, the defendants were privileged to refuse to take them." This prayer could not be given for many reasons. The breach of contract, nothing else appearing, entitled the plaintiff at least to nominal damages. The plaintiff was also entitled to recover storage, and interest on the purchase price, while making reasonable and proper efforts to resell the goods. Besides, the defendants, after their wrongful act, are not entitled to be allowed, in abatement of damages, the market price at the time of the breach of the contract, but only, if we follow the terms of the issues tendered by themselves, that the goods should be sold within a reasonable time, using reasonable diligence in effecting a sale, and that it should be a fair sale. In *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889, 32 Am. St. Rep. 782, it is held that, if the vendee refuses to pay for and receive the goods, the vendor has the right either to rescind the contract or resell the goods and recover from the vendee the difference in price. In making such resale he is considered as acting as the agent of the vendee. 1 Benjamin, Sales, 1077, note. Of course he must act in the utmost good faith, and with diligence. We know not what instructions his honor gave on this point, but they were satisfactory to the defendants, for they have made no exceptions to the charge.

The defendants rely upon *Heiser v. Mears*, 120 N. C. 443, 27 S. E. 117. That was where an executory contract for the manufacture of goods was rescinded before the work was finished, and the court distinguished between the measure of damages in such a case and in a case like the present, saying: "In a contract for the sale of specific articles then in existence and ready for delivery, when the purchaser refuses compliance, the seller has three remedies at his option: (1) To treat the property as his own, and sue for damages; (2) as the property of the buyer, and sue for the price; (3) as the property of the buyer, and resell it

for him, and sue for the difference between the contract price and that obtained on the resale." The latter option was exercised by the plaintiff herein. The court in *Heiser v. Mears* said that a different rule obtained where the contract was for goods thereafter to be manufactured, because, when the vendor "was notified of the rescission of the agreement, it seems unreasonable that he should continue to manufacture, and thus continue to increase his damages." Therefore, in such case, the damages are to be measured "at the time of the breach." Under the charge herein, to which the appellants did not except, and which is therefore not sent up, the jury evidently did not think that the \$5,500 obtained on a resale was a fair price, but found that the plaintiff should have obtained something over \$8,000; for, though the plaintiff was entitled to storage, interest, and an allowance for his time as agent in reselling, the damages are assessed at \$900.

The defendants have no ground to complain.

No error.

#### BRAY v. STAPLES et al.

(Supreme Court of North Carolina. Nov. 11, 1908.)

#### 1. ARBITRATION AND AWARD (§ 39\*)—PROCEEDINGS—NOTICE—NECESSITY.

Where two arbitrators, with power to choose a third arbitrator on their inability to agree, heard the testimony of parties and disagreed, and then, without notifying the parties, appointed a third arbitrator, who met with them, and who was informed by them of the evidence, the award made by one of the original arbitrators and the third arbitrator, without notice to the parties and an opportunity to be heard, must be set aside.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 201; Dec. Dig. § 39.\*]

#### 2. ARBITRATION AND AWARD (§ 76\*)—INVALID AWARD—SETTING ASIDE—EFFECT.

The parties and their rights as to the subject-matter of an arbitration are not affected by an invalid award or the judgment setting it aside, but they are relegated to their original status.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 402; Dec. Dig. § 76.\*]

#### 3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where there was no contradictory testimony, and no inferences to be drawn from it contrary to the legal conclusion stated by the court in its instructions, errors in the instructions were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.\*]

Appeal from Superior Court, Gullford County; Ferguson, Judge.

Action by C. A. Bray, trustee, against J. N. Staples and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The facts necessary to a disposition of this appeal are: In an action pending in the superior court of Gullford county, A. L. Brooks, Esq., was duly appointed receiver of the estate of B. F. Fisher, deceased. In the discharge of his duties it became necessary for him to settle with the defendant John N. Staples a claim, presented by said defendant, against the estate of said Fisher, for professional services rendered said Fisher prior to his death. For the purpose of fixing the amount due said defendant the receiver, with the assent of Mrs. Isabelle Fisher in her capacity of administratrix and individually, and said John N. Staples entered into an agreement in writing to submit the question "as to the amount said Staples is entitled to as counsel for the said Fisher," in certain litigation referred to, "and as counsel for Isabelle Fisher and her children after the death of said Fisher," to Clement Manly, Esq., and Judge R. C. Strudwick; "and in the event the said Manly and Strudwick cannot agree upon the amount, they are empowered to choose a third arbitrator, and the award of a majority of them shall be the amount to which the said Staples shall be entitled." This agreement, bearing date April 12, 1908, is signed by the receiver, Col. Staples, and by Mrs. Fisher. Pursuant to said agreement the arbitrators met and heard testimony, examined papers, etc., submitted to them. One of them took notes of the evidence. After hearing the evidence and examining the papers, they failed to agree upon an award. Pursuant to the power conferred upon them they selected R. B. Reid, Esq., as "a third arbitrator." Mr. Reid met with the other arbitrators at a time and place agreed upon. No notice was given the said receiver, Col. Staples, or Mrs. Fisher of said meeting, or the time and place thereof. The two original arbitrators agreed that, as they had heard all of the evidence, they would state the same to Mr. Reid, in the presence of each other. This was done, and an award was concurred in by Mr. Manly and Mr. Reid, to which Judge Strudwick declined to assent. The award fixing the amount to be paid Col. Staples was drawn up and signed by Mr. Manly and Mr. Reid, April 18, 1908. Mr. Brooks, the receiver, before receiving notice of the award, through his partner paid a portion of the amount awarded to be due Col. Staples. The plaintiff was, by order of the court, substituted as receiver in the place of Mr. Brooks, and brings this action to set aside the award, for that no notice was given to the parties of the time and place of the meeting of the arbitrators, after the selection of Mr. Reid as third arbitrator, and that Mr. Reid did not hear the evidence upon which he joined in the award. Defendant Staples contended that the award was valid, and if not so, that it had been ratified by

Brooks, receiver. The case was brought to trial, and upon the issue directed to the validity of the award his honor charged the jury that, if they believed the evidence, they should answer the issue "No"; and, as to the issue in regard to the alleged ratification, that Brooks, receiver, had no power, after June term, 1906, to ratify the award, and there was no evidence of any ratification. The jury answered the issue as instructed, and judgment was rendered setting aside and vacating the award. To all of which defendant Staples duly excepted. He asked the court to instruct the jury, if they believed the evidence, to answer the issue "Yes." To the refusal to do so he excepted and appealed, assigning as error the refusal of the court to instruct the jury as requested, and the instructions given.

J. A. Barringer and Wm. P. Bynum, for appellants. Stedman & Cook, Justice & Broadhurst, and King & Kimball, for appellee.

CONNOR, J. The right of the plaintiff to the relief demanded, and the ruling of his honor, depends upon the answer to questions, in regard to which there is no conflicting evidence. Does the failure of the arbitrators to notify the parties of the appointment of Mr. Reid as "third arbitrator," and of the time and place of their meeting with him to finally hear and determine the matters submitted to them, and the failure of Mr. Reid to hear the evidence from the witnesses, invalidate the reward? The questions do not appear to have been decided by this court. In Russell on Arbitration (3d Ed.) 320, cited with approval in *Gaffy v. Bridge Co.*, 42 Conn. 143, it is said that it is the duty of the umpire to re-examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined as to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course. In *Thomas v. Ry. Co.*, 24 N. J. Eq. 572, it is said: "When the new arbitrator was chosen, the complainant had the right to adduce additional testimony and additional arguments, and that, unless the right was clearly waived by their agreement or conduct, notice of the appointment of a third arbitrator and opportunity to be heard were essential preliminaries to a valid award. This doctrine is founded in natural justice, and is not denied to be law." *Elemdorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Alexander v. Cunningham*, 111 Ill. 511; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522, in which it is said: "Parties are always entitled to a hearing before arbitrators, unless that hearing is waived, and if an umpire or other arbitrator is called in, in case of a disagree-

ment, the same rule as to a right of hearing applies. The waiver of the right must be distinct and unequivocal." In a well-considered opinion, reviewing the authorities, Keith, P., says: "We deduce from the authorities the general rule that, when two arbitrators who differ have the power to appoint a third, who shall have authority to decide between them, it is necessary to inform the parties in interest of his appointment, give them a reasonable opportunity to produce evidence before them touching the matters in controversy." *Coons v. Coons*, 95 Va. 434, 28 S. E. 835, 64 Am. St. Rep. 804. In 8 Cyc. 660, the editor says that, after a disagreement between the original arbitrators, the special arbitrator, acting with them, or upon his sole responsibility, may proceed to a consideration of the case as presented by the original arbitrators, and make an award thereon without hearing the evidence anew or additional evidence, unless such rehearing be specially requested by one of the parties or required by the terms of the submission; but he further says this rule does not apply unless the parties have been notified of the appointment of the special arbitrator or umpire, and of the proceedings by him, and have been accorded reasonable opportunity to make such demand. In the note he says: "In the absence of such notice and opportunity to be heard or to demand a rehearing no authority to proceed exists"—citing numerous cases. Some distinction has been made between the duty and power of an umpire and a "third arbitrator." It is unnecessary to consider this question, because Mr. Reid was, by the terms of the submission, made "third arbitrator," and comes clearly within the decisions cited. Whether the award may be attacked for failure to give the notice and hear the evidence by the third arbitrator collaterally, or only by a direct proceeding to set it aside, is not presented upon this appeal. This is a direct proceeding for that purpose.

It is insisted that, however the question may have been decided in other jurisdictions, this court, in *Zell v. Johnson*, 76 N. C. 302, held the award valid. In that case Judge Rodman puts the decision on the ground that, conceding the rule as to notice, when the parties have presented their claims and evidence they are not entitled to notice of the time when the arbitrators will meet to consider and dispose of the case. He also says that the defendant clearly waived any other notice that he had. The decision is not in conflict with the uniform current of decisions on the question in other jurisdictions. His honor's instruction on the first issue was clearly correct. We find no evidence of a ratification by the receiver, if it be conceded that he had the power to ratify, which is very doubtful. We concur with his honor's instruction in that respect. It is conceded by all parties that the arbitrators, and each of them, acted in good faith, and

no suggestion is made to the contrary. They inadvertently overlooked the necessity of notifying the parties of Mr. Reid's appointment, and the time and place of their meeting, to determine the matter submitted to them. We think that their course in that respect was in accordance with the custom with us, but the uniform current of authority is that notice must be given of the selection of the third arbitrator or umpire, and that the rule is founded in wisdom. Its observance secures to the parties an opportunity to present their evidence and arguments to the final arbiter of their rights, and tends to secure acquiescence in this mode of trial favored by the law, because it is inexpensive, expeditious, and usually works substantial justice. The gentlemen who consented to act and the "third arbitrator" were doubtless discharging "a friendly office," without compensation. The judgment of his honor, for the reasons assigned, was correct. The other exceptions in the record are immaterial in the view which we take of the case.

Of course the parties, and their rights in respect to the subject-matter of the arbitration, are not affected by the award or the judgment setting it aside. They are relegated to their original status. It may be well enough to say that the form of his honor's instruction to the jury does not conform to many decisions of this court; but, as there was no contradictory testimony, and no inference to be drawn from it contrary to the legal conclusion stated by his honor, no harm could come to defendant.

The judgment must be affirmed.

**SLAWSON v. EQUITABLE FIRE INS. CO.**  
(Supreme Court of South Carolina. Nov. 13, 1908. On Rehearing, Nov. 23, 1908.)

**1. INSURANCE (§ 665\*)—FIRE INSURANCE—IRON SAFE CLAUSE—WAIVER—EVIDENCE.**

In an action on a fire policy containing an iron safe clause, and stipulating that the policy should not become operative until countersigned by the agent of insurer, a judgment for insured based on a finding that insurer waived the clause was affirmed by an equally divided court.

Per Pope, C. J., and Gary, A. J.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.\*]

Jones and Woods, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Orangeburg County; J. C. Klugh, Judge.

Action by H. L. Slawson against the Equitable Fire Insurance Company and another. From a judgment for plaintiff, defendant the Equitable Fire Insurance Company appeals. Affirmed.

The following are the exceptions referred to in the opinion:

(1) Because his honor erred in overruling defendant's objection to the following question asked H. L. Slawson, plaintiff, upon

his examination in chief: "What was said at that time about the policy? What did Mr. Ameker tell you?" Error assigned being that it is incompetent to introduce any testimony going to explain or vary the written contract which was sued on.

(2) Because the presiding judge erred in overruling defendant's objection to the following question asked the plaintiff on his direct examination: "State to the jury what was burnt in that store—what the stock consisted of?" Error assigned being that the contract sued on provided how such loss should be established and how the books and papers necessary to make up the proof of loss would be preserved, and oral testimony was incompetent to make up such proof of loss.

(3) Because the presiding judge erred in permitting the plaintiff to testify orally as to an alleged waiver of any of the provisions of the policy. Error assigned being that the policy before the court provided that its terms could not be waived by an agent and only in writing, as stipulated in said policy.

(4) Because the presiding judge erred in permitting the plaintiff to testify orally as to the amount of goods in his store, the exception being that the contract sued on provided that proof of loss should be made in writing in the manner therein specified, and further error is assigned in that the presiding judge ruled: "That the proof to show the failure of the company to deliver the policy is interposed to obviate the difficulty. I will allow testimony to go in, and, if it is not competent, I will so instruct the jury."

(5) Because the presiding judge erred in allowing the plaintiff to testify that he had taken stock up to \$1,738. Error assigned being that the contract provided the mode in which the plaintiff's loss should be ascertained.

(6) Because the presiding judge erred in allowing the plaintiff to answer the following question: "At the time that this insurance was taken out was there anything said about this iron safe?" Error assigned being the contract sued on having provided for an iron safe or the keeping of the books in some safe place not exposed to fire, it was incompetent for the plaintiff to testify as to any oral understanding varying said contract; and further, that the contract also provided that the agent whose variance of the contract it was attempted to introduce could not bind the company by any agreement to waive any of the provisions of the contract.

(7) Because the presiding judge erred in admitting in evidence the paper purporting to be a proof of loss. Error assigned being that it appeared on the face of said paper that it was not made out in accordance with the terms of the policy.

(8) Because the presiding judge erred in

\*For other cases see same tools and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

permitting witness W. Herbert Sandell to answer the following question: "I want you to state whether or not the store was well filled with stock?" Error assigned being that this testimony was incompetent to prove the loss because the policy provided how such loss should be ascertained or proved.

(9) Because the presiding judge erred in allowing the same witness to answer the question: "What did the stock that you took amount to?" Error assigned being the same as that stated in last exception.

(10) Because the presiding judge erred in permitting the same witness to answer the question: "What stock of goods did he have in the store when you were there?" Error assigned being the same as in last exception.

(11) Because the presiding judge erred in allowing the witness John M. Antley to answer the question: "From your knowledge of the mercantile business and from what you saw of the stock of goods in Mr. Slawson's store, what was that stock worth?" Error assigned being the same as in last exception.

(12) Because his honor erred in allowing the same witness to answer the question: "Did you have occasion to observe his stock of goods?" Error assigned being the same as in last exception.

(13) Because his honor erred in permitting the same witness to answer the question: "How much goods did he have in there?" Error assigned being the same as in last exception.

(14) Because his honor erred in refusing the motion made by the defendant's attorneys to strike out from the record testimony above objected to. Error assigned being that the complaint having alleged that the policy was issued to the plaintiff and the same being the plaintiff's cause of action and introduced in evidence by the plaintiff, it was not competent or proper that testimony should be allowed to go to the jury to sustain any other contract or agreement than that sued upon and so produced in evidence by the plaintiff. And the further error is assigned that the ruling of the judge was based upon the theory that the policy sued on had been suppressed or its contents withheld from the plaintiff.

(15) Because his honor erred throughout the taking of said testimony in allowing testimony so refused to be stricken out to go to the jury. Error assigned being that the uncontradicted proof was that said policy had at the instance of the plaintiff been left as security with Banks & Wimberly, of which firm the agent of the insuring company was a member, and the plaintiff was by law charged with the knowledge of all the contents of said policy.

(16) Because his honor erred in charging the jury as follows: "If the parties to the contract agreed that a failure to observe what is commonly called the 'iron-safe

clause' should result in a forfeiture of the policy, and if you find that the plaintiff agreed to observe that clause and failed to do so, then that would result in a forfeiture of the policy; if there was no such agreement to that effect, then a failure to observe that clause cannot avoid the policy. That is a question of fact, and is one of the issues for you to determine." The error assigned being that the contract introduced in evidence by the plaintiff himself showed that there was an iron safe clause agreed to, and that defendant had asked the presiding Judge to charge the jury to that effect.

(17) Because the presiding judge erred in charging the jury as follows: "If, however, he entered into an agreement wherein the terms were withheld from him, then the conditions of the agreement are not binding on him. If the knowledge of the terms was withheld from him through fraud, or even if it was withheld without any fraudulent intent, then the terms would not be binding, if he did not have the opportunity of knowing those terms, and if the contract was binding between the parties, he is not responsible for the stipulation in the contract, and the balance of the contract would be binding." The error assigned being that, by the testimony of the plaintiff himself, the policy of insurance was held as collateral security by a firm, of which the company's agent was a member, for a note due by the plaintiff, and that plaintiff was chargeable with the notice of all the contents of said policy.

(18) Because his honor erred in drawing a distinction in this case between stipulations in the contract which were essential and those which were not essential. The error assigned being that the iron-safe clause in the contract was a warranty and an essential part of it.

(19) Because his honor erred in modifying the defendant's first request to charge, which was as follows: "The jury is instructed that, under the terms contained in the policy of insurance in this case, the insured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to date of this policy, one shall be taken within thirty days of the issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. The jury is instructed that, if they find from the testimony that the plaintiff did not take either of the inventories mentioned in this agreement, as therein provided, the same policy became null and void and the verdict must be for the defendant—by adding these words: "I charge you that, provided you find that there was such an agreement." Error assigned being that the agreement was attached to the policy put in evidence by the plaintiff as the contract



on which he sued, and the jury could not, under any view of the case, determine that there was no such agreement.

(19) Because the presiding judge erred in modifying the defendant's third request to charge, which is as follows: "The jury is further instructed that if it was agreed that 'the assured will keep a set of books and inventories if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy is not actually open for business, or failing in this the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.' And the jury is instructed that if they find from the testimony that the plaintiff failed to keep and perform the agreement mentioned in this clause of the policy, the plaintiff cannot recover, and the verdict must be for the defendant—by adding these words: 'Those instructions will be given you under the same instructions as I have given you about the iron-safe clause. I charge you that subject to what I have already charged you, with reference to the iron-safe clause,' if there was no such an agreement it was not binding, and if there was such an agreement it was binding." The error assigned being that there could be no dispute because the plaintiff had himself introduced in evidence, as part of his proof, this agreement, and was charged with the knowledge of it.

(20) Because the presiding judge erred in modifying the defendant's fourth request to charge, which was as follows: "The jury is further instructed that, in and by the said agreement between the plaintiff and the defendant company, it was provided that in the event or failure to produce such set of books and inventories for the inspection of the company, the policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereof, and the jury is instructed that, that if they find from the testimony that the plaintiff failed to keep and perform this agreement, the plaintiff cannot recover, and the verdict must be for the defendant"—by adding these words: "I charge you that as I have already charged you; that is, if you find that it was so agreed. Of course if this writing here is not the agreement, it cannot bind the parties (policy)." The error assigned being that this agreement was contained in the contract put in evidence by the plaintiff upon which he brought his action.

(21) Because the presiding judge erred in refusing to charge the following request of the defendant: "Lastly, the jury is further instructed that they cannot consider the question of the waiver of the requirements of these clauses of the policy, because there is no evidence before them of any waiver of any of such requirements."

Mordecai & Gadsden and Rutledge & Haggood, for appellants. Glaze & Herbert, for respondent.

POPE, C. J. It seems that H. L. Slawson, a citizen of Orangeburg county, was engaged in merchandising in the year of 1906, and on the 18th of October of that year sought a policy of insurance upon his stock of goods, such stock consisting of dry goods, groceries, grain, etc. He applied for such insurance to T. A. Ameker, in the town of St. Matthews, S. C., Mr. Ameker was the agent of the defendant the Equitable Fire Insurance Company. The amount desired was \$1,200. The subject was discussed between the two; amongst other things, the fact that said Slawson did not own an iron safe. Here the parties differ, Slawson contending that he was informed that such fact would not prevent the issuing of the policy to him. The defendant claimed that Ameker made no such concession. The result was a policy for \$1,200 was issued to the plaintiff by the defendant, such policy was retained by Ameker, and on the same occasion a chattel mortgage was issued by the plaintiff to the Banks & Wimberly Company. Subsequently on the 7th day of January, 1907, the insured property was totally destroyed by fire, which fire also destroyed the books of the plaintiff such as the usual books, invoice book, and cash and credit sales book; notice was given of this fire, and when Mr. Pinckney came to see the plaintiff he was carried to St. Matthews to see Mr. Ameker, and the insurance policy was obtained from him (it should be stated right here that Mr. Ameker was a member of the firm of Banks & Wimberly Company). The policy was delivered by Mr. Ameker on that occasion, and was delivered to Mr. Pinckney, but the question was asked by Mr. Pinckney as to where were the books of the plaintiff, as merchant. He was informed that they had been totally destroyed by the fire which burned the store and its contents, and that there was no iron safe in the building. The result was a denial of the right of the plaintiff to a recovery. On the 6th day of April, 1907, this action was brought by H. L. Slawson, as plaintiff, against the Equitable Fire Insurance Company and Banks & Wimberly. The complaint set up these allegations of fact, and the answer of the defendant admitted that it had issued the policy, and that Banks & Wimberly held a chattel mortgage for \$271.83, but denied its liability to pay the plaintiff anything for the insurance which had been issued to the plaintiff. The cause came on to be heard before Judge Klugh and a jury at the October term, 1907, of the court of common pleas. After full hearing of testimony and the charge of his honor, the jury rendered a verdict in favor of the plaintiff for \$1,200. After judgment the appeal was taken upon 20 grounds, which we will now examine. The exceptions will be reported.

These exceptions will not be considered in their order, but will be grouped as has been done by the appellant in their argument.

Exceptions 1, 6, 14, and 21. There is no doubt but that the general rule is there cannot be an admission of evidence to change or modify by parol evidence any contract in writing; but still it is well admitted that such testimony often becomes necessary in cases when contracts are completed by the official act of an agent. Now in the case at bar the policy of insurance was issued by the official signatures of the officers in charge of the same, but it was not to become operative until countersigned by the agent of the insurance company, Mr. T. A. Ameker; and the testimony was that, before the signature of Mr. T. A. Ameker as the agent was made, the agreement was made that, although the language in the policy required that an iron safe should be held by the plaintiff, H. L. Slawson, and the rule relating to the invoices and other papers should be made, yet both parties through said agent agreed that no such requirement should be held operative, and that contemporaneous with such agreement the thirty-nine dollars (\$39) in cash was actually paid as the premium required of H. L. Slawson. Such being the case, it would have operated as a fraud upon Slawson if the defendant insurance company had obtained and retained the premium so paid by Slawson. Thus the defendant insurance company through its own agent not only received the premium for the policy, but assured the plaintiff here that his property would be made secure to the extent of twelve hundred (\$1,200) dollars, which directly assured the agent through Banks & Wimberly of protection from loss by fire in the property insured to the extent of \$271. This is no new doctrine, as will be seen by reference to *Gandy v. Insurance Co.*, 52 S. C. 229, 29 S. E. 655; *Pearlstone v. Insurance Co.*, 74 S. C. 250, 54 S. E. 372; *Doyle v. Hill*, 75 S. C. 263, 55 S. E. 446; *Fludd v. Insurance Co.*, 75 S. C. 320, 55 S. E. 762; *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261; *Mutual L. Ins. Co. v. Logan*, 87 Fed. 637, 31 C. C. A. 172. And many other cases might be cited. To hold otherwise would seem to foster the commission of palpable wrong. These exceptions we therefore overrule.

Exceptions 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 13. The property having been destroyed by fire, and the papers, including the inventory, stockbook and cash and credit book, also destroyed, necessitated resort to secondary evidence of such property so destroyed to show plaintiff's losses. Very fortunately he was just engaged a day or so before the fire in making inventories of the personal property amounting in the aggregate to \$1,738, which was fully established by the testimony, and that there was also several hundred dollars worth of groceries and grain that was not included in the invoice list. To require the

production of books and papers showing in what these losses consisted before the plaintiff could recover for his losses would be requiring an unheard of proposition after a fire has destroyed the same. While it is true that insurance companies guard against improper losses by the means just suggested, yet that is not the primary object of the defendant's engagement. The plaintiff sought protection against fire, and by the means now suggested by the defendant the plaintiff was virtually required to insure them. The agent of the insurance company knew exactly what policy was pursued by the plaintiff when his personal property was insured, and there was therefore no imposition practiced by the plaintiff upon the defendant insurance company. All in all, it seems that the plaintiff was entitled to his judgment against the insurance company, for witness after witness testified that there was over \$2,000 worth of property there when the fire destroyed the building. Let these exceptions be overruled.

Exceptions 15, 16, 17, 18, 2 numbered 19 and 20. We cannot see that the judge committed any error when he admitted testimony as is here pointed out. He rightly left it to the jury to say whether there was an agreement as to the iron safe clause. They have spoken in their verdict, and it is binding upon us.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, A. J. (dissenting). This action is upon a fire insurance policy for \$1,200, issued by defendant to plaintiff October 18, 1906, upon a stock of merchandise which was destroyed by fire on January 7, 1907. The main defense was forfeiture of the policy by noncompliance with the iron safe clause. The plaintiff not only failed to keep the books and inventories in an iron safe, but kept them in the storeroom exposed to the fire, which destroyed them with the stock. The action resulted in a verdict and judgment for plaintiff for the amount claimed, and defendant appeals upon exceptions to rulings as to the admissibility of testimony and instructions to the jury. We will notice the points made by which the appeal should be controlled. To avoid the iron safe clause the plaintiff sought to show (1) that he did not know that such clause was in the policy; (2) that such clause was waived by defendant.

The evidence on part of plaintiff was to the effect that the policy was never actually delivered to him or seen by him until after the fire; that Mr. Thomas Ameker was agent of the defendant company, wrote the policy in question, and he was also connected with the defendant the Banks & Wimberly Company; that the policy, by instructions of plaintiff and with defendant's consent, was made payable to the Banks & Wimberly Company "as their interest may appear," because

of the fact that they held a mortgage on the stock of merchandise; that plaintiff about 28th October, 1906, asked Mr. Ameker for the policy, and he said he was busy then and could not find it; that plaintiff made no further attempt to see the policy, leaving it in the hands of Ameker until after the fire.

The complaint alleged issuance of the policy by defendant to plaintiff after October 18, 1906, whereby defendant agreed to insure plaintiff's property "in accordance with the stipulations, schedules, forms, terms and conditions of the said insurance policy," which allegation was admitted by the answer. Furthermore, plaintiff introduced in evidence the policy, and it contained the iron safe clause in question. There was no allegation of fraud, misrepresentation, or mistake in the statement of the terms of the policy. Under these circumstances plaintiff is conclusively presumed to know that the iron safe clause was a part of the policy upon which he sought recovery. It was therefore error to submit to the jury to determine whether such clause was a part of the policy, in the absence of evidence tending to show waiver thereof by defendant at the inception of the policy. The circuit court refused to instruct the jury that they could not consider the question of waiver of the requirements of these clauses of the policy because there was no evidence of such waiver, and we think this was error. The only evidence relied on to show waiver is this: "Q. At the time that this insurance was taken out was there anything said about the iron safe? A. Yes, sir. Mr. Ameker asked me if I had one, and I told him I did not have one, and he said that would be all right." If an insurance agent at the inception of the contract has knowledge of a fact constituting forfeiture, that knowledge is imputed to the company, and the issuance of the policy as a valid policy estops the company from asserting the forfeiture. *Gandy v. Ins. Co.*, 52 S. C. 228, 29 S. E. 655. But the mere fact that the defendant knew plaintiff had no iron safe at the issuance of the policy is entirely consistent with the iron safe clause. This clause does not make the policy forfeitable if the insured has no iron safe, for it distinctly provides that in case of failure to keep the books and inventories securely locked in a fire proof safe at night "the assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building." The insurance company, knowing that the insured had no safe at the time of the insurance, may nevertheless in perfect good faith rely upon the stipulation, at least to the extent that if the insured did not thereafter procure an iron safe he would protect the books and inventories as otherwise stipulated in the policy. There is no inconsistency whatever between delivery of

the policy, as a valid policy, with the iron safe clause in it, and knowledge of the fact that the insured then possessed no iron safe, for such fact constituted no ground of forfeiture. The cases of *Gandy v. Ins. Co.*, 52 S. C. 228, 29 S. E. 655; *Pearlstone v. Ins. Co.*, 74 S. C. 250, 54 S. E. 372; *Doyle v. Hill*, 75 S. C. 263, 55 S. E. 446; *Fludd v. Ass. Soc.*, 75 S. C. 320, 55 S. E. 762; *Reardon v. State Mut. Life Ins. Co.*, 79 S. C. 528, 60 S. E. 1106; and kindred cases—rest upon the view that, if upon the delivery of the policy the insurance company knew of an existing fact constituting ground of forfeiture, the insurance company is estopped to set up such fact against the policy, or is deemed to have waived forfeiture based upon such known fact. Two recent cases, *Hankinson v. Piedmont Ins. Co.*, 80 S. C. 392, 61 S. E. 905, and *Plunkett v. Piedmont Ins. Co.*, 80 S. C. 407, 61 S. E. 893, are referred to in *McCarty v. Piedmont Ins. Co.*, 81 S. C. 159, 62 S. E. 1, as being cases in which the knowledge of the agent which constituted the basis of waiver or estoppel was as to existing facts inconsistent with the delivery of the policy as a valid contract, and as falling with the rule in *Gandy's Case*.

The judgment of the circuit court should be reversed.

WOODS, J., concurs.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition be dismissed, and that the order heretofore granted, staying the remittitur, be revoked.

BULCKEN et al. v. RHODE<sup>\*</sup> et al.

In re RHODE.

(Supreme Court of South Carolina. Nov. 16, 1908.)

1. LIMITATION OF ACTIONS (§ 144\*) — ACKNOWLEDGMENT OF DEBT—TIME.

A written acknowledgment of a firm debt by two of the partners, made after action brought to dissolve the firm, and presentation of the claim to a master, and objection made that it was barred by limitations, was insufficient to toll the statute, under Code Civ. Proc. 1902, § 131, providing that the acknowledgment must be in a writing, signed by the party to be charged.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 616; Dec. Dig. § 144.\*]

2. LIMITATION OF ACTIONS (§ 146\*) — BOOK-KEEPER'S ENTRIES—ACKNOWLEDGMENT.

Bookkeeper's entries of credits for interest payments on a debt owing by the firm to a claimant for money loaned, not signed by any of the partners, and without any intent to deliver the writing to the creditor, were insufficient to toll the statute, under Code Civ. Proc. 1902, § 131, requiring a written acknowledgment of the debt signed by the party to be charged; there being no proof that such entries were made with the creditor's knowledge and consent, or that she accepted such credit as payments on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

note at about the time the indorsements were made.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 593, 596; Dec. Dig. § 146.\*]

**3. LIMITATION OF ACTIONS (§ 144\*)—New PROMISE—PAYMENTS—INDORSEMENTS.**

Indorsements of interest payments, made on a note given for a firm debt by one of the partners after the note had been filed in dissolution proceedings as a claim against the firm, transferring to the note entries of interest payments made on the firm ledger, were insufficient to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 616; Dec. Dig. § 144.\*]

Appeal from Common Pleas Circuit Court of Charleston County; Geo. W. Gage, Judge.

Action by Edward Bulcken and another against D. Rhode and others for the dissolution of the firm of D. Rhode & Co., in which Mrs. A. R. Rhode filed a claim for money loaned the firm. From an order denying the claim, claimant appeals. Affirmed.

Simons, Slegling & Cappelmann and Legare & Holman, for appellant. J. P. K. Bryan, for D. Rhode.

JONES, J. This action was commenced June 6, 1906, by plaintiffs, two of the partners of D. Rhode & Co., against D. Rhode, the other copartner, and certain creditors of said firm for an accounting of the property of said copartnership, the appointment of a receiver, and general relief. The case was referred to the master, and his report was affirmed by the circuit court. The question at issue is whether there was error in sustaining the plea of the statute of limitations against the claim presented by Mrs. A. R. Rhode. The material facts are stated by the master in his report: "Among the debts presented, in response to the master's call for creditors is a claim of Mrs. A. R. Rhode for the sum of \$4,410, with interest from December 11, 1905, which claim arose from money loaned to the firm of D. Rhode & Co. on January 10, 1885, and is evidenced by a note of D. Rhode & Co. of that date to Mrs. A. R. Rhode for \$3,000, payable one day after date, with interest from date at the rate of 6 per cent. per annum. No part of the principal of this sum has been paid, and no payment of any sort for interest or otherwise has been made upon the said claim since July 17, 1899. A ledger account with Mrs. A. R. Rhode was, however, opened upon the books of the firm, showing a balance to her credit, on January 1, 1899, of \$3,270. Three payments are charged against this balance, viz., July 1, 1899, \$50, July 15, 1899, \$50, and July 17, 1899, \$20, in all \$120. No further payments in cash were made, but every six months thereafter the bookkeeper of D. Rhode & Co., under the direction of the firm, charged up the sum of \$90 as interest on said amount to the credit of Mrs. Rhode. Upon the original note in evidence these entries are indorsed, but the said indorsements were copied by Edward Bulcken,

one of the partners, from the ledger since the commencement of this suit. Mr. Bulcken and Mr. Wohltman, two of the partners, have testified in this suit that the debt of Mrs. Rhode is a just one, and should be paid, and have also filed formal statements in writing to that effect." We think the appellant's exceptions must be overruled. Section 131, Code Civ. Proc. 1902, is: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing." The acknowledgment of the debt by two of the partners was made on March 30, 1907, after this action was commenced, and after the presentation of the claim before the master, and objection made that it was barred by the statute. Under the authority of *Martin v. Jennings*, 52 S. C. 375, 29 S. E. 807, such acknowledgments do not come within the statute. The entries of the bookkeeper upon the ledger, by the direction of the copartnership, cannot be construed as a writing signed by the party to be charged thereby. There was no actual signing by the party to be charged, and there was no attempt or intention to deliver such writing to the creditor. Nor could the indorsements made on the note by one of the copartners after the commencement of this action, transferring to the note entries made on the ledger, operate to toll the statute. It is not disputed that the last actual payment made to Mrs. Rhode on the claim or note was on July 17, 1899, more than six years before the commencement of this action. The entries on the ledger crediting Mrs. Rhode's account with payment of interest every six months were not shown to have been made with the knowledge and consent of Mrs. Rhode, or that she about the time of the entry accepted such credits as payments upon the claim or note. Hence such entries on the debtors' books cannot be treated as payments falling within the statute. The case may seem hard, but the statute is imperative, and it is our duty to enforce it.

The judgment of the circuit court is affirmed.

**AMERICAN SPINNING CO. v. SOUTHERN RY. CO.**

(Supreme Court of South Carolina. Nov. 16, 1908.)

**RAILROADS (§ 68\*)—RIGHT OF WAY—CONVEYANCES—CONSTRUCTION—"CONSTRUCTED, RUN, AND OPERATED."**

A deed of a railroad right of way conveyed to the grantee, its successors and assigns, all the land contained within 100 feet in width on each side of the track or roadway, measuring from the center of any portion of the lot of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land thereafter described through which the railway may be "constructed, run, and operated," to have and to hold for railroad purposes forever, and for no other, in fee simple. *Held*, that the words "constructed, run, and operated," were limited by what preceded them, so that the deed should be construed to convey only a right of way through the particular part of the land actually touched by the grantee's main line as originally laid out.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 68.\*]

Appeal from Common Pleas Circuit Court of Greenville County; Chas. G. Dantzler, Judge.

Action by the American Spinning Company against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed on opinion of trial judge, which is as follows:

"This action was instituted November 24, 1905, for an injunction to prevent defendant railroad company from entering on plaintiff's land to construct railway tracks without condemnation proceedings, and against written notice of plaintiff forbidding the same. A preliminary restraining order was signed November 24, 1905, which also contained a rule to show cause why the injunction should not be continued until final hearing, which was done. The hearing was had on the complaint, answer, and return, plats of the original location, and the original deed for right of way by one H. P. Hammett.

"The real contention of the parties is upon the construction of this deed; and the effect of this will be more clearly understood by the following explanation: Upon the plat produced by each of the parties appears a line marked 'N. 32° E.' running from a stone near the Buncombe road to a stone in front of Mill No. 1. This was formerly the dividing line between the lands of H. P. Hammett and Franklin Coxe. The plaintiff claims from H. P. Hammett and the defendant also claims its right of way from him. The main line of the railroad as located in 1872 or 1873, and continuously used ever since, crosses the Buncombe road at the point indicated on the plat, and enters the Franklin Coxe property at a point about 55 feet from the stone corner near the Buncombe road, indicated on the plat as a corner on the N. 32° E. line, the dividing line between Hammett's and Coxe's. The track proceeds upon a three-degree curve in a northeasterly direction, gradually approaching the said dividing line until it intersects it at a point 306 feet from the stone corner above referred to. It runs thence along said dividing line, the center of the track being the same, for a distance of 322.3 feet. It then leaves the said line as gradually as it approached the same, and does not touch plaintiff's land again until it reaches a point where plaintiff owns land upon both sides of the track, not now in controversy. The plaintiff admits that the defendant is entitled to 100 feet right of way from the center of the track

along that portion 322.3 feet in length from the point at which the main line first touches the dividing line to the point it leaves the same, but it contends that said claim is limited to that space. The defendant by its deed from Franklin Coxe obtained a right of way over his land of only 25 feet upon each side, measuring from the center of the main line. When, therefore, the main line entered the Coxe lands at the Buncombe road, there was a triangular piece of the Coxe land between the 25-foot strip of right of way and the Hammett land, over which the railway had no claim. The same situation was presented at the other end of the dividing line.

"The Hammett deed is as follows:

"Atlanta & Richmond Air-Line R. R. Co. State of South Carolina, Greenville County. In consideration of the benefit and advantage to me accruing by the construction of the Atlanta and Richmond Air Line Railway, as well as the receipt of five dollars, to be paid and also in consideration that the said company shall and do make and keep in good order sufficient cattle guards on the said premises have this day bargained and sold, and do hereby transfer and convey unto the Atlanta and Richmond Air Line Railway Company, and its successors and assigns, all the land contained within 100 feet in width on each side of the track or roadway (measuring from the center) of any portion of the lot of land hereinafter described, through which said railway may be constructed, run and operated. The land hereby conveyed being cut off and a portion of a certain track lying and being in the county and state aforesaid near the city of Greenville and adjoining lands of Franklin Coxe, J. A. David, B. F. Perry, Wm. Bates and others. To have and to hold said track or parcel of land unto said Atlanta and Richmond Air Line Railway Company for railroad purposes forever and for no other in fee simple. Witness my hand and seal this 27th day of May A. D. 1871. Signed, sealed, and delivered in presence of H. P. Hammett. [Seal.] In presence of W. K. Easley, F. B. McBee.

"The State of South Carolina, Greenville County. Personally appeared before me W. K. Easley and made oath that he saw H. P. Hammett sign, seal and deliver the within instrument for the uses and purposes therein mentioned and that F. B. McBee was with himself and witnessed the same. Sworn to before me this 28 day of October, 1871. Wm. Bayne, W. A. McDaniel, C. C. P. Magst. Ex Officio."

"The defendant contends that it is entitled to a right of way over any portion of the land in question within 100 feet of the center of the main line whether such portion be actually touched by the main line or not; that the deed does not limit the terms 'constructed, run, and operated' to the laying of a main line simply, but necessarily includes

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sufficient right of way for railroad purposes; and that the deed is in perpetuity, the railroad company may at any time after it has laid the main line call for such portion of the land as may be needed for railroad purposes.

"I am of the opinion that the construction claimed by the plaintiff is correct, and that the deed means to convey only a right of way through that particular part of the land actually touched by the main line as laid out originally; that is, the portion through which the railroad may be constructed, run, and operated within the meaning of the deed.

"It is therefore ordered and adjudged that the defendant, its agents, and servants be, and it is hereby, restrained and enjoined from entering upon any portion of the plaintiff's premises other than that over which it has admittedly a right of way as stated above, until the further order of this court.

"This injunction to be of force only upon the execution by the plaintiff of a bond with sufficient surety to be approved by the clerk in the sum of five hundred (\$500) dollars conditioned as required by the statute."

Cothran, Dean & Cothran, for appellant.  
B. A. Morgan, for respondent.

WOODS, J. This court adopts and affirms the decree of the circuit court.

**KNIGHT v. UNION MFG. & POWER CO.**  
(Supreme Court of South Carolina. Nov. 16, 1908.)

**PLEADING (§ 279\*)—SUPPLEMENTAL PETITION—RIGHT TO FILE.**

An order allowing plaintiff, in an action for overflowing land in which she owned an undivided interest, to file a supplemental complaint, setting up partition proceedings brought and ended pending the action without defendant's knowledge, in which proceedings the land mainly burdened by defendant's easement granted by plaintiff's co-tenants was allotted to plaintiff, should be vacated as premature on it appearing that the partition judgment has been opened to allow defendant to intervene.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 837½; Dec. Dig. § 279.\*]

Appeal from Common Pleas Circuit Court of Union County; R. C. Watts, Judge.

Action by Sara Ida Knight against the Union Manufacturing & Power Company. From an order allowing plaintiff to file a supplemental complaint, defendant appeals. Order vacated.

J. Ashby Sawyer and Wm. Elliott, Jr., for appellant. Wallace & Barron, for respondent.

JONES, J. This is an appeal from the order of Judge Watts allowing plaintiff to file a supplemental complaint in this action. The plaintiff began suit against the defendant company for damages alleged to have resulted to her as the owner of an undivided fourth interest in a tract of land on Broad

river, in Union county, by the erection of defendant's dam across that river. Defendant interposed as a defense that plaintiff's co-tenants had granted easement to overflow said land. Pending this suit, an action by the co-tenants to partition said land was begun and ended without the knowledge of the defendant company, and partition was had without any regard to the alleged right of the defendant company as owner of easement to overflow a portion of said land, and the portion mainly burdened by said easement was allotted to the plaintiff. Then plaintiff moved to file supplemental complaint, setting forth the result of the partition proceedings, and this motion was resisted by defendant company, and proceedings by it were begun to open such judgment and have another partition with due consideration of its rights.

The proper method by which to bring to the attention of the court facts occurring after the institution of the original complaint is by supplemental complaint; but, inasmuch as this court in the case of *Ex parte Union Mfg. & Power Co.*, in *Re Sue R. Jeter and Mary A. Jeter*, against *Sara Ida Knight*, just filed, has decided to open said judgment in partition and allow the defendant company to intervene so as to protect as far as practicable its rights as grantee of an easement by two of the co-tenants, we deem it proper to set aside the order allowing the supplemental complaint as premature until the final determination of the partition proceedings, at which time such supplemental proceedings as may be necessary in this case may be allowed.

The order appealed from is therefore set aside.

## SMITH v. LURTY.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. APPEAL AND ERROR (§ 1075\*)—ASSIGNMENT OF ERROR—ABANDONMENT.**

Error assigned in refusing to permit filing of an amended answer is properly abandoned, on plaintiff conceding the sufficiency of the original answer to put in issue the matter sought to be raised by the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4253; Dec. Dig. § 1075.\*]

**2. LOST INSTRUMENTS (§ 8\*)—ESTABLISHMENT—PROOF—ESSENTIAL.**

To establish a lost instrument as a muniment of title, there must be conclusive proof of its former existence, loss, and contents.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.\*]

**3. LOST INSTRUMENTS (§ 8\*)—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.**

Evidence in a suit to establish a lost deed held to show that defendant conveyed to his wife and claimed by her and that the deed was lost or destroyed.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. § 8.\*]

#### 4. WITNESSES (§ 144\*)—COMPETENCY—DECEDENT'S WIFE.

Decedent's wife, on suing to establish loss or destruction of a deed whereby he conveyed to her land claimed by his devisee, was an incompetent witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 639; Dec. Dig. § 144.\*]

#### 5. LOST INSTRUMENTS (§ 8\*)—PROOF OF LOSS—REQUISITES.

Where the former existence and contents of an alleged lost paper have been clearly proved, and there is no suggestion that the person seeking to establish it could have any motive in alleging its loss, the same high degree of proof of the loss should not be required as where a motive appears.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. § 17; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Rockingham County.

Suit by Mrs. Annie S. Lurty against Susie Smith. From a decree for complainant, defendant appeals. Affirmed.

D. O. Dechert and E. B. Crawford, for appellant. Sipe & Harris and Conrad & Conrad, for appellee.

BUCHANAN, J. The object of this suit, which was brought by Mrs. Annie S. Lurty, the appellee, against Miss Susie Smith, the appellant, is to set up a deed alleged to have been executed and delivered to the appellee and afterwards lost, purloined, or destroyed.

Upon the hearing of the cause, there was a decree in favor of the complainant, granting her the relief prayed for. To that decree this appeal was allowed.

The error assigned in the petition for appeal to the action of the court in refusing to permit the appellant to file an amended answer, to more clearly deny the loss or destruction of the alleged deed, was properly abandoned, since the appellee concedes that the original answer was sufficient to put that question in issue.

The other assignments of error involve but one question, and that is whether or not the case made by the pleadings and proof entitled the appellee to the relief prayed for and granted.

It appears that Warren S. Lurty, under whom both parties claim, intermarried with the appellee in December, 1898, and died in February, 1906, leaving a will in which the appellant was his chief devisee and legatee. The appellant claims the land in controversy under that will, and it is conceded that she is entitled to it unless the appellee became the owner of it under the deed which is sought to be set up in this case.

Courts of equity, in exercising their jurisdiction to set up a lost instrument which is to constitute a muniment of title, require strong and conclusive proof of its former existence, its loss, and its contents. *Thomas v. Ribble*, 24 S. E. 241, 2 Va. Dec. 321; *Barley v. Byrd*, 95 Va. 316, 325, 28 S. E. 329; *Carter v. Wood*, 103 Va. 68, 71, 48 S. E. 553.

The evidence relied on to show the existence of the alleged conveyance consists of letters from Warren S. Lurty to the appellee before their marriage, the testimony of the scrivener, who it is claimed prepared the deed, and the admissions of Capt. Lurty to third parties that he had given the land to her.

A few months prior to Capt. Lurty's marriage with the appellee, whose maiden name was Sheppard, he wrote to her, in anticipation of their approaching marriage, letters which contained, among other things, the following statements in reference to the execution of a deed to her:

In one he writes: "I will look this morning to see if I can find enough data in the clerk's office to make you a deed for all the broad acres of St. Maur. \* \* \*"

In another he writes: "On Saturday I went to the clerk's office, and after a long and laborious search I found and copied all the data necessary to make you a deed. This with the interlocks, which must remain under your control, gives you possession of about 6,000 acres of land, and you own at least 800 acres of the best land on Dry river. \* \* \* Monday I employed Dr. Points to help me write your deed. I dictated and he wrote. \* \* \* You can send it to Mr. J. S. Messerley, Clerk Co. Court Rockingham Co., Harrisonburg, Virginia, and tell him to record it. Tell him, in estimating the tax to be paid, he can look at the assessor's book for that Dist. \* \* \* It is intended as a bridal gift. \* \* \* Latest. You see I have acknowledged and stamped your deed. \* \* \*"

In another he says: "By this time you are reading your deed of my gift to your manor, absolutely your own. No partners, no joint owners, nor survivors; a great mountain range, with none to divide or interfere. \* \* \* I only employ Dr. P. because he was a splendid amanuensis, and it is hard to run the metes and bounds without some one to call them out. \* \* \* You have as good a deed as the mind of man ever devised. I am able to give it without impairing my estate. It is valuable. I owe all to you. I know it ought to make you very happy. You must do just as you please about the time of recording it. The \$1 stamp is the war tax."

In a letter of a later date he writes: "Well, now you have the highest proofs in your hand: My letter, full of fervent love and demands that you should marry me. The gift of the manor of St. Maur—not a mere promise, but the full and complete deed in every particular—is enough to convince any one who knows me I am seriously in earnest and want you no longer to doubt, for in doubts you show a lack of resolute love, confiding in me and my truth."

Dr. Points, who is referred to in these letters as aiding in the preparation of a deed conveying the lands known as St. Maur to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appellee, testified that he had studied and practiced law, and had been connected with the federal and state courts as clerk and commissioner; that in the summer or early fall of the year 1898 Capt. Lurty, whom he had known since 1871, told him that he wished to convey his mountain land to Miss Annie E. Sheppard, and requested the witness to go to the clerk's office with and assist him in getting up the necessary data to make the deed; that he did so, and after getting the data from the clerk's office he returned to Capt. Lurty's office and wrote a deed conveying the land up at St. Maur to Miss Sheppard; that he did not remember the character of said lands, except that there was a considerable acreage in one of the tracts and a much smaller number of acres in the other; and that the metes and bounds of the two tracts were stated in the deed, and, as usual, the source from which the title was derived.

James W. Cochran testified that he was an intimate personal and political friend of Capt. Lurty; that Capt. Lurty frequently visited his shop, and had talked with him several times about the mountain farm, St. Maur, and that it belonged to his wife, and in one of their conversations Capt. Lurty had told him that he had been offered a very high price for it, so high that witness asked him if he was not going to sell it, and Capt. Lurty replied he could not sell it, as he had given it to his wife. This was while he and his wife were on friendly terms.

Dr. Harris, a brother-in-law of Capt. Lurty, testified that in a conversation with him Capt. Lurty told him that the farm known as St. Maur was the appellee's property.

A nephew of the appellee also testified that Capt. Lurty had told him, and that he had heard Capt. Lurty state, both before and after his marriage with the appellee, that he had given her a deed for his "mountain farm." As this witness was only 11 years of age at the date of Capt. Lurty's marriage with the appellee, and did not, as he admits, then know what a deed was, not much weight can be given to his deposition, taken many years afterwards. But the other evidence referred to above can leave no reasonable doubt upon the mind that Capt. Lurty did execute, acknowledge, and deliver to the appellee, prior to their marriage, a conveyance of land.

The next question is: What land passed by the deed?

It clearly appears that the land so conveyed was situated on Dry river; that it was sometimes known as the "mountain farm," and sometimes as "St. Maur"; that the deed embraced all the land known as St. Maur. It is described in the conveyance by which Capt. Lurty acquired title to it as consisting of two parcels—one supposed to contain 632 acres, more or less, and the other 67 acres, more or less. That conveyance refers to the deed by which his grantor acquired title to

the land for a more perfect description of it, and in that deed the courses and distances are given.

Dr. Points testified that the deed which he prepared at Capt. Lurty's request, in which the appellee was the grantee, described the land as consisting of two parcels, one of a considerable acreage and the other much smaller; that the metes and bounds were stated in the deed, and also the source from which the title was acquired. There is no pretense that Capt. Lurty ever owned any land on Dry river, or in that portion of the county, other than that known as St. Maur.

In one of Capt. Lurty's letters to the appellee he refers to the boundary of land which he proposed to convey to her as containing, including interlocks, 6,000 acres, of which he writes she will own at least 800 acres. This statement, it is insisted, shows that the land conveyed by him to the appellee is not the same as that claimed by her and described in her pleadings.

In the deed to Capt. Lurty's grantors (Newman and wife) there is a statement which shows that the boundary conveyed did or might conflict with other titles. Capt. Lurty may have had this in mind when he referred to the interlocks in his letter; but whatever may have been his view as to the number of acres in the boundary, including the interlocks, it clearly appears that the land which he conveyed and intended to convey to the appellee was the land acquired from Newman and wife, and known as St. Maur.

The remaining question to be considered is whether or not the loss or destruction of the deed from Capt. Lurty to the appellee was satisfactorily shown.

There is no direct evidence that the deed was lost or destroyed. The appellee was an incompetent witness. There is nothing in the record to suggest that she could have any object in secreting or destroying it, or in having a deed conveying different land or a greater interest set up in its place. The deed, as clearly appears from the letters of Capt. Lurty, who was a lawyer, was a conveyance of the whole of the land known as St. Maur, in fee simple. In one of his letters he writes: "By this time I hope you are reading your deed of my gift to your manor, absolutely your own. No partners, no joint owners, nor survivors; a great mountain range, with none to divide or interfere. \* \* \* It is yours without let or hindrance. \* \* \* You have as good a deed as the mind of man ever devised." In another, referring to the character of the gift, he writes: "It is 'the manor of St. Maur, not a mere promise, but a full and complete deed in every particular. \* \* \*'"

Generally the loss of an instrument can only be established by circumstantial evidence. Where the existence and contents of an alleged lost paper have been clearly proved, and there is nothing in the facts and circumstances of the case to suggest that the



party seeking to have it set up could have any motive or object in alleging its loss, the same high degree of proof as to its loss ought not to be required as where this is not the case. The degree of proof of the loss depends upon the circumstances of the particular case, and the rule should be so applied as to promote the ends of justice and carefully guard against fraud and imposition. The rule only requires that its loss shall be established with reasonable certainty in a case like this.

The facts and circumstances relied on in this case to show the loss of the deed relate to or grow out of the unhappy differences which existed between Capt. Lurty and his wife during the last two years of his life, during which time the appellant was his housekeeper and nurse, and his wife, for causes real or imaginary, refused to reside with him. It would serve no good purpose to discuss in detail these facts and circumstances; but it is sufficient to say that it is impossible to read the record in the case without being fully convinced, not only that the deed sought to be set up was executed and delivered by Capt. Lurty to the appellee, conveying the land claimed by her and described in her bill, but that the deed had been lost or destroyed.

We are of opinion, therefore, that there is no error in the decree complained of, and that it should be affirmed.

Affirmed.

#### REED et al. v. REED et al.

(Supreme Court of Appeals of Virginia. Nov 19, 1908.)

#### 1. CONTRACTS (§ 92\*)—PARTIES—MENTAL CAPACITY—SUFFICIENCY.

One who had been discharged from an insane asylum as "improved," and who thereafter between insane intervals, lasting from two days to two weeks, was quiet and inoffensive, and worked with efficiency, read, voted, and was regarded as having sufficient mental capacity to deed, had sufficient capacity during a lucid interval to contract with his sister to give her his property in consideration of care for him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 413; Dec. Dig. § 92.\*]

#### 2. FRAUDS, STATUTE OF (§ 125\*) — PAROL AGREEMENT TO CONVEY—CERTAINTY.

An agreement by decedent that he would give his sister all his property, excepting certain bonds, if she would provide him a home for life and care for him, and if he should not be returned to an insane asylum, was sufficiently definite, within the rule that parol agreements to sell land and can only be enforced when definite.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 276; Dec. Dig. § 125.\*]

#### 3. FRAUDS, STATUTE OF (§ 129\*) — PAROL AGREEMENT TO CONVEY—EVIDENCE—SUFFICIENCY.

Evidence held to show that defendant's acts in caring for decedent were done pursuant to decedent's parol agreement to give her his prop-

erty, within the rule governing enforcement of parol agreements to sell land.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287, 289; Dec. Dig. § 129.\*]

#### 4. FRAUDS, STATUTE OF (§ 129\*) — PAROL AGREEMENT TO CONVEY—EQUITIES.

Evidence held to show that decedent's parol agreement to give his property to his sister in consideration of his care had been so far executed by her that a refusal of full execution would operate a fraud upon her.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287, 289; Dec. Dig. § 129.\*]

Appeal from Circuit Court, Rockbridge County.

Bill by J. H. Reed and others against Indiana Reed and another. From a decree for defendant Indiana Reed on her cross-bill, complainants appeal. Affirmed.

Timberlake & Nelson, for appellants. Moore & Moore and Greenlee D. Letcher, for appellees.

KEITH, P. J. H. Reed and others, claiming to be heirs at law of Alexander Reed, deceased, filed their bill in the circuit court of Rockbridge county, in which they state that Alexander Reed died seised and possessed of sundry personal and real estate. The real estate consisted of an undivided five-eighths interest in a tract of land containing about 85 acres, the other three-eighths interest being owned by his sister, Indiana Reed, and the personal estate amounted to \$373.29. The object of the bill was to have a partition of the real estate and a distribution of the personal estate among those entitled thereto. Indiana Reed, a sister of Alexander Reed, and Thomas A. Sterrett, his administrator, were made parties defendant.

Indiana Reed filed an answer and cross-bill, in which she states that her brother, Alexander, was in April, 1885, adjudged a lunatic and admitted to the lunatic asylum at Staunton, Va.; that he soon recovered his mind, and wrote to her most earnest letters, and made urgent appeals to her and to his brothers to get him released, that he was in a most distressed condition by reason of his surroundings; that respondent went to see him, and he renewed his appeals in person, and agreed that if she would get him out of the asylum, take him home with her, furnish him a living the rest of his life, and take care of him, he would give her all of his property, real and personal; that she finally agreed to accept his offer, and in company with her brother Hezekiah went to Staunton, and brought her brother Alexander home with her; that upon his return he was overjoyed, saying that he believed he would have died, had he remained longer at the asylum, and repeated the bargain which he had theretofore made, and she agreed with him that she would never let him be taken back, and

would take care of him the remainder of his life; that she would not have made this agreement under any circumstances with a stranger, as she did not consider all the property he had, real and personal, in any way equivalent in value to the trouble and care that his condition promised to impose upon her, but as a sister she with pleasure agreed to and accepted the proposition made by her brother, and from that day to the day of his death she faithfully carried out the same, giving him every attention and furnishing him every comfort that her humble means and the property received from him permitted. The answer further avers that, after she had acquired title to the real and personal property of Alexander Reed, she fully carried out and performed said agreement on her part, and held full, entire, and exclusive possession of the property, real and personal, in all respects as her own, and the same was thereafter regarded as hers by Alexander Reed and all cognizant of the facts; that, being hers, she repaired the house and the outhouses, barn, and stable, and made various new and permanent improvements, both to the buildings, fences, and the land, and did and caused to be done a great amount of advantageously directed and beneficial labor thereon, in which improvements the little work done by Alexander Reed was not effective and contributed little, if anything.

The cross-bill avers that the contract was made between respondent and her brother when he was clothed in his right reason and in law able and competent to contract, and when he thoroughly understood the nature of the contract and its effect. The cross-bill then goes on to detail with much particularity the services rendered by respondent to her brother, his frequent attacks of insanity, when he would have to be chained to the floor to prevent his doing injury to himself and others; the watchful care with which she soothed him during the night, going scores of times to talk with him, adjust his bedclothing, and render to him the unremitting attention which would be required by a child. These attacks would last sometimes for days, weeks, and even months, after which he would recover his mind, and for intervals of longer or shorter duration be perfectly sane.

The plaintiffs answered this cross-bill, and by their answer put all of its material allegations in issue. The case was referred to a commissioner, to ascertain what personal property Alexander Reed died possessed of and its value; what real estate he died possessed of and its value; what contract was made between Alexander Reed and Indiana Reed, and whether the same was legal and enforceable, and the value of her services; and a statement of the property taken by Thos. A. Sterrett, administrator, and the proceeds therefrom, to whom it belonged,

and the proper distribution of said proceeds and the costs.

In answer to these interrogatories, the commissioner made an excellent report, in which the facts are stated so clearly that we cannot do better than to reproduce it in substance.

Dealing first with the mental capacity of Alexander Reed to make the contract, the report states that Alexander Reed had been dangerously insane when committed to the asylum in April, 1885; that he was discharged as "improved" in December of that year and that during all the rest of his life he was subject to frequent epileptic fits of more or less severity; that these attacks would last from two or three days to sometimes as long as two weeks. He seemed during the intervals between the insane spells to have been quiet and inoffensive, to have worked about the farm with a considerable degree of regularity and efficiency, to have gone to the post office and blacksmith shop, and to have been fond of reading and interested in religious and political questions; that he voted regularly, without his vote ever being challenged, although he voted at a close precinct; that he was regarded as having sufficient mental capacity to make a deed, he together with Indiana Reed and James H. Reed and wife having made a deed to Mary Hunter Reed on February 16, 1892, conveying to said grantee his interest in a tract of 68 acres and 5 poles which was inherited from his father; that a number of witnesses, who knew him well and were in the habit of working with him, testified that during the intervals between these insane spells his mind was all right and he knew what he was doing.

From this evidence the commissioner deduced the conclusion that a man who could perform the ordinary duties of life would be capable, during the periods when he was free from insanity, of making a contract involving the disposition of his property.

The commissioner then proceeds to inquire whether or not the contract made with his sister was such as to remove the case from the operation of the statute of frauds, referring to *Wright v. Pucket*, 22 Grat. 370, and *Plunkett v. Bryant*, 101 Va. 818, 45 S. E. 742, where the principles upon which a court of equity will enforce a parol agreement for the sale of land are stated as follows:

"(1) The parol agreement relied on must be certain and definite in its terms.

"(2) The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved.

"(3) The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation."

We will not follow the commissioner in his criticism of the evidence of the several witnesses examined. It seems to us that the

conclusion reached is supported by the testimony, and that a certain and definite contract has been proved in this case. No contract could be more precise and definite in its terms than that which is stated in the cross-bill. The claim of appellee is that her brother, in order to secure his release from the asylum and a home in which to live in comfort, proposed that he should give to her all of his property of every description, real and personal, upon the consideration that she would provide him with a home during his life, provide and care for him, and that he should not be returned to the asylum. The cross-bill states, it is true, that certain bonds due to Alexander Reed were excepted from this agreement; but that circumstance does not, we think, affect the certainty of the contract. It only diminishes the consideration which he was to pay for the services which were to be rendered to him.

Referring to the second principle upon which a parol agreement for the sale of land will be enforced—that the acts proved in part performance must be in pursuance of the agreement proved—the report states that the only reasonable explanation that can be made of the sister's taking the brother from the asylum and keeping him at home is that she did it at his request and pursuant to some agreement made with him; that it is hardly conceivable that she would as a mere volunteer assume the burden and danger of caring for a man, even though her brother, who was subject to such horrible and dangerous spells of insanity as this man had; but that she was inspired to a large degree by her sisterly affection for her brother in the care that she gave him, as the little property he had was very poor compensation for the services rendered to him. The commissioner concludes, therefore, upon the evidence, that the acts proved were done in pursuance of the agreement which had been entered into.

Coming, then, to the third requirement—that the refusal of full execution would operate a fraud upon the party and place her in a situation which does not lie in compensation—the report shows that Miss Indiana Reed, who is now quite an old woman, has spent 16½ years of her life in caring for her afflicted brother; that he had insane spells several times during a year, which would sometimes last for several weeks; that he would have to be handcuffed and chained to the floor, and his condition was at such times horrible and repulsive, and the entire burden of feeding, washing, and caring for him fell upon his sister; that none of his other relatives except his brother H. J. Reed, who died some time prior to Alexander, gave her any assistance in caring for him during these spells. The report states that it was claimed by defendants' counsel that Alexander Reed was an industrious and efficient laborer on the farm, and that his labor was worth the care and attention be-

stowed upon him; but the commissioner was of opinion that it was immaterial whether he was an efficient or an inefficient laborer, as what he could have done during his lucid intervals would have been insufficient compensation for the care rendered to him during his insane spells.

The conclusion of the commissioner is that the contract between the parties has been proven with certainty, and that it should be enforced, those who are resisting its enforcement having stood by for more than 16 years without raising a finger to aid this sister, who has borne the whole burden and danger of caring for her afflicted brother, and, finally, that they are not hurt by its enforcement, for if he had been allowed to remain in the hospital all of it would have fallen far short of paying his expenses, and there would have been nothing left for his relatives.

We think the evidence fully sustains the conclusions of the commissioner.

In addition to the authorities already cited of *Wright v. Pucket* and *Plunkett v. Bryant*, we refer to *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490: "Where, in a parol agreement for the purchase of real estate, the consideration consists of services to be rendered which are of such a peculiar character that it is impossible to estimate the value to the vendor by a pecuniary standard, and neither party intended so to measure them, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol."

In *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279, it was held: "In general, the payment of the consideration is not such a part performance of a parol agreement for the purchase of lands as will relieve it from the operation of the statute of frauds; but where the consideration consists of services to be rendered which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend to measure them by such a standard, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol. This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family agreed to provide for and take care of the other—who had no family, and who was subject to epileptic fits—during his life, in consideration that the former should have all the real and personal estate of the latter. Held, also, that the contract was so far certain and reasonable in its terms that it ought to be enforced in equity."

The doctrine of that case is cited with approval by *Pomeroy* in his work on *Contracts* (page 181), where he says that the principle of the case is sound, and further says: "But if the services are of such a

peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages. Under these circumstances the rendition of the services, or the procuring them to be rendered, is a part performance of the verbal agreement, and the case is quite analogous to those in which outlays are made for improvements by a vendee or lessee under a parol contract."

In *Svanburg v. Fosseen*, supra, Mitchell, J., concurring, said: "I think the case is taken out of the statute of frauds by the fact that the consideration which plaintiff has furnished consisted not merely of services in the ordinary sense of the word, but also of the assumption of a peculiar personal and domestic relation to the deceased as a member of their family, and therefore the value of the consideration as a whole is incapable of being estimated by any mere pecuniary standard."

The commissioner's report is fully sustained by the evidence, and upon the whole case we are of opinion that it should be affirmed. Affirmed.

#### SEAL v. VIRGINIA PORTLAND CEMENT CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

##### 1. PLEADING (§ 53\*)—REPUGNANT COUNTS.

A declaration for personal injury to an employé is not defective because one count charges that defendant promised to remedy the defect causing the injury and another charged that defendant assured plaintiff that there was no danger and directed him to continue the work, as a plaintiff can present his case with such variation of statement as he thinks necessary to meet every possible phase of the testimony.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 114, 116; Dec. Dig. § 53.\*]

##### 2. MASTER AND SERVANT (§ 256\*)—INJURY TO EMPLOYÉ—PLEADING—SUFFICIENCY.

A declaration for injury to an employé is sufficient, where it shows the relation between the parties, defendant's duty to plaintiff, defendant's failure to discharge that duty, and resulting injury, and states such facts as would enable the court to say on their proof that they established a good cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 809-843; Dec. Dig. § 256.\*]

##### 3. PLEADING (§ 204\*)—DEFECTIVE COUNT—EFFECT.

That one of several counts is defective does not warrant a demurrer to the whole declaration and dismissal of the action.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 204.\*]

##### 4. MASTER AND SERVANT (§ 258\*)—INJURY TO EMPLOYÉ—PLEADING—SUFFICIENCY.

A declaration for injury to an employé is sufficient, though it does not expressly state that

the injury was due to defendant's negligence, where the manner in which the negligent acts caused the injury are set out with sufficient clearness to enable defendant to understand the case made and to know what he must meet.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

Error to Circuit Court, Augusta County.

Personal injury action by L. H. Seal against the Virginia Portland Cement Company. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Reversed and remanded.

Charles & Duncan Curry and Timberlake & Nelson, for plaintiff in error. Patrick & Gordon, for defendant in error.

HARRISON, J. In this case the plaintiff has set forth his cause of action in a declaration containing three counts. The defendant company demurred to the declaration and to each count thereof, and the circuit court sustained the demurrer, upon the ground that the second count was repugnant to the first and third counts, and dismissed the case.

This was manifest error. The alleged repugnancy consisted in the statement in the first and third counts that the defendant, after its attention was called to the danger, promised to remedy it, and the statement in the second count that it assured the plaintiff that there was no danger and directed him to continue the work. Had these two allegations appeared in one and the same count, as occurring at one time, they would have been inconsistent and repugnant. Each count, however, is a separate declaration, and the plaintiff has the right to present his case with such variation of statement as he thinks necessary to meet every possible phase of the testimony. This is one of the objects and purposes of adding several counts, so that, if the plaintiff fails in the proof on one count, he may succeed in another and thereby prevent a fatal variance. *B. & O. R. Co. v. Whittington's Adm'r*, 30 Grat. 805, 811; *New River M. Co. v. Painter*, 100 Va. 507, 510, 42 S. E. 300; *Barton's Law Pr.* vol. 1, p. 300.

It is the universal practice in this state, in tort cases, for the plaintiff to present his case in different counts, varying his statements in each count to meet the different phases of the testimony at the trial; and the action of the circuit court in sustaining the demurrer to the declaration, upon the ground of repugnancy between the counts, was contrary to this general practice and to the decisions of this court.

The contention that the plaintiff has not stated his cause of action with sufficient particularity cannot be sustained. The declaration, and each count thereof, shows the relation between the plaintiff and the defendant, the duty of the defendant to the plaintiff, the failure of the defendant to dis-

charge that duty, and the resulting injury to the plaintiff. The declaration clearly informs the defendant of the nature of the demand against it, and states such facts as would enable the court to say, if the facts were proven as alleged, that they established a good cause of action. Under such circumstances the cause of action is stated with sufficient particularity. *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Wheel Co. v. Harris*, 103 Va. 712, 49 S. E. 991; *Lane Bros. v. Seakford*, 106 Va. 98, 55 S. E. 556; *Lynchburg Traction Co. v. Gull*, 107 Va. 86, 57 S. E. 644.

The contention that the allegations of duty are so blended in the declaration as to make it bad on demurrer is without merit, and need not be discussed.

It is further insisted by the defendant in error that on the case stated in the declaration the plaintiff assumed the risk incident to the work and therefore cannot recover.

The only suggestion in support of this contention, necessary to be noticed, is that the first and third counts each allege that the accident occurred after a reasonable time had elapsed for changing the alleged dangerous method of doing the work. The first count is not amenable to this objection. The third count does say that the accident occurred after the defendant had had a reasonable time to make the change in question. The contention is that, as soon as the period contemplated for the removal of the dangerous condition has terminated, the servant's position is precisely what it would have been if no promise to remedy the dangerous method had been given; in other words, that the plaintiff reassumed the risk. Conceding this to be true, and that the third count was defective in the particular pointed out, it was not ground for sustaining the demurrer to the whole declaration and dismissing the action. The plaintiff should have been afforded an opportunity to amend the third count, if so advised; otherwise, to proceed to trial upon the first and second counts.

Finally, it is insisted that the declaration does not attribute the injury to the defendant's negligence.

It is true that the declaration does not state, in so many words, that the injury was due to the negligence of the defendant; but the manner in which the alleged acts of negligence caused the injury are set out with sufficient fullness and clearness to enable the defendant to understand the case made, and to know what he is to meet. This is all that is required. *Dingee v. Unrue*, 98 Va. 247, 35 S. E. 794.

For these reasons, the judgment complained of must be reversed and the case remanded to the circuit court, with leave to the plaintiff to amend the third count of his declaration, and for further proceedings.

Reversed.

**CHESAPEAKE & O. RY. CO. v. WILLIAMS.**  
(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. APPEAL AND ERROR (§ 999\*)—VERDICT—CONCLUSIVENESS.**

The jury being the judges of the weight and credibility of the evidence, the Supreme Court of Appeals will not disturb a verdict unless satisfied that the evidence is plainly insufficient to sustain it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3912; Dec. Dig. § 999.\*]

**2. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.**

Where, on a question of negligence, the evidence is such that reasonable men may fairly differ as to whether there was such negligence or not, the verdict will not be disturbed by the Supreme Court of Appeals.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Error to Circuit Court, Alleghany County.

Action by C. M. Williams against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Robert L. Parrish, for plaintiff in error.  
William E. Allen and Charles & Duncan Curry, for defendant in error.

**HARRISON, J.** In this case, the plaintiff, an employé of the Chesapeake & Ohio Railway Company, has recovered a verdict and judgment for \$8,000 damages for an injury alleged to have been caused by the negligence of the defendant company. We are asked to set aside this judgment and grant a new trial upon the ground that the verdict of the jury is not sustained by the evidence.

The jury is the judge of the weight and credit to be attached to the evidence, and for this reason it has always been regarded as a delicate matter for the court to interfere with their verdict. According to the practice of this court, established by a long line of decisions, it has no power to disturb the verdict of a jury, unless satisfied that the evidence is plainly insufficient to sustain it. *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *So. Ry. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183; *Blosser v. Harshbarger*, 21 Grat. 214.

In the last-named case it is said: "A new trial, asked on the ground that the verdict is contrary to the evidence, ought to be granted only in a case of plain deviation from right and justice—not in a doubtful case, merely because the court, if on the jury, would have given a different verdict. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved."

The opinion of the court which tried the cause, on such a point, is entitled to peculiar

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lar respect in an appellate court. Brugh v. Shanks, 5 Leigh, 598.

This court has repeatedly held that the verdict of a jury on a question of negligence will not be disturbed, where the evidence is such that reasonable men might fairly differ as to whether there was such negligence or not. Carrington v. Ficklin, 32 Grat. 670; Marshall v. Valley R. Co., 99 Va. 798, 34 S. E. 455; Danville v. Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162; Bass v. Norfolk Ry. Co., 100 Va. 2, 40 S. E. 100; Norton Coal Co. v. Murphy, 108 Va. —, 62 S. E. 268.

The case at bar was fairly submitted to the jury, and we cannot hold that the evidence was plainly insufficient to sustain their verdict.

In the light, therefore, of the authorities cited, the judgment complained of must be affirmed.

Affirmed.

# HOT SPRINGS LUMBER & MFG. CO., Inc., v. STERRETT.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

## 1. FORCIBLE ENTRY AND DETAINER (§ 8\*)— RIGHT OF ACTION—POSSESSION.

Color of title without possession is insufficient to sustain an action of unlawful detainer.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 35; Dec. Dig. § 8.\*]

## 2. TRIAL (§ 156\*)—QUESTIONS OF LAW AND FACT—DEMURRER TO EVIDENCE.

Where plaintiff demurred to the evidence, in which demurrer defendant was required to join, conflicting evidence of the demurrant must be rejected.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354–356; Dec. Dig. § 156.\*]

## 3. ADVERSE POSSESSION (§ 103\*)—COLOR OF TITLE—SEVERANCE OF BOUNDARY.

The rule that a grant from the commonwealth invests the senior patentee with constructive seisin of all land included in the grant until disturbed by actual entry by an adverse claimant, and is then only affected to the extent of dispossession, does not apply to the case of a junior patentee or claimant, where the contiguity of the original boundary had been severed anterior to the acquisition of title or color of title under which he claims, in which case, as to the junior claimant who does not connect his title with that of the original patentee, there is no such contiguity of seisin with respect to the dissevered tracts as would render actual possession of one constructive possession of the other.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590–594; Dec. Dig. § 103.\*]

Error to Circuit Court, Bath County.

Action by the Hot Springs Lumber & Manufacturing Company, Incorporated, against Tate Sterrett. Judgment for defendant for part of the land in controversy, and plaintiff brings error. Affirmed.

McAllister & Nelson and Harmon & Walsh, for plaintiff in error. John W. Stephenson and George A. Rivercomb, for defendant in error.

WHITTLE, J. This action of unlawful detainer was brought by the plaintiff in error, the Hot Springs Lumber & Manufacturing Company, Incorporated, against Tate Sterrett, the defendant in error, to recover possession of 1,000 acres of wild mountain land located in Bath county, adjoining the lands of the defendant. The boundary in controversy is designated "Lot 2" in a survey of 45,000 acres of land patented to Robert Patten in the year 1802, which tract was subsequently subdivided into 45 lots, containing about 1,000 acres each.

After all the evidence had been introduced, the plaintiff demurred to the evidence, in which demurrer the defendant was required to join. Thereupon the jury, by direction of the court, returned a verdict for the defendant for a small parcel of inclosed land, which had been in his possession under claim of title for more than three years prior to the institution of the action, and as to the residue of the tract the verdict was in usual form. To the action of the circuit court overruling the plaintiff's demurrer to the evidence and rendering judgment for the defendant, this writ of error was awarded.

The plaintiff rests its right of recovery on the allegations that it has color of title to lots 2, 3, 4, 5, and 6, which are contiguous, coupled with actual possession of part of lot 6 and acts of ownership over lot 2. The color of title relied on was acquired by virtue of a deed from Achenbach and others to the plaintiff, dated December 31, 1903.

It is not necessary to consider the source of this color of title further, except to remark that no attempt was made to connect it with the commonwealth. For the purposes of this case, resolving all the subordinate propositions in favor of the plaintiff in error, we shall address ourselves to the consideration of the controlling question whether or not the plaintiff has shown possession, actual or constructive, of lot 2; for it is conceded that color of title without possession is insufficient to maintain the action.

To show constructive possession of lot 2, the plaintiff proved that in 1903 its predecessor in title, Achenbach, entered into a written contract with one Rorke, by which the latter, as his tenant, took actual possession of a half acre of lot 6, which he inclosed and cleared, and has cultivated hitherto. Further to maintain the issue on its part, the plaintiff introduced a witness, Williams, deputy surveyor of Bath county, who testified that lots 6 and 2 adjoined.

On the other hand, the evidence of the defendant tended to show that the lands of McAllister, Stonestreet, and Gatewood (whose

titles and possession long antedated the color of title and possession on which the plaintiff relies) wholly separated lot 2 from lot 6.

We have considered the argument of counsel in their attempt to show that there is no conflict of evidence on that vital point; but we are not convinced by it. On the contrary, a careful examination of the evidence shows a distinct and irreconcilable conflict. In this state of the case, upon principles too familiar and well-settled to require reference to authorities, the conflicting evidence of the demurrant must be rejected.

But our attention has been called to the case of *Ilsley v. Wilson*, 42 W. Va. 757, 28 S. E. 551, as authority for the proposition that "when a party holds a large tract of land under patent from the state, which tract is divided by a line of narrow surveys running across it, held by junior patentees, who have acquired good title to said narrow surveys, and the holder of the senior patent takes possession of the land within the bounds of his patent on the east side of said line of narrow surveys, such possession will not be limited by the boundaries of said narrow surveys, but will extend to the exterior bounds of his patent on the west side of said narrow surveys."

We have no occasion to quarrel with the doctrine of that case. It proceeds on the principle that the effect of a grant from the commonwealth is to invest the senior patentee with constructive seisin of all land included in the grant; and such seisin continues until disturbed by actual entry of an adverse claimant, and is then affected only to the extent to which the first patentee may be dispossessed by the junior claimant. 2 Min. Inst. (2d Ed.) pp. 506, 507. But the principle obviously has no application to the case of a junior patentee or claimant where the contiguity of the original boundary had been severed anterior to the acquisition of the title, or color of title, under which he claims. In such case it would seem clear that quoad the junior claimant, who does not connect his title with that of the original patentee, there is no such contiguity of seisin with respect to the dissevered tracts as would render actual possession of one constructive possession of the other.

We find no reversible error in the judgment of the circuit court, and it must be affirmed. Affirmed.

**TAYLOR v. BALTIMORE & O. R. CO.**  
(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

A plaintiff, not entitled to recover in any view of the case, is not prejudiced by an erroneous instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. § 1068.\*]

**2. MASTER AND SERVANT (§ 268\*)—INJURY TO SERVANT—RELATION OF MASTER AND SERVANT—EVIDENCE.**

Where, in an action against a railway company for injuries to one employed by a freight conductor to help unload cars, it appeared that the rules of the company denied to its freight conductors the power to employ help, evidence of the custom of other railroads as to the authority of freight conductors in such cases was inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 268.\*]

**3. MASTER AND SERVANT (§ 277\*)—INJURY TO SERVANT—RELATION OF MASTER AND SERVANT—EVIDENCE.**

Where, in an action against a railway company for injuries to one employed by a freight conductor to assist in unloading a car, an express grant of the power of the conductor to employ help was disproved, and the employment from necessity was neither averred nor proved, there could be no recovery on the ground of the existence of the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.\*]

**4. RAILROADS (§ 17\*)—AUTHORITY OF SERVANT—POWER OF RAILROAD CONDUCTORS.**

The authority of a railroad conductor extends, ordinarily, to the control of the movements of his train and of the employees engaged in operating it; but his authority does not, ordinarily, extend to the making of contracts on behalf of the company, except in cases of urgent emergency.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 37; Dec. Dig. § 17.\*]

**5. MASTER AND SERVANT (§ 1\*)—EXISTENCE OF RELATION—VOLUNTEER.**

A volunteer cannot charge a railroad with the duty of an employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 1.\*]

**6. MASTER AND SERVANT (§ 1\*)—EXISTENCE OF RELATION.**

Where a freight conductor called to a third person to assist him in unloading cars at a station, because his train was late and his men were out of place, and the third person complied with the request, the existence of the relation of master and servant did not exist between the railroad company and the third person; the third person performing the work without either promise or expectation of reward.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 1.\*]

Error from Circuit Court, Rockbridge County.

Action by W. O. Taylor against the Baltimore & Ohio Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Glasgow & White, for plaintiff in error. Bumgardner & Bumgardner, for defendant in error.

**WHITTLE, J.** The plaintiff gives substantially the following version of the happening of the accident which caused the injury for which he demands damages: As he was passing a freight train of the defendant in error, unloading freight from a siding into its warehouse at East Lexington, the conductor called out to him: "Jump up here, Bill, and help me check this out. I am late, and my men

are out of place." He complied with the request, and in pushing a truck across the gang-plank from the door of the wareroom to the door of the car for the first load the gang-plank tilted, precipitating him to the ground, a distance of several feet, and the heavy truck, falling upon his hand, cut it off. He ascribes the accident to the circumstances that the door of the car was not precisely opposite the wareroom door and that the sill of the latter was worn from use and uneven. He moreover insists that by reason of what passed between him and the conductor the relation of master and servant was established, and the master was guilty of actionable negligence in failing to exercise ordinary care to provide him with a reasonably safe place in which to work.

The declaration avers that the conductor had authority to engage the services of the plaintiff for the purpose indicated, and that the plaintiff, for the benefit of the defendant, "as a matter of accommodation," complied with the request.

The trial court instructed the jury that under the allegations of the declaration and proof the plaintiff was a mere volunteer and that the defendant owed him no other duty than that of not inflicting willful injury upon him.

There was a verdict and judgment for the defendant, which judgment we are called on to review.

The pivotal question in the case, therefore, is: Did the relation of master and servant exist between the parties? If that question is to be answered in the negative, it matters not that the circuit court practically directed a verdict for the defendant (which it is conceded is not in accordance with the accepted practice in this state); for it is the well-settled rule of this court that, where it appears that the plaintiff is not entitled to recover in any view of the case, he cannot have been prejudiced by an erroneous instruction. *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307; *Moore v. B. & O. R. Co.*, 103 Va. 189, 48 S. E. 887; *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89; *Hanger v. Com'th*, 107 Va. 872, 60 S. E. 67.

On the trial the book of rules of the company was introduced by the plaintiff, and it showed that freight conductors had no express authority to employ servants. The testimony of the superintendent of that division of the road also showed affirmatively that the conductor possessed no such authority.

In this connection it may be remarked that the court did not err in excluding evidence of the general rule and custom of railroads with regard to the authority of freight conductors, in their discretion, to employ help. The rule of this company denied that authority to its freight conductors, and hence it could not be bound by proof of the existence of a contrary custom among other rail-

roads. It is true that such authority may arise either from express delegation or, by implication, from necessity; but in this instance, as we have seen, an express grant of authority is disproved, and agency from necessity is neither averred nor shown.

In *Elliott on Railroads* the author says: "The authority of the conductor ordinarily extends to the control of the movements of his train, and to the immediate direction of the movements of the employes engaged in operating the train. \* \* \* His authority does not, ordinarily, extend to making contracts on behalf of the company; but there may be cases of urgent emergency where he may make a contract for the company. He is to administer the rules of the company, rather than make contracts for it. \* \* \* The conductor has no general authority to make contracts on behalf of the company; but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties." 1 *Elliott on Railroads* (2d Ed.) § 302.

The same author, on the subject of "Volunteers," declares that "the overwhelming weight of authority sustains the doctrine that a volunteer cannot charge a railroad with the duty of an employer." 3 *Elliott on Railroads* (2d Ed.) § 1305.

In the case of *Vassor v. A. C. L. R. Co.*, 142 N. C. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, the Supreme Court of North Carolina, in an able opinion abundantly sustained by authority, holds that where the "plaintiff boarded the defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train, and the conductor replied that he could, and that he was to help unload and load freight, and plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter, held, the conductor had no authority to employ the plaintiff as a servant, or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty of a passenger nor employe."

So, in *Railway Co. v. Propst*, 85 Ala. 203, 4 South. 711, where the conductor requested the plaintiff, a passenger, to assist in coupling a car, accosting him thus, "Will, come here and make this coupling for me," the court said: "Such order or direction, as averred, is entirely without the routine of the conductor's duties, and could not, by its abuse, fasten a liability on the railroad corporation. \* \* \* More is essential than a mere order or request to couple cars at one time and place, or doing a single act, to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature."

Our attention has been called to other authorities of like import, but those to which



we have referred sufficiently illustrate the principle under consideration.

We are satisfied, from the pleading and evidence, not only that the freight conductor had no authority to create the relation of master and servant between the company and the plaintiff, but also that he had no intention of establishing any contractual relations between them. On the contrary, it is obvious that what occurred amounted merely to a request by the conductor of an acquaintance to perform a casual service for his accommodation, which was responded to in the same spirit of good fellowship, without either promise or expectation of reward.

There are additional grounds of objection suggested, which render the plaintiff's right to a recovery extremely doubtful; but the view already presented is conclusive of the case, and renders the discussion of other questions unnecessary.

We find no reversible error in the record, and the judgment must be affirmed.

Affirmed.

#### MARTIN v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

##### 1. JUSTICES OF THE PEACE (§ 31\*)—JURISDICTION—STATUTES.

Jurisdiction of a justice of the peace is statutory only.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 71; Dec. Dig. § 31.\*]

##### 2. PROHIBITION (§ 10\*)—GROUNDS—EXCESS OF JURISDICTION.

Prohibition lies to prevent a justice of the peace from exceeding his jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-39; Dec. Dig. § 10.\*]

##### 3. JUSTICES OF THE PEACE (§ 36\*)—JURISDICTION—TITLE TO REALTY.

A justice of the peace cannot try actions involving title to realty, though the actions are otherwise within his jurisdiction; and his jurisdiction to impose a fine for digging up a street in violation of an ordinance is ousted on defendant setting up a fee-simple ownership of the land on which the digging occurred.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83-96; Dec. Dig. § 36.\*]

##### 4. PROHIBITION (§ 5\*)—JURISDICTION—OTHER REMEDY.

Where a police justice has no jurisdiction to impose a fine for digging up a street, defendant setting up a fee-simple ownership therein, prohibition will lie to the justice, though there is a right of appeal to defendant, where the appeal is to the hustings court of the city, which also is without jurisdiction to try controversies involving title to realty.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 5.\*]

##### 5. PROHIBITION (§ 10\*)—GROUNDS—EXCESS OF JURISDICTION.

Prohibition lies to restrain the police justice of a city from proceeding with a prosecution of defendant for digging up a street in violation of an ordinance after defendant set up a

fee-simple ownership of the land where the digging occurred.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-39; Dec. Dig. § 10.\*]

Buchanan, J., dissenting.

Appeal from Chancery Court of Richmond.

Application for writ of prohibition by J. Henry Martin against the city of Richmond to prevent the police justice from taking further cognizance of a prosecution for a violation of a municipal ordinance. There was a judgment denying the writ, and plaintiff appeals. Reversed and rendered.

Robert H. Talley, for appellant. H. R. Pollard, for appellee.

CARDWELL, J. J. Henry Martin was summoned to appear before the police justice of the city of Richmond on the 18th day of May, 1907, to show cause, if any he could, why a fine of \$20 should not be imposed on him for violation of an ordinance of the city by "digging up the street near Main and Elm streets" without a permit.

The section of the city's ordinance alleged to have been violated is as follows:

"18. No person shall break or dig up, or assist in breaking or digging up, any part of any street, sidewalk, or alley, or remove any gravel, dirt or manure therefrom, without having first obtained the written permission of the committee on streets or the engineer of the city. \* \* \*

"Any person failing to comply with this section shall be reported to the police justice by the city engineer and officers of the police force, and shall be liable to a penalty of not less than ten nor more than one hundred dollars," etc.

On the return day of the summons Martin appeared and moved the court to dismiss the summons on the ground that the location, at which, as alleged, he had dug up a street, was not "a street, sidewalk, or alley," but was owned by him in fee simple and in his occupancy, under and by virtue of a deed of conveyance to him which included the location in question, and which deed, having been duly recorded, he then and there exhibited to the court; that he claimed to own the land upon which he had dug and removed gravel by bona fide title under and by virtue of his said deed; and that the city of Richmond had no manner of title to or interest in the same.

The city denied the right of Martin to the property and asserted its right thereto. Thereupon Martin again moved to be discharged, and the summons against him dismissed, because, the title to the property having been drawn in question, the police court was without jurisdiction to try and determine the controversy; in other words, that the police justice was without jurisdiction to try and determine a controversy involving the title to real estate, such as had thus arisen.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The police justice refused to dismiss the summons against Martin and discharge him from custody, whereupon Martin preferred a petition to the chancery court of the city of Richmond, praying a writ of prohibition to prevent the police justice from taking further cognizance of the prosecution against him.

The city answered the petition, admitting, among other things, that petitioner's claim to the property involved was made in good faith, but denied that the making of such claim and the raising of the question of title to the property operated to oust the police justice of jurisdiction over the prosecution asked to be prohibited, claiming title to the property in dispute as a highway, both by conveyance and dedication, and relied upon certain sections of the charter and ordinances of the city, and of the Constitution of the state for the proposition that as the provisions of the charter, enacted in pursuance of authority of the Constitution, reserved to every one prosecuted for a violation of the ordinances of the city an appeal from any fine or imprisonment imposed upon him, the jurisdiction of the police justice to try and determine this controversy is not ousted by the fact that the title to real estate, though bona fide made, is drawn in question.

The answer of the city was adopted by the police justice as his own, and Martin demurred to said answers, which demurrers were overruled; the chancery court being of opinion that the police justice had jurisdiction, notwithstanding the fact that the title to real estate was directly and necessarily involved, and denied the writ of prohibition prayed for.

The writ of error awarded by this court to the judgment of the court below presents for consideration the single question whether or not the jurisdiction of the police justice to try and determine the prosecution against plaintiff in error was ousted by his having in good faith made claim to the property in dispute.

We do not deem it necessary to review the ordinances cited and relied on by the learned attorney for the city. It may be conceded that they are constitutional and valid, but not one of them confers in terms any authority upon the police justice, or any other justice of the peace of the city, authority to try and determine a case such as the one under consideration; nor is there to be found in the Constitution or the statutes of the state or the charter of the city any such express authority to a justice of the peace or a police justice.

As said by this court in *James v. Stokes*, 77 Va. 225, the jurisdiction of a justice "is given by law alone, and is, in every case, what the law affixes it at. \* \* \* In the history of the state the efforts of the justice to extend his jurisdiction beyond the limits prescribed by law have been checked by the

mandate of the higher courts in the form of the writ of prohibition."

24 Cyc., at page 440, states the civil jurisdiction of the justices of the peace to be of purely statutory origin, and that the statutes conferring jurisdiction will not be aided or extended by inference or implication beyond their express terms.

The same authority, at pages 450, 451, and also 18 A. & E. Enc. L. p. 24, may be cited for the proposition that justices of the peace have no jurisdiction of actions in which the title to real property is involved. In support of that broad statement of the law a large number of decided cases are cited, among which is *Warwick & Barksdale v. Mayo*, 15 Grat. 528.

In *Warwick & Barksdale v. Mayo* the precise question was involved that we are here considering, and it was the unanimous judgment of the court that in such a case, if the claim to the property in dispute is bona fide made by the defendant, "the jurisdiction of the mayor or justice is ousted. He cannot inquire into the validity of the claim, and he has no power in such case to proceed to summary conviction. This principle applies as well to the case where an incorporeal hereditament or real franchise is claimed or resisted as to a controversy touching the freehold itself."

The opinion in that case, in which all the judges sitting concurred, was by that learned jurist and president of the court, Judge Allen, and we quote the following from the opinion as conclusive of the question there involved:

"In Virginia it is not pretended that justices of the peace or officers of corporations have ever been empowered by any statute to try, without writ, titles to land in civil causes. The eleventh article of the Bill of Rights declares that in controversies respecting property, and in suits between man and man, the ancient trial by jury of 12 men is preferable to any other, and ought to be held sacred.

"Though this provision may not amount to a positive restriction upon the power of the Legislature in reference to all controversies respecting property of every kind and suits between man and man, no matter what may be the amount in dispute, it is nevertheless the provision which should always be kept in mind in construing the acts of the Legislature; and we are not warranted in giving such an interpretation to their acts as to impute to the Legislature the intention of setting aside this article by mere implication. In civil cases we see no such jurisdiction is conferred, and it would be a strained construction which would impute to the Legislature the intention to confer such jurisdiction where officers were invested with power to impose fines and the question arose collaterally. We have, for instance, a provision in the Code, copied from former laws (Code,

p. 450, c. 101, § 2), subjecting a person to a fine of \$3 for each offense of shooting, hunting, etc., within the inclosed bounds of another person, without license from the owner. It would be a forced construction which would authorize the justice, upon complaint for violating this law, to adjudicate upon the question of title. The contrary was held by all the judges in *Queen v. Cridland*, 90 Eng. C. L. R. 853, a proceeding under a statute imposing a fine for committing a trespass by entering on land in search or pursuit of game; all concurring that, where there was a bona fide claim of title set up, the justices have no longer jurisdiction to proceed to a summary conviction. The regard which the Legislature has always had for this right to a freehold is further manifested by provisions contained in the laws regulating appellate jurisdiction, conferring as a general rule such appellate jurisdiction where the title or bounds of land shall be drawn in question. The principle is recognized also in the eleventh section of article 6 of the present Constitution, declaring in what cases appellate jurisdiction may be conferred on this court, and providing that it shall not have jurisdiction in civil causes, where the matter in controversy, exclusive of costs, is less in value or amount than \$500, except in controversies concerning the title or boundaries of land, etc.

"The question has never been presented for adjudication in any case in Virginia, where the justice was exercising the jurisdiction conferred to proceed to a summary conviction. But that a justice of the peace had no jurisdiction to try titles to freehold, or any fee-simple estate or interest in an incorporeal hereditament, was expressly determined in *Miller v. Marshall*, 1 Va. Cas. 158, where a prohibition was awarded to the justice, who was proceeding to try a cause before him for the recovery of a rent reserved by deed to one and his heirs, forever. On this branch of the case I conclude that, whether upon a trial of a civil cause or in the exercise of the general power conferred by statute to proceed to a summary conviction, the justice, mayor, or any such subordinate officer, is bound to dismiss his summons immediately on being convinced that the case involves a bona fide claim of title to real estate, unless the jurisdiction is expressly conferred by statute."

It will be observed that *Miller v. Marshall*, 1 Va. Cas. 158, is cited with approval by Allen, P., where it was expressly determined that a justice of the peace had no jurisdiction to try title to a freehold, or any fee-simple estate or interest in an incorporeal hereditament, and that decision has remained unchallenged for a century. Nor has the decision in *Warwick & Barksdale v. Mayo*, rendered nearly a half century ago, ever been called in question, so far as we are advised.

In the case at bar, while it is admitted in the argument for the city that there was no express authority for the assumption of juris-

isdiction by a justice to try title to land, and that the statutory law in this respect is just as it existed when *Warwick & Barksdale v. Mayo*, supra, was decided, the contention is made that that case is not in point, inasmuch as the absolute right of appeal is now secured to any person convicted of violating the ordinances of the city of Richmond, but when *Warwick & Barksdale v. Mayo* was decided there was no such right of appeal. It is further contended that the case of *Brown v. Epps*, 91 Va. 728, 21 S. E. 119, 27 L. R. A. 676, in effect overruled the decision in *Warwick & Barksdale v. Mayo*.

With respect to the first of these contentions, while the opinion of the court in *Warwick & Barksdale v. Mayo* did mention (but only incidentally as appears to us) the fact that no appeal was allowed by the ordinance under which the mayor was proceeding, stronger language could not have been employed than was employed to point out that, in the absence of a statute expressly conferring such jurisdiction, a justice of the peace, or a mayor having only the power and authority of a justice, is bound to dismiss a case that involves a bona fide claim of title to real estate. The opinion states in so many words that no jurisdiction had been conferred by statute upon justices of the peace to try such cases as the one under consideration, and it would be a strained and unreasonable construction of the opinion to hold that the decision was based upon the lack of the right to an appeal reserved to the defendant. The plain interpretation of the opinion is that a justice can only take such jurisdiction as is expressly conferred on him, and it could not have been meant that the right of appeal would take the place of affirmative legislation conferring jurisdiction to try a case in which the title to real estate was drawn in question.

With respect to the contention that the case of *Brown v. Epps*, supra, in effect overruled the case of *Warwick & Barksdale v. Mayo*, it is to be noted that in the last of these cases decided the police justice did not, as he did in the first, assume or usurp jurisdiction, but jurisdiction was expressly conferred upon him by statute to try and determine the case of the defendant, *Brown*, before him, and the constitutionality of that statute was the question at issue. Not a word of reference to the case of *Warwick & Barksdale v. Mayo* is employed in the opinion by Keith, P., and no expressions are used which could be fairly interpreted as impairing the controlling influence of the decision in *Warwick & Barksdale v. Mayo*. In this case there is no statute, ordinance, or other authority of law authorizing, empowering, or justifying the police justice to try and determine the controversy, involving, as it necessarily does, the title to real estate.

The courts of other states, with practical unanimity, lay down the principle enunciated in our own decisions, supra, that a justice of

the peace cannot try and determine causes which, though otherwise within his jurisdiction, involve the title to real estate.

In addition to the authorities already referred to, see the following: *Campbell v. Potts*, 119 N. C. 530, 26 S. E. 50; *Alleman v. Dey*, 49 Barb. (N. Y.) 641; *Bloom v. Stenner*, 50 N. J. Law, 59, 11 Atl. 131; *Hughes v. Mount*, 23 W. Va. 130; *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939.

While the right of appeal may be clearly reserved to plaintiff in error from a judgment in this prosecution convicting him before the police justice of a misdemeanor, it is worthy of note that the appeal is to the hustings court of the city, a court without jurisdiction to try and determine controversies involving the title to real estate.

The case at bar is not in any material feature differentiated from the case of *Warwick & Barksdale v. Mayo*, supra, and therefore we are of opinion that the chancery court of the city of Richmond erred in not awarding the writ of prohibition, as prayed by plaintiff in error, and its judgment will be reversed; and this court will enter the order that should have been entered by the chancery court, awarding the writ.

Reversed.

BUCHANAN, J. (dissenting). I cannot concur in the opinion of the court in this case. In my judgment the case of *Warwick & Barksdale v. Mayo*, 15 Grat. 523, does not control it. The principle involved in that case is stated by Judge Allen in the opinion of the court (page 537) to be: "Whether the title to lands may in this collateral way be subjected to the jurisdiction of police officers, proceeding without writ, deciding without the intervention of a jury, who holds no court of record, and therefore no record of their proceedings is preserved, and from whose judgment there is no appeal. The recognition of such a jurisdiction might in effect submit the whole beneficial interest in the freehold to the absolute control of such inferior tribunal; for by successive fines the right of the owner might be so impaired as to be of little value."

Upholding the jurisdiction of the mayor in that case would have deprived the claimant of the land of the right of trial by jury, and might in effect, as stated by Judge Allen, have submitted his whole beneficial interest in the freehold to the absolute control of the mayor.

In this case upholding the jurisdiction of the police justice can have no such effect. The claimant of the land has the absolute right of appeal to a court of record, where he has the right of trial by jury; so that none of the objections made to upholding the jurisdiction of the mayor applies to this case, except the fact that the proceeding is "without writ" in the strict sense of that term, but upon notice to show cause why he should

not be fined for violating the ordinance. This objection can have no weight in the decision of this case, if the other objections do not exist. There is no question that the city had the right to pass an ordinance prohibiting any person from digging up its streets, and to impose a penalty for its violation. Neither can there be any question that the Legislature had the power to confer jurisdiction upon the police justice and all other justices to try any person charged with any offense not punishable with death or confinement in the penitentiary, provided the right of appeal was secured to the accused. Article 2, § 8, Const. 1902 (Va. Code 1904, p. cclix).

Neither, in my judgment, is there any doubt that it has conferred upon the police justice the right to try persons for violating the ordinances of the city, although there may be involved incidentally the right to the freehold of land.

By section 105 of the city charter it is provided "that the jurisdiction of the court [justice] shall extend to all cases arising within the jurisdictional limits of the city, of which a justice of the peace may take cognizance under the laws of the State, and to all cases arising under the charter or ordinances of the city."

There is no exception made in the section, limiting the police justice's jurisdiction to cases not involving the title to freehold in lands. His jurisdiction is expressly declared to "extend to all cases" of the character mentioned.

As was said by Judge Moncure in *Moore v. Va., etc., Ins. Co.*, 28 Grat. 508, 516, 517, 26 Am. Rep. 373: "A more comprehensive word than 'all' cannot be found in the English language." And unless, as was said in that case, very strong reasons can be furnished for giving it a restricted construction, it should receive its comprehensive meaning.

No such reason, as we have seen, exists in this case; for the accused in a case like this, when tried by a police justice, is protected in every right secured to him by the Constitution as fully and as effectually as was the accused in the case of *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676, and there is no reason, in my judgment, why the jurisdiction of the police justice in this case should not be sustained, as was that of the justice of the peace in that case, unless the right to land is of more value and is to be placed upon higher grounds than the right to personal liberty; and this, of course, cannot be so.

By section 4106 of the Code of 1904 it is provided that justices of the peace in the counties shall have exclusive original jurisdiction of all misdemeanors, except violations of the revenue and election laws of the state, of offenses against public policy, violations of Sunday laws by railroads and steamship companies, and the sale of intox-

licating liquor on Sunday. Section 4106, Va. Code 1904.

If police justices have no jurisdiction of any case where the freehold to land may be involved, then justices of the peace have no such jurisdiction of such cases; for the statute which confers jurisdiction upon them is no more comprehensive than the ordinance which confers jurisdiction upon the police justices. If it be true that justices of the peace have no such power, then in the counties of the state there is no means of punishing the violations of many laws.

By section 3856a of the Code it is provided that "any person other than a duly authorized officer changing the line of any public road on either side thereof, as the lines have existed for twenty years or more, without the permission entered of record of the circuit court of the county in which the road lies, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than five nor more than fifty dollars."

By section 2071 of the Code, shooting, hunting, ranging, fishing, trapping, or fowling upon the lands of another without his consent is prohibited under a penalty of not less than \$5 nor more than \$50 for each offense.

In prosecutions under either of these sections the question of the title to the freehold may often be incidentally involved; yet, if justices of the peace have no jurisdiction where the accused bona fide claims the land upon which the unlawful act is charged to have been committed, there is no tribunal provided in which he can be prosecuted criminally for the violation of those sections. The circuit courts clearly have no original jurisdiction over such cases. Va. Code 1904, § 4106. Their jurisdiction over them is only by way of appeal.

A construction which requires the word "all" to receive a narrow instead of its usual comprehensive meaning, and which places the lawmaking power in the position of enacting laws to punish offenses, and yet furnishing no tribunal in which to try those who are charged with their violation, ought not, in my opinion, to be given any provision of law, unless there be some very strong reason for it. No such reason—in fact, no reason at all, so far as I can see—exists in this case for such a construction; but, on the contrary, the language of the statute and the manifest policy of the Legislature not to burden the courts of record in the first instance with the trial of minor criminal offenses, seem to me to show that the construction placed upon the provisions of law involved in this case by the learned chancery court, in refusing the writ of prohibition, was correct, and that its judgment should be affirmed.

## BUENA VISTA EXTRACT CO. v. HICKMAN.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

### 1. APPEAL AND ERROR (§ 511\*)—BILL OF EXCEPTIONS—SETTLEMENT—SIGNING—TIME PRESCRIBED.

Where bills of exceptions in the record purport to have been signed, sealed, enrolled, and made a part of the record, with the clerk's certificate, dated November 26th, "that the foregoing is a true transcript of the record," and the record shows that the court was in session as late as October 28th, this shows that the bills of exceptions were signed within 30 days after the end of the term at which the exceptions were noted, as provided by Acts 1908, p. 336, c. 225.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2330; Dec. Dig. § 511.\*]

### 2. APPEAL AND ERROR (§ 511\*)—BILL OF EXCEPTIONS—SETTLEMENT—SIGNING—TIME PRESCRIBED.

Under Acts 1908, p. 336, c. 225, allowing bills of exceptions to be signed either in term time or vacation, the correct practice demands that a bill of exceptions not signed during the term should show that it was signed within 30 days after the end of the term, or at such other time as the parties, by consent entered of record, agreed on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2320; Dec. Dig. § 511.\*]

### 3. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé in a tanning plant, engaged in regulating valves in pipes conveying steam to open tubs, while standing with one foot on the edge of a tub and the other on a trough, necessitating a straddle of over four feet, slipped and fell into the tub and was injured. He was familiar with the situation and knew the danger, having been accustomed to stand astride the tubs 50 or 60 times a day, but continued in the service without requesting, or without the master promising to supply, safer appliances. Held, that he assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

### 4. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—RISKS ASSUMED.

A servant does not assume extraordinary and unusual risks, nor risks created by the negligence of the master, nor such as are latent, or are only discovered at the time of the injury; but he assumes the ordinary risks, and all risks which he knows, or in the exercise of reasonable care may know, unless there is some agreement to the contrary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

### 5. MASTER AND SERVANT (§ 219\*)—INJURY TO SERVANT—"ASSUMPTION OF RISK."

Assumption of risk rests on agreement of the servant with the master, express or implied, from the circumstances of the employment, that the master shall not be liable for any injury incident to the service, resulting from a known or obvious danger arising in the performance of the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 589, 591; vol. 8, pp. 7584, 7585.]

Error to Circuit Court, Rockbridge County.

Action by E. L. Hickman against the Buena Vista Extract Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hulst Glenn and Charles & Duncan Curry, for plaintiff in error. Glasgow & White, for defendant in error.

WHITTLE, J. We are met at the threshold of this case with the objections, that there is no order of court making the bills of exception a part of the record, and nothing to show that they were signed within the time required by law.

The record contains the following memorandum: "On the trial of this case the defendant, by its attorneys, excepted to sundry opinions of the court given upon the trial, and obtained leave to file its bills of exception according to law, which, when filed, are ordered to be made a part of the record in the case."

Corresponding bills of exception in due form appear in the printed transcript of the record, which purport to have been signed, sealed, and enrolled, and made a part of the record, with the clerk's certificate attached "that the foregoing is a true transcript of the record." The certificate bears date November 26, 1907, and inasmuch as the record shows that the court was in session certainly as late as October 28, 1907, the bills of exception must have been signed within 30 days after the end of the term at which the exceptions were noted.

As to the effect of the clerk's certificate, see *Yellow Poplar Lumber Co. v. Thompson's Heirs*, 108 Va. —, 62 S. E. 358.

While we are of opinion that a substantial compliance with the statute appears in this instance, correct practice demands that a bill of exception not signed during the term at which the opinion of the court is announced to which exception is taken ought to show that it has been signed within 30 days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon. Said signing now may be either in term time or in vacation, whether another term of the court has intervened or not; and it is declared that all bills of exceptions "so tendered to and signed by the judge, as aforesaid, either in term time or in vacation shall be a part of the record of the case." Acts 1908, pp. 336, 337, c. 225.

On the merits, the case presented for our consideration is as follows: The plaintiff in error (the defendant in the court below) is the owner and operator of a plant for extracting tannin and other chemical properties from the wood and bark of certain trees. In its operations it is necessary to use boilers and engines to generate heat and power, and also other machinery for cutting and grinding wood and extracting its chemical properties. Among other agencies, eight tubs or vats are

used in the leaching room to hold the ground wood. The wood and liquid in these tubs are kept at high temperature by means of steam conveyed through pipes connected with the engine. These pipes are equipped with valves or gauges for regulating the heat, and are attached to a standpipe in the center of each tub, extending a short distance above the top. The tubs, which are from 4 to 6 feet in diameter and 4 feet deep, were uncovered and arranged in a row across the floor of the leach room. The operation requires the services of a man to run the engine and rotary pump, and likewise to manipulate the valves controlling the steam and keep the contents of the tubs at proper temperature.

The plaintiff, E. L. Hickman, was employed by the defendant and placed in charge of the leach room. On the occasion of the accident, while he was engaged in regulating the valves, standing with one foot on the edge of a tub and the other on the liquor trough, which necessitated a straddle of 4 feet 6 inches, his foot slipped from the rim of the tub and was submerged in its boiling contents, occasioning the injury of which he complains.

To an adverse judgment the defendant brings this writ of error.

The gravamen of the declaration is the alleged failure of the master to exercise ordinary care to provide the servant with a reasonably safe place and suitable appliances in and with which to perform the work required of him.

The servant had been in the employment of the master from the time the plant was first established, in various departments of the service, and had worked for a long time in the leach room. Indeed, he admits that he was perfectly familiar with the situation, the dangers of which were open and obvious. To quote his own language, "Anybody could see it was dangerous." Yet, with full knowledge of the danger, and without request of or promise by the master to supply safer appliances, he chose to continue the service, standing astride of these seething leach tubs 50 or 60 times a day, so often, he says, that he got accustomed to it. Upon his own testimony it is clear that the servant assumed the risk and cannot demand damages from the master.

The general rule governing risks assumed by the servant is well stated in 26 Cyc. 1177 et seq.: "While a servant does not assume the extraordinary and unusual risks of the employment, the rule is well settled, both in England and in this country, that on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or may in the exercise of reasonable care know, to exist, unless there is some agreement to the contrary. He does not, however, assume such risks as are created by the master's negligence, nor such as are latent, or are only

discovered at the time of the injury. The doctrine of assumption of risk is distinct from that of contributory negligence, and rests upon an agreement of the servant with his master, express or implied from the circumstances of his employment, that his master shall not be liable for any injury incident to the service, resulting from a known or obvious danger arising in the performance of the service."

This statement of the law is in accord with numerous decisions of this court. The last expression on the subject will be found in an opinion handed down at Staunton September 10, 1908—Norton Coal Company v. Murphy, 108 Va. —, 62 S. E. 268.

It is not necessary to notice the minor assignments of error, since the testimony of the plaintiff himself precludes a recovery.

The judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

#### MORRIS v. STATE.

(Supreme Court of Georgia. Nov. 11, 1908.)

#### 1. CRIMINAL LAW (§ 923\*)—NEW TRIAL—COMPETENCY OF JUROR—FAILURE TO CHALLENGE.

That a traverse juror who has served at one term of the superior court may be summoned to serve at the next succeeding term furnishes a ground of challenge proper defectum, under the act of August 15, 1903 (Acts 1903, p. 83); but, if he serves without challenge or objection, this is not cause for a new trial after verdict, even though the fact of his previous service may not be known to the movant until after the verdict or sentence. *Jackson v. State*, 125 Ga. 277, 54 S. E. 167 (1), and citations; *Jordan v. State*, 119 Ga. 443, 46 S. E. 679.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 923.\*]

#### 2. CASE NOT REVIEWED.

This court declines to review and reverse the decision in *Hill v. State*, 122 Ga. 166, 50 S. E. 57. Moreover, it would not be of any benefit to the plaintiff in error to review that case alone (as requested), without also reviewing the other cases making the same ruling, which preceded and followed it.

#### 3. CRIMINAL LAW (§ 1124\*)—WRIT OF ERROR—RECORD—MATTERS PRESENTED FOR REVIEW—ADMISSION OF EVIDENCE.

Grounds of a motion for a new trial, which set out that after the evidence for the defendant was closed certain questions were asked witnesses for the state, that objection thereto was made on the ground that such questions were not in rebuttal of the evidence for the defendant, but cumulative of evidence previously introduced for the state, and that the objection was overruled, present no proper assignments of error; it not appearing what answers were elicited by such questions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2947; Dec. Dig. § 1124.\*]

#### 4. REFUSAL OF NEW TRIAL.

The other grounds of the motion for a new trial not dealt with specifically are without merit, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Seaborn Morris was convicted of a crime, and he brings error. Affirmed.

W. Y. Allen and Henry O. Farr, for plaintiff in error. O. H. B. Bloodworth, Jr., O. H. Bloodworth, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

#### ARNOLD v. STATE.

(Supreme Court of Georgia. Nov. 11, 1908.)

#### 1. CRIMINAL LAW (§ 365\*)—EVIDENCE—RES GESTÆ.

Where, on the trial of one for murder, the homicide is admitted, and the material question is whether it was willful or accidental, the conduct of the defendant in shooting at the sister of the deceased as she ran from the house immediately after the defendant had mortally wounded her brother, and her screams for help, are parts of the *res gestæ*, and relevant to the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.\*]

#### 2. CRIMINAL LAW (§ 376\*)—EVIDENCE—GOOD CHARACTER—SPECIAL TRAITS.

While a person accused of crime may put his general character in issue, a witness called by him to show his general character will not be permitted on his examination in chief to testify as to the particular instances or special traits which do not bear upon the peculiar nature of the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 841; Dec. Dig. § 376.\*]

#### 3. CRIMINAL LAW (§ 670\*)—NEW TRIAL—REJECTION OF EVIDENCE INADMISSIBLE IN PART.

Where testimony is offered as a whole, some of which is competent and some not, a new trial will not be granted because of its rejection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1595; Dec. Dig. § 670.\*]

#### 4. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

In defining a reasonable doubt, it is not error to instruct the jury that a reasonable doubt "is just such a doubt as its name implies, not a vague conjecture nor fanciful doubt, but it is such a doubt that you, as trial jurors, can give a reason for having."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1904-1922; Dec. Dig. § 789.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

#### 5. CRIMINAL LAW (§ 785\*)—TRIAL—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

The charge on the subject of impeachment of witnesses was within the ruling in *Powell v. State*, 101 Ga. 19-22, 29 S. E. 809, 65 Am. St. Rep. 277; *Smith v. State*, 109 Ga. 479 (2), 35 S. E. 59.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.\*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

John Arnold was convicted of murder, and he brings error. Affirmed.

J. W. Wise and G. E. Maddox, for plaintiff in error. W. H. Ennis, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

EVANS, P. J. John Arnold was convicted of the murder of Harris Rodney, and recommended to mercy. He made a motion for a new trial, which was refused, and he excepts.

1. The deceased was slain at the house of his sister, at about 10 o'clock at night. At the time of the homicide the deceased, his sister, and her two infants were the only persons in the house. The defendant demanded that he be allowed to come in the house, and, upon being refused, he forced an entrance, and in a struggle with the deceased killed him. The sister, in narrating the occurrence, was allowed to testify, over objection, that immediately upon the defendant shooting her brother she ran out of the house, and the defendant shot at her four times while she was running; that she ran across the street to Sadie Brock's, calling upon her to run and help her brother, and stating that defendant had shot him and would kill him; that Sadie Brock told her father not to go, but to get a policeman. While this was going on, witness and Sadie Brock entered the house, and by that time the defendant had come on the porch. The specific objection to this testimony was that it related to occurrences after the killing, and included a conversation with a third person not in the presence of the defendant. In his statement the defendant claimed that the killing was accidental, and that the pistol was unintentionally discharged in a scuffle with the deceased and his sister. The testimony to which objection was made was but a part of the narrative of the circumstances of the homicide. The immediate flight of the witness, the firing upon her by the defendant as she was fleeing, her instant appeal for help, was so closely connected with the firing of the fatal shot as to become a part of the *res gestæ*, and was material in determining whether the shooting was willful or accidental. *Pool v. State*, 87 Ga. 526, 13 S. E. 556. It is not certain whether the conversation was heard by the defendant who had followed her, but the evidence is strongly indicative that it occurred within his hearing, if not actually in his presence. Even if the conversation relative to getting a policeman was inadmissible, the error in admitting it was so manifestly harmless that a new trial should not be had on that account alone.

2, 3. The defendant offered to prove his good character by several witnesses, one of whom was C. T. Clements. The fourth ground of the motion for a new trial complains that the court erred in ruling out the following testimony of this witness: "Q. Are you acquainted with John Arnold's general character in the community in which he lives? A. Yes, sir; I think I am pretty

well acquainted with it. Q. Is that character good or bad? A. He had the character of being a good man, so far as laboring and being peaceable and quiet was concerned. He was respectful to both white and black." It appears from the brief of evidence that this witness was allowed to testify that he had known the defendant about two years, knew his character in the community pretty well, that his character was good, except that he had the reputation of drinking some. We fully concede that it is the right of a person accused of crime to put in issue his general character. In examining the witnesses called to establish his character, the defendant may inquire of them how long they have known him, and their opportunities of forming a knowledge of his character. *Peeples v. State*, 103 Ga. 629, 29 S. E. 691. But a witness called by the defendant to show his good character will not be permitted on his examination in chief to testify as to the particular instances or special traits which do not bear upon the peculiar nature of the crime with which the defendant is charged. Thus a man on trial for murder will not be permitted to show his character for industry. *State v. Dalton*, 27 Mo. 13. The witness in this case was allowed to swear that the character of the accused was good. The excluded answer was not so positive in its indorsement of the defendant's character as the evidence which was admitted. Testimony that the defendant's general character for peaceableness was good was relevant. But from the form of the question it seems his purpose was to put in issue his general character, and not his character for peaceableness. If the court had allowed the witness to answer the question in the manner the witness would have answered it, the effect would have been to allow the defendant to establish his good character from his habits of industry, and being respectful to white and black people. The evidence was offered as a whole; and the rule is well settled that where evidence, some of which is admissible, and some of which is not admissible, is offered as a whole, a new trial will not be granted because of its rejection. *Skellie v. Central R. Co.*, 81 Ga. 56, 6 S. E. 811; *Smalls v. State*, 99 Ga. 26, 25 S. E. 614; *Ellis v. Poe*, 109 Ga. 422, 34 S. E. 567.

4. The court charged that the defendant "goes into the trial of the case presumed to be innocent, and that presumption remains with him throughout the trial and entitles him to an acquittal at your hands, unless the state, by evidence, legally and satisfactorily establishes his guilt, not to a mathematical certainty, for that is not required, but the state is required to establish his guilt to a moral and reasonable certainty and beyond a reasonable doubt. That doubt, gentlemen, is just such a doubt as its name implies; not a vague conjecture nor fanciful doubt, but it is such a doubt that you, as trial



jurors, can give a reason for having. If you have such a doubt as to the guilt of the defendant, you should acquit him. If you believe beyond such a doubt that he is guilty, you should convict him of that offense of which you are so satisfied he is guilty." The vice of this charge is alleged to be in the definition of a reasonable doubt; and it is contended that the court's instruction was calculated to impress upon the jury that they must have a sufficient reason for doubting the guilt of the accused, whereas the true rule of law is that, if the evidence leaves the reasonable mind wavering and unsettled, the defendant should be given the benefit of such a doubt. We see no error in this instruction. The very term "reasonable doubt" imports a doubt for which a reason may be ascribed. *Vann v. State*, 83 Ga. 45, 9 S. E. 945; *Fletcher v. State*, 90 Ga. 468 (2), 17 S. E. 100.

5. Another excerpt from the charge which is criticised is this: "Under that rule, gentlemen, you look and see whether any witness in the case has or has not been impeached. If a witness has been so successfully impeached and has not been corroborated in one of the ways I have explained to you, it would be your duty to disregard the testimony of that witness; but whether a witness has been so successfully impeached, and, if successfully impeached, whether such witness has been corroborated, and what weight you will give to the testimony of that witness under all the facts and circumstances of the case, is a matter for you to determine." The error in the charge is said to be that the jury was left to determine what weight they would give to the testimony of a witness who had been successfully impeached, whether or not such witness had been corroborated or sustained in any of the ways pointed out by law. There was no error in this charge. *Powell v. State*, 101 Ga. 19-22, 29 S. E. 309, 65 Am. St. Rep. 277; *Smith v. State*, 109 Ga. 477 (2), 35 S. E. 59.

The verdict was amply supported by the evidence, and no sufficient cause is shown for reversing the judgment refusing a new trial.

Judgment affirmed. All the Justices concur.

#### WOODALL v. FIDELITY & CASUALTY CO. (Supreme Court of Georgia. Nov. 14, 1908.)

INSURANCE (§ 539\*)—HEALTH INDEMNITY—NOTICE.

Where a health indemnity policy provided for liability of the insurance company for a specified amount per week during the disability of the assured resulting from certain diseases for a period not exceeding 26 weeks, and that the medical adviser of the company had the right to examine the assured during such disability, and further provided that immediate notice should be given the company of any disease causing such disability, and of the full name

and address of the assured, held, where the disability continues for the full period of 26 weeks, and there is a failure to give such notice during such period, and no excuse for such failure is given, there can be no recovery on account of such disability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1833-1836; Dec. Dig. § 539.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mary Woodall against the Fidelity & Casualty Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. F. Gollightly, for plaintiff in error. Slaton & Phillips, for defendant in error.

HOLDEN, J. The plaintiff brought suit against the defendant, a corporation of the state of New York, with its main office located in the city of New York, on a policy of insurance issued by the defendant to the plaintiff's husband, alleging that on the 10th of April, 1906, her husband was afflicted with cirrhosis of the liver, which totally disabled him from performing any of the duties of his occupation from that time to the 16th of November, 1906, when he died. Within three weeks thereafter she went to the person in charge of the company's business in Atlanta, and informed him of the disability above named and the liability of the defendant. He afterwards furnished her a blank on which to make out a claim of loss, which she filled out, making out her claim, proof of loss, and notice of disability. He stated he would attend to the matter. The policy attached to the petition provided that if the assured suffered from cirrhosis of the liver or other specified diseases, which disabled him from performing any duty pertaining to his occupation, the company would pay to him a weekly indemnity of \$25 per week during the period of such disability during which he was necessarily confined to the house "for not less than 7 consecutive days and not exceeding 26 weeks." The policy further provided as follows: "Any medical adviser of the company shall be allowed to examine the person or body of the assured in respect to any alleged disease or illness in such manner and at such times as he may require. Immediate written notice must be given the company at New York City of any disease or illness for which a claim is to be made, with full particulars thereof, and full name and address of the assured. Affirmative proof of duration of disability must also be furnished to the company within two months from the termination of disability. \* \* \* An agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent or knowledge of his or any person be held to effect a waiver or change in this contract or in any part of it.

No change whatever in this policy and no waiver of its provisions shall be valid unless an indorsement is added hereto signed by the president or vice president or one of the secretaries of the company expressing such change or waiver." The plaintiff claimed that under the terms of the policy she was the beneficiary thereof, and brought suit to recover the indemnity provided for of \$25 per week for 26 weeks. To the petition the defendant filed a demurrer, and to the order of the court sustaining the demurrer and dismissing the petition the plaintiff filed exceptions.

1. One of the grounds of demurrer was that the petition set forth no cause of action, and another ground of demurrer was that the "provisions as to notice were not complied with, nor was there any excuse therefor; the said violation and the absence of excuse therefor appearing from plaintiff's declaration." The requirement in the policy that immediate written notice must be given the company at New York City of any disease or illness for which a claim is to be made is of the essence of the contract, and must be complied with before any recovery can be had. *Employers' Liability Assur. Corp., Ltd., v. Light, Heat & Power Co.*, 28 Ind. App. 437, 63 N. E. 54; *London Guarantee & Accident Co., Ltd., v. Siwy*, 35 Ind. App. 340, 66 N. E. 481; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Harp v. Firemen's Fund Ins. Co.*, 131 Ga. —, 61 S. E. 704. The requirement that immediate notice be given must be held to mean that notice must be given within a reasonable time after the insured became afflicted with the disease from which the disability resulted, and the question here involved is whether or not the notice was given the company in such time. There is no allegation in the petition that any notice whatever was given until three weeks after the death of the assured which occurred on the 16th of November, 1906. The disability began on the 10th of April, 1906, and the 26 weeks for which the company contracted for liability on account of disability expired on the 9th of October, 1906. Hence no notice of the existence of the disease from which the disability resulted was given until after the expiration of the 26 weeks, which was the maximum period of disability for which the company contracted to pay. It is the general rule that the question as to what is a reasonable time in which a notice of this kind can be given is one for the jury. *Southern Fire Ins. Co. v. Knight*, and *Harp v. Firemen's Fund Ins. Co.*, supra.

But can it be said that, under all the provisions of this policy, notice was given within a reasonable time when it was not given until after the expiration of the longest period of disability for which the company contracted to be liable, and no excuse for such delay is given? In *4 Cooley's Ins. Briefs*, 3570,

appears the following: "Employers' liability policies very generally contain a requirement that the insured shall furnish immediate notice, both of any accident by which the insured may be rendered liable and of any claim against the insured arising therefrom. These provisions are valid and of the essence of the contract, being designed to enable the insurer to investigate the circumstances of the accident while the matter is yet fresh in the minds of all, and to make timely defense against any claim filed. They are therefore usually given a more liberal construction in favor of the company than the requirement for notice and proof of loss under an ordinary fire policy, which can only become effective after the company's liability has already been fixed." And the following statement is made in the same work, on page 3573: "The purpose of the notice of the accident and claim has been deemed a proper element to be considered in determining what will or will not be a reasonable time for its production." This reasoning is applicable to a contract of the kind under investigation, which is similar to the one referred to in the text, and the purpose for which the insurer requires notice to be given is the same in both instances. In the paragraph immediately preceding the requirement that immediate notice be given of any disease for which a claim is to be made, the policy provides that any medical examiner of the company shall be allowed to examine the person or body of the insured in respect to any disease or illness in such manner and at such time as he may require. The cardinal rule for construing contracts is to ascertain the intention of the parties; and, in view of these provisions of the policy, it was certainly not in contemplation of the parties that the notice referred to should be delayed beyond the full period of time for which the company might be liable. It would be unfair to the company to wait until this full time had expired before giving it any notice. Certainly it was not contemplated by the company that it should incur the extreme liability to which it would be subjected without any notice that such liability was accruing and would be claimed against it, and thus be precluded from the opportunity of making any investigation of the subject-matter on which the claim would be based until the liability had existed for 26 weeks and terminated, when an investigation would prove of little value. Insurance companies cover many subjects, and cannot be supposed to keep themselves advised of the condition of the various risks insured; and, in order that they may be made aware that one of the persons insured has incurred a disability from a disease for which it will be sought to hold them liable, the provision requiring immediate notice is a part of the contract. The company is entitled to this notice, not only that it may see that the claim is a legitimate one with respect to the

duration of disability, but that it may also assure itself that it arises from one of the diseases which is covered by the policy which the claimant holds. Whatever may be the rule where the disability covers a less period of time than the full period for which the company would be liable, or where such period covers only a short time, we are clear that it is unreasonable for the assured to withhold, without any excuse therefor, such notice during an illness covering the long period of 26 weeks, constituting the full period of disability for which the company contracts to become liable. The policy provides, not only that notice of the disability must be given, but that notice of the full name and address of the assured at the time of the disability must be given to the company. This fact, together with the further fact that any medical adviser of the company shall be allowed to examine the person or body of the insured, shows that the main object of requiring the notice was to give an opportunity to the medical adviser of the company to make an examination of the assured and keep track of the time of duration of disability. Knowing that \$25 per week was to be claimed, and knowing, too, that the contract gave the company the right to have its medical adviser examine the assured, and provided for immediate notice to the company of any illness for which a claim would be made, it would certainly be unfair to the company and in violation of the contract not to give the notice during this long period of disability, which was the full period of time for which the company contracted liability. No excuse whatever is offered in the allegations of the petition why the notice was not given during this time.

The facts alleged could not constitute a waiver of the notice by the company, in view of the provisions of the policy, even if, in the absence of such provisions, they could amount to such waiver, occurring, as they did, after the expiration of the time in which the notice was to be given.

Judgment affirmed. All the Justices concur.

**CINCINNATI CORDAGE & PAPER CO. v.  
DODSON PRINTERS' SUPPLY  
CO. et al.**

(Supreme Court of Georgia. Nov. 14, 1908.)

**1. MORTGAGES (§ 564\*)—FORECLOSURE—DISTRIBUTION OF FUND.**

Where property levied on under a mortgage *fi. fa.* is sold under the provisions of Civ. Code 1895, §§ 5463, 5464, an order for the sale having been duly granted upon a petition therefor by the plaintiff in such *fi. fa.*, he cannot complain that in proceeding to distribute the funds arising from the sale the court in which the proceedings are had awards a portion of the funds to the holder of a mortgage of an older date, which created a lien upon the property sold, although the mortgage last referred

to has not been foreclosed. *Welsh v. Lewis*, 71 Ga. 387.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1627; Dec. Dig. § 564.\*]

**2. MORTGAGES (§ 564\*)—FORECLOSURE—EFFECT ON LIENS.**

A sale under the provisions of the sections referred to in the foregoing headnote divests all liens in the property sold, and the liens so divested attach to the money raised by the sale. *Welsh v. Lewis*, supra.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1627; Dec. Dig. § 564.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Proceedings between the Cincinnati Cordage & Paper Company and the Dodson Printers' Supply Company and others to determine rights to proceeds of foreclosure sale. From the judgment, the Cincinnati Cordage & Paper Company brings error. Affirmed.

Jas. L. Key, for plaintiff in error. C. J. Haden, C. L. Pettigrew, and John A. Boykin, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

**CARMICHAEL v. JORDAN et al.**

(Supreme Court of Georgia. Nov. 13, 1908.)

**TENANCY IN COMMON (§ 55\*)—ACTIONS—BOUNDARIES—PARTIES.**

Where it appeared from an application for processioning that the applicants and other persons, not named in the application, were tenants in common of the land around which it was sought to have the lines surveyed and marked anew, it was error to overrule a motion of a protestant to dismiss the application on the ground that the other tenants in common were not parties thereto.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 146; Dec. Dig. § 55.\*]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Application of J. M. Jordan and others for the processioning of a certain parcel of land. From the lines marked by the processioners, J. H. Carmichael entered a protest. Verdict against protestant, and he brings error. Reversed.

J. Z. Foster and J. E. Mozley, for plaintiff in error. Moore & Branch and H. B. Moss, for defendants in error.

FISH, C. J. J. M. Jordan, W. F. Hill, and R. P. Daniel applied to the processioners of the Ninety-Second militia district of Cobb county to have the lines around a parcel of land surveyed and marked anew. The application was as follows: "The application of J. M. Jordan, W. F. Hill, and R. P. Daniel, as deacons of the Collings Spring Primitive Baptist Church of Christ, shows that said church is the owner of a certain tract of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land lying and being in said district, containing two acres, more or less, and that applicants and the other members of said church are tenants in common in said land. Applicants are authorized to act for other members. Applicants desire the lines around the entire tract of said land to be surveyed and marked anew. The owners of the adjoining land resident in said state are J. W. Boling, M. M. Brown, as trustees of the Collings Spring Church Cemetery, and J. H. Carmichael and Dock Fletcher." Carmichael, being dissatisfied with the lines as run and marked by the processioners and the surveyor, filed his protest thereto; and, the proceedings having been entered by the clerk of the superior court in accordance with the statute, the issues made by the protest came on to be heard in that court, and on the trial before a jury a verdict was rendered against the protestant. Carmichael made a motion for a new trial, which being overruled, he excepted. He also excepted to the overruling of certain objections in the application, in the nature of demurrers thereto.

One ground of the motion to dismiss the proceedings was because the names of the other members of the church and owners in common of the land, for whom the applicants assumed to act, were not set out in the application. The court erred in not dismissing the proceedings upon this ground. The statute (Civ. Code 1895, § 3244) provides that every owner of land, who desires the lines around the same to be surveyed and marked anew, shall apply to the processioners to have this done. Manifestly one of several common owners of a tract of land cannot, on his application alone, have it processioned. In order that there be an end of controversies as to the location of land lines, all owners of the land around which the lines are to be surveyed and marked anew should be made parties to the application, just as all the owners of adjoining lands, if resident within this state, must be notified, and, as it were, made parties defendant to the proceedings; otherwise, the proceeding would be of no avail. If one of many common owners can proceed, in his own behalf alone, to have the tract of land in which he holds an undivided interest processioned, then the owners of adjoining lands might be harassed by a different proceeding, for a like purpose separately brought by each of the other common owners. The fact that it was alleged in the application that the applicants were authorized to act for other owners of the land did not cure the defect in the application, it not appearing in what manner such authority was given, so that the question of its sufficiency for the purpose for which it was alleged to have been given might be determined; and, besides, there are reasons which might be readily suggested why the owners of the lands adjoining the tract around which

the lines were to be run and marked anew were entitled to know who were the applicants and alleged owners of such tract, other than those whose names were signed to the application. One ground of the motion to dismiss was directed at the defect in the application, due to its failure to allege in what way the three applicants were authorized to act for the other common owners of the land in question. As the proceeding should have been dismissed upon the motion of the protestant, the trial was a nullity; and consequently it is not necessary to deal with the questions raised in the motion for a new trial.

Judgment reversed. All the Justices concur.

#### MCGILL v. OSBORNE et al.

(Supreme Court of Georgia. Nov. 18, 1903.)

##### 1. MANDAMUS (§ 12\*)—TO PUBLIC OFFICERS.

A mandamus will not lie to compel an officer to do an act which he has no legal power to perform when the application for the writ is made.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 39-41; Dec. Dig. § 12.\*]

##### 2. CONSTITUTIONAL LAW (§ 46\*)—CONSTRUCTION BY COURTS—CONSTITUTIONALITY.

A court will always abstain from passing upon the question of the constitutionality of an act of the Legislature, if there be any other ground in the case upon which to rest its decision.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.\*]

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Application of J. W. Osborne and others for writ of mandamus to I. L. McGill. From an order granting the writ, defendant brings error. Reversed.

W. E. Mann, for plaintiff in error. R. J. & J. McCamy, for defendants in error.

FISH, C. J. J. W. Osborne, W. W. Benton, and J. P. Mardis applied to the judge of a superior court for a mandamus to compel I. L. McGill, county school commissioner of Catoosa county, to pay the petitioners, as trustees of the public school in the town of Boynton, Catoosa county, the amount due such school from the public school fund of the county. The petitioners alleged that they were elected trustees of the public school of Boynton in accordance with an act of the General Assembly approved August 22, 1907 (Acts 1907, p. 467), incorporating such town, providing for a system of public schools therein, and requiring the county school commissioner to pay over to the trustees of such school its share of the public school fund of the county. It was alleged in the petition that there were 33 children of

school age in the town, a list of whom was attached as an exhibit to the petition, and that there was due to the school from the public school fund of the county, on account of these children, "a sum of money approximating, if not reaching, \$100." It also appeared from the petition that petitioners, as such trustees, in December, 1907, applied to McGill, county school commissioner, for the payment of such sum, and that the board of education of Catoosa county, on January 7, 1908, in prorating the public school funds of the county among the school districts, expressly declined to recognize the town of Boynton as entitled to any portion of the fund, on the ground that the act of the General Assembly providing for the payment of a portion of the common school fund to the trustees of the public school of Boynton was in conflict with the general school laws and would be injurious to the surrounding school districts. The petition alleged that this act of the board of education of the county was illegal and wrongful.

The answer of the county school commissioner set up that "the pro rata going to each child is \$2.60 of public school money," but claimed that the act under which petitioners were proceeding was unconstitutional, for various specified reasons, in so far as it sought to establish a school district in the town of Boynton and to entitle the public school therein to a pro rata of the public school fund. As a further reason why a mandamus should not be granted, the answer alleged that, even if the act in question were valid and constitutional, mandamus should not be granted, because the act provides that the county school commissioner shall pay out the county school fund after an estimate made by the board of education of the county upon some plan adopted by such board, and that the board had never made any such estimate nor adopted any plan, and that therefore the respondent was without power or legal authority to pay out any of the public school fund of the county. Upon the hearing a mandamus absolute was granted, and the respondent directed to pay to petitioners the sum of \$85.80, "the sum admitted to be due petitioners if they can lawfully demand the same." To this judgment the respondent excepted.

1. The act incorporating the town of Boynton (Acts 1907, p. 467), under the provisions of which the petitioners for mandamus claim to be the trustees of the public school of Boynton, alleged that they were entitled to receive the money which they sought by mandamus to compel the county school commissioner of Catoosa county to pay them, provides, in section 12 thereof: "That the school commissioner of the county of Catoosa is hereby authorized and required to pay over to the trustees of the Boynton school system the proportion of the common school fund arising from any source, belong-

ing to said town, to be estimated by the board of education of said town upon any plans which the board may adopt in distributing the public school fund to the schools of the county; said funds to be used by said trustees in the maintenance of a free school in pursuance of this act and as authorized and directed by the constitution and laws of this state." Considering this whole section, it is evident that the intention of the Legislature was that the proportion of the common school fund of the county to be paid by the county school commissioner to the trustees of the Boynton public school should be paid upon an estimate made by the board of education of the county, and not by the board of education of the town, if there be such a body. The act does not impose an absolute duty upon the county school commissioner to pay any portion of the public school fund of the county to the trustees of the Boynton school system, but authorizes and requires such commissioner to pay the proportion of the common school fund belonging to such town to such trustees upon an estimate made by the board of education of the county. It follows, therefore, that until such estimate has been made by such board the county school commissioner has no power or authority to appropriate any of the common school fund for the benefit of the Boynton school system. It appeared on the hearing, and, indeed, it was set forth in the petition for mandamus, that the county board of education had expressly declined to recognize the Boynton school district as entitled to any of the public school fund. This was tantamount to a refusal to authorize the county school commissioner to pay any portion of such fund to the trustees of the Boynton school. As the commissioner had no legal power to pay to the petitioners any portion of the public school fund of the county, the court erred in rendering the judgment requiring him to do so.

A special act for the county of Houston provided that after its passage no extra pay should be allowed to county officers for extra services performed by them, "unless allowed by the county commissioners of the county of Houston, upon due proof of the services performed, and the value of them." In *County Com'rs v. Culler*, 58 Ga. 131, it appeared that Culler, as clerk of the superior court of that county, had performed certain extra services; that the judge of the superior court had referred Culler's bill for such services to an auditor, who had approved the same; and the judge thereupon ordered the bill to be paid, but the county commissioners refused to pay the same. The superior court granted a mandamus absolute to compel the commissioners to pay the clerk's bill for extra services. This court held that, in view of the provisions of the act, "the superior court cannot, by mandamus, compel the county treasurer to pay such costs until they

have been approved by such commissioners." "A writ of mandamus will not, in general, be allowed, unless the act commanded to be done is legally possible before the writ issues." *State v. Perrine*, 34 N. J. Law, 254; *Ball v. Lappius*, 3 Or. 55; *State v. Cavanac*, 30 La. Ann. 237; 26 Cyc. 165; *High on Ex. Leg. Rem.* § 14.

2. It being clear that petitioners will not be entitled to mandamus under the case made, the constitutionality of the act under which they were proceeding will not be passed on. *Armstrong v. Jones*, 34 Ga. 310; *Scoville v. Calhoun*, 76 Ga. 263, 269; *Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Oglesby v. State*, 123 Ga. 506, 51 S. E. 505.

Judgment reversed. All the Justices concur.

#### WEVER et al. v. PARKER.

(Supreme Court of Georgia. Nov. 13, 1908.)

#### JUDGMENT (§ 853\*)—DORMANCY—ENTRIES ON EXECUTION—RECORDING—EXECUTION SALE.

The entries made on an execution issued upon a judgment rendered in 1877 need not, under Civ. Code 1895, § 3761, be recorded upon the execution docket in order to prevent the dormancy of such judgment.

(a) Civ. Code 1895, § 3761, has no application to judgments rendered prior to the act of the General Assembly approved October 15, 1885 (Acts 1884-85, p. 95).

(b) The ruling in the case of *Dozier v. McWhorter*, 113 Ga. 584, 39 S. E. 106 (2), upon a review thereof, is reaffirmed.

(c) Under the allegations of the petition in the present case, the judgment under which the sale therein referred to was made was not dormant, and the sale was valid.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1567, 1568; *Dec. Dig.* § 853.\*]

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. G. Rawlings, Judge.

Action by F. M. Wever and others against W. H. Parker. Judgment for defendant, and plaintiffs bring error. Affirmed.

Osborne & Lawrence and E. H. Abrahams, for plaintiffs in error. E. K. Overstreet and Hines & Jordan, for defendant in error.

**HOLDEN, J.** The plaintiffs, as sole heirs at law of L. D. Wever, brought suit to recover a certain tract of land and to cancel a deed made to the defendant by the sheriff. The petition alleged that the land was sold by the sheriff in 1907, under a judgment rendered in 1877 against said Wever, and that the defendant, who was the purchaser at such sale, obtained no title, because the judgment under which the sale was had was dormant. The court dismissed the petition upon general demurrer, and the plaintiffs excepted.

The court committed no error if the judgment referred to in the petition was not dormant at the time of the sale of the land

thereunder. The execution issued November 19, 1877, upon the judgment rendered November 6, 1877, had such entries been made upon it, with less than seven years intervening between the making of such entries, as would preserve the judgment in life, unless it was necessary for the entries to be recorded in order to prevent the dormancy of the judgment. The judgment was rendered in 1877, and the sale occurred in 1907. No entry on the execution was recorded until the expiration of more than seven years after the adoption of the Code of 1895. The question involved in this case is whether or not the judgment under which the sale occurred was dormant at the time of the sale. The first section of the act of 1885 (Acts 1884-85, p. 95) provides: "That no judgment hereafter obtained in the courts of this state shall be enforced after the expiration of seven years from the time of its rendition, when no execution has been issued upon it and the same placed upon the execution docket, as now provided by law, or when execution has been issued and seven years have expired from the time of the record upon the execution docket of the court from which the same issued of the last entry upon the execution made by an officer authorized to execute and return the same." In section 3761 of the Civil Code of 1895 the following words of the act are omitted: "Hereafter obtained in the courts of this state." What is the effect of the omission of these words in the Code section? If its effect is to operate on judgments rendered prior to the adoption of the Code, what is there in the act to show that it is not to operate on all judgments whether rendered before or after the act of 1885?

This section of the Code provides that "no judgment shall be enforced after seven years from its rendition, when no execution has been issued upon it and the same placed upon the execution docket." Does this section apply to all judgments, including judgments rendered prior to the adoption of the Code, or does it apply only to judgments rendered subsequently thereto? In the case of *Easterlin v. New Home Co.*, 115 Ga. 305, 41 S. E. 595, it was ruled that in order to prevent dormancy of a judgment under this section it is necessary that an execution be issued on the judgment and placed upon the execution docket within seven years from the rendition of the judgment. On page 308 of 115 Ga., and page 597 of 41 S. E., the court says: "Inasmuch as dormancy of the judgments was not prevented by the mere issuance of the executions, but in addition thereto the executions must have been entered within seven years from the date of the judgments, in order to prevent dormancy, it follows that no entries on the execution made before the entry on the docket, although copied on the execution docket under the terms of the act of 1885, would have prevented

dormancy. Even with such entries, in the absence of the record of the execution, the judgment would have been dormant at the expiration of seven years from the date of its rendition. The true construction of the law in relation to the dormancy of judgments is that an execution must be issued and entered on the docket within seven years from the date of the judgment. Without regard to the date of the execution, if it is so entered, dormancy is prevented; and, no matter at what time during the period of seven years from the date of the judgment the entry is made, the judgment is not dormant if proper entries after the record of the execution follow such entry and each other on the execution and on the docket within periods of seven years."

As this section, according to the decision above referred to, provides in the first part thereof that in order to prevent the dormancy of a judgment it is necessary that an execution issue upon it and be placed on the execution docket within seven years from the rendition of the judgment, it is clear that this part of the section only applies to judgments rendered subsequently to the adoption of the Code. Prior to the act of 1885, to prevent dormancy of a judgment, the law required executions to be issued thereon within seven years; but there was no law requiring such executions to be entered on the docket within seven years of the rendition of the judgment in order to prevent the dormancy thereof. If section 3761 applied to judgments rendered prior to the Code, including judgments rendered prior to the act of 1885, the effect would be to render dormant judgments rendered prior to the act of 1885, because executions issued thereon were not placed upon the execution docket within seven years from the date of the judgment, when there was no law until the act of 1885 requiring this to be done in order to prevent dormancy. If the section makes dormant a judgment rendered prior to the act of 1885 because something was not done which no law had hitherto required to be done, it would be the same thing as declaring such judgments ipso facto dormant. This the Legislature could not do, and did not intend to do. The effect of making section 3761 applicable to judgments rendered prior to the act of 1885 would be to make it declare all judgments rendered prior to the act of 1885 dormant when no execution issued thereon was placed on the execution docket within seven years from the rendition of the judgment. According to the ruling in the case cited *supra*, if section 3761 applies to judgments rendered prior to the passage of the act of 1885, although executions were issued thereon and entries were made and recorded on the execution docket according to the provisions of this section, such judgments

would nevertheless be dormant if the execution was not placed on the docket within seven years from the rendition of the judgment. Such could not have been the intention of section 3761, and we are forced to the conclusion that it was intended to apply only to judgments rendered subsequently to the adoption of the Code.

This construction is in consonance with the act of 1885, which was made applicable only to judgments thereafter rendered. As the Code was adopted after this act, judgments rendered after the adoption of the Code would necessarily be rendered after the passage of the act, and to make section 3761 apply only to judgments rendered after the adoption of the Code gives it an effect in harmony with the operation of that act. If a section of the Code is doubtful in its meaning, it is proper to look to the act of which it is a codification to aid in construing it. *Smith v. Evans*, 125 Ga. 100, 53 S. E. 589. An act of this nature will not be construed to have a retroactive operation, unless by its terms such intention is expressly declared or necessarily implied. We are clear that section 3761 has no application to any judgment rendered prior to the adoption of the Code. In the case of *Dozier v. McWhorter*, 113 Ga. 584, 39 S. E. 106, the second headnote is as follows: "There is no law requiring that entries on an execution issued on a judgment rendered in 1876 shall be entered on the general execution docket before they will have the effect of preventing the judgment from becoming dormant." There is no law requiring entries on executions issued on any judgment to be entered on the general execution docket, to prevent dormancy of the judgment. The decision in the *Dozier Case*, however, was perhaps intended to refer to the execution docket, instead of the general execution docket. We have been asked to review and overrule that decision. Upon a review of it, however, we think it sound and decline to overrule it.

The judgment involved in the present case was not dormant, and the sale made thereunder was valid, the purchaser obtained a good title, and the court committed no error in sustaining the demurrer to the petition.

Judgment affirmed. All the Justices concur, except ATKINSON, J., disqualified.

#### FLEMING v. FLOYD COUNTY.

(Supreme Court of Georgia. Nov. 18, 1908.)  
COUNTIES (§ 208\*)—ACTIONS AGAINST—LIABILITIES.

A., as transferee of B., brought suit against the county of F. upon account, comprising various items of expenses incurred by B. in going to and returning from the state of Texas, to which state B. had gone as agent of the state of Georgia with requisition papers on the Governor of Texas for a prisoner, who had fled from this state, after his conviction in the su-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perior court of the county of F., to the state of Texas, where he was arrested and incarcerated until delivered to B., the agent of the state of Georgia. *Held*, that the court below did not err in dismissing A.'s suit upon general demurrer filed thereto by the county, the defendant in the suit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 838; Dec. Dig. § 208.\*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by L. J. Fleming against Floyd county. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. A. H. Harris & Son, for plaintiff in error. Junius F. Killyer, for defendant in error.

BECK, J. The plaintiff in error sued Floyd county on an account, which he held as transferee. The greater part of the account was for the expenses of one C. I. Harris in going to Ft. Worth, Tex., and returning to Rome, Ga., with a prisoner. The balance of the account was for the expense of one Alexander Harris, incurred in going to Atlanta, from Rome, Ga., "to have requisition papers properly issued." C. I. Harris, having been furnished with a requisition from the Governor of Georgia upon the Governor of Texas, went to Ft. Worth, received the prisoner referred to, and brought him back and delivered him to the sheriff of Floyd county. The prisoner had previously been convicted of crime in that county, had made a motion for a new trial, and to the judgment refusing a new trial had excepted, bringing the case to this court for review. Pending the hearing of the case in this court the prisoner made an application to be admitted to bail, and was admitted to bail in the sum of \$500. The Supreme Court affirmed the judgment of the lower court, but the defendant in that case failed to appear to abide final judgment of the lower court, and fled the state. Subsequently he was arrested in Texas and there incarcerated. The requisition of the Governor of Georgia having been honored, the prisoner was brought back to the state of Georgia, as above stated. C. I. Harris, who went as the agent of the state of Georgia to Texas to receive and bring back the prisoner, incurred an expense to the amount stated in the account upon which this case is based. He transferred the account to the plaintiff in error, who brought suit against Floyd county on the account, setting out facts as stated in substance above. The defendant in the suit filed a general demurrer, which the court below sustained, and the plaintiff excepted.

The court below did not err in sustaining a general demurrer to the petition. The petition failed entirely to show any liability

on the part of the county for which a suit against it could be maintained. "A county is not liable to suit for any cause of action unless made so by statute." Pol. Code 1895, § 341. "There is no liability on the county for any cause whatever, except such as created by statute. Counties are not liable at common law, and it is for the reason that the several counties of the state are political divisions, exercising a part of the sovereign power of the state; and they cannot be sued, except where it is so provided by statute." County of Monroe v. Flynt, 80 Ga. 489, 6 S. E. 173. Our attention has not been called to any statute providing that an account of the character of the one in which suit is brought in the present case may become the basis of a suit against a county.

Judgment affirmed. All the Justices concur.

EDERHEIMER, STEIN & CO. v. CARSON.  
(Supreme Court of Georgia. Nov. 19, 1908.)

APPOINTMENT OF RECEIVER.

Under the evidence submitted at the interlocutory hearing of this case, upon the application to appoint the sheriff receiver for the property in question and for other relief, the court did not abuse its discretion in refusing such application.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by Ederheimer, Stein & Co. against Keith Carson. Judgment for defendant, and plaintiff brings error. Affirmed.

J. B. Murrow and J. J. Murray, for plaintiff in error. Fulwood & Murray, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

BUCHAN et al. v. WILLIAMSON.

(Supreme Court of Georgia. Nov. 13, 1908.)

1. EXECUTION (§ 38\*)—PROPERTY SUBJECT—LEVIALE INTEREST.

Since the adoption of the act approved December 17, 1894 (Acts 1894, p. 100), as now contained in the Civil Code of 1895, §§ 5432, 5433, where a deed to secure a debt has been executed and a bond given to the grantor binding the maker thereof to reconvey the property upon payment of the debt, and both are properly recorded, the grantor named in the deed has not a leviable interest in the property while the title thus remains out of him, and a levy of an execution in favor of another person and a sale of the property thereunder, without having first caused title to be revested in the grantor in terms of the law, will not pass title to the purchaser.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 98, 99, 101; Dec. Dig. § 38.\*]



## 2. ADVERSE POSSESSION (§ 55\*)—PRESCRIPTION—DURATION OF POSSESSION—DEATH OF PARTY.

Without deciding whether in any case one who takes a deed to secure a debt, makes a bond to reconvey on payment thereof, and subsequently obtains possession under a void sheriff's deed made in pursuance of a sale of the property by virtue of an execution in favor of a third party, might prescribe against the holder of his bond, we do hold that where a petition was brought by the heirs at law of the obligee in the bond, seeking to cancel the sheriff's deed, and to set up that the mesne profits received by the obligor in the bond were sufficient to satisfy the debt of their ancestor, such petition should not have been dismissed on the ground that the obligor had a perfect title by prescription, it being alleged that the obligee died within less than seven years after the sheriff's sale, and that all but two of his heirs were minors, and it not appearing that there was administration for a time sufficient to complete the prescriptive period.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 55.\*]

## 3. EXECUTION (§ 256\*)—SALE—ACTION TO SET ASIDE.

The petition in the present case was not open to demur on the ground that it was in effect a proceeding to set aside a judgment of a court of competent jurisdiction, after the lapse of such length of time as would have barred such a proceeding. The attack upon the judgment was upon the ground that it was void and should be treated as a nullity.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 256.\*]

## 4. PLEADING (§ 225\*)—DEMURRER—JUDGMENT.

Where a demurrer containing both general and special grounds was filed to a petition, one of the special grounds raising the question of the necessity for attaching certain exhibits, and another complaining of a failure to make parties, and on the hearing thereof counsel for plaintiffs requested the presiding judge that, if the grounds of special demurrer should be sustained, he should be allowed a reasonable opportunity to amend, it was erroneous for the judge to refuse the request, stating to counsel that if he had any other amendments to make he had best make them, that it was not his practice to give his reasons, or to state upon which particular grounds of demurrer the judgment of the court was based, and that when the pleadings were closed he would pass upon the case as submitted, and thereupon, after argument, to take the papers under consideration (including all amendments which counsel offered before the hearing closed), and after consideration pass a general order sustaining the demurrer and dismissing the case, without affording any opportunity to correct the defects pointed out by any special grounds of demurrer which the judge may have sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 575; Dec. Dig. § 225.\*]

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by S. A. Buchan and others against A. G. Williamson. Judgment for defendant, and plaintiffs bring error. Reversed with directions.

S. A. Buchan and others, as the widow and children of T. J. Buchan, filed an equitable petition against A. G. Williamson, to cancel a deed made by the sheriff to the defendant, and

to compel a cancellation of a deed to secure a debt, or, in lieu thereof, a reconveyance of the property therein described. It was alleged that the administrator of Buchan had consented to the bringing of this suit by the heirs; that Buchan, on January 10, 1895, made a deed to Williamson to secure an indebtedness of \$1,000, taking from him a bond for title to reconvey upon payment, and both were duly recorded; that subsequently the sheriff made a levy on the property as that of Buchan, under a *fi. fa.* in favor of Williams & Co. against Buchan and others, and at the sale Williamson, the present defendant, became the purchaser on December 1, 1896; that the sheriff placed him in possession, where he has since remained, covering a period of 11 years, enjoying the rents, issues, and profits of the yearly value of \$1,000, being more than enough to have paid the indebtedness secured by the deed from Buchan to Williamson; that the judgment under which the sale was made was void; and that the sale was void on several grounds, among them being that the title was in Williamson, and no deed of reconveyance was made to Buchan before the levy on the property as his. A demurrer to the petition was filed, which was sustained, and the plaintiff excepted. So far as necessary, the various grounds of demurrer will appear from the opinion.

W. H. Terrell, for plaintiffs in error. De Lacy & Bishop, D. M. Roberts & Son, and Chas. W. Griffin, for defendant in error.

ATKINSON, J. 1. By previous decisions of this court it has been held, since the act of December 17, 1894 (Acts 1894, p. 100; Civ. Code 1895, §§ 5432, 5433), that, where a deed to secure an indebtedness has been made and bond for title given to the grantor to make a reconveyance upon payment of the debt, he has not a leviable interest until redemption has been made either by him or by a judgment creditor desiring to subject the property; and that where an execution against the holder of the bond for titles was levied upon the land held thereunder, without his being revested with title, a sale under such a levy passed no title to the purchaser. *Green & Colwell v. Hill*, 101 Ga. 258, 28 S. E. 692; *Black v. Gate City Coffin Co.*, 115 Ga. 15, 41 S. E. 259; *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10; *Jordan v. Cen. City Loan & Trust Assn.*, 108 Ga. 495, 34 S. E. 132. On the face of this petition it was alleged that an execution in favor of a third party against Buchan was levied on the property as his, while the title was in Williamson as security for a debt, and had not been reconveyed to Buchan. As against a general demurrer, the allegations as they stand would show that no title passed under the sale. Thus the attack upon the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sale was sufficient to withstand a general demurrer, as the record now appears.

2. It was alleged that the sale was made December 1, 1896. The suit was instituted in June, 1907. It was also alleged that Buchan died on June 14, 1903, and that, before the institution of the suit by the heirs of Buchan, the administrator consented thereto. It did not appear when the administrator was appointed. One ground of demurrer asserted that it appeared on the face of the petition that the defendant had a prescriptive title to the property, and that nothing was alleged which would be sufficient in law or equity to overcome or disturb his prescriptive right or title. This ground is not tenable. No prescription works against the rights of a minor during infancy (Civ. Code 1895, § 3593); nor against an unrepresented estate until representation, provided the lapse does not exceed five years; nor against a joint title which cannot be severally enforced when a portion of the owners labor under the disability of infancy (Civ. Code 1895, § 3595). It is not decided that Williamson could prescribe under the sheriff's deed against the Buchan claim, while holding Buchan's deed to secure a debt and while his bond to reconvey to Buchan was outstanding; but if he could ordinarily prescribe under such conditions, he could not in this instance. The sheriff's sale was made and possession under the sheriff's deed commenced December 1, 1896. Buchan died June 14, 1903, 6 months and 13 days before the statutory period of 7 years had elapsed from the commencement of possession. It is not alleged when administration was granted, or that it existed any number of days before the filing of the suit. The mere allegation that the administrator consented that the heirs at law should institute the suit would not alone, or when taken in connection with the allegation that all of the period of 7 years' possession by Williamson had occurred during the life of Buchan, except the 6 months and 13 days above pointed out, serve to perfect an inchoate prescription. Thus it is clear that inasmuch as the time possession continued while Buchan lived was insufficient, and there was no allegation as to length of time the estate was represented by the administrator, it could not be said that the declaration showed upon its face that Williamson had prescribed against Buchan or his estate on account of the estate being represented by an administrator. The necessary 6 months and 13 days for prescription to run would remain. Nor would prescription run against the heirs at law of Buchan, who were the plaintiffs in the case. Their claim of right was that the meane profits of the land should be applied to extinguish the debt, and thus give a right to a restoration of title, under the theory as announced in *Polhill v. Brown*, 84 Ga. 339, 10 S. E. 921. If prescription is a reply to such a claim, all of the heirs were minors except the widow and one child, and

all must join in the assertion of this equitable right. Certainly the entire petition could not be dismissed on general demurrer on this ground.

3. Another ground of demurrer was that the petition is in effect a proceeding to attack and set aside a judgment or decree of a court of competent jurisdiction against T. J. Buchan, and it appears upon the face of such petition that said judgment or decree was rendered more than three years prior to the institution of said proceeding to set aside the same, and more than three years prior to the death of said T. J. Buchan, and that said proceeding is therefore barred by the statute of limitations. A careful examination of the allegations contained in the petition will show that it did not amount to a proceeding to set aside the judgment. The sheriff's sale at which Williamson became the purchaser, and in pursuance of which he received the sheriff's deed and entered possession, was attacked by the plaintiffs as illegal. Among the reasons assigned why the sale was illegal, it was alleged in clause (e) of paragraph 8 of the petition, that "there was no legal judgment against T. J. Buchan upon which to base said execution against said T. J. Buchan in favor of J. P. Williams & Company, the said judgment having been rendered in a suit brought by said Buchan and said Mrs. A. E. Whiddon, as administrator of W. B. Whiddon, against J. P. Williams & Company and others, claiming to be creditors of the estate of W. B. Whiddon, for the purpose of marshalling the assets of the estate of W. B. Whiddon, deceased, there being no authority in law for the rendition of a personal judgment against the administrator in such a proceeding." There was no prayer that this judgment be set aside, or any other relief prayed with reference thereto. Under these circumstances the most that could be said of the reference to the judgment is that there was an effort upon the part of the plaintiffs to treat it as a nullity on the ground that it was void as having been rendered without any authority of law. Whatever may be said of the validity or invalidity of the judgment for the reason assigned, the plaintiff's petition should not have been dismissed upon the ground of demurrer directed against this part of the pleadings.

4. Another ground of the demurrer was: "Because said petition seeks to attack and set aside a judgment or decree, certain deeds and other proceedings, and no copy of the judgment and decree, deeds, or other proceedings sought to be set aside is attached as an exhibit to said petition, and because the parties thereto are not made parties to said petition which seeks to set the same aside." Another ground of the demurrer was: "Defendant specially demurs to clause (e) of paragraph 8 of said petition, upon the ground that the same merely pleads a conclusion in alleging that 'there was no legal judgment against T. J. Buchan,' as set forth in

said clause and paragraph, and no facts are stated therein which show that the judgment complained of was not a legal judgment; and further upon the ground that in the identical case mentioned in said clause and paragraph, to which said T. J. Buchan was a party, the Supreme Court of Georgia held and decided that said judgment complained of was a valid and legal judgment, and affirmed the same; so that the question of its legality is *res judicata*, as shown by the decision of the Supreme Court in said case in *Whiddon v. Williams*, 98 Ga. 310, 24 S. E. 437, and complainants claiming in privity with said T. J. Buchan, as shown by their petition, they are concluded by said decision." A general and a special demurrer were not filed separately, but all of the grounds were included in a single demurrer. The presiding judge passed the following order: "After hearing the argument on the demurrer filed in this case, it is ordered by the court that the said demurrer be sustained, and the plaintiff's petition be dismissed at plaintiff's cost." This order should be construed as sustaining the entire demurrer on all the grounds thereof. *Gunn v. James*, 120 Ga. 482, 48 S. E. 148 (2). We have already dealt with all the grounds except those last quoted. It will be seen that the first of these raises the point that certain proceedings and the judgment and deed attacked should be set out as exhibits to the petition, and that it appeared that there was a want of necessary parties. The second sets up the contention that the allegation in regard to the judgment is a conclusion, and also undertakes to plead *res adjudicata*. This latter feature was not a proper subject of demurrer, the former adjudication not appearing on the face of the record. To this extent it was a speaking demurrer, and to sustain it was not proper. Omitting that feature, apparently the presiding judge held that it was necessary to attach certain exhibits to the petition in order that the facts might fully appear, and at the same time dismissed the petition because the facts in regard to the judgment did not appear, and because some omitted parties not specifically named were necessary. Civ. Code, § 5045, requires the judge of the superior court at each term to call all cases on the appearance docket, and hear and decide all objections made to the sufficiency of petitions and pleas, and provides that he may, by order, dismiss the plaintiff's petition, or strike the defendant's plea for noncompliance with the requirements of law, unless the defect is cured by amendment, and that the court may, on good cause shown, allow a reasonable time in his discretion for making and filing such amendment. This evidently contemplates the possibility of curing the defect by amendment, and authorizes the judge to allow a reasonable time in his discretion for that purpose, on good cause shown. Considerable latitude is given to him as to the allowance of time and the ex-

tent of such allowance, in order that justice may be done, but not delayed unreasonably. Whenever a defendant raises some objection to the plaintiff's petition, particularly by way of special demurrer calling for further allegations on some subject or the attaching of exhibits, it does not follow as a matter of course that the objection is well founded, and the plaintiffs are at least entitled to a ruling of the court on the point before suffering dismissal. A plaintiff is not bound in all cases to follow the suggestions of his adversary on pain of having his case dismissed. In the present case exhibits which may be of considerable extent were declared to be necessary by the defendant, and the plaintiff seems to have controverted that position, and to have claimed that they were unnecessary. Was he not entitled to ask the judgment of the court settling the disputed point of necessity before adding the exhibits? In some cases long records or books are referred to, and it is asked that they be considered without attaching them as exhibits and thus greatly enlarging the pleading.

Sometimes reference and proffer have been permitted in lieu of making exhibits under particular circumstances. Suppose that the plaintiff should bona fide think that it was not necessary to make a certain exhibit, and the defendant should set up by way of special demurrer that the exhibit should be made; is the plaintiff bound in all events to yield his judgment and submit to that of the defendant, or may he ask the court to decide the point of contest between them? We think he may. In regard to that ground of demurrer complaining of a failure of the plaintiffs to set forth a copy of the judgment and decree and deeds and other proceedings attacked by the plaintiffs, we think the better practice would have been to pass upon the ground of demurrer, and, if it was sustained, to allow such reasonable opportunity for amendment as the judge might, in the exercise of a sound discretion, determine was proper. So, also, we think the court should have ruled on that ground of demurrer which complained of the failure of the plaintiffs to make parties to the present suit such persons as were interested in sustaining the proceeding, judgment, and decree above referred to, and to have offered a like opportunity to amend, if the plaintiffs should have desired to amend after the ruling. Under the ruling as made by the court, it is impossible to tell, except by implication, who, if any, of the parties were held by the court to be necessary parties.

The bill of exceptions contains the following recital: "During the hearing of said demurrer, plaintiffs requested the said judge to make his ruling on the special demurrers of the defendant separately, and, in the event he sustained any of said special demurrers, that he put in his order a time limit within which plaintiffs should be allowed to amend their petition to meet the same, if they could do

so. This request of plaintiffs was refused and denied by said judge, who stated to counsel for plaintiffs that, if he had any other amendments to make to meet the demurrer, he had best make them; that it was not the practice of the court to give his reasons or state upon which particular grounds of demurrer the judgment of the court was based in overruling or sustaining demurrers, or to suggest to counsel in what respect the court thought pleadings required amendment; and that, when the pleadings had been closed, and submitted and argument had thereon, the court would pass upon the case as submitted to him by counsel. All the time asked for was given plaintiffs' counsel, who, after making certain amendments, expressly stated to the court that he had no other amendments to offer." As will appear from what has already been said, we do not think that this was proper practice, under the facts of the present case. Where the court takes the papers and renders his decision afterwards in the absence of counsel, and declines to state on what grounds he predicates his order, or which ground he sustains, or to give them any other opportunity to offer an amendment, in spite of a request to do so, after announcing his ruling, counsel are put in the somewhat difficult position of having to amend so as to cover every objection which is raised by his adversary, regardless of whether he believes it to be well taken or not, or else to risk the dismissal of his case for failure to meet a ground of special demurrer, if the presiding judge should differ with him in his view of the matter. Of course the judge is not required to advise counsel, or to intimate to them, what amendments they should make; but that is quite different from passing on a ground of demurrer which raises a contention between the parties as to whether an allegation on some particular point should be made fuller, or whether certain exhibits should be attached to a petition or the like. No ruling has ever been made upon the exact point now before us, but intimations will be found in *Ripley v. Eady*, 106 Ga. 422, 424, 32 S. E. 343, and *Lamar, Taylor & Riley Co. v. First Nat. Bank*, 127 Ga. 452, 56 S. E. 486.

Upon consideration of the entire case as it appears in the record before us, we are of the opinion that the proper disposition of it by this court is to reverse the judgment, with direction that the presiding judge pass upon the special grounds of the demurrer separately, and, if he sustains any of them, that he allow counsel for plaintiff such reasonable opportunity to amend as he may deem proper in the exercise of a sound discretion. If the decision is rendered in the absence of counsel, or of notification to them, the order should allow a reasonable time for the making of any amendment to cure the defect pointed out by special demurrer and determined to exist, as requested by counsel for plaintiff.

If no amendment is made, or, if made, it fails to cure the defects, if any, held to exist in the petition, it can then be properly dealt with.

Judgment reversed, with direction. All the Justices concur.

#### BUCHAN et al. v. WILLIAMSON.

(Supreme Court of Georgia. Nov. 14, 1908.)

#### DESCENT AND DISTRIBUTION (§ 90\*)—RIGHTS OF HEIRS—ACTIONS TO RECOVER REALTY—PLEADING.

Where, in an action of complaint for land, the petition showed that the plaintiffs claimed as heirs at law of a decedent, suing with the consent of the administrator, and also showed on its face that their ancestor under whom they claimed had made a deed conveying the property to the defendant, and there was nothing to show that such deed did not convey a perfect title, the petition was properly dismissed on general demurrer.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 90.\*]

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Action by Alice Buchan and others against A. G. Williamson. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Terrell, for plaintiffs in error. De Lacy & Bishop, D. M. Roberts & Son, and Chas. W. Griffin, for defendant in error.

ATKINSON, J. Alice Buchan and others, as heirs at law of T. J. Buchan, deceased, brought suit to recover certain land from A. G. Williamson. The petition alleged that the defendant was in possession of the land, describing it and referring to it in the descriptive clause "as described in deed from T. J. Buchan, dated January 10, 1895, to defendant." In the petition as originally filed it was alleged that "the defendant ousted T. J. Buchan of his possession, and went in to possession under an alleged sheriff's sale and deed, which petitioners allege was void." By amendment this allegation was stricken; and it was also alleged that plaintiffs had the written consent of the administrator of Buchan to bring the suit. As thus amended the case presented the situation of heirs of a decedent undertaking to recover land from a defendant to whom they alleged the decedent had conveyed it, and with no attack on such conveyance, and nothing to show why it did not carry a perfect title to the defendant. Such a petition was plainly open to general demurrer. In the bill of exceptions reference is made to special demurrers, but the demurrer contained in the record is a general demurrer on several grounds, and not one of a special character. Each ground raises the issue of want of right on the part of the plaintiff to recover under the allegations, and affects the petition as a whole.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

There is another case before us between the same parties, based on an equitable proceeding, and some reference is made in the briefs to that action, but a demurrable petition in an action of complaint for land cannot be saved because there is pending in the same court another suit of an equitable character between the same parties and relating to the same subject-matter. The record now under consideration is in no way connected with the other case on its face, and the only reference to the equitable petition is contained in the briefs of counsel.

Judgment affirmed. All the Justices concur.

#### LEE et al. v. WINKLES.

(Supreme Court of Georgia. Nov. 19, 1908.)

##### 1. NEW TRIAL (§ 41\*)—EXCLUSION OF EVIDENCE.

Even if the rejection of the proffered testimony of one of the defendants, as set out in the first ground of the amendment to the motion for a new trial, were, when considered without more, error, it was not cause for a new trial, when the witness gave the same testimony in another part of his evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 69; Dec. Dig. § 41.\*]

##### 2. NEW TRIAL (§ 128\*)—ADMISSION OF EVIDENCE.

A ground of a motion for a new trial, assigning error upon the admission of an incomplete, and therefore meaningless, sentence in the testimony of a witness, presents no point for adjudication.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 258; Dec. Dig. § 128.\*]

##### 3. PAYMENT OF NOTE.

The verdict was supported by the evidence, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by C. A. Winkles against J. W. Lee and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. S. Edwards and Janes & Hutchens, for plaintiffs in error. Griffith & Mathews, for defendant in error.

FISH, O. J. Mrs. Winkles sued J. W. Lee and three others on a note. The defense was payment. There was a verdict for plaintiff, and, defendants' motion for a new trial being overruled, they excepted.

1. One ground of the motion was, "Because the court ruled out, on objection by counsel for plaintiff, the following evidence of W. B. Lee, one of the defendants and a witness for the defendants: 'He (meaning his father, J. W. Lee) told me to carry it on to town and turn Mr. Winkles over the other' (meaning the other two bales belonging to J. W. Lee)." This evidence was offered by defendants to show that J. W. Lee directed his son, W. B. Lee, the witness, to turn these

two bales of cotton over to Mr. Winkles, the agent of the plaintiff, and also to corroborate the testimony of J. W. Lee, one of the defendants and a witness for them, that W. B. Lee was directed by him to turn the cotton over to Mr. Winkles. It appears from the record that W. B. Lee, the witness, did testify, in another part of his evidence that he, by order of his father, delivered the two bales of cotton here referred to to Mr. Winkles, agent of the plaintiff, to be credited on the note sued on. As the defendants, therefore, got the full benefit of this testimony, the refusal of the court to permit the witness to testify to the same fact in another portion of his testimony was not cause for a new trial. *Kessler v. Pearson*, 126 Ga. 725, 55 S. E. 963 (2).

2. The only other special ground of the motion was, "Because the court admitted in evidence the testimony of Jasper Winkles, agent and husband of the plaintiff, who was a witness for the plaintiff, \* \* \* as follows: 'I told him (meaning G. T. Lee, one of the defendants) it was in your hands (meaning that the note was in the hands of plaintiff's counsel), and then they came over and paid \$70 on the note and gave a note for the balance.'" The objection was that this was an offer to compromise. This incomplete, and as it stands meaningless, sentence from the testimony of the witness, raises no point for adjudication. *Smith v. State*, 126 Ga. 803, 55 S. E. 1024 (2).

3. The general grounds of the motion, that the verdict was without evidence to support it, etc., were not meritorious, as there was ample evidence to support the verdict.

Judgment affirmed. All the Justices concur.

#### AIKEN v. AIKEN.

(Supreme Court of Georgia. Nov. 19, 1908.)

##### DIVORCE (§ 223\*)—ALIMONY—COUNSEL FEES.

The evidence being conflicting as to the cause of the separation, whether the wife voluntarily quit the husband, or was forced to leave him because of threats of personal violence, the judge did not abuse his discretion in allowing alimony and counsel fees to the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 645; Dec. Dig. § 223.\*]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by Daisy Aiken against Tebeau Aiken. From the judgment, defendant brings error. Affirmed.

J. D. Wade, Jr., for plaintiff in error. Branch & Snow, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## MOODY v. VONDEREAU.

(Supreme Court of Georgia. Nov. 14, 1908.)

## 1. DEEDS (§ 38\*)—DESCRIPTION—SUFFICIENCY.

When a boundary given in a deed is the land of a named person, the description of this particular boundary will be sufficient, although the title of such third person may be defective, if it be made to appear that the maker of the deed recognized him as the owner and as claiming the land, and the boundary line of the adjacent tract is established by competent extraneous evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65, 78; Dec. Dig. § 38.\*]

## 2. DEEDS (§ 38\*)—DESCRIPTION—UNCERTAINTY.

A deed purporting to convey a parcel of an irregularly shaped tract of land, which describes the land conveyed as containing a definite and exact number of acres, and bounded on the west, south, and east by well-defined boundaries, and on the north by the land of the grantor, is not void for uncertainty. In the absence of a contrary intent appearing, the northern line of the land granted is to be located by a line drawn east and west so as to cut from the larger tract the number of acres specified in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65, 73-79; Dec. Dig. § 38.\*]

## 3. JUDGMENT (§ 685\*)—RES JUDICATA—PERSONS BOUND.

A mortgagee is a privy in estate with the mortgagor as to actions begun before the mortgage is executed; but he is not bound by a judgment against the mortgagor in a suit begun after the mortgage is given, unless he is a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1208; Dec. Dig. § 685.\*]

(Syllabus by the Court.)

Error from Superior Court, Clarke County; C. H. Brand, Judge.

Action by J. T. Moody, for the use of one Holliday, against William H. Ficklin, to foreclose a mortgage. On levy of execution, W. P. Vondereau interposed a claim. Judgment for plaintiff in execution. From an order granting a new trial, he brings error. Affirmed.

W. H. Ficklin was the owner of a tract of land. On March 13, 1895, he executed a mortgage on the same to Moody. The mortgage was transferred to Holliday, who obtained a judgment of foreclosure. Holliday transferred the execution and judgment to Mrs. O'Farrell. In 1897 a portion of the land was sold at a tax sale to Thomas Potts, treasurer, the tax deed describing the land so sold as follows: "About twenty-five acres of land, more or less, in Clarke county, Georgia, and in the corporate limits of the city of Athens, and bounded as follows: On the west by Sandy Creek Bridge road, on the north by other lands of W. A. Ficklin, and on the south and east by streets; said land being in a triangular shape." An execution for the taxes of 1897 was issued against Ficklin, and on March 9, 1898, it was levied upon a portion of the land embraced in the mortgage; the levy being as follows: "I have this day levied the within *fi. fa.* on a tract

or lot of land lying in the 216th district, G. M., said county, containing twenty-five acres, it being a part of the W. H. Ficklin lands, bounded on the west by Sandy Creek Bridge road, on the north by part of the Ficklin lands, on east by an unknown street, on south by lands owned by Loan Association of Henrico County, Va., Thomas Potts, treasurer, levied on as the property of defendant, W. H. Ficklin, pointed out by T. J. Anderson, agent." At a sale pursuant to this levy S. L. Davis became the purchaser, and the sheriff executed a deed to him on April 5, 1898. On April 9, 1900, Davis executed a deed to W. P. Vondereau. On May 3, 1899, Ficklin filed an equitable petition against Davis, W. P. Vondereau, and Mrs. L. J. Vondereau, alleging that the 25 acres above referred to had been sold at tax sale to Davis, who had executed a bond for title to Mr. Vondereau, and charging that the tax sale was void, for the reason that the levy was excessive. There was no allegation that the description of the land in the levy was insufficient. The defendants filed a joint answer, in which they denied that the levy was excessive, and set up that Ficklin was estopped from attacking the sale, for the reason that the land was pointed out for levy by his authorized agent, who after the sale received from the sheriff the surplus of the proceeds of the sale, after the payment of the taxes and costs. A verdict was rendered finding "for the defendants the property in dispute, that the sale under the tax *fi. fa.* was a good and legal sale, and that the title to the property in dispute is in S. L. Davis." A decree was entered, making the verdict the decree of the court. On May 8, 1902, the mortgage execution was levied upon the land therein described. On June 2, 1902, W. P. Vondereau interposed a claim to the land as described in the tax deed to Davis. The claim of Vondereau was returned to the superior court for trial. The claimant filed an amendment to his claim, describing it as a plea of *res adjudicata*, in which it was set up that the plaintiff in the mortgage execution was concluded, by the decree in the case of Ficklin v. Davis et al., from attacking the sale. The case came on for trial at the October term, 1906, and the jury under the charge of the court returned a verdict for the plaintiff in execution. The claimant filed a motion for a new trial, upon the general grounds, which was subsequently amended by the addition of certain special grounds. On November 26, 1907, the court set aside the verdict and granted a new trial, and the plaintiff excepted.

W. M. Smith, Henry C. Tuck, and Cobb & Erwin, for plaintiff in error. T. S. Mell, for defendant in error.

EVANS, P. J. (after stating the facts as above). 1. This is the first grant of a new

trial to the claimant, and under Civ. Code 1895, § 5585, the judgment will not be disturbed unless the law and the facts demanded the verdict. The plaintiff in error contends that the title of the claimant depends on the validity of the tax sale at which Davis was the purchaser, and that this sale is void for the reason that the description of the land in the levy and in the sheriff's deed is so vague and uncertain that it is impossible to locate the land, even with the aid of parol evidence. If the claimant's title be found invalid, the verdict would be demanded by the evidence. It is essential to the validity of a deed that the land granted be sufficiently described to enable it to be identified. Any description will suffice which identifies the land with such certainty that the specific parcel intended to be granted can be ascertained, either by the calls of the instrument as applied to the land or by aid of the descriptive portions of the grant. As was said in *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958, "the test as to the sufficiency of the description contained in a deed is whether or not it discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land therein referred to, so that its identification is practicable." The same rule for determining the sufficiency of a deed made by an individual applies to a deed made by the sheriff; for the sheriff is but the agent of the defendant in execution, constituted and authorized by the law to convey to the purchaser at sheriff's sale the title of the defendant in execution. Where a deed purports to convey a part of a larger territory, it must contain something by which the smaller area can be segregated from the larger.

Does the deed from the sheriff to Davis measure up to this requirement? The descriptive clause of the deed is "a tract or lot of land lying in the 218th district, G. M., said county [the deed was executed in Clarke county], containing twenty-five acres, it being a part of the W. H. Ficklin lands, bounded on the west by Sandy Creek Bridge road, on the north by part of the Ficklin lands, on the east by an unknown street, on the south by lands owned by Loan Association of Henrico County, Va., Thomas Potts, treasurer, levied on as the property of the defendant, W. H. Ficklin, pointed out by J. T. Anderson, agent." The western and eastern boundaries are respectively a road and a street, and are therefore fixed and certain. The southern boundary calls for the land owned by the Loan Association of Henrico County, Va., Thomas Potts, treasurer. The plaintiff in execution offered in evidence a tax deed from Weir, sheriff, to Thomas Potts, conveying "about twenty-five acres of land, more or less, in Clarke county, Georgia, and in the corporate limits of the city of Athens, and bounded as follows: On the west by Sandy Creek Bridge road, on the north by

other lands of W. H. Ficklin, and on the south and east by streets; said land being in a triangular shape." It is her contention that this is the deed under which the Loan Association of Henrico County, Va., Thomas Potts, treasurer, acquired title to the land described as the southern boundary, and that this boundary can only be fixed by the terms of the deed, and that the land is so indefinitely described therein that it is incapable of exact location.

We may readily concede that this deed is invalid as title, because of its indefinite description of the land, under the ruling in the case of *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513. But it does not follow from this circumstance that the call for the loan association tract as a southern boundary could not furnish a line of boundary between the parcels of land claimed to be owned by the loan association and that sold to Davis. The call of the Davis deed for the southern boundary therein described is not for the deed to Potts, treasurer, or any lines fixed in that deed, but for the line of another tract of land, viz., that of the Loan Association of Henrico County, Va. Where the line of another tract is called for in the description of a deed as one of the boundaries of the land conveyed, the line must be run to such boundary line. If the boundary is given as the land of another, the description of this particular boundary will be sufficient, although the name of the person given as an adjoining owner may be incorrect, if it be made to appear that the maker of the deed recognized him as the owner, and as claiming the land at the time the deed was made. 2 Devlin on Deeds, § 1014. The designation of another tract as a boundary is part of the description of the land conveyed, and extrinsic evidence is admissible to show its location. When this is done, the line of such tract becomes the boundary line of the land called for by the deed. It was shown in this case that the Potts tract had been definitely marked out before the land in controversy was sold to Davis at the tax sale. We cannot agree, therefore, with the contention of the plaintiff in execution that the southern boundary of the land in controversy is not susceptible of exact location.

2. We have come to that point in the construction of the deed from Weir, sheriff, to Davis, where we find that the land purporting to be conveyed is bounded on the east, west, and south by boundaries susceptible of exact location. It only remains to consider whether the northern boundary, from the calls of the deed, is capable of being located. It will be noticed that the conveyance is of a definite and exact number of acres of land. Ordinarily the quantity of the land enumerated in a deed is immaterial; but, when the boundary line is not clearly stated, then the quantity becomes an important and material element in the description of the land conveyed. In the deed before us we have

these factors: The land is to be cut off from an irregularly shaped tract of land belonging to W. H. Ficklin, the defendant in *fa*. The parcel to be detached is to contain 25 acres, and is bounded by a road on the west side, by a street on the east side, and by another tract of land on the south. These lines as given in the calls may not strictly conform to the points of the compass, but they are definitely located by fixed physical boundaries. Is it not a fair inference that it was intended that the line between the larger and the smaller area should run from east to west, and located so as to include 25 acres between the northern and southern boundaries? If the northern boundary line be run due east and west, it could only be located at one place so as to embrace 25 acres. It is a cardinal rule in the construction of deeds that a deed will not be held to be void for uncertainty if by any reasonable construction it can be upheld. Certainly it is not unreasonable to say that the parties intended the northern boundary should be run due east and west, when by so doing the grantee receives 25 acres of land with boundaries as stated in the deed.

This question was before the Supreme Court of North Carolina in the case of *Webb v. Cummings*, 127 N. C. 41, 37 S. E. 154. In that case the grantor owned an irregularly shaped tract containing 430 acres. He conveyed to his wife 200 acres. The descriptive language in the deed was "a certain tract of land situated on the east side of [the grantor's] tract he now resides on, to contain 200 acres, and adjoining the lands of D. V. Mercer, W. Y. Webb, and [the grantor's] land on the west side." It was held that the divisional line between the land of the grantor and the grantee should be located by a line run due north and south through the whole tract, so as to cut off 200 acres on the eastern side of the line. A similar holding was made in *Currier v. Nelson*, 96 Cal. 505, 31 Pac. 531, 746, 31 Am. St. Rep. 239; *Reed v. Tacoma Bldg. & Savgs. Ass'n*, 2 Wash. 198, 28 Pac. 252, 28 Am. St. Rep. 851; *Oskaloosa Col. v. Wes. Un. Fuel Co.*, 90 Iowa, 380, 54 N. W. 152, 57 N. W. 903. A grantor who conveys a part of an irregularly shaped tract of land, describing the land conveyed as a certain definite number of acres and bounded on three sides by definite boundaries, and on the north by his land, in the absence of a contrary intent appearing, will be deemed as locating the divisional line between himself and the granted land to be run due east and west, so as to give to the grantee the quantity of land specified in the deed. It may be that at the time the deed was executed the grantor and the grantee agreed upon a divisional line and made a practical location of it, the course of which was not exactly east and west or north and south. In such a case the located line would prevail. *Osteen v.*

*Wynn*, 181 Ga. 209, 62 S. E. 37. And some cases may possibly be conceived where extraneous testimony may be received to show that the divisional line was not intended to run due east and west or due north and south. *Reed v. Tacoma Ass'n*, supra. But this point is not now before us.

The conclusion we have reached is in perfect harmony with the cases of *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323, and *Shackelford v. Orris*, 129 Ga. 791, 59 S. E. 772. In the latter case the description of the land in the deed was very similar to that in the deed before us. It was: "The 15 acres hereby conveyed are bounded as follows: North by land of T. B. Crouch and Wm. Stucker, south by lands of the party of the first part, east by the Louisville public road, and west by the Louisville plank road (old southwestern road)." It was held that the description afforded sufficient means of ascertaining and identifying by competent extrinsic evidence the land intended to be conveyed, and was not void for uncertainty.

We will next examine into the merits of the plea of *res adjudicata* filed by the claimant in aid of his claim. The main feature of the pleading which eventuated in the decree was an attack by Ficklin on the tax sale to Davis, on the ground that the levy was excessive. The parties to the suit were W. H. Ficklin, as plaintiff, and S. L. Davis, L. J. Vondereau and W. P. Vondereau, as defendants. The petition was filed May 3, 1899, four years after Ficklin had mortgaged the land to Moody. Neither Moody nor the assignee of the mortgage was a party to the suit. A mortgagee is a privy in estate with the mortgagor as to actions begun before the mortgage is executed; but he is not bound by a judgment against the mortgagor in a suit begun after the mortgage is given, unless he is a party to the suit. *Keokuk R. Co. v. State*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450. The decree which was set up in the amendment to the claim does not conclude the plaintiff in execution as to the matter therein adjudicated.

From the foregoing it will be seen that the evidence did not demand the verdict, and there was no error in granting a new trial.

Judgment affirmed. All the Justices concur.

#### SOUTHERN RY. CO. et al. v. CASH.

(Supreme Court of Georgia. Nov. 18, 1908.)

#### MASTER AND SERVANT (§ 329\*)—INJURIES TO FELLOW SERVANT.

Where, in a suit for damages by an employé against a railroad company and another employé, who was the engineer in charge of a locomotive, the petition alleges that the engineer suddenly, unusually, and unnecessarily slackened the speed of the train on approaching a station, thereby causing the plaintiff to be injured by being thrown, without his fault, to the ground

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



from the top of a caboose, where he went in the performance of his duty on approaching such station, without alleging that the engineer knew, or alleging facts or circumstances charging him with notice, that the plaintiff was, or was liable to be, at the time in such position, such petition was subject to demurrer by the engineer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 329.\*]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by W. V. Cash against the Southern Railway Company and another. From the overruling of demurrers to the complaint and refusal to grant an order of removal to the federal court, defendants bring error. Reversed.

Jno. J. Strickland and H. L. Parry, for plaintiffs in error. Atkinson & Born, for defendant in error.

HOLDEN, J. Cash brought suit for damages against the Southern Railway Company and J. L. Hudson, making the following allegations: Hudson was an engineer of the company. Cash was also an employé of the company, working in the capacity of a flagman. Cash and Hudson, with other employés, were engaged, upon the date of the alleged injury, in operating one of the company's freight trains. Hudson, the engineer, who was in charge of the train, and who controlled the movements thereof, suddenly, unusually, and unnecessarily slackened the speed of the train, violently bumping and jarring the caboose and cars thereof, and violently throwing Cash from the top of the caboose to the ground, causing him serious injuries. To the petition Hudson filed a general and a special demurrer. The railway company filed an application, setting up the facts that the controversy involved more than \$2,000 and that a diversity of citizenship existed between it and the plaintiff, contending that the petition showed on its face that the controversy was a separable one and asserted separable and distinct causes of action, and asking an order removing the cause to the federal court, filing with the application the requisite removal bond. Exceptions were taken to the overruling of the demurrers and to the refusal to grant an order of removal to the federal court.

One of the main questions involved in this case is whether or not the court committed error in overruling the demurrer filed to the petition by the defendant Hudson. The petition made the following allegation: "While the said train was running at a rapid rate of speed, it became the duty of your petitioner, as said freight train approached Chamblee, a station on defendant company's line of road, and within said state and county, to go from the inside onto the top of the caboose of said train, as he was required to do by the said defendant company; and

while there, your petitioner being then and there wholly free from fault, on account of the joint and concurrent acts of negligence of the defendant company and of its said engineer, who controlled the movements of said train, your petitioner was thrown violently from the top of the caboose onto the ground while running at a rapid rate of speed." The petition further alleged: "That after your petitioner had taken his proper position upon the top of the caboose, your petitioner being then and there and at all times free from fault, the said engineer, who was in charge of said train and who controlled the movements thereof, suddenly, unusually, and unnecessarily slackened the speed of said train, violently bumping and jarring the caboose and cars thereof, and violently throwing your petitioner from the top of the caboose onto the ground, seriously and permanently injuring your petitioner." The only act of negligence charged against the engineer was that he suddenly, unusually, and unnecessarily slackened the speed of the train while the plaintiff was on top of the caboose, which caused him to be thrown to the ground. Though the company itself would be charged with notice of any duty which required the flagman to be on top of the caboose, there is no allegation that the engineer knew, or that the circumstances of the case were such that he should have known, that the plaintiff was, or was likely to be, on top of the caboose, where the alleged conduct of the engineer was liable to cause him any injury. The petition not only fails to allege that the engineer had notice of the fact that the plaintiff was on top of the caboose, or in any place where the unusual and unnecessary slackening of the speed of the train was liable to cause him injury, but there are no allegations of any facts or circumstances which would charge the engineer with knowledge of such position of the plaintiff. The allegations of the petition are not such as to plainly show that it was the duty of the plaintiff, every time the train approached Chamblee, to go from the inside to the top of the caboose. The allegation is that on this occasion it became his duty to do this, as he was required to do by the company; but it is uncertain whether this allegation means that it was his duty to do this on this occasion, or on all occasions when the train approached this station.

While the pleadings are to be construed most strongly against the pleader, yet, if it is proper to infer from this allegation that it was the duty of the plaintiff at all times when the train approached this station to go on the top of the caboose, there is no allegation that the engineer knew of this duty on the part of the plaintiff, or that the engineer's services with the company had been of such duration, and the performance of this duty by the plaintiff had been going

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on for such a length of time, that the engineer should have known that the plaintiff would likely be on top of the caboose whenever the train was approaching this particular station. There is no allegation showing why it was made the duty of the plaintiff to go on the top of the caboose as the train was approaching this station. The only effect of this allegation, of which the plaintiff can have advantage, is that in this particular instance it was his duty to go on top of the caboose as the train approached this station. There was no allegation that it was his duty to go on top of the caboose as the train approached all stations along the road, nor was there any allegation showing that it was his duty to go on top of the caboose every time the train approached this particular station. If the engineer had no notice, and there were no facts and circumstances charging him with notice, that the plaintiff was or was liable to be on top of the cars of the train when the sudden, unusual, and unnecessary slackening of the speed of the train occurred which caused plaintiff damage, such conduct on the part of the engineer, if negligence, would not be negligence with reference to the plaintiff, for which the plaintiff would have a right of action against the engineer. Proof of the allegations of the petition that the plaintiff was without fault and was injured by the conduct of the engineer in suddenly, unusually, and unnecessarily slackening the speed of the train might make a prima facie case against the company by reason of the statute, which raises a presumption of negligence when such facts are shown; but there is no law which permits a presumption to be raised against any one other than a railroad company in a suit for damages when such facts are shown. This presumption is raised against the railroad company by reason of the express statute to that effect. The presumption which is raised against a railroad company is not raised against an individual, though such individual might be a servant or agent of the company at the time of the alleged injury, and his conduct the sole cause of an injury and the basis of recovery therefor. An agent is sometimes relieved from personal liability, because the liability is shifted to the principal for whom he is acting; but certainly in no instance can an agent incur a personal liability for a tortious act in excess of the liability which the same act would impose on one acting solely as an individual, nor are any presumptions which may be created by statute as against the principal applicable to an action in which it is sought to charge the agent with personal liability.

The question which must be considered here is whether or not proof of the allegations made would constitute a prima facie case against the engineer if the suit were against him alone. A sudden, unusual, and

unnecessary slackening of the speed of a train might be such negligence as to constitute an actionable wrong where one was injured thereby, and the engineer knew or was chargeable with knowledge that such person was in a position of danger from such conduct; but negligence causing an injury does not give a right of action to the person injured, unless there is some diligence due to such person at the time with reference to the particular conduct in question. In slackening the speed of the train there was no diligence or care in doing so due by the engineer to the plaintiff while in a position of which the engineer had no notice, or of which he was not charged with notice. It may be that the engineer thought Cash was in the caboose, and that he had no reason to believe and was not chargeable with any notice that the plaintiff was anywhere else; and it may be that the sudden, unusual, and unnecessary slackening of the speed of the train would not have caused any injury to the plaintiff if he had been in the caboose. The engineer might have exercised more care in slackening the speed of the train, if he had known, or was charged with knowledge of the fact, that the flagman was or was liable to be on top of the caboose. In the case of *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990, it was said: "Negligence relatively to the safety of any particular person is the breach of some diligence due to that person. Where no duty of diligence appears relatively to the person injured, there can be no presumption of its breach, notwithstanding the broad language of section 3033 of the Civil Code of 1895." In this connection, see *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 28 L. R. A. 553, 44 Am. St. Rep 145, and the authorities cited and the reasoning given in the opinion.

No cause of action was set forth against Hudson, the engineer, and the court committed error in refusing to sustain his demurrer. If the petition had been so amended as to withstand the demurrer, such amendment might create a different state of pleadings on which to determine the question of the right of the railway company to remove the case to the federal court. If no sufficient amendment had been offered, and the petition dismissed as to the defendant Hudson, it follows, as a matter of course, that the railway company, upon the facts shown in its application for a removal, would have been entitled to an order removing the case to the federal court. The demurrer having been improperly overruled, this court is not now called upon, nor can it at this time properly pass upon the question as to whether it would or would not have been proper to have removed the case if the petition had contained such allegations as would have made it withstand the demurrer of Hudson thereto.

Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

**SMITH v. FIRST NAT. BANK OF FITZGERALD et al. (No. 1,252.)**

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. EVIDENCE (§ 423\*)—PRINCIPAL AND SURETY (§ 90\*)—PAROL EVIDENCE AFFECTING WRITINGS—NOTES—DISCHARGE OF SURETY—NOTICE OF SURETYSHIP.**

A person signing an obligation as a joint maker may show by parol that he is surety only. The equity of a surety to be discharged when he has been prejudiced by any act of the creditor does not depend upon any contract to that effect between the parties, but upon the fact that it is inequitable in the creditor knowingly to prejudice the rights of the surety. The fact that the bona fide holder for value of a negotiable instrument did not know of the suretyship of one of the apparently joint makers when he took the paper makes the foregoing rule no less applicable, if he was given notice of the suretyship before he did the prejudicial act by which the discharge is alleged to have been effected. *Brandt on Suretyship* (3d Ed.) §§ 38, 41; *Stewart v. Parker*, 55 Ga. 658.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1964; Dec. Dig. § 423; \* Principal and Surety, Dec. Dig. § 90.\*]

**2. BILLS AND NOTES (§ 366\*)—BONA FIDE PURCHASERS—DISABILITIES OF COVERTURE—SURETYSHIP.**

As against the bona fide purchaser for value of a negotiable instrument, a married woman signing thereon as apparent maker will not be allowed to show that she was a surety for the purpose of invalidating the contract under section 2488 of the Civil Code, which prohibits a married woman from binding her separate estate by any contract of suretyship; but she will be permitted to show that she was a surety for the purpose of defending against the enforcement of the contract on the ground that the holder of the instrument after notice of her true relationship thereto did such an act to her prejudice as in law will discharge her.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 366.\*]

**3. PRINCIPAL AND SURETY (§ 105\*)—DISCHARGE OF SURETY—EXTENSION OF TIME.**

If, after the maturity of an obligation on which one is bound as surety, the creditor without the consent of the surety accepts the promissory note of the principal debtor and another, due at a later date, for the same debt, the surety is released.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 191, 196; Dec. Dig. § 105.\*]

**4. JUDGMENT (§ 375\*)—SETTING ASIDE—FRAUD OR OTHER IRREGULARITY.**

A timely proceeding in the nature of a motion to set aside a judgment may be filed in a court of law to vacate a judgment for fraud in its procurement or other irregularity sufficient to impeach it, though the facts do not appear on the face of the record. *Ford v. Clark*, 129 Ga. 202, 58 S. E. 818. Such a proceeding must be filed promptly and without laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 712; Dec. Dig. § 375.\*]

5. The fraud and irregularity set up as to the procurement of the judgment assailed in the present proceeding is very similar to that set up in *Ford v. Clark*, supra. The court was not authorized to hold on demurrer that the movant was guilty of such laches as to bar her proceeding under the facts appearing in the record.

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Action between Mrs. J. B. Smith and the First National Bank of Fitzgerald and others. From the judgment, Mrs. Smith brings error. Reversed.

O. H. Elkins, for plaintiff in error. Haygood & Cutts, for defendants in error.

POWELL, J. Judgment reversed.

**THIRD NAT. BANK OF COLUMBUS v. POE. (No. 1,128.)**

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. HUSBAND AND WIFE (§§ 494, 84, 87, 179\*)—WIFE'S SEPARATE ESTATE—CONTRACTS—GIFT—PRESUMPTION AND BURDEN OF PROOF.**

A married woman has power to contract as to her separate estate subject only to the limitations that she can make no contract of suretyship. She cannot assume to, or pay to, a creditor of the husband a debt of the latter. She cannot sell her separate estate to her husband without the consent of the superior court.

(a) In the absence of fraud or undue influence, she may give her property or money to her husband in order that he may pay his debts; and, in the case of a gift, the burden of showing fraud or undue influence is upon her.

(b) In the absence of fraud or collusion, she may borrow money or sell property (the husband's creditor not being the lender or purchaser as the case may be) to get money to furnish to her husband in order that he may pay his debts notwithstanding the lender or purchaser knows the purpose.

(c) She may legally procure a third person to pay the debt of her husband and will be bound by her contract to reimburse him in so doing.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 259, 328, 346-351, 711; Dec. Dig. §§ 494, 84, 87, 179.\*]

**2. HUSBAND AND WIFE (§ 207\*)—BILLS AND NOTES (§§ 339, 346, 363\*)—WIFE'S SEPARATE ESTATE—CONTRACTS—BONA FIDE PURCHASERS—"REASONABLE CAUSE TO BELIEVE"—"REASONABLE CAUSE TO SUSPECT."**

Where a husband, who is a customer of a bank, and who is indebted to it by a past-due note, brings into the bank the cashier's check of another bank payable to his order, indorses it, places it to his deposit account, and gives his personal check thereon in settlement of his note due the bank, the bank, in the absence of mala fides, is not subject to an action by his wife to recover the value of the cashier's check, although it was obtained with her money, and although the bank so accepting it has cause to suspect that the wife was in some way instrumental in procuring it for the husband.

(a) The purchaser for value of a commercial paper who takes it from the apparent owner acquires a good title against an undisclosed true owner in the absence of mala fides. Mere want of such caution in the purchaser as ordinarily prudent men usually exercise in other transactions is not sufficient to defeat his title.

(b) Ordinarily, where commercial paper is offered in the usual course of business, the purchaser need not make inquiry as to the ownership when the transaction appears regular on its face.

(c) If the purchaser knows or has reasonable cause to believe that the apparent owner is not the true owner, and enters into privity or participation in the fraud upon the true title, his title is defeasible.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(d) There is a marked difference between "reasonable cause to believe" and "reasonable cause to suspect."

(e) The verdict in the case at bar is without evidence to support it.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 207; \* *Bills and Notes*, Cent. Dig. §§ 790, 821, 869; Dec. Dig. §§ 339, 346, 363.\*]

(Syllabus by the Court.)

### 3. WORDS AND PHRASES—"WITH NOTICE."

The expression "with notice" usually means and includes all facts discoverable by reasonable inquiry.

Error from City Court of Columbus; J. L. Willis, Judge.

Action by Mrs. E. L. Poe against the Third National Bank of Columbus. Judgment for plaintiff, and defendant brings error. Reversed.

To boil down the testimony, and to give the defendant in error the benefit of doubtful issues of fact, it may be stated in general terms that Capt. Poe, the husband of the defendant in error, owed the bank a past-due note for \$5,000. The bank was peremptorily demanding payment suspecting him to be insolvent. Capt. Poe and his wife, for reasons not necessary to mention, were extremely anxious that it should be paid, and that the bank should not take action. The cashier of the bank came to the Poe residence on May 11th, which was Saturday, and made final demand. Poe had about \$600 in the bank to his credit, and he gave a check for this sum to be placed upon the note. Mrs. Poe had about \$200 in the savings department, and she insisted on giving this to be paid on the note and the cashier took her check for it; but this \$200 is not involved here now. She said she would give her home and a legacy she was expecting soon if the bank would not close Capt. Poe out. The cashier told Capt. Poe that, if the balance were not paid at once, the bank would take action on the note, which was secured by the transfer of a large number of cotton receipts. After the cashier left the house, Mrs. Poe sent for a Mr. Bowers, who was a friend of the family. She stated to him that they were under the necessity of paying to the bank \$5,000 at once to prevent Capt. Poe's business being closed out. Mrs. Poe told him she desired to mortgage to him her home for the sum of \$5,000 to raise the money. Bowers undertook to arrange it for her. After trying to borrow the money for her elsewhere, he went to see Mr. Bradley, who was the active vice president in charge of the affairs of the bank, party plaintiff in error herein. He asked Mr. Bradley if he knew of any reason why he (Bowers) should not lend Mrs. Poe \$5,000. Mr. Bradley said he did not. Bowers then asked Bradley if he knew Capt. Poe's financial condition, to which the latter replied that he did not. He then asked why the bank was pressing for the \$5,000

to be paid that day—why so short a time was given. Bradley replied that he was willing to give him a day or two. Bowers told him that Mrs. Poe had applied to him for the loan of \$5,000, that it would take till Monday to fix the papers, but that, if the bank would await action until Tuesday, he would see that the debt was paid. Bradley replied that, if he (Bowers) would go by the bank and guarantee payment of the paper, the bank would not press it prior to Tuesday. Bowers went by the bank and made the guaranty. He then went to the Merchants' & Mechanics' Bank in the same city and made a personal arrangement by which the sum of \$5,000 was placed to his credit. He prepared a note and mortgage payable from Mrs. Poe to himself for \$5,000 and Mrs. Poe duly executed them. He then made out his check on the Merchants' & Mechanics' Bank payable to Mrs. Poe for the \$5,000, and gave it to Capt. Poe, with directions that he have Mrs. Poe to indorse it. She indorsed it in blank, and sent it back to Bowers. She had instructed Bowers to get the money on it, and pay the note at the Third National Bank. So he took the check thus indorsed by Mrs. Poe to the Merchants' & Mechanics' Bank, indorsed it himself, and asked for the cash on it. As to this Bowers testified: "I went there to get the money on the check to pay the debt I promised to pay to Mr. Bradley." The cashier of the Merchants' & Mechanics' Bank asked him to take a cashier's check for the money, instead of the cash. He agreed to do so, and asked the cashier to make the check payable to Capt. Poe, and this was done. Bowers took this cashier's check to Capt. Poe, who carried it to the Third National Bank, indorsed it, made out a deposit ticket, and deposited it to his credit on his individual account at the teller's window, and then gave the cashier a check on his account for the balance due on the note, which was marked "Paid," and was surrendered, together with the collaterals which had secured it. The cashier testified that, in taking the money in payment of the note, he did not know that Mrs. Poe had anything to do with it, or that it was her money; that he supposed that Capt. Poe, probably through the assistance of Mr. Bowers, had obtained a loan from the Merchants' & Mechanics' Bank; that he made no inquiry; that he had received instructions from Mr. Bradley, the vice president, not to accept payment of the debt from Mrs. Poe; that, if he had known or believed it was Mrs. Poe's money, he would not have accepted it. Mr. Bradley the vice president testified to substantially the same thing, except that he was not present when the note was paid, but learned of the payment later in the day. Mrs. Poe thereafter filed an action against the bank to recover this \$5,000. The petition alleges that at the time the bank received

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the \$5,000 from Capt. Poe it knew that it was not his money, but was the money of the separate estate of petitioner. The jury returned a verdict in her favor for the full amount claimed.

Garrard & Garrard, W. Cecil Neill, Goetchius & Chappell, and Wm. A. Little, for plaintiff in error. Sam. B. Hatcher and C. E. Battle, for defendant in error.

POWELL, J. (after stating the facts as above). 1. A married woman, who, to trace her ascent in the social scale according to the observation of a noted French anthropologist of the last generation, was "first a beast of burden, then a domestic animal, then a slave, then a servant, and then a minor," is now according to our law a free trader, subject only to three express exceptions: She cannot bind her separate estate by any contract of suretyship. She cannot assume to or pay to the creditor a debt of her husband. She cannot sell her separate estate (property or money) to her husband without the consent of the superior court. *Farmers' & Traders' Bank v. Eubanks*, 2 Ga. App. 839, 59 S. E. 193; *White v. Stocker*, 85 Ga. 200, 11 S. E. 604. She may give her property or money to her husband that he may pay his debts with it, in the absence of fraud; and, where a gift is shown, the burden of proving fraud is on her. *Civ. Code 1895, § 2491*; *Cain v. Ligon*, 71 Ga. 682, 51 Am. Rep. 281; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806. She may borrow money to be used by her husband to pay his debts, provided the husband's creditor is not the lender. *White v. Stocker*, supra; *McCrary v. Grandy*, 92 Ga. 327, 18 S. E. 65; *Johnson v. A. Lefler & Co.*, 122 Ga. 670, 50 S. E. 488; *Nelms v. Keller*, 103 Ga. 745, 30 S. E. 572; *Chastain v. Peak*, 111 Ga. 889, 36 S. E. 967. The fact that it is to the lender's interest that the wife should borrow the money from him to furnish it to her husband to pay his debts makes the wife's contract with the lender no less valid. *Rood v. Wright*, 124 Ga. 849, 53 S. E. 390. She may sell her property to get money to pay her husband's debt, and the purchaser, if he is not the husband's creditor, gets a good title, though he knows of the purpose. *Skinner v. Braswell*, 126 Ga. 761, 55 S. E. 914. She may legally procure a third person to pay the debt of her husband, and will be bound by her contract to reimburse him for so doing. *Hill v. Cooley*, 112 Ga. 116, 37 S. E. 109. We have stated these preliminary propositions so that it may be seen how broad are a married woman's powers of contracting even as to matters affecting her husband's debts.

2. The present suit is but a form of the common-law remedy of money had and received. The substance of the petition and the gist of the action is that the bank received for its use and benefit \$5,000 which in equity and good conscience belonged to the

plaintiff. Her petition, as construed in the light of the proof, asserts that the bank allowed her husband to deliver to it the cashier's check which was payable to him, but which was really hers, and to direct its appropriation to a purpose forbidden by law; that her husband held the check as her depository or agent, in a fiduciary relationship; and that the bank colluded with him to break his trust to its benefit and to her detriment. *Cf. Moye v. Waters*, 51 Ga. 13.

It becomes pertinent to inquire, therefore, whether such an action can be maintained when the husband's creditor has received in payment of his pre-existing debt a negotiable bill standing in his name, but really the property of the wife; and, if so, upon what conditions. In the leading case of *Humphrey v. Copeland*, 54 Ga. 543, it is held that "a creditor who receives in payment money belonging to his debtor's wife, knowing it to be her separate estate, acquires no title to it as against her, whether she consents to the payment or not. The Code in declaring a sale void when made by the wife to a creditor of the husband in payment of his debt comprehends, in its reason and spirit, a transaction in money, as well as a transaction in property. Without notice of the wife's ownership, a creditor receiving money is protected, and the burden of proving notice is upon her." In the body of the opinion (page 548) Judge Bleckley says: "In ruling, as we have felt bound to do, that married women can repudiate their consent, whether express or implied, to the use of their money in transactions with their husbands, or in payment to their husband's creditors, we do not mean to say that wives are tolerated by the law in combining with their husbands to commit fraud on other people. It is only where notice is brought home that a wife's rights will be saved. The burden of proof is upon her; for in every case where money is received and value given there is a presumption that title passes, which stands until it is rebutted by evidence. And the measure of evidence should not be too scant in mere deference to sex. When man and wife co-operate for good they can do much good; and so, when they combine against third persons and co-operate for evil, they can do much harm. In protecting women courts and juries should be careful to protect men, too, for men are not only useful in general society, but to women especially." It appears, therefore, that such an action may be maintained if the husband's creditor received the money with notice of the wife's title to it. In the present case the property received was a negotiable instrument. The question, therefore, resolves itself into the more immediate inquiry: What degree of notice is necessary to impeach the title of one who has taken a negotiable instrument from the holder thereof when the instrument in fact belongs to another? This court considered that question in the case of *Walden*

v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127. It will be seen by reference to that case and the authorities therein cited that one who takes a negotiable instrument as a purchaser for value (and in the payment of a pre-existing debt there is a transfer for value) from the apparent owner gets a good title as against the true owner, unless he takes it mala fide; that "such title is not defeated by the want of such caution in the purchase as a careful and prudent man would exercise in the conduct of his affairs, or by gross negligence"; that "mala fides consists in notice, actual or constructive, of the fact that the security [the negotiable instrument], is not the property of the person who offers it and a privity with or participation in a fraud upon the true owner."

It will be seen by reference to the cases of *Matthews v. Poythress*, 4 Ga. 287, and *Shaw v. Railroad Co.*, 101 U. S. 564, 25 L. Ed. 892, cited in *Walden v. Downing Co.*, supra, that the taker of the negotiable instrument is not usually charged with any duty of inquiry by which he would become chargeable with notice of those facts to which such inquiry would lead. The case of *Matthews v. Poythress*, supra, is also cited as authority for the ruling in the case of *Moye v. Waters*, 51 Ga. 18, in which the creditor took from the husband a promissory note payable to the wife or bearer. In the light of the generality of the principle that one may take a negotiable instrument freely from the apparent true holder, there seems to be no reason for restricting it in case the husband is the transferor and the wife the undisclosed true owner. Such cases seem to follow the general rules of jurisprudence. Note the opening statement in the first division of the opinion in the case of *Humphrey v. Copeland*, 54 Ga. 545. See, also, *Gorman v. Wood*, 68 Ga. 527. We find no Georgia case to the contrary. The cases cited by counsel for the defendant in error easily distinguish themselves. In *Chappell v. Boyd*, 61 Ga. 662, *Bank v. Bell*, 65 Ga. 528, *Lewis v. Howell*, 98 Ga. 428, 25 S. E. 504, *Grant v. Miller*, 107 Ga. 804, 33 S. E. 671, and *Rogers v. McClure*, 128 Ga. 393, 57 S. E. 692, the husband's creditor had actual notice of the wife's title. In *Klink v. Boland*, 72 Ga. 498, and *Love v. Lamar*, 78 Ga. 327, 3 S. E. 90, the husband and his creditor were guilty of collusion and fraud against her. In *Chason v. Anderson*, 119 Ga. 497, 46 S. E. 629, it is said that, "unless Chason [the husband's creditor] knew the money belonged to Feriba Mason [the wife], he had a right to presume that it was Mason Anderson's [the husband's] and to apply it to his debt." In *Hull v. Sullivan*, 63 Ga. 139, some of the statements of the court are very strong: "Nothing but fraud committed by Hull [the creditor] or by Sullivan [the husband] with his knowledge would relieve her [the wife]. \* \* \* She was mistress of the title, and it was her province to see that she got the use or the fruits of the use. The

law cast no duty in that respect upon Hull." It is true that in *Humphrey v. Copeland*, supra, Judge Bleckley says: "If at that time he [the creditor] knew or had reasonable cause to believe it was her money, and it was in fact hers, that was enough." But in the light of the whole discussion in the case it is plain that there was no intention of using the phrase "reasonable cause to believe" in any other sense than as equivalent to that constructive knowledge which amounts in substance to actual knowledge, and not as the equivalent of the expression "with notice," which by construction usually means and includes all facts discoverable by reasonable inquiry. A fair example of such constructive knowledge is found in the case of *Bank v. Bell*, 65 Ga. 528. There a note payable jointly to the husband and wife or bearer was placed in the bank for collection. The bank collected it, and placed its proceeds by the husband's direction to the payment of one of his debts. The bank had actual knowledge that the note was given in payment for lands of the wife, and that the note was hers. It was held that on account of the actual knowledge of the ownership of the note the bank had constructive knowledge of the ownership of the proceeds of the note which it itself had collected. If we give to the expression "reasonable cause to believe" found in Judge Bleckley's opinion in the *Humphrey Case*, supra, the same meaning it has been given by the Supreme Court of the United States in construing the national bankruptcy act, we shall see how much it lacks of sustaining the wife's action in the present instance. See *Stucky v. Masonic Bank*, 108 U. S. 74, 27 L. Ed. 640, and *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 97. By these cases it is made plain that "reasonable cause to believe" differs much from reasonable cause to suspect.

There is a difference as to the duty of inquiry where the subject-matter of the transaction is a negotiable instrument offered in the ordinary course of business and where the subject-matter is property of another character. It would seriously embarrass business, especially the business of banking, if commercial paper could not be taken without inquiry as to its title, in the absence of more than a mere suspicion. Take the present case, it certainly cannot be claimed that the bank was in any privity or collusion with the husband or any one else to induce the wife to pay her husband's debt. The agents in charge of the bank were expressly instructed not to allow her to do so. A solvent friend had guaranteed that the debt would be paid on the very day it was paid. It was perfectly legal for that friend to pay the debt or to furnish the husband with money with which to pay it, and even for the wife to agree to reimburse him if he would so furnish it. See *Hill v. Cooley*, 112 Ga. 116, 37 S. E. 109. The husband came into the bank with the cashier's check of another bank

payable to the husband and indorsed by him, and suggesting no connection of the wife with it, and offered that check for credit to his deposit account and ultimate payment on his note. Was it the duty of the teller or the cashier to inquire of him: "Is this your wife's money?" Is it in accordance with the usage of bank officers to inquire of their customers as to their private transactions, as to where they get the money or checks they offer for deposit where they appear regular on their face? If such an inquiry had been made, Capt. Poe might justly have resented it as an act of impertinence. If he had replied merely according to his knowledge, and not also according to his inferences and suspicions, he would have said, "I got it from my friend Bowers." Was it the duty of the cashier or the teller before they received the check to go to the Merchants' & Mechanics' Bank and ask: "Where did Capt. Poe get that check? Whose money is it?" The officials of that bank would properly have replied: "We do not recognize your right to ask any such questions. Banks do not make a practice of divulging the private business affairs of their customers transacted through them." The bank may have suspected that somehow or in some way Mrs. Poe had assisted in procuring the check that Capt. Poe had presented; but her mere assistance in procuring the money would not have prevented the bank from legally accepting it. It is shown by the cases cited in the first division of this opinion that there are several ways in which she might legally have enabled him to get the money with which to pay the bank's debt. Therefore, even conceding that the cashier's check was really Mrs. Poe's, it seems too plain to us that, in the light of the presumptions the bank was authorized to indulge, she did not carry the burden resting on her of showing that the officers of the bank at the time they took the check from Capt. Poe knew it was hers, or that they had reasonable cause to believe (not merely suspect) that which it was necessary the bank should have had reasonable cause to believe in order to allow her to recover, namely, that the check was not Capt. Poe's; that it was not Bower's; that it was still hers; that she had not given it to Capt. Poe.

This view of the case disposes of it without reference to many other questions presented. Indeed, we are strongly impressed with the view that the check was not her property at all in legal contemplation, that legally tested the transaction necessarily shows that Bowers furnished the money at her instance, and that she had no title legal or equitable to the check; but we have not developed that proposition for what we have said above seems to make a final determination of the matter. Her case necessarily rested solely upon the proposition that the

bank received a commercial paper belonging to her under such circumstances that she could recover its value in an action for money had and received. Her right to recover could not be based on the other proposition, and the two propositions are sometimes confused, that the transaction amounted to a sale of her separate estate made to a creditor of her husband in extinguishment of his debt, in violation of section 2488, Civ. Code 1895; for, although money delivered by the wife to the creditor has been held to be within the spirit and scope of this provision, the sale actual or implied which is an essential element is a form of contract, and every contract requires mutuality of consent, and it is plain that, even though she may have intended to transfer or sell this money or commercial paper to the bank in payment of her husband's debt, it was never the bank's intention to deal with her in the transaction by receiving it from her. Cf. *Cason v. Heath*, 86 Ga. 439, 12 S. E. 678. A close comparison of the facts of this case with those of *Walden v. Downing Co.*, supra, will show that the principles announced in that case control the one at bar.

Judgment reversed.

#### McDONALD v. PEARRE BROS. & CO. (No. 1,187.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

##### 1. PRINCIPAL AND AGENT (§§ 99, 103\*)—APPARENT AUTHORITY—SALES AGENTS—INSURANCE OF GOODS.

A principal is bound by the acts of his agent within the scope of the agent's apparent authority. Authority to do an act clothes the agent with apparent authority to do those things usual and necessary for the accomplishment of the act authorized.

(a) Where it is a custom of wholesalers to effect insurance on goods shipped by them when requested or instructed so to do by their customers, an ordinary drummer or commercial traveler, who by the terms of his employment is authorized to receive and transmit orders, but not to close contracts, has apparent authority to receive and transmit instructions as to effecting insurance on goods ordered through him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 254-261; Dec. Dig. §§ 99, 103.\*]

##### 2. SALES (§ 201\*)—CARRIERS—AGENT OF CONSIGNEE—DELIVERY—COMPLIANCE WITH INSTRUCTIONS.

Before delivery to the carrier will convert the carrier into the agent of the consignee, the delivery must be made in the manner specified and in accordance with the instructions of the consignee.

(a) Where a merchant orders goods shipped by sea insured, and the goods are shipped by sea uninsured, the carrier receiving the goods is not the agent of the consignee, especially where it is a custom of the trade for goods to be shipped insured when instructions are given to that effect.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 378, 535; Dec. Dig. § 201.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**3. SALES (§ 201\*)—TRANSFER OF TITLE—DELIVERY TO CARRIER—BUYER'S INSTRUCTIONS—NONCOMPLIANCE—BUYER'S LIABILITY.**

Where goods are ordered shipped by sea insured, and they are shipped by sea uninsured, and are lost, the loss must be borne by the consignor, unless he can recover from the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 378, 535; Dec. Dig. § 201.\*]

(Syllabus by the Court.)

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by Pearre Bros. & Co. against C. J. McDonald. Judgment for plaintiffs, and defendant brings error. Reversed.

The plaintiffs are members of a firm engaged in the business of selling goods at wholesale at Baltimore, Md. The defendant is a retail merchant living at Johnson Station, in this state. The plaintiffs' agent, an ordinary drummer, with authority only to solicit orders and transmit them to his principal, and without any authority to make a binding contract, took the defendant's order for a certain lot of merchandise. The goods were to be shipped by steamer from Baltimore to Savannah. They were shipped on the steamer Lawrence, and were supposedly lost at sea. At least, there is no proof that the goods were ever delivered to the defendant. The plaintiffs sued the defendant for the purchase price of the goods. He defended on the ground that he instructed the plaintiffs' agent to have the goods insured, and that the goods were shipped uninsured. The trial judge held as a matter of law that this did not make out a defense, and directed a verdict for the plaintiffs. The defendant himself and two other witnesses offered to testify that the agent was instructed to have the goods insured. The plaintiffs testified that, when the order was received by them, it said nothing about insurance, and so they shipped the goods uninsured. The plaintiffs, however, as to their custom in the matter of having goods insured, testified as follows: "We have had marine insurance taken out on goods for customers when it was requested by the customer. We have done this only upon personal request by them, or by letter and at their expense. It is our custom, when any of our customers request it, to have goods insured and charge them with the premium. It is a custom of trade, with wholesale dealers, to insure the goods ordered from them and shipped by boat, when such customers so direct. If Mr. McDonald had directed that goods be insured, and we had had knowledge of such direction, we would have insured the goods and charged Mr. McDonald with the premium; but inasmuch as no such directions were received by us from him, or through any other channel, we did not put him to this additional expense without his assent and authority." The drummer was not produced

as a witness. It seems, however, that in certain instances the orders which were sent in by the traveling salesmen of the plaintiffs contained instructions as to insurance. The plaintiffs' shipping clerk testified that the goods were not insured, "as the order did not call for insurance, and we never insure unless so directed."

Donald Fraser, for plaintiff in error.  
Stubbs & Chapman, for defendants in error.

**POWELL, J.** 1. The controlling question in this case is one of agency. Was the agent authorized to receive on behalf of his principal instructions as to having insurance effected on the goods? If so, of course, the plaintiffs are bound by those instructions just as if they had had personal knowledge thereof. The undisputed evidence shows that the agent was an ordinary drummer or commercial traveler, with authority only to solicit and transmit orders for goods, and with no authority to make any contract binding on his principals. Express authority to do an act includes as incidental thereto authority to do those things which are usual or necessary to accomplish effectually the act expressly authorized. Civ. Code 1895, § 3023 et seq.; Huffcut on Agency, 137. "A traveling salesman, like other agents, has implied authority to do all acts or make all contracts that are reasonably necessary and proper, or usually done or made by other agents in the same or similar line of business." 1 Clark and Skyles on the Law of Agency, § —. It would seem, therefore, to follow that an agent with the authority to solicit and transmit orders for goods would have authority to receive and transmit therewith instructions as to the time and manner of shipping the goods. Suppose the purchaser in this very case had instructed the drummer to ship the goods by land, and in transmitting the order the drummer had said nothing as to the route, and the goods had been shipped by steamer and had been lost; or that he had directed shipment by freight and shipment had been made by express, or that he had directed shipment at a certain time and the agent had not transmitted the instructions as to the time of shipment and the seller had shipped at another time; could it be plausibly contended that the agent exceeded his authority in receiving the instructions as to the manner, method, and time of shipment, and that, therefore, the seller was not bound thereby? It could hardly be said that the agent had authority to take orders for goods, but had no authority to take instructions as to the time and manner of shipment. Authority to do the one includes authority to do the other. We fail to see any material difference between the time of shipment or the route, and the matter of having the goods insured. Instructions as to the



time and route of shipment are no more important nor do they go any more to the root of the transaction than instructions as to effecting insurance. Certainly, where the evidence shows a custom on the part of the seller to insure when directed or requested so to do by the purchaser, it would be unreasonable to say that the purchaser must give his order to the agent, and then adopt some other method of communicating his instructions or his wishes as to having insurance effected on the shipment. Indeed, it seems that the usual way for the purchaser's instructions to be communicated as to this very matter is through the drummer; for the plaintiffs' own shipping clerk testified that he did not have insurance effected on the goods because the order did not so specify. The instructions given to the drummer are just as effectual to bind his principals as if he had transmitted such instructions. The familiar rule that an agent with authority only to solicit orders has no implied authority to sell and collect (1 Am. & Eng. Enc. of Law [2d Ed.] 1016) has no application here. The defendant's case does not rest on the proposition that the agent had authority to make a contract of insurance on the goods, but on the proposition that he had authority to transmit instructions as to having insurance effected on them. He was not acting as the agent of the purchaser so far as these instructions were concerned. The only offer made by the purchaser was to take goods on condition that they be insured. The condition was a part of the offer, and the seller

could not accept the offer without complying with the conditions annexed to it. There was no complete contract until the seller accepted the offer transmitted by the drummer; and the offer could be accepted only as it was given. *Howell v. Maine*, 127 Ga. 574, 56 S. E. 771; Civ. Code 1895, § 3645.

2. The remaining question in the case is whether the plaintiffs' failure to effect insurance on the goods as instructed throws the loss on them. In order to convert the carrier into the agent of the consignee, the goods must be delivered to the carrier in the manner specified by the consignee. 1 *Mechem on Sales*, § 746 et seq.; *Burdick on Sales* (2d Ed.) § 275. If there is a material variation as to route, time, place, or manner of delivery to the carrier, the consignee is not bound thereby, and the carrier is the agent of the consignor. *Graves v. Legg*, 9 Exch. 709; *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787; *Corning v. Colt*, 5 Wend. (N. Y.) 253; *Jones v. Schneider*, 22 Minn. 279; *Woodruff v. Noyes*, 15 Conn. 335; *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513. When, therefore, the purchaser orders the goods shipped insured, and they are delivered to the carrier uninsured, and are lost in transit, the loss must be borne by the seller, unless he can recover from the carrier. *New York Tartar Co. v. French*, 154 Pa. St. 273, 26 Atl. 425; *Burdick on Sales* (2d Ed.) § 280; 1 *Mechem on Sales*, § 749. The judge erred in holding that the defense is legally insufficient.

Judgment reversed.

# MARTIN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Nov. 16, 1908.)

## 1. TELEGRAPHS AND TELEPHONES (§ 65\*)—MESSAGES—NONDELIVERY—PLEADINGS—EVIDENCE.

Where a complaint for nondelivery of a telegram, announcing the death of plaintiff's husband, alleged that the body had been delivered for dissection because of defendant's failure to deliver the telegram, and no motion was made to strike such allegation, the admission of evidence that, on plaintiff obtaining possession of the body, it was in such a condition that she was denied the privilege of seeing it was not error.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 65.\*]

## 2. APPEAL AND ERROR (§ 1033\*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where the body of plaintiff's husband was turned over to the Tennessee Anatomical Board, under state law, because of defendant's delay in delivering to plaintiff a telegram announcing her husband's death, evidence, in an action for damages for the delay, that many bodies were turned over to the board was favorable to defendant, as showing that no particular indignity was offered to the body, but that it was disposed of in accordance with the general practice required by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4054; Dec. Dig. § 1033.\*]

## 3. CUSTOMS AND USAGES (§ 19\*)—EVIDENCE—KNOWLEDGE.

Evidence of defendant telegraph company's custom in delivering messages, on ascertaining that an addressee lives outside the free-delivery limits, was properly excluded, in the absence of evidence that the addressee had actual knowledge of the custom, or proof that the custom was so notorious, general, and well established that knowledge would be presumed.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 43, 44; Dec. Dig. § 19.\*]

## 4. EVIDENCE (§ 471\*)—OPINION.

In an action against a telegraph company for failure to deliver a message announcing the death of plaintiff's husband, plaintiff's evidence that her husband was well known in G., whither the message was sent, was not objectionable as an expression of opinion.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

## 5. TRIAL (§ 62\*)—RECEPTION OF EVIDENCE—REBUTTAL.

Where, in an action for nondelivery of a telegram announcing the death of plaintiff's husband, resulting in plaintiff's not being permitted to see her husband's body before interment, defendant offered a letter from the superintendent of the hospital where the husband died, stating that he died from the excessive use of liquor and morphine, plaintiff was entitled to testify in rebuttal that her husband was not addicted to the use of whisky and morphine.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 62.\*]

## 6. TELEGRAPHS AND TELEPHONES (§ 66\*)—MESSAGES—NONDELIVERY—NEGLIGENCE—EVIDENCE.

Where, in an action for nondelivery of a telegram addressed to plaintiff, defendant offered evidence of inquiries made for plaintiff's address at the post office of the town where the message was received, evidence of a mail carrier that he knew where plaintiff lived was ad-

missible to show that, if a still greater diligence of inquiry had been used, her address would have been discovered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.\*]

## 7. TELEGRAPHS AND TELEPHONES (§ 37\*)—MESSAGES—NONDELIVERY—NEGLIGENCE.

Where the addressee of a telegram lived in a suburb of the city to which the message was addressed, but her residence was plainly disclosed by the city directory, the telegraph company, in failing to ascertain such address and take proper steps to deliver the message, was negligent.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 32; Dec. Dig. § 37.\*]

## 8. TELEGRAPHS AND TELEPHONES (§ 37\*)—MESSAGES—NONDELIVERY—FREE-DELIVERY LIMITS—DUTY OF TELEGRAPH COMPANY.

Where a message contract provided that it would be delivered free within the established delivery limits, but for delivery at a greater distance a special charge would be made, it meant that, if the addressee lived beyond the free-delivery limits, and within a reasonable distance, the telegraph company would deliver the message on payment of an extra charge, and was therefore liable for injuries sustained by its failure to deliver a death message to plaintiff, who lived in a suburb of the city to which the message was directed, about three miles from defendant telegraph office; defendant having made no demand for extra charges, and given no opportunity for the sender to pay or guarantee the same.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 32; Dec. Dig. § 37.\*]

Appeal from Common Pleas Circuit Court of Greenville County; D. E. Hydrick, Judge.

Action by Mary O. Martin against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Gary Evans and Jos. A. McCullough, for appellant. Haynsworth, Patterson & Blythe and J. P. Casey, for respondent.

WOODS, J. The plaintiff, Mrs. Mary O. Martin, recovered a verdict of \$500 for mental anguish due to the defendant's delay in delivering the following telegram: "Nashville, Tenn. 17. Mrs. J. Hamilton Martin, Greenville, S. C.: Your husband died in Nashville City Hospital to night. Wire me what to do with the body. O. H. Goodlet." These were the uncontested facts appearing from the evidence: The message was sent from Nashville, Tenn., on October 17, 1905, and not delivered until called for at the Greenville office on 25th October. In consequence of this delay Mrs. Martin was not apprised of her husband's death until the receipt of a letter on 25th October. In the meantime the authorities of the hospital where Martin died, having received no instructions from relatives as to the disposition of his body, turned it over to the State Anatomical Board, as required by the laws of Tennessee. The plaintiff immediately, on receiving information of her husband's death,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had the body sent to Greenville, but it was found on arrival to be in such a ghastly condition that she was denied the privilege of seeing it. The plaintiff's residence was not in the city of Greenville, but in Monoghan, a suburb about three miles from the defendant's office. The defendant's agent made considerable inquiry in the effort to find Mrs. Martin and deliver the telegram, and, being unsuccessful, by service messages attempted to get a more definite address from the sender. The defendant's free-delivery limit was one mile in every direction from the county courthouse, but the defendant often delivered messages in the suburb of Monoghan where plaintiff lived. The defendant's agent had in the office a directory which gave the name and street address of Mrs. Martin and her husband; the name of the husband in the directory being given as Jacob H. Martin, and the wife's as Mary C. Martin. The telegram was addressed to Mrs. J. Hamilton Martin. Defendant's manager, Brenicke, was uncertain whether he looked in the directory to find the name and place of residence. He thought one of the clerks had examined the directory, but was not sure. A motion for nonsuit was granted as to the cause of action based on willfulness, but refused as to the issue of negligence.

Exceptions 1, 2, 3, and 4 raise the point that evidence should not have been admitted of the condition of the body, as the defendant had no notice that nondelivery of the telegram would result in its being turned over to an anatomical board at Nashville. The complaint alleged the body was so treated because of a failure to deliver the telegram, and no motion was made to strike out the allegation. It was therefore not reversible error to admit the testimony. *Milbous v. Ry. Co.*, 72 S. C. 442, 52 S. E. 41, 110 Am. St. Rep. 620; *Mauldin v. Ry. Co.*, 73 S. C. 9, 52 S. E. 677; *Harbert v. Ry. Co.*, 78 S. C. 537, 59 S. E. 644. If the testimony that many bodies were turned over to the Anatomical Board had any effect on the issue, it was favorable to the defendant, because it showed there was no peculiar indignity offered to the body of Martin, but only a disposition of it in accordance with a general practice required by the statute of Tennessee.

There was no error in excluding evidence of the defendant's custom or practice when it ascertained that an addressee lived outside of the free-delivery limits, on the ground that the custom cannot avail unless it is with the knowledge of the parties to be affected. The rule is that such knowledge must be shown, either by evidence of personal knowledge, or by evidence that the custom is so notorious, general, and well established that knowledge of it will be presumed. *Heyward v. Searson*, 1 Speers, 249; 29 Am. & Eng. Enc. 391.

The statement of the plaintiff that her husband was well known in Greenville, and sold medicines to druggists there, was not objec-

tionable as an expression of opinion, for the testimony was as to facts, not opinions.

The defendant introduced a letter from the hospital superintendent, stating that Martin had died from the excessive use of liquor and morphine. This statement, if true, tended to show the wife's respect for her husband, and her grief at being deprived of the privilege of treating his body with tender consideration, was less than she alleged it to be and therefore her testimony in reply that he was not addicted to the use of whisky and morphine was competent.

It is next contended that the evidence of the mail carrier Huff that he knew where plaintiff lived should have been excluded. The defendant offered evidence of inquiries made for plaintiff's address at the post office. This evidence of the mail carrier was competent as tending to show that, if still greater diligence had been used by inquiring of him, the address would have been discovered. But the admission or rejection of all testimony of this kind is quite immaterial because, if it be once conceded that, although the plaintiff lived without the free-delivery limits of the defendant company, yet the issue of diligence in ascertaining her address is involved, then it will hardly be contended it was not negligence to fail to discover the plaintiff's address in the city directory, where it was plainly set down. Indeed the evidence was by no means clear that the directory on which the manager usually depended was referred to at all.

This brings up the main question of the appeal, made by the exceptions to the charge, and to the refusal to grant a nonsuit as to the cause of action for negligence, namely, whether the defendant was required to exercise any care at all to ascertain the residence or place of business of an addressee of a telegram, when such residence or place of business is without its free-delivery limits, but within a reasonable distance from the limits. The defendant had printed on the message form used for this telegram the following undertaking on its part: "Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery." The meaning clearly was that, if it turned out the addressee lived beyond the free-delivery limit, and within a reasonable distance, the telegraph company would nevertheless undertake to deliver the message on payment of the extra charge. It has been held that if from lack of knowledge or other cause the company failed to exact in advance the extra charge for delivery outside the free-delivery limits, it must, upon ascertaining the fact of residence beyond such limits, give an opportunity to pay the extra charge. *Campbell v. Tel. Co.*, 74 S. C. 300, 54 S. E. 571; *Lyles v. Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534. By the stipulation above quoted the company contracts not

only with reference to the free-delivery limits, but also with respect to a reasonable distance beyond. The duty to use due diligence to perform its contract with reference to delivery within a reasonable distance beyond free-delivery limits is as definite and clear as the duty to use due diligence to perform its contract within the limits. The duty in the latter case is to ascertain the residence or place of business and promptly deliver the telegram; in the former to ascertain the residence or place of business, if within a reasonable distance beyond the limits, and ask for the extra compensation for delivery.

This case illustrates the reasonableness of our construction of the stipulations placed by the defendant in its contract, and the justice of the rule of duty which we think grows out of the contract. The plaintiff lived in the suburb Monaghan Mills, not only within a reasonable distance beyond the free-delivery limits, but where the defendant had often delivered telegrams. Her name, as well as her husband's, was in the directory of the city of Greenville, and no intelligent person on examining the directory could fail to discover her name and place of residence, except through negligence. The directory seems to have been the first reliance of the defendant's agent for ascertaining the residence or place of addressees of telegrams, and yet the examination of the directory was so carelessly made that this important telegram remained undelivered. There was certainly evidence to go to the jury on the issue of negligence, and the following instruction of the circuit judge was a correct statement of the law: "It is, however, the duty of a telegraph company, when a telegram is received, to exercise reasonable care and diligence to ascertain the residence of the addressee or person to whom it is sent, and, if he resides within its free-delivery limits, to deliver it free of charge, for that is what it agrees to do; and, if such person lives beyond its free-delivery limits, the company should either deliver it, if within a reasonable distance from its office, and take the risk of being able to collect the extra charge for delivery beyond the limits, or notify the sender of the message, by what is called a service message, that the addressee lives beyond its free-delivery limits, and require either payment or guaranty of payment, as it may choose, of the extra cost or expense of delivery beyond such limits."

The judgment of this court is that the judgment of the circuit court be affirmed.

#### HUTTO v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina. Nov. 20, 1903.)

#### 1. RAILROADS (§ 472\*)—FIRES—ACTIONS—NATURE AND FORM OF REMEDY.

A complaint alleging that a locomotive was so negligently operated that it emitted sparks

which set fire to a cotton seed house adjacent to the railroad, and that the fire was communicated therefrom to the cotton seed house used by plaintiff, stated an action at common law for negligence, and not under Civ. Code 1902, § 2135, making a railroad liable for damages by fire communicated by its engines or originating on its right of way, except where the property damaged shall have been placed on its right of way unlawfully or without its consent.

[Ed. Note.—for other cases, see Railroads, Dec. Dig. § 472.\*]

#### 2. RAILROADS (§ 482\*)—FIRES—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railroad company for the destruction by fire of cotton seed stored in a cotton seed house on its right of way, that the cotton seed was in the house with the acquiescence of the railroad company and was awaiting a car for shipment, which the owner had requested and for which he had made a guarantee deposit, and that previous shipments from such house had been made by the owner over the railroad company's line, authorized a finding that the cotton seed was upon the right of way with the railroad company's consent, so as not to fall within the exception to Civ. Code 1902, § 2135, making a railroad company liable for damages by fire communicated by its engines or originating on its right of way, except where the property shall have been placed on its right of way unlawfully or without its consent.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 482.\*]

#### 3. RAILROADS (§ 473\*)—FIRES—ACTIONS—DEFENSES.

A person who stored cotton seed in a house erected on a railroad company's right of way under an agreement between it and a third person that such third person should not assign or underlet the premises, and that the railroad company should not be liable for loss by fire, without knowledge, actual or constructive, of such agreement, was not bound thereby.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 473.\*]

#### 4. RAILROADS (§ 484\*)—FIRES—EVIDENCE—QUESTION FOR JURY.

Evidence, in an action against a railroad company for the destruction by fire of cotton seed stored in a house on its right of way, that a train had passed at a speed of 40 miles an hour going up grade, with many sparks flying, that a stiff wind was blowing toward the seed-house, and that, when the train had gone about two miles, a seedhouse adjacent to the one in which the seed was stored was discovered to be on fire, which fire extended to plaintiff's seed-house, and there being no evidence of the existence of any other cause of fire, was sufficient to go to the jury on the question of whether the fire was communicated from the locomotive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1743; Dec. Dig. § 484.\*]

#### 5. RAILROADS (§ 480\*)—FIRES—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Communication of fire by a locomotive is prima facie evidence of negligence which casts the burden on the railroad company to show that the locomotive was constructed, equipped, and managed with due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1710, 1711; Dec. Dig. § 480.\*]

Appeal from Common Pleas Circuit Court of Orangeburg County; J. C. Klugh, Judge.

Action by J. D. Hutto against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Moss & Lide, for appellant. L. K. Sturkie and Raysor & Summers, for respondent.

JONES, J. In this action plaintiff recovered judgment against defendant for \$507.15 as damages for destruction of a lot of cotton seed by fire communicated thereto by one of defendant's locomotive engines.

The first contention presented by defendant's exceptions to this judgment is whether the court erred in holding that the complaint was under the common law, and not under the statute. Section 2135, Civ. Code 1902. The complaint, after alleging the incorporation of the defendant, that it operated the railroad at the time of the fire, and that plaintiff had the lot of cotton seed stored in a seedhouse "adjacent to defendant's railroad" in the town of Livingston, a station on said railroad, further alleged:

"Fourth. That on or about the 15th day of March, A. D. 1907, one of defendant's locomotives, used for pulling or carrying defendant's through train which passed through the said town of Livingston, going north, shortly after nightfall, on or about the 15th day of March, 1907, at a high rate of speed, in violation of the laws of said town, was so carelessly and negligently managed and operated by the defendant that said locomotive emitted, while passing through said town of Livingston as aforesaid, a large quantity of sparks, which sparks so emitted set fire to a certain cotton seed house adjacent to defendant's railroad, in the county and state aforesaid, and the flames and heat of said cotton seed house while being burned communicated and set fire to the cotton seed house used by the plaintiff, adjacent thereto, in which the plaintiff had stored his cotton seed, as described in paragraph 'Third' herein, and situate in the town of Livingston, in the county and state aforesaid, adjacent to defendant's railway.

"Fifth. That by reason of said fire, caused by the carelessness and negligence of the defendant as aforesaid, the cotton seed house in which the plaintiff had stored his twenty-one tons of cotton seed, as described in paragraph 'Third' of this complaint, the said cotton seed house was totally destroyed and the plaintiff's twenty-one tons of cotton seed totally consumed by said fire, to the damage of plaintiff five hundred and seven and  $\frac{15}{100}$  dollars, with interest thereon from March 15, 1907, till settlement is made."

The answer of defendant, besides a general denial, alleged a written agreement between defendant and J. F. Hutto, executed October 29, 1900, permitting J. F. Hutto to erect and maintain a seedhouse upon defendant's right of way in Livingston, S. C., for the purpose of storing cotton seed, etc., upon the stipulation of J. F. Hutto that he would not assign or underlet the premises without the written consent of defendant, and it was further stipulated that defendant should not be liable for loss or damage occurring to

the building or contents by fire from the engines of defendant, and that plaintiff used said building so erected for storing cotton seed without the authority, knowledge, or consent of defendant.

There was evidence introduced by defendant showing that said lease was duly executed, and that the said house in which the cotton seed in question was stored was erected by J. F. Hutto under the lease upon defendant's right of way, and that the plaintiff had been using the same for the purpose of storing cotton seed and not for shipment. This lease was not recorded, and there was no evidence that plaintiff was aware of its provisions. Plaintiff testified that he had no knowledge of the lease or its contents; that the said seedhouse was upon defendant's right of way; that for some time it had been in the possession of the Southern Cotton Oil Company; that he had been using the said house for about two years with the permission of the Southern Cotton Oil Company; that he obtained no written consent from the defendant to use the house; that defendant's agent at Livingston knew that he was using the house; that defendant had been furnishing him cars for the shipment of cotton seed stored in said house; and that he was at the time of the fire awaiting the furnishing of a car by defendant for the shipment of cotton seed, having put up money to guarantee the car. At the close of the testimony defendant moved for direction of verdict in its favor on the ground that the complaint was under the statute, and the evidence was conclusive that the property destroyed by fire was upon defendant's right of way without its consent.

Section 2135, Civ. Code 1902, provides that: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said railroad in consequence of the act of any of its authorized agents or employes, except in case where property shall have been placed on the right of way of such corporation unlawfully, or without its consent, and shall have insurable interest in the property upon its route for which it may be held responsible and may procure insurance thereon in its own behalf."

Our cases show that it is not necessary to prove negligence in order to recover under the statute. *Thompson v. R. R.*, 24 S. C. 366; *Rogers v. R. R. Co.*, 81 S. C. 378, 9 S. E. 1059; *Gregory v. Layton*, 36 S. C. 93, 15 S. E. 352, 31 Am. St. Rep. 857. The plaintiff declared that the action was based upon negligence and not upon liability under the statute, and looking at the complaint it is clear that such was the intention and that the circuit court was correct in so holding. But assuming that recovery could neverthe-

less be had upon the pleadings on proof of a case falling within the statute, we think there was no error in refusing to direct a verdict for defendant. There was testimony tending to show that the cotton seed was destroyed by fire communicated by defendant's locomotive, and that the property was upon defendant's right of way for purposes of shipment over its line, with the knowledge and acquiescence of its agents, and was at the time of the fire awaiting a car for shipment, which plaintiff had requested and for which he had made guarantee deposit of money, and that previous shipments from said house had been made by plaintiff over defendant's line. These were circumstances from which the jury would have the right to infer that the cotton seed was upon defendant's right of way, not unlawfully but with its knowledge and consent, hence the case did not fall within the exception in the statute excusing liability. As stated already, there was no evidence connecting plaintiff with the lease in question or with notice, actual or constructive, of its stipulations, hence he was not bound thereby. This case is distinguishable from *Insurance Co. v. Southern Ry. Co.*, 77 S. C. 467, 58 S. E. 337, relied on by appellant, wherein there was an express stipulation by the owner of the cotton that the railroad company should not be deemed to have consented to the placing of cotton upon its right of way, and that the cotton was at the sole risk of the owner until tendered and accepted for shipment. The first, second, and third exceptions are therefore overruled.

The four remaining exceptions raise the question whether it was error to refuse defendant's motion for nonsuit and to direct a verdict for failure of plaintiff to make out a case of negligence under the common law. We think there was no error. The testimony showed that the said house containing plaintiff's cotton seed was located in the incorporated town of Livingston, that defendant's vestibule No. 84 passed through the town after nightfall on March 15, 1907, at a speed of 40 miles an hour, going upgrade, with many sparks flying rapidly from its locomotive, and a stiff wind blowing from the east across the tracks towards the seedhouse located on the west side, and that by the time the train had gone about two miles from the station the north corner of the seedhouse adjacent to the one in which plaintiff's lot of seed was stored was discovered to be on fire, which fire extended to plaintiff's seedhouse and burned up his seed. There was no evidence of the existence of any other cause of the fire. There was some evidence to go to the jury on the question of whether the fire was communicated from defendant's locomotive, and the verdict under the charge establishes the fact that the fire was so caused.

There is conflict among the authorities in other jurisdictions as to whether the mere communication of fire by a railroad engine is

sufficient to raise a presumption of negligence against the company. Many cases are collated in 13 *Ency. Law.*, at pages 498, 499, for the affirmative of the proposition, and at pages 507, 508, for the negative. See, also, note in 15 *L. R. A.* 40, collating cases on the subject. Our cases sustain the view that proof of loss by fire communicated by a railroad engine is prima facie evidence of negligence, which casts the burden on the railroad company to show that its engine was constructed, equipped, and managed with due care. In *Brown v. Atlantic, etc., Ry.*, 19 S. C. 56, the court said: "The fact of the injury being proved, the onus was on the company to disprove negligence, which they might do by showing that they had the most improved mechanical contrivances, and that on that day such engines were managed with due care and skill." In *Wilson & Co. v. Atlantic, etc., Ry. Co.*, 16 S. C. 588, the plaintiff offered evidence tending to show the burning of cotton on the platform by sparks communicated by the defendant's engine, and the defendant in that case offered evidence of care in the equipment and management of the engine, but the Supreme Court held that the circuit court committed no error in refusing the defendant's request to charge: "That if the jury find from the evidence that the defendant corporation was provided with the usual improved machinery for protection against fire, and that said machinery was worked by competent and careful engineers, they will find for the defendant." The court held that, while these were facts which would create a very strong presumption in favor of the company, they are not absolutely conclusive on a question of negligence. In the case at bar defendant made no attempt whatever to show due care in the equipment and management of its engine. In *McCready v. R. R.*, 2 *Strob.* 356, the court held that when the fact of damage by fire of the railroad engine is shown, and the manner in which the fire was communicated appears, the question of negligence is for the jury. The following cases support the principle stated in *Brown v. R. R.*, supra: *Hull v. Sacramento, etc., Ry. Co.*, 14 *Cal.* 387, 73 *Am. Dec.* 656; *Spaulding v. Chicago, etc., R. R. Co.*, 30 *Wis.* 110, 11 *Am. Rep.* 550; *Clemens v. Hannibal, etc., R. R. Co.*, 53 *Mo.* 366, 14 *Am. Rep.* 460; *Atchison, etc., R. R. Co. v. Stanford*, 12 *Kan.* 354, 15 *Am. Rep.* 362; *Burke v. Louisville, etc., R. R. Co.*, 7 *Heisk. (Tenn.)* 451, 19 *Am. Rep.* 618; *Green Bridge, etc., R. R. Co. v. Brinkman*, 64 *Md.* 52, 20 *Atl.* 1024, 54 *Am. Rep.* 757; *Gulf, etc., R. R. Co. v. Benson*, 69 *Tex.* 407, 5 *S. W.* 822, 5 *Am. St. Rep.* 74; *Louisville, etc., R. R. Co. v. Reese*, 85 *Ala.* 497, 5 *South.* 283, 7 *Am. St. Rep.* 66; *Dean v. Chicago, etc., R. R. Co.*, 39 *Minn.* 413, 40 *N. W.* 270, 12 *Am. Rep.* 659; *White v. Chicago, etc., R. R. Co.*, 1 *S. D.* 326, 47 *N. W.* 146, 9 *L. R. A.* 826; *Southern R. R. Co. v. Elliott*, 129 *Ga.* 705, 59 *S. E.* 787.

This view is sufficient to dispose of the exceptions, and it is unnecessary to notice whether there was not other circumstances in the case which, when combined, would aid the presumption of negligence, such as the speeding of the train at night through the town with a high wind blowing across the track towards the combustible property near by, and the engine rapidly emitting a large quantity of sparks.

The judgment of the circuit court is affirmed.

**WEATHERSBEE et al. v. WEATHERSBEE et al. (two cases).**

(Supreme Court of South Carolina. Nov. 24, 1908.)

**1. JUDGMENT (§ 567\*)—RES JUDICATA—CONSISTENT DECREE.**

Proceedings were brought by a widow and others to partition property, in which the widow had a dower interest. At the foot of the decree was a written consent to the decree signed by the widow, individually and as guardian ad litem for her infant children, who thereafter entered into possession of the land as partitioned. The decree was signed in another county than the one in which the land was located. Code Civ. Proc. 1902, § 144, provides that actions for partition must be tried in the county where the subject of the action, or some part thereof, is situated, provided that this section shall not prevent the hearing of by consent of the parties in a county other than that in which the property is situated. *Held*, that the proceedings and the subsequent action of the widow in taking possession of her portion of the land as partitioned were a bar to an action for dower by the widow or to an action of partition by one of the children.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1011; Dec. Dig. § 567.\*]

**2. WILLS (§ 564\*)—CONSTRUCTION—DESCRIPTION OF PROPERTY.**

A devise of certain property, together with its increase in value by rents and otherwise, to take effect on the death of a person named, is a devise of the rents during the lifetime of such person, and testator, as to such rents, does not die intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1228-1232; Dec. Dig. § 564.\*]

Appeal from Common Pleas Circuit Court of Alken County; Geo. W. Gage, Judge.

Action by Mattie C. Weathersbee and others against M. F. Weathersbee and others, and action by Annie C. Weathersbee against M. F. Weathersbee and others. Judgments for defendants, and plaintiffs appeal. Affirmed.

B. T. Rice, for appellants. Bates & Simms, D. S. Henderson, and Robt. Aldrich, for respondents.

POPE, C. J. In the two foregoing cases Judge George W. Gage made the following decree:

"State of South Carolina, Barnwell County.  
"In the Court of Common Pleas, Fall Term,  
1906.

"Annie C. Weathersbee v. M. F. Weathersbee, B. L. Weathersbee, E. E. Weathersbee, R. A. Weathersbee, Mattie C. Weathersbee, Mary A. Weathersbee, and Elizabeth Weathersbee. Decree.

and

"Mattie C. Weathersbee, Mary A. Weathersbee and Elizabeth Weathersbee, by Their Guardian ad Litem, R. C. Holman, v. M. F. Weathersbee, R. A. Weathersbee, E. E. Weathersbee, B. L. Weathersbee, and Madelle Weathersbee. Decree.

"The cause first entitled is an action for dower. The cause next entitled is for partition. The subject for the action is the same in both causes; and so are the parties, except Annie C., plaintiff and widow in the first case, and Madelle Weathersbee, who is defendant in the last case. The subject of the actions is a plantation containing 530 acres, a house and lot at Williston described as the homestead lot, three brick stores at Williston, and a vacant lot at the same place, and described as the burnt or Garbel lot, four parcels all told. The title upon which plaintiff rely, and defendants too, is a deed made 4th January, 1879, by Ashley M. and Martin F. Weathersbee, to their father, Allen J. Weathersbee. Allen is now dead, so is Ashley M. The latter left his wife, Annie C., and his children Mattie, Mary, and Elizabeth. The deed from sons to father (supra) limited the fee thus: To Allen and his wife, Mary C., for their lives, or the life of that one who should survive the other; remainder to Ashley, Martin, and Robert (another brother), share and share alike, the children of either of the three who might be dead at the termination of the life estate to take the dead parent's share per stirpes. The defendant E. E. Weathersbee is the wife of Robert, and she claims title to two lots at Williston, first, under deed from R. A. Weathersbee dated 5th November, 1894, and recorded book 7 E, p. 48; and, second, under a deed from F. H. Creech, sheriff, dated 16th March, 1899, and recorded volume 6 R, p. 556. Counsel for the plaintiff admitted at the hearing that this title was not subject to partition. The defendant B. L. Weathersbee is the wife of Martin F., and his conveyee of some of the property in issue. To the action for dower the defendants plead as a defense that heretofore, in 1898, the plaintiff Annie C. Weathersbee and her three children, Mary, Mattie, and Elizabeth, joined with Martin and Robert Weathersbee in an action for the partition of these same lands; that a decree was rendered therein by Judge James Aldrich; and that, of the farm lands of 530 acres, the parties actually went into possession of their several parts, and have

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

since enjoyed them in severalty. Manifestly, if that decree is lawful, then the action for dower must fail. The plaintiff assails the decree, first, by the contention that the court had no jurisdiction to make it at Bamberg, out of Barnwell county, the locus of the land; and, second, by the contention that the decree is erroneous, in that it undertakes to vest a title in Annie O. Weathersbee, contrary to the terms of the deed from Martin and Ashley Weathersbee to their father, Allen J. And, to correct that error, plaintiffs three daughters move to open the decree. That motion is ancillary to this action, but independent of it, and will be determined by a separate order. At the foot of Judge Aldrich's decree there is written this consent: 'We consent to the above decree being signed by the Hon. James Aldrich, judge of the Second circuit, at chambers.' That is signed by Annie Weathersbee in her own right, and as guardian ad litem for her children.

"I am of the opinion that Judge Aldrich had jurisdiction to make the decree, and these parties are bound by its terms. Plaintiff relies on section 144 of the Code of Civil Procedure of 1902, and *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477. In the case cited the issue here did not arise. The decree there was made in Georgetown, and the land there lay in Georgetown. That cause was decided in 1887. After that time and in 1894, the Code of Procedure was amended by providing that, upon consent of the parties, the hearing might be had in a county 'other than that in which the property is situated.' If the parties consented, the decree was lawful. The statute does not prescribe how the consent shall be evidenced. In the case then pending there was no contest. No issue was made by the pleadings, and no issue was tried by the judge. All the parties were represented by one attorney, a gentleman of character and culture. The parties to the cause agreed in writing to the terms of partition, they made it themselves, and they signed the evidence of it with their own seals. The circuit judge merely confirmed their action, and the parties consented in writing that he might do so at chambers; and their conduct, as well as the character of the act, implied that it might be done anywhere.

"The Code plainly and wisely requires that actions involving the title to land (and personal property in one instance) shall be tried in the county where the subject is located. Title 4, which embraces section 144, uses the words 'place of trial' as synonymous with 'venue.' The place of the trial is the place where the action is brought, and where the record is preserved for the guidance of those who may be interested in land titles. The same statute directs how the venue may be changed from one county to another, and the record transferred thither. Until the

record has been thus transferred, the trial is deemed to be had in the county named in the summons. In the instance under review, the place of trial has always been in Barnwell, and the record is now there and has always been. The 'hearing' was only had in Bamberg for the convenience of the parties or their attorney. To conclude that the mere hearing of a cause across a county line would invalidate a judgment would be hazardous, and make the statute law an unreasonable thing. And, if the letter of the record must be appealed to, it does not disclose that the 'hearing' was had at Bamberg, but only the 'signing.' A circuit judge often hears in one county and signs in another county, a practice justified by necessity and by the decisions. Furthermore, the parties have actually executed the decree. The plaintiff and her daughters are in possession of 170 acres of the land which was partitioned. I am therefore of the opinion, that the demand for dower cannot be sustained, and the complaint therefore is dismissed.

"As to the partition: It is admitted on all hands that, if the decree of Judge Aldrich, hereinbefore referred to, is valid, then the plaintiffs are not entitled to partition of the lands, which were by that action partitioned in severalty to plaintiffs and defendants. I conclude, therefore, that the plantation of 530 acres of land, last described in the complaint, is not subject to partition. So far as it is concerned, the prayer of the complaint is denied.

"It is not denied by the defendants that the plaintiffs are entitled to partition of the storehouse and lot occupied once by Rountree, in which plaintiffs have an undivided one-half interest; and to a partition of the brick store and lot, in which plaintiffs have an undivided one-third interest. So much appears from the decree of Judge Aldrich upon which the defendants stand, and which I have already found to be a valid decree. The complaint further puts in issue the homestead lot, or, as it is sometimes called, the 'residence' lot.

"And the argument at bar made another issue which is mooted in this testimony. That is the northern boundary of the homestead. The plaintiffs contend that, when the homestead was assigned, the northern boundary line ran so close to the residence that entrance to it was practically closed, and thus a vacant lot was left betwixt the homestead and the railroad or street. The return of the appraisers thus describes the lot assigned: 'One tract of land containing house and lot adjoining lands of S. C. R. R. and Mrs. Martha Smith and A. J. Weathersbee, also a lot of about three acres, bounded by a street separating from above lot, and on south by J. H. Sprawls and west by public road.' The appraisers differ in their testimony about the disputed line. The will of the testator describes the homestead lot as



embracing nearly five acres. I am of the opinion that the northern boundary is the railroad or street.

"The next issue is one of law, and it rises upon a construction of the will of Allen J. Weathersbee. That instrument was manifestly prepared by a nonprofessional hand. In the second item the testator undertakes to dispose of the major part of the homestead. The minor part is devised in the fourth item; and there the testator refers to the homestead lot as the 'residence' lot. That he gives to Viney Wright for her life. The plaintiffs contend that the testator limited the title by executory devise to certain persons who might be alive at the death of Robert Weathersbee; and that the title before the event, betwixt death of testator and death of Robert, was intestate property in the heirs of the testator, and subject to partition between them. The defendants contend that the testator intended Robert A. to enjoy the property for his life, and that he took by implication an estate for his own life, or that he became trustee to hold the property, and collect the rents therefrom, for those who might be entitled at his death. In my opinion, the testator intended one or both of these things; but the weight of the argument is that he intended the last. Here, as in every case, the business of the court is to ascertain from the whole instrument the intent of the maker. That ascertained, it must be executed, if lawful. It is not always possible, if indeed it be desirable, to characterize by accurate definition the estate or interest which a testator has created to carry out his intent. In much confusion of speech the intent may yet be manifest. In the case at bar the testator plainly stated the ultimate objects of his bounty. They were the children of Robert A. He further plainly stated the time at which these objects should take. That was at Robert's death. He further plainly stated what subject-matter they should take. That was the major part of the homestead, 'together with \* \* \* the increase in the value (thereof) by rents or otherwise, at the time of the death of the said Robert'; and, further, the minor part in the same way, after Viney Wright's death. Manifestly, the rents were to be collected, and if the children of Robert are entitled to have them at Robert's death, from testator's death to Robert's death, then the plaintiffs cannot have them. The plaintiffs do not demand aught else than the rents, which is the use. But the will expressly declares that such rents shall belong to the children of Robert. In my opinion such a direction is not unlawful. A gift by will of rents of land to a person for a fixed period, to be paid at a fixed time, is lawful; and if no trustee is named to hold the title and possession of the corpus, then the court will name such a trustee. In this case a trustee

is named in the person of the executors. I am therefore of the opinion that the plaintiffs are not entitled to partition of the home lot, or any part of it.

"Thus all the issues made in the pleadings and testimony and argument have been passed upon.

"Any of the parties may apply at the foot hereof for any order to carry out the views expressed herein; and for that purpose application can be made to me or some other circuit judge."

Thus it will be seen that the circuit judge first passes on the question of dower, and holds that there is no dower. We sustain the circuit judge in this finding. *Smith v. Tanner*, 32 S. C. 259, 10 S. E. 1008; *Smith v. Oglesby*, 33 S. C. 194, 11 S. E. 687.

The second question related to the partition; it is agreed on all sides that if Judge Aldrich's decree is valid no question of partition arises. It is claimed that the decree of Judge Aldrich is not a legal decree because signed at Bamberg, not in Barnwell. The reasons given by the judge which have hereinbefore been reported are satisfactory to this court; it holds that the decree of Judge Aldrich, although signed at Bamberg, was a valid decree; it was a consent decree, and might be considered as a family settlement. *Smith v. Oglesby*, supra; *Smith v. Tanner*, supra.

The third question is as to the effect of the will of Allen J. Weathersbee. We agree with the circuit judge that the intention must govern.

The reasons assigned by the circuit judge for his conclusions are entirely satisfactory to this court.

The judgment of the circuit court is affirmed.

#### GREENWOOD DRUG CO. v. BROMONIA CO.

(Supreme Court of South Carolina. Nov. 16, 1908.)

#### 1. JUDGMENT (§ 713\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment against a purchaser in favor of the seller for the price of the goods and for the expenses of advertising, pursuant to a contract between the parties, estops the purchaser from subsequently bringing an action against the seller to recover the amount of the purchase price and amount paid for advertising, interest on these amounts, costs of the suit brought by the seller, and attorney's fees and expenses incurred in defending such suit, on the ground of fraud on the part of the seller, which was known to the purchaser at the time the action was brought by the seller, but owing to defective pleading by defendant therein evidence of such fraud could not be introduced, as a judgment giving effect to a contract is conclusive evidence that it is free from illegality, although such issue was not raised in the action, except where the party objecting was ignorant of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

illegality before judgment, or was prevented from pleading.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.\*]

**2. JUDGMENT (§ 726\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

Judgment in an action on a note is conclusive that the maker's name was not forged.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1256; Dec. Dig. § 726.\*]

**3. JUDGMENT (§ 713\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

Allegations of fraud in the execution of a mortgage and prior payments are res adjudicata after judgment of foreclosure and sale, and will not support an action to set aside the sale and vacate the mortgage where defendant appeared in the former action and had opportunity to litigate such question.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.\*]

Appeal from Common Pleas Circuit Court of Greenwood County; J. C. Klugh, Judge.

Action by the Greenwood Drug Company against the Bromonia Company. From an order enjoining the defendant from enforcing a former judgment against the plaintiff, defendant appeals, and from orders dissolving an attachment and dismissing the complaint, plaintiff appeals. Injunction order set aside, and orders dissolving the attachment and dismissing the complaint affirmed.

Ellis G. Graydon and Nicholson Bros., for plaintiff. Giles & Ouzts, for defendant.

**JONES, J.** This appeal involves the application of the law of estoppel by judgment.

In a former action the Bromonia Company recovered judgment against the Greenwood Drug Company for the value of a quantity of certain medicine, called "Bromonia," amounting to \$140, and for expenses of advertising said medicine, amounting to \$57.50, pursuant to a contract entered into between the parties, which judgment on appeal to this court was affirmed. Bromonia Company v. Greenwood Drug Co., 78 S. C. 482, 59 S. E. 303. Thereafter the Greenwood Drug Company paid the judgment and brought this action against the Bromonia Company, and attached the funds paid in settlement of said judgment. The complaint in this action seeks to recover damages for alleged fraudulent misrepresentation by the Bromonia Company which induced the Greenwood Drug Company to enter into the contract sued on in a former action, and for the worthlessness of the medicine for which recovery was had, alleging as elements of the damages the \$140 paid as the price of the goods, \$57.50, the amount paid for advertising, \$30.36, interest on these amounts, \$71.70, the costs of that suit, and \$90.94, the attorney's fees and expenses incurred by the Greenwood Drug Company in defending that suit. Judge Gage dissolved the attachment and dismissed the complaint, holding that the plaintiff, the Greenwood Drug Company, was estopped by

the judgment in the former action, from which order appeal is taken by the plaintiff.

The reasons given by Judge Gage are as follows: "The complaint in the second case is practically the same as the answer in the first case, except that it alleges a scienter on the part of the Bromonia Company when it made the alleged false statements. The Greenwood Company contends that the issue of fraud which it now makes has never been heretofore made and adjudicated; that it is entitled to a day in court, and now demands it. It contends that, inasmuch as that issue was not made in the first action, it was not then adjudicated. The parties to the action are the same; the court is the same; the subject-matter, Bromonia, and the advertisement of it, is the same. The exact issue in the first case was, Did the Greenwood Drug Company owe the Bromonia for a lot of medicine and for money paid out in the advertisement of the medicine? That, too, is the issue in the second case. It was decided in the first case, and that ends the controversy. *Cromwell v. Sac County*, 94 U. S. 852, 24 L. Ed. 195. If Smith should sue Brown on a note, and Brown should plead payment, and the jury should find for Smith, Brown could not thereafter renew the controversy by pleading that Smith had seduced him into signing the note by fraudulent misrepresentations."

We think the judgment should be affirmed. The general rule is that a judgment giving effect to a contract is conclusive evidence that it is free from fraud or illegality, although such issue was not raised in the action, except where the party objecting was ignorant of the fraud or illegality before judgment or was prevented from pleading it. 23 Cyc. 1294. The case of *Hart v. Bates*, 17 S. C. 35, falls within the exception stated, as in that case the fraud was not discovered until after the former judgment. Estoppel by judgment on the merits covers not only what was actually decided, but also what was necessarily implied in the final result. 23 Cyc. 1306. Our decisions are in accord with this general rule. In *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617, the court said: "A judgment is conclusive between the parties to it not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition. *Trimmer v. Thomson*, 19 S. C. 254; *Caldwell v. Mischeaw*, 1 Speers, 276." Hence a judgment on a note is conclusive that the maker's name was not forged. *Fraser & Dill v. Charleston*, 19 S. C. 384. And allegations of fraud in the execution of a mortgage and prior payments are res adjudicata after judgment of foreclosure and sale, and will not support an action to set aside the sale and vacate the mortgage where the defendant appeared in the former action and had opportunity to litigate such question. *Ruff v.*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709. In this last-mentioned case the court, referring to *Hart v. Bates*, 17 S. C. 85, and *Fraser & Dill v. Charleston*, 19 S. C. 399, said: "These two cases considered together decide briefly that a matter necessarily involved and not raised in a previous case is not *res adjudicata*, but if necessarily involved and (whether) raised or not, it is concluded, and especially so if the party denying the adjudication knew of the matter and could have interposed it at a previous trial, either in support of a claim or as a defense." In *Ryan v. Association*, 50 S. C. 188, 27 S. E. 618, 62 Am. St. Rep. 831, the court held a judgment debtor estopped from bringing a separate action under section 1891, Rev. St. 1893, for usurious interest collected of him in a foreclosure judgment, as the judgment negatived usury.

In this case the Greenwood Drug Company knew of the alleged fraud, if any existed, as the answer in the former action set up the said fraud but failed to allege the scienter, and in the second action the complaint alleged that "soon after entering into said contract the plaintiff had reason to believe that it had been deceived and defrauded, etc," hence this case cannot fall within the exception to the general rule. The plaintiff was not prevented from pleading fraud in the former action, but because of its defective plea certain evidence which it sought to introduce on that subject was properly rejected. Such result followed from the failure or neglect of the Greenwood Drug Company to make proper plea, and not from any denial of the right to make such issue. The judgment upon the contract necessarily involved an adjudication that the Bromonia Company had delivered to the Greenwood Drug Company goods of value as alleged, and had incurred expense of advertising according to contract, and necessarily implied that there was no want or failure or illegality of consideration in the contract enforced. To support the second action would necessarily assail and annul the correctness of the result in the first action, and give back to the Greenwood Drug Company the money it was adjudged to pay therein, on the ground that the goods adjudged to be of value were really worthless, and on the ground that the contract adjudged to be a valid obligation was void for fraud known at the time of the former judgment. It is apparent that the second action substantially involves the issues actually and impliedly involved in the first action, and it is of no consequence that the form of the second action was in tort while the first action was in contract.

The appellant cites *Kirven v. Chemical Co.*, 77 S. C. 494, 58 S. E. 424, as sustaining its contention. In that case the judgment of the circuit court was affirmed by a divided court, in effect holding that a judgment of the United States Circuit Court on a note

for fertilizers is not *res adjudicata* of an action in the state court for damages for actual injuries to the crop of defendant caused by the use of the fertilizer alleged to have been negligently compounded and deleterious, when such question was withdrawn in the United States court by permission of the court.

If it be conceded that the action by Kirven in the state court was a distinct and independent suit for actual injury to his property, constituting a cross-action as distinguished from a suit based upon mere failure of consideration of the notes upon which judgment was rendered, there is much reason for holding that a withdrawal of such issue by permission of the court in the first suit should prevent judgment therein from operating as an estoppel in a subsequent suit on the issue or cross-claim so withdrawn. The opinion of the two justices opposed to affirmance in that case was based upon the view that where a judgment goes against the defendant, and he afterwards sues plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with or opposed to the facts on which recovery was had in the first action, the former judgment operates as an estoppel. If Kirven in the second action had sued for damages arising from his payment of the judgment rendered against him, on the ground that the fertilizers were worthless, and that fact was known to him before the judgment, he would undoubtedly have been estopped by the judgment.

But in the case at bar no issue was withdrawn by permission of the court, and if evidence of fraud was excluded it was only because such fraud was not properly pleaded. The case stands as if there had been no attempt to plead fraud in avoidance of the contract. Moreover, the present suit is not upon a distinct and independent cause of action for actual injury, arising from the sale or use of the medicine, but is nothing more in effect than an action to restore the Greenwood Drug Company to the status it would have occupied if it had made successful defense in the former action; in other words, to reopen and relitigate that case.

These views require that the order of Judge Gage be sustained.

It appears that on the 13th day of January, 1908, Judge Klugh issued an order enjoining the Bromonia Company from enforcing its said judgment against the property of the Greenwood Drug Company during the pendency of this action, and from this order the Bromonia Company has appealed. For the reasons already stated, the order of Judge Klugh should not have been granted.

The judgment of this court is that the order of Judge Gage herein be affirmed, and the order of Judge Klugh herein be set aside.

## STOUFFER v. ERWIN.

(Supreme Court of South Carolina. Nov. 16, 1908.)

## 1. EVIDENCE (§ 235\*)—DECLARATIONS OF THIRD PERSON.

In an action on the acceptance of a bill of exchange payable to the order of the drawer, letters written by an attorney in the name of the drawer of the bill of exchange are not admissible in evidence against the plaintiff, who was a purchaser of the bill.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 873-876; Dec. Dig. § 235.\*]

## 2. TRIAL (§ 60\*)—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Where drafts are purchased before maturity, it is incompetent to allow any testimony in an action against the acceptor of the draft of any defense against the original payees until defendant first offers testimony that plaintiff is not a bona fide purchaser.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 60.\*]

## 3. TRIAL (§ 186\*)—INSTRUCTIONS—MATTERS OF FACT.

Under Const. art. 5, § 28, forbidding instructions as to matters of fact, it is error for the court to read a contract offered in evidence and to comment thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 409, 410; Dec. Dig. § 186.\*]

## 4. BILLS AND NOTES (§ 537\*)—ACTIONS—QUESTIONS FOR JURY.

In an action by the purchaser of a draft against the acceptor, where the testimony tended to show that plaintiff was a bona fide purchaser of the draft and there was no testimony to the contrary, it was error to submit the question of want or failure of consideration as between the defendant and the drawer of the draft.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

## 5. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF REQUEST.

It is not error to refuse to give a requested instruction where the substance of the requested instruction is given in the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 6. TRIAL (§ 206\*)—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In an action by the purchaser of a draft against the acceptor, in which the defense was failure of consideration as between the drawer and the acceptor and collusion between the purchaser and the drawer, it is error to refuse instructions that there was no evidence of any collusion between plaintiff and the drawer of the draft, nor any evidence that the purchaser had any notice of any defense between the original parties before purchase of the draft, where the testimony fails to show any collusion, and does show without contradiction that plaintiff purchased the draft before maturity.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 206.\*]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; Ernest Gary, Judge.

Action by J. C. Stouffer against A. M. Erwin on the acceptance of a bill of exchange. The defense was a failure of consideration for the acceptance, and that plaintiff was not a bona fide transferee. Exception 8 was

to an instruction in which the court read a contract between the drawer of the bill of exchange and the defendant which had been introduced in evidence and which was commented on by the court. Exception 11 was taken to a refusal by the court to charge that there was no evidence of any collusion between plaintiff and the drawer of the bill of exchange. Exception 12 was to a refusal by the court to charge that there was no evidence that plaintiff had any notice of any defense which defendant had to the payment of the draft, and that, if the jury believed that plaintiff purchased the same on the date alleged for value, verdict must be for plaintiff. Judgment for defendant, and an appeal taken from an order denying a new trial. Reversed.

Wm. P. Greene, for appellant. Wm. N. Graydon, for respondent.

POPE, C. J. The above-stated case came on for trial at the October term, 1907, of the court of common pleas before his honor Ernest Gary and a jury. The following is the complaint:

"The complaint of the plaintiff above named respectfully shows:

"(1) That on the 5th day of September, 1905, United Jewelers' Manufacturing Company made their bill of exchange in writing dated on that day, directed to the defendant, A. M. Erwin, and thereby required the said defendant to pay to the order of the said United Jewelers' Manufacturing Company eighteen and <sup>75</sup>/<sub>100</sub> dollars two months after the said date for value received.

"(2) That thereupon on the ——— day of September, 1905, at Antreville, the said defendant upon sight accepted the said bill.

"(3) That thereafter, and before the maturity of the said bill, the same was for value received duly assigned and transferred to the plaintiff, J. C. Stouffer; that no part thereof has been paid, and the plaintiff is still the owner and holder thereof."

The second cause of action is exactly the same as the first, except the maturity of the note which was four months after date. The third cause of action is the same, except the maturity, which was six months after date. The fourth cause of action is exactly as the foregoing, except the maturity was eight months after date.

The defendant, answering the complaint, alleges:

"(1) That he admits the making and acceptance of the four bills of exchange mentioned in the said complaint. That he denies each and every other allegation of the complaint herein, except that no part of said bills has been paid.

"For a defense to the whole cause of action alleged and set forth in the complaint, this defendant alleges:

"(2) That the consideration of the said four bills of exchange was a contract made by the defendant and the United Jewelry Manufacturing Company, by which said company agreed to sell and did sell to the defendant a lot of jewelry represented by said manufacturing company to be of sterling silver, rolled gold plate, gold front, and gold filled and oxidized finished goods.

"(3) That the said goods or jewelry failed to come up to the guarantee and warranty of said manufacturing company, and said goods were nothing but brass of the cheapest quality and absolutely worthless to this defendant or to any one else. That the defendant sold some of the goods, but they were returned to the defendant, and defendant had to return to the purchaser the price paid him for said goods.

"(4) That said goods were not as represented by the salesman selling the same, and not such goods as called for in the contract, and the same were and are utterly worthless.

For a further defense to said alleged cause of action the defendant alleges:

"(5) That the said J. C. Stouffer, the plaintiff herein, is not the owner and holder of the said bills of exchange, but is simply put forward by the United Jewelry Manufacturing Company as a blind to prevent the defendant from pleading failure and want of consideration and to try to shut off the defense of the defendant by claiming that said Stouffer is the holder of negotiable paper passed to him before it was due, when as a matter of fact said bills of exchange were never turned over to the plaintiff until after they were due, and were then turned over to him solely for the purpose of shutting out this defendant's defense to said bills of exchange."

Testimony was offered on both sides, and after the charge of his honor the jury rendered a verdict in favor of the defendant. A motion was made for a new trial, which was refused by the presiding judge. The plaintiff now appeals to this court upon 15 exceptions and subdivisions, which we will consider.

Let the exceptions be reported.

The first, second, and third exceptions relating to letters written by R. P. Howell, an attorney, and in the name of the United Jewelry Manufacturing Company, must be sustained, for the reason that a declaration of an attorney for the United Jewelers' Manufacturing Company cannot be evidence against this plaintiff, who is a different party.

The fourth, fifth, and sixth exceptions will be considered together, relating as they do to the drafts. The drafts were executed in settlement of the amount claimed by the United Jewelers' Manufacturing Company, and the evidence tended to show that J. C. Stouffer purchased them before maturity. It was incompetent to allow any testimony

which the defendant had against the original payees until the defendant first offered testimony going to show that plaintiff was not a purchaser of said drafts before maturity for value. These exceptions must be sustained.

The seventh exception must be sustained for the reasons set forth in the foregoing exceptions.

The eighth exception is sustained; for his honor erred in using the contract which was introduced in the testimony, it being in violation of article 5, § 26, of the Constitution, forbidding judges from charging as to matters of fact.

Ninth. We think his honor erred in submitting the question of want of, or the failure of, consideration as between the defendant and the United Jewelers' Manufacturing Company when the testimony tended to show that the plaintiff was the holder and owner of the drafts and was a purchaser for value before maturity without notice, and there was no testimony to the contrary, hence plaintiff had nothing to do with the jewelry company. This exception is sustained.

The tenth exception must be overruled, for a reference to his honor's charge will show that it did contain in substance the basis of this ground of appeal.

Eleventh and twelfth. His honor should have charged both the requests here pointed out. We have already held that there was no evidence of any collusion between the plaintiff and the jewelry company, and also that the testimony tended to show without contradiction that the plaintiff purchased the drafts before maturity. These exceptions are sustained.

The thirteenth, fourteenth, and fifteenth exceptions are sustained for the reason set forth already.

The judgment of this court is that the judgment of the circuit court be reversed and a new trial granted.

GARY, A. J., dissents.

WOODS, J. I concur. It is obvious from the pleadings and issue referred in the opinion of the Chief Justice that the appeal turns on the question whether the letter written by Howell to the defendant was admissible in evidence. If it was admissible, then there was evidence for the consideration of the jury on the issue whether the alleged endorsement to the plaintiff before maturity was pretensive, and this would open for the defendant the other issue, made by the answer, of failure of consideration, and make the evidence on that issue competent. Howell testified on behalf of plaintiff that when these letters were written he held the drafts for collection as attorney for Stouffer, and not for the United Jewelers' Manufacturing Company; that the letters were written by a clerk in his office, who made the mistake of saying in them that the drafts were held for the United Jewelers' Manufacturing Com-

pany. If Howell be regarded as attorney of the United Jewelers' Manufacturing Company, indorsee, then the declarations contained in the letters written in his office and signed by him could not be binding on the plaintiff as indorsee. If he be regarded the attorney for the plaintiff when the letters were written, as he testifies he was, the letters were still not admissible, because it was not within the scope of his power as agent to repudiate his client's ownership of the drafts and bind him by admissions that the drafts were owned by another.

**CUNNINGHAM v. CUNNINGHAM et al.**  
(Supreme Court of South Carolina. Nov. 16, 1908.)

**1. TRUSTS (§ 20\*)—CREATION.**

A deed of lands from J. to R., with a contemporaneous instrument executed by R. to J., reciting that whereas the lands were conveyed to him to mortgage to pay debts of J., and to hold them to pay debts of J. to R., he held them for said purposes, and after payment of said debts to reconvey the lands to J., created a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 25; Dec. Dig. § 20.\*]

**2. TRUSTS (§ 179\*)—ACCOUNTABILITY OF TRUSTEE.**

The rule of accountability of trustees requires that they use, in the preservation and improvement of the trust fund, such diligence as a prudent man would use in relation to his own affairs, that they shall not make profit out of the trust, and that they shall be charged with no loss except for neglect of duty.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. § 179.\*]

**3. TRUSTS (§ 308\*)—ACCOUNTABILITY OF TRUSTEE.**

A trustee of lands is chargeable with the value of the cotton rents thereof at the time of their receipt, thus eliminating speculative holding.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 428; Dec. Dig. § 308.\*]

**4. TRUSTS (§ 329\*)—ACCOUNTING—REVIEW—SHOWING PREJUDICIAL ERROR.**

A decree charging a trustee of land with the value of cotton rents thereof at the time of sale of cotton, rather than when the rents were received, will not be disturbed in the absence of definite evidence of difference in values at such times.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 490; Dec. Dig. § 329.\*]

**5. TRUSTS (§ 308\*)—ACCOUNTABILITY OF TRUSTEE—RENTS.**

In the absence of a definite showing by the trustee of the profits made by him in working a part of the portion of the trust lands he could not rent, he is chargeable with a reasonable rental value of such part, though he testifies that he made no profits therefrom.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 428; Dec. Dig. § 308.\*]

**6. TRUSTS (§ 311\*)—CREDITS TO TRUSTEE—MATTERS OUTSIDE DUTIES.**

The trustee under a conveyance to him by J. of land, to mortgage to pay debts of J., and to hold to pay debts of J. to the trustee, is not entitled to credit for loss in selling mules to tenants of the land, and in furnishing or becoming

liable for supplies to them, such enterprises not properly falling within his duties as trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 311.\*]

**7. TRUSTS (§ 317\*)—COMMISSIONS OF TRUSTEE.**

Civ. Code 1902, § 2590, providing for the allowance to trustees of the same commissions as are allowed executors and administrators, applies as well to the commissions for extraordinary trouble, and the mode for ascertaining the amount thereof, provided for by section 2561, as to the ordinary commissions provided for by section 2560.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 444, 460; Dec. Dig. § 317.\*]

**8. USURY (§ 82\*)—RIGHT TO PLEAD.**

Under Civ. Code 1902, § 1664, providing that any one having an interest in the estate or assets of the borrower may plead usury, the equitable owner of land may plead it where the trustee mortgages it for a usurious loan.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 162; Dec. Dig. § 82.\*]

Appeal from Common Pleas Circuit Court of Laurens County; R. O. Purdy, Judge.

Action by John Cunningham against R. N. Cunningham and another. Judgment for plaintiff, and defendants appeal. Modified, and remanded with directions.

W. R. Richey, for appellants. F. P. McGowan, for respondent.

JONES, J. In 1894 John Cunningham, plaintiff, through partition of the estate lands of his father, became owner of a tract of land in Laurens county containing about 472 acres. Thereafter on July 28, 1895, he mortgaged said land to J. T. Johnson and W. R. Richey to secure a note for \$600, payable November 28, 1897, and on December 2, 1896, he mortgaged the said land to Johnson & Richey to secure a note for \$162, payable December 1, 1897. Judgments for foreclosure of these mortgages were entered on July 22, 1898, on the first named for \$701.70, and the second for \$196.24, and the land was advertised to be sold the following December. To prevent such sale an arrangement was made under which John Cunningham on November 18, 1898, executed to Robert N. Cunningham a deed in form conveying to him an absolute title in said land, the consideration expressed in the deed being \$1,100. On the same day Robert N. Cunningham executed to the plaintiff the following instrument:

"State of South Carolina, County of Laurens. To All Whom These Presents May Concern: R. N. Cunningham ———— Sends Greeting: Whereas, I, the said R. N. Cunningham, have purchased a tract of land consisting of four hundred and seventy acres, more or less, on Saluda River, bounded by lands of myself, Clarence Cunningham and B. D. Cunningham, and whereas the said lands were conveyed to me to mortgage the same and pay certain debts of John Cunningham and hold the same to pay certain indebtedness of the said John Cunningham due to me. Now know all men by these

presents that I, the said R. N. Cunningham, have and hold the said lands for the purpose aforesaid, and in further trust that after meeting all the debts due me by said John Cunningham, discharging the mortgage this day given to the Perpetual Building and Loan Association of Laurens, should the said John Cunningham at any time be able to pay all of said debts and obligations and a reasonable interest to me, I bind my heirs and executors to reconvey the said lands to the said Cunningham, he of course to pay for all betterments and improvements. Given under my hand and seal this Nov. 1898.

"R. N. Cunningham. [L. S.]"

The debts of John Cunningham at that time were: Judgments to Johnson & Richey, \$936.69; note to Bailey's Bank, \$10; duebill to W. R. Richey, \$50; note to Robert N. Cunningham, \$150—aggregating the sum of \$1,101.69. In order to procure the money to pay John Cunningham's debts, Robert N. Cunningham on the same day mortgaged the land to the defendant Perpetual Building & Loan Association for \$1,200, assigning as further security six shares of stock in said association which on maturity thereof, according to plan, would be of the value of \$1,200. After deducting for expenses of the loan, \$12.25, amount paid for six shares stock, \$54, interest for nine months, \$3.25, nine months' dues in advance, \$175.50, aggregating \$245, he received from the association \$955, which was applied to the payment of the three first-mentioned debts of plaintiff, leaving in his hands \$3.31. Robert N. Cunningham went into possession of the premises after the execution of the papers aforesaid, rented the same out and received rents and profits, and cultivated a small portion of the land himself during the years 1899 to 1906. This action was commenced by plaintiff on May 10, 1906, for the purpose of requiring the defendant Robert N. Cunningham to account for the rents and profits received from the lands mentioned, and to reconvey the same, and of requiring the defendant Perpetual Building & Loan Association to cancel and surrender the mortgage given to it over the said land by the defendant Robert N. Cunningham, and to pay plaintiff any amount which may be due the defendant Robert N. Cunningham by said association on account of six shares of stock which said Cunningham held in said association. A part of the defense set up by the defendant R. N. Cunningham was that plaintiff's deed to him conveyed a fee-simple title to the land, and that if he signed the alleged defeasance set out in the complaint it was without consideration, null and void, and not binding on said defendant. The defendant Perpetual Building & Loan Association as a defense alleged that the defendant R. N. Cunningham by virtue of the deed given him by the plaintiff, John Cunningham, had mortgaged the said land to said association on or about 18th November, 1898, for \$1,200, and had as-

signed to it as collateral security six shares of its stock, the ultimate value of which was \$200 per share, and that under its agreement with said R. N. Cunningham he was to pay to said association \$19.50 per month, \$6 as payment on stock, \$6 as interest, and \$7.50 as premium, until the said shares of stock became of the value of \$200 each, when the said mortgage would be fully paid and satisfied. It alleged that R. N. Cunningham still owed on said mortgage \$425.35, and had broken the conditions of the contract and subjected the mortgage to judgment for foreclosure, and prayed for judgment for foreclosure. Plaintiff, in reply to the answer of the defendant building and loan association, alleged that the contract between the defendant building and loan association and the defendant R. N. Cunningham was usurious, and that the mortgage debt was already overpaid. The cause was heard before his honor Judge R. O. Purdy at the spring term, 1907, for Laurens county, on testimony taken by R. E. Babb, special referee, and additional testimony introduced at the trial. Judge Purdy ordered an accounting of the rents and profits, reconveyance of the land, surrender of possession and delivery of all rental contracts by defendant R. N. Cunningham, and cancellation of the mortgage held by the defendant association; and further adjudged that Robert N. Cunningham should pay plaintiff \$708.16, the balance due him upon the accounts as established in the decree. Defendants appeal from Judge Purdy's decree.

We think it clear that the transaction between the parties as evidenced by the two instruments placed the legal title in Robert Cunningham, but subject to the trust declared in the writing signed by him (1) to mortgage the same and pay certain debts of John Cunningham, including indebtedness of John to Robert, (2) to hold the land for the purpose aforesaid, (3) to reconvey to John Cunningham when Robert Cunningham was reimbursed for his payment of said debts, with interest, and for all betterments and improvements. Robert Cunningham was trustee holding the legal title, but the equitable estate and beneficial interest was in John Cunningham. As Robert Cunningham was merely holding these lands for the purpose of paying said debts, he was as trustee accountable to John Cunningham for rents and profits. The rule in reference to the accountability of trustees requires that they shall use such diligence in the preservation and improvement of the trust fund as a prudent man would do in relation to his own affairs, that he shall not make profit out of his trust, and that he shall be charged with no loss except for neglect of duty. *Dixon v. Hunter*, 3 Hill, 204; *Nicholson v. Whitlock*, 57 S. C. 42, 35 S. E. 412.

In the accounts as stated by the circuit decree Robert Cunningham is properly charged with all the rents received by him since he has been in possession, and we think the

court has correctly ascertained the amount of cotton rents so received. The ordinary and proper rule is to charge the trustee with the value of the cotton rents at the time of their receipt and thus eliminate all speculative holding of the cotton, but as there is no such definite showing as will enable this court to ascertain whether the value of the cotton at the time of its receipt was anything different from its value at the time of sale, we will not disturb the finding of the circuit court as to the value of the cotton rents received by Robert Cunningham each year, for which he should account. Nor can we sustain respondent's contention that the trustee should account for the highest price he might have obtained for the cotton because of a rise of price during the period of holding the same, because his primary liability was for the value of the cotton at the time of its receipt, and it does not appear that he has not been made to account for such value, nor does it appear that he has made any profits from dealing with the cotton rents, nor that he did not exercise his best judgment under the circumstances. We are of the opinion, however, that the circuit court erred in charging Robert Cunningham with 1,000 pounds of cotton as rent of the portion of the land worked by himself. After a review of the testimony we are satisfied that Robert Cunningham did not work an amount of the land exceeding 16 acres on an average, which under the testimony is not more than two-thirds of a one-horse farm. As 1,000 pounds of lint cotton according to the testimony was the rental value of a full one-horse farm, the trustees should be only charged with two-thirds of this amount each year. The trustee testified that he made no profits whatever from his working of the land, and that he only worked patches in parts of the land he could not rent; but in the absence of any definite showing by him of the profits made by him he is chargeable with a reasonable rental value of two-thirds of 1,000 pounds of cotton.

We think the circuit court committed no error in refusing to allow Robert Cunningham credit for \$550, claimed by him to have been lost in selling mules to the tenants and in furnishing or becoming responsible for supplies to said tenants. These enterprises, while beneficial to the trust estate, did not properly fall within his duties as trustee so as to make the trust estate chargeable therefor. These transactions must be treated as if strangers had sold the mules and furnished the supplies to the tenants without waiver of the claims for rent. The mules were sold to the tenants by Robert Cunningham, and the supplies were mostly furnished by J. Q. Pyles & Co., of which firm Robert Cunningham was a partner, and while, no doubt, these transactions were partly done in order to realize rents, the strongest motive for making them was the prospects of profits he hoped to realize for himself by reason of the same. Nor does it appear with any certain-

ty what precise loss was sustained. The amounts claimed were balances due on the accounts lapping over from year to year, and may not represent anything more than the loss of the profits that would have been made had full payment been received, and it is possible that some of the amounts may yet be paid by the debtors. At any rate, the trust estate is not chargeable with this loss.

The circuit court allowed Robert Cunningham 10 per cent. one way as commissions for his services in the premises. Both sides object to this conclusion, the defendant Cunningham on the ground that the compensation should have been \$150 per annum, as a reasonable sum for extraordinary services, whereas the plaintiff contends that no commissions at all are allowable. All this matter is regulated by statute. By section 2560, Civ. Code 1902, executors and administrators, for their care, trouble, and attendance in the execution of their duties, are allowed a commission of 2½ per cent. for receiving, and 2½ per cent. for disbursing, funds coming into their hands, except that they are not entitled to commissions for money paid or retained for debts or legacies due them. Section 2561 provides that executors or administrators who have had extraordinary trouble in the management of the estates under their care, and who are not satisfied with the sums herein allowed, may be at liberty to bring an action in the court of common pleas for their services, and the verdict of the jury and the judgment of the court thereon is final, provided no verdict shall be given for more than 5 per cent. over and above the sums allowed in section 2560. Section 2590 provides that trustees shall be allowed the same commissions in the execution of their trust as are allowed by law to executors and administrators. We see no ground for applying to trustees a different rule with respect to the allowance of additional compensation. There was in this case no verdict of a jury on the matter of additional compensation, hence it was error to allow commissions in excess of the amount provided by statute. This conclusion, however, is not to prejudice the right of the defendant R. N. Cunningham to sue for additional compensation as provided in section 2561, or to have the same assessed by a jury in this case.

With respect to the \$61.85 which defendant claims should have been charged against plaintiff in the accounting, we find no sufficient testimony in the record to warrant the disturbing of the conclusion of the circuit court that it was not a proper charge.

Appellants point out, with exceptions 8, 9, and 10, several errors in the calculations of the circuit court in stating the account. It appears that there were errors in calculation as alleged in these exceptions, and they should be corrected in restating the accounts.

It must follow from the foregoing that the judgment in favor of plaintiff against Robert N. Cunningham for \$708.16 is excessive, and



should be reduced to such amount as restatement of the accounts will show when corrected as herein indicated.

The remaining exceptions relate to the issues between plaintiff and the defendant building and loan association.

The building and loan association sought to foreclose the mortgage in question, claiming a balance to be due thereon of \$425.35, with interest from May 10, 1906, at 8 per cent. per annum. Robert N. Cunningham, the borrower and holder of the legal title of the mortgaged premises, raises no issue against the building and loan association. The plaintiff, John Cunningham, however, pleads usury and counterclaim for usurious interest received, and that the mortgage upon a proper settlement between it and Robert N. Cunningham has been paid. The circuit court held that the transaction between the association and Robert N. Cunningham was usurious, but that nevertheless the plaintiff, seeking the cancellation of the mortgage, must do equity, and that the association was entitled to recover the amount borrowed with interest at 7 per cent., after deducting monthly stock dues, premiums, and interest paid thereon according to the rule of partial payments by annual rests and balances. The court thereupon stated the account on that method, and ascertained that the loan had been, on February 14, 1906, overpaid by \$243.35.

Appellant contends that the plea of usury is not available to plaintiff, and that the loan is not usurious. Plaintiff, as equitable owner of the land mortgaged, had the right to plead usury under section 3, No. 467, p. 749, of the act of February 10, 1898 (section 1664, Civ. Code 1902), which provides: "The borrower, and his heirs, devisees, legatees or personal representatives, or any creditor or any person having a legal or equitable interest in the estate or assets of such borrower may plead the benefit of the provisions of the following section," etc. We agree with the circuit court that the contract was usurious, as on a loan of \$1,200 the contract provides for a monthly payment, besides stock dues, of \$6 as interest and \$7.50 as premium, another name for interest, whereas the legal rate of interest allowed by law is 8 per cent. per annum. This result is not avoided by the fact that a by-law of the association provided that the interest and premium paid by borrowing members shall not exceed 8 per cent. per annum on moneys advanced on shares upon the shares reaching the maturity or settlement value. Making the calculation under the rule stated in *Association v. Holland*, 65 S. C. 453, 43 S. E. 978, on the theory that there was no usury, the payments exceed the loan and interest, whether at 7 or 8 per cent. per annum, hence, of course, if no interest be allowed at all because of

usury, the payments must exceed the loan. Whether John Cunningham could recover anything of the building and loan association on his counterclaim for alleged usury is not involved in this appeal, as the circuit court declined to allow such counterclaim and no exception is taken to such ruling.

The judgment of the circuit court is modified in the particulars mentioned above, in all other respects it is affirmed, and the cause remanded for a restatement of the accounts between John Cunningham and Robert Cunningham in accordance with the views herein announced.

## HALL v. NORTHWESTERN R. CO. OF SOUTH CAROLINA.

(Supreme Court of South Carolina. Nov. 16, 1903.)

### 1. MASTER AND SERVANT (§ 208\*)—ASSUMPTION OF RISK.

Assumption of risk involves an implied agreement by the employé to assume the risks ordinarily incident to his employment or a waiver after full knowledge of an extraordinary risk of his right to hold the employer for a breach of duty in that regard.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 538; Dec. Dig. § 203.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 589-591; vol. 8, pp. 7584-7585.]

### 2. MASTER AND SERVANT (§ 227\*)—"CONTRIBUTORY NEGLIGENCE."

"Contributory negligence" of an employé rests in the law of torts, and, when such defense is established, plaintiff's action is defeated not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury complained of.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 668; Dec. Dig. § 227.\*]

### 3. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a freight conductor, injured while coupling cars by being caught between the buffers, assumed the risk of injury resulting from his going between the cars rendered necessary by reason of the failure of the company to provide a proper lever for the work, held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1070, 1071, 1077, 1082; Dec. Dig. § 288.\*]

### 4. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a freight conductor, injured while coupling cars by being caught between the buffers, was guilty of contributory negligence in going between the cars, held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1125; Dec. Dig. § 289.\*]

### 5. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a freight conductor, injured while coupling cars which were unsafe for lack of a proper lever, voluntarily operated the cars within Const. art. 9, § 15, declaring that knowledge of any employé of the unsafe character of any machine shall be no defense to an action for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

injury caused thereby except as to conductors in charge of unsafe cars, held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.\*]

**6. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.**

Where, in an action for injuries to a freight conductor while coupling cars, there was evidence of negligence of the company in not providing a proper lever and in not providing against a defective appliance by inspection, and the jury might find that there was such an emergency as justified a man of reasonable discretion in going between the cars to make the coupling, a motion for nonsuit, on the ground that the evidence showed contributory negligence or assumption of risk, was properly denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1125; Dec. Dig. § 289.\*]

**7. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

Where a railway company by its negligence created an emergency which justified a freight conductor in going between cars to couple them, it could not claim that the conductor was negligent as a matter of law because of a slight miscalculation in the usual position of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1125; Dec. Dig. § 289.\*]

**8. MASTER AND SERVANT (§ 289\*)—ASSUMPTION OF RISK.**

A servant in entering his employment assumes the risk of his own errors; but where, by the negligence of the master, he is brought into a position of unusual peril, it is generally a question for the jury whether the injury arose from an error of the servant due to his negligence, or to such inadvertence as a reasonably prudent man might have fallen into in the servant's situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1095; Dec. Dig. § 289.\*]

**9. MASTER AND SERVANT (§ 295\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

An instruction that, where a servant knows of a patent defect in the appliances which will make it dangerous for him to operate them, it is for the jury to determine whether he assumed the risk, or whether a man of ordinary prudence would have undertaken to operate the appliances with knowledge of its defect, etc., is not erroneous as making assumption of risk to depend on reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.\*]

**10. NEW TRIAL (§ 162\*)—POWER OF COURT—GROUNDS—EXCESSIVE VERDICT.**

The power of circuit courts to grant new trials, as authorized by Civ. Code, § 2734, extends to the granting of new trials for excessive verdicts in tort for unliquidated damages on condition that plaintiff shall refuse to remit the amount deemed excessive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 326; Dec. Dig. § 162.\*]

**11. APPEAL AND ERROR (§ 979\*)—DISCRETION OF TRIAL COURT—GRANTING OR REFUSING NEW TRIALS—REVIEW.**

The granting or refusing of a new trial on the ground of an excessive verdict in tort for unliquidated damages is within the discretion of the circuit judge, and the court on appeal will not disturb the ruling unless it was based on an error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3873; Dec. Dig. § 979.\*]

**12. NEW TRIAL (§ 76\*)—GROUNDS—EXCESSIVE VERDICT.**

A new trial should not be granted merely because the trial judge would have found a less amount than that found by the jury, unless the opinion of the judge amounts to a clear conviction that injustice has been done by an excessive verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 153; Dec. Dig. § 76.\*]

**13. NEW TRIAL (§ 162\*)—GROUNDS—EXCESSIVE VERDICT.**

Where the circuit judge in the exercise of his discretion orders a new trial unless plaintiff will remit a specified sum, he adjudges that the verdict is by such amount excessive, and that defendant is of legal right entitled to be relieved from that excess or have a new trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 162.\*]

**14. NEW TRIAL (§ 161\*)—GROUNDS—EXCESSIVE VERDICT.**

The circuit judge, in granting a new trial because the verdict is excessive, may provide that defendant shall do things necessary to preserve the rights of plaintiff as a condition of the new trial, and he may require defendant to secure the reduced amount of the verdict if it should stand.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 321; Dec. Dig. § 161.\*]

**15. NEW TRIAL (§ 161\*)—GROUNDS—EXCESSIVE VERDICT.**

An order for a new trial because the verdict is excessive is a benefit to which defendant is entitled by right, and it cannot be made a condition of the enjoyment of such right that he shall surrender his right of appeal on the ground of error committed in the trial.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 161.\*]

**16. NEW TRIAL (§ 162\*)—GROUNDS—EXCESSIVE VERDICT.**

An order granting a new trial because the verdict is excessive, which provides that if defendant, within a specified time, shall tender a specified sum in satisfaction of the verdict, and if plaintiff shall decline to accept it, a new trial shall be had, but, if defendant fail to make the tender, a new trial shall be refused, is erroneous, as imposing the condition that defendant shall tender the reduced amount, and the order must be modified so that defendant shall be entitled to a new trial unless plaintiff shall within a specified time file a remittitur of a specified amount.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 162.\*]

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. E. Prince, Judge.

Action by W. J. Hall against the Northwestern Railroad Company of South Carolina. From a conditional order for a new trial, defendant appeals. Modified and affirmed.

Lee & Moise and Clark & Von Treskon, for appellant. Kirkland & Smith, for respondent.

WOODS, J. The plaintiff, a freight conductor on the defendant's railroad, went between two freight cars for the purpose of coupling them, was caught between the buffers, and received personal injuries. On the allegation that his injuries were due to the negligence of the defendant railroad com-

pany, a verdict of \$15,000 was recovered. The circuit judge refused a motion for nonsuit, but granted a conditional order for a new trial. The defendant's counsel by their exceptions submit that the motion for nonsuit should have been granted, that there were errors in the charge to the jury, and that the conditions attached to the order for new trial were not authorized by law.

We first consider the refusal to grant a nonsuit: The grounds of the motion were that the plaintiff knew the danger of attempting to make the coupling by going between the cars, and could not recover (1) because he assumed the risk of the attempt, and (2) because he was guilty of contributory negligence in taking the risk. This is one of that class of cases where, by reason of the allegation that the danger was so obvious and imminent that no prudent servant would have undertaken to make the coupling, the defenses of contributory negligence and assumption of risk approach so closely to each other that distinction between them is almost impossible in the practical application of the law. In *Bodie v. C. & W. C. Ry. Co.*, 61 S. C. 468, 39 S. E. 715, the general distinction is thus stated: "'Assumption of risk' rests in the law of contract, and involves an implied agreement by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. \* \* \* 'Contributory negligence,' on the other hand, rests in the law of torts, as applied to negligence, and, when such defense is established, the plaintiff's action is defeated, not because of any agreement express or implied, but because his own misconduct was a proximate cause of the injury." In further elaboration of the distinction, it is said in *Barksdale v. C. & W. C. Ry.*, 66 S. C. 211, 44 S. E. 743: "Nearly every case of contributory negligence on the part of an employé involves in a general sense some assumption of risk, because in order to be guilty of contributory negligence there must be the risk of apparent danger. When a servant risks this danger in the discharge of duty imposed on him in the course of usual duty, this would be, in an exact sense, a case of assumption of risk; but if he improperly risks the danger, which becomes a proximate cause of the injury, in doing that which is not imposed on him in the course of his usual duty, it would be contributory negligence." Under the law, as thus laid down, neither the defense of assumption of risk nor contributory negligence was conclusively made out either by the evidence of the plaintiff or the evidence on both sides taken together.

The testimony tended to show these conditions: Camden and Sumter were the terminal points of the defendant, Northwestern Railroad Company. It is customary for railroads to have car inspectors at terminal

points, charged with the duty of seeing that cars were in fit and safe condition for use; but the defendant failed to provide for such inspector. It was also customary to provide for the crew of a freight train three brakemen, that force being necessary besides the engineer and conductor; but the plaintiff was allowed only two brakemen on his train, though he had complained to the president of the road that two brakemen were insufficient and had been promised more men. There were no printed or written rules of the road furnished to employes; but it was the duty of the plaintiff to shift and move cars at Camden, as ordered by the Camden freight agent; the plaintiff determining for himself the manner of doing the work. On November 23, 1903, after the plaintiff's train was made up at Camden, and was about to depart on its schedule time, the freight agent directed the plaintiff to place two empty cars on the track, known as the "oil mill track." The two cars to be moved were on the same track but were not coupled together. The plaintiff, at the rear of the train, signaled the engineer to move the train and make the coupling. Seeing that the train had not been moved against the rear car with sufficient force to make the coupling automatically, plaintiff tried to use the lever provided for coupling the cars, without going between them; but the lever failed to work. He then went between the cars, and, walking with the slowly moving train, undertook to make the coupling with his hand by lifting the latch pin. The plaintiff testified he had made couplings this way hundreds of times before with safety; but on this occasion he inadvertently went in a little farther than was necessary, and his left side was caught between the buffers. The plaintiff admitted he knew there was danger in going between the cars to couple; but he testified he made the effort because the last car was on a downgrade, and he had reason to apprehend that, if he did not stop it by coupling it, the car would run down the grade and off the track. In addition for this reason for attempting to make the coupling, as the plaintiff testified, a part of his train was on the main line of the Southern Railway Company, and its passenger train being about due, and his own train unguarded for lack of a sufficient crew, the plaintiff considered it important to get his train out of the way.

There is force in the argument that the plaintiff voluntarily assumed the risk of the dangers of his employment, due to lack of inspection of the cars, because he had continued in the service of the defendant with full knowledge that the cars were not inspected. *Wofford v. Clinton Cotton Mills*, 72 S. C. 348, 51 S. E. 918, and cases cited. Decision of the point, however, is not necessary in the consideration of the motion for nonsuit, because there was evidence to go to the jury on other issues of negligence and assumption

of risk. The evidence is very far from showing that the plaintiff's contractual relation of service contemplated that in the usual course of his service he should assume, at his own peril, the risk of coupling cars by going in between them and lifting the latch pin with his own hands. Indeed, we do not understand the defendant's counsel to contend that assumption of risk arose in that way. It is true the plaintiff says he had so made the coupling a thousand times with safety, but that such a mode of coupling was not to be expected as usual is shown by the fact that the defendant's cars were equipped with levers to be operated from the side of the car. But there was evidence that it was the duty of the plaintiff in the course of his usual service to couple cars, and that the performance of this duty was necessary to the service. The position of defendant we understand to be that, coupling cars being a duty imposed by plaintiff's usual course of service, if the negligence of the defendant be assumed in imposing the urgent duty on this occasion of making the coupling without a safe means of performing the duty, yet the plaintiff at the moment was well aware of the danger, and, in choosing to perform it, assumed the risk, and thus waived his right to have provided a safe means.

The defendant's charge of contributory negligence depends on viewing the same act of the plaintiff from a different standpoint. Stated in short, the argument is this: The plaintiff was required in the course of his service to couple cars, but by the use of a lever, and not by going between the cars and using his hands, and hence it was negligence to attempt to move the coupling in that way; and further, even if defendant's negligence, in not supplying a workable lever, made it necessary for plaintiff to go between the cars, he could nevertheless have coupled the cars in that position without being caught, if he had not negligently gone too near the buffers. In this view the defendant asked the court to find contributory negligence of the plaintiff as a necessary sequence (1) from the negligent act of going between the cars, where his services did not require him to go, and (2) from the negligent act in going so far in that he was caught. Under the evidence of the plaintiff in this case that he had made such couplings a thousand times in safety, it might be doubted, as a matter of law, whether it would have been contributory negligence for the plaintiff to go between the cars to make a coupling, even where there was no emergency; but assuming that such acts would be so held under ordinary circumstances, or taking the other view, and considering the evidence such as would under the ordinary circumstances admit of no other inference than that the plaintiff had assumed the risk, and was therefore precluded from discovery, such inference would not be admissible under the other facts of the case. The plaintiff had exhausted the safest means

of making the coupling by attempting to use the lever provided by defendant, which proved to be out of order. If the presence of his train on the main track of the Southern Railway was not positively dangerous to the passenger train then expected, it was an obstruction which it was his duty to remove. Much more important than this was his anxiety that, unless he should be able to stop the car by making the coupling, it would run off the track, and thus involve the defendant, his employer, in loss. It was for the jury to say whether these conditions amounted to such an emergency as would justify or excuse a man of ordinary prudence and judgment in undertaking to make the coupling in the way he did. This is the pivotal inquiry in such cases under the defense of assumption of risk (*Ivy v. Willson*, Cheves, 74; *Barksdale v. Railway Co.*, supra), as well as under the defense of contributory negligence (*Thompson v. Seaboard Air Line Ry.*, 81 S. C. 333, 62 S. E. 396).

Only one remark need be made as to the application of the following clause of article 9, § 15, of the Constitution: "Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliance shall be no defense to an action for injury caused thereby, except as to conductors and engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." Assuming that the car was dangerous or unsafe for lack of the lever, it was a question for the jury to decide whether the plaintiff "voluntarily" operated it, or did so under the constraint of a duty to make such an effort in an unforeseen emergency as a reasonably prudent man would make for the protection of his employer's property.

There being evidence of the negligence of defendant in not providing a lever that would work, and in not having provided against such a defective appliance by inspection of the cars, and evidence from which the jury might reach the conclusion that there was such an emergency as would justify a man of reasonable prudence and discretion in going between the cars to make the coupling, when he could make it in no other way, it follows that the motions for nonsuit and for new trial could not be granted on the ground that the evidence conclusively shows contributory negligence or assumption of risk on the part of the plaintiff in going between the cars. Nor could either of these motions be granted on the ground that the plaintiff, after getting between the cars, inadvertently went a few inches further in than was necessary, so that he was caught between the buffers. If the defendant, by its negligence, created an emergency which justified the plaintiff in going between the cars, it cannot maintain the position that negligence must be imputed to the plaintiff as a matter of law, because of a slight miscalculation or inadvertence in the usual position of danger. The servant in entering the employment of

the master, it is true, assumes the risk of his own errors committed in his usual service. *Green v. So. Ry. Co.*, 72 S. C. 402, 52 S. E. 45. But where, by the negligence of the master, he is brought into a position of unusual peril, in the effort to perform one of the duties of his service, it is generally a question of fact for the jury to determine whether the injury arose from an error or miscalculation of the servant, due to his negligence, or to such mistake or inadvertence as a reasonably prudent man might have fallen into in the servant's situation. Of course, there are cases in which only the inference of negligence could be drawn, but this is not one of them, for, engaged as the plaintiff was, a prudent and careful man might well have made the mistake of getting a few inches too near the coupling and between the buffers. The facts of this case bring it within the principle of *Schlemmer v. Buffalo, etc., Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. It is clearly distinguished from *Lyon v. C. & W. C. Ry. Co.*, 77 S. C. 328, 58 S. E. 12, where a flagman was injured in doing a negligent act not demanded nor called for by the conductor, and which he well knew was not intended by the order he had received.

Exception is taken to this instruction to the jury: "But if the servant knows of a patent defect in the appliances which will make it dangerous for him to operate that appliance, then it becomes a question of fact for the jury whether or not he assumed the risk, or whether or not a man of ordinary prudence would have undertaken to operate the appliance with knowledge of its defect which rendered it dangerous, whether or not he knew it was dangerous to do it, if he did, and if a man of ordinary prudence would not have acted as he did, having due regard for his own safety, he is guilty of negligence, if that negligence contributed as a proximate cause of his injury, he cannot recover, however painful his injuries may be, however permanent." The error assigned is in making assumption of risk to depend on reasonable care. The exception is disposed of by this language of the court in *Barksdale v. C. & W. C. Ry. Co.*, supra: "To defeat the claim of a conductor or engineer for injury in cases of this character, the knowledge must be of defects which the conductor or engineer believed to be dangerous or unsafe, or which he ought to have regarded dangerous or unsafe, in the exercise of ordinary prudence and reason. Any other view would not only be straining the meaning of words, but would be unreasonable and result in an intolerable hardship both to the public and those charged with the conduct of roads, for it would require an engineer or conductor upon discovery of any slight defect of machinery to stop his train or proceed at his peril." Furthermore, as we have pointed out, whether the exigency was such as to constrain a man of ordinary prudence

to operate even a dangerous car was a question for the jury.

The remaining exceptions relate to the power of the circuit judge to impose the conditions appearing in his order granting a new trial. As the point is important, we set out the order in full: "This was a motion for a new trial made upon the minutes of the court at the recent spring term of court for Kershaw county. The jury had rendered a verdict in this case for plaintiff for \$15,000. The motion for a new trial is based on the grounds hereto attached. The first, second, and third grounds are, after mature consideration, overruled. The fourth ground, which is as follows: 'Because the verdict of the jury was capricious and excessive'—has given me no little concern. I cannot hold that the verdict was capricious, but as to whether or not it was excessive is a matter that has caused me considerable thought. After full deliberation, I have concluded to cut this verdict, provided the plaintiff is to get the amount indicated by me without further expense and litigation. It is therefore ordered that, if the defendant within 30 days from the date of the filing of this order tenders to plaintiff the sum of \$10,000 and costs in full satisfaction of said verdict, and if the plaintiff declines to accept said amount and release the defendant upon record from all further liability for said verdict, then a new trial is ordered; but if defendant fail or decline within said period of time to make the tender aforesaid, then a new trial be and is hereby refused. The tender is to be made to the plaintiff through his attorneys, and the plaintiff is to be allowed 24 hours in which to decline or accept the tender, pending which 24 hours the tender is to be kept good unless sooner declined by the plaintiff." The statute provides: "The circuit courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the Courts of law in this State." Civ. Code 1902, § 2734. The order puts the defendant in the dilemma of tendering the amount fixed by the circuit judge and giving up his statutory right of appeal on the penalty of having to pay the excessive verdict if his appeal should fail. Indeed, it is manifest from the language of the order that the circuit judge intended that the defendant should have the benefit of the reduction of the verdict only on condition of giving up the right of appeal and paying within 30 days. The question is whether the imposition of such terms was a lawful exercise of judicial discretion.

The power to grant new trials, now vested in the circuit court, was formerly exercised by the court of appeals. It is well settled that this power extends to the granting of new trials for excessive verdicts in actions of tort for unliquidated damages, on condition that the plaintiff shall refuse to remit the amount adjudged to be excessive. *Nettles*

v. Harrison, 2 McCord, 230; Davis v. Ruff, Oheves, 17, 34 Am. Dec. 584; Fripp v. Martin, 1 Speer, 236; Warren v. Lagrone, 12 S. C. 51; Finch v. Finch, 21 S. C. 342; Beaudrot v. Railway Co., 69 S. C. 180, 48 S. E. 106. It may be regarded settled, further, by the case of Laney v. Bradford, 4 Rich. 1, that the power extends to fixing other conditions in addition to a refusal of the plaintiff to remit the portion of the verdict adjudged to be excessive; but the case is by no means conclusive of the question here, because there the court in imposing conditions carefully preserved the legal rights of the parties. It is to be borne in mind, too, that there could be no appeal in that case because the order was made by the court of last resort, and therefore the case is not an authority for the proposition that conditions of granting a new trial for excessive damages may be imposed which take away the right to appeal for alleged errors of law in the course of the trial or require the defendant to waive any other statutory right. The granting or refusing a motion for a new trial, made on the ground that the verdict is excessive, is within the discretion of the circuit judge, and this court will not disturb his conclusion unless the order was based on an error of law. The discretion of the circuit judge must, however, be controlled by these established principles, recognized by the cases above cited: First, a new trial should not be granted merely because the judge would have found a less amount than that found by the jury, unless the opinion of the judge amounts to a clear and fixed conviction that injustice has been done by an excessive verdict; second, when the circuit judge has a clear conviction that injustice has been done by an excessive verdict, then it is his duty to relieve from the injustice by ordering a new trial unless the plaintiff remits the excess. This being the judicial duty of the circuit judge, the party aggrieved has the legal right to have that duty performed by him. Hence when, in the exercise of his judgment and discretion, the circuit judge makes an order that a new trial should be granted unless the plaintiff remits so many dollars from the verdict, that is an adjudication that the verdict is by that amount clearly excessive, and that the defendant is of legal right entitled to be relieved from that excess or have a new trial. This was undoubtedly the adjudication of Judge Prince, and this was the right of the defendant. We do not doubt that Judge Prince might have provided in the order that the defendant should do anything necessary to preserve the rights of the plaintiff as a condition of the new trial; such, for example, as requiring the defendant to make secure the reduced amount if it should stand.

But that is a very different thing from making the defendant's adjudicated right to a new trial ~~niel~~ depend on his surrender of his constitutional and statutory right of appeal to the Supreme Court.

It is true the order for a new trial was a benefit bestowed upon the defendant, but it was a benefit to which he was entitled, not by grace, but by right, as soon as the verdict was adjudged excessive, and it cannot be made a condition of the enjoyment of this right that he shall surrender his other right to appeal to the Supreme Court on the ground of error committed in the course of the trial. The principle we have stated is well supported by authority. As was well said by the Supreme Court of California in a very similar case, it was not the fault of the defendant that the jury found an excessive and unjust verdict, and the defendant should not be punished for it by being deprived of his right of appeal. Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880. While the precise point was not involved, the opinion of the court in Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110, seems to accord with this conclusion. In Schultz v. C., M. & St. P. R. Co., 43 Wis. 375, 4 N. W. 399, in discussing an order like this, the court said: "The court may grant or refuse a new trial, or, in a proper case, may grant a new trial ~~niel~~; but should do one thing or the other. It should not, as was done in this case, require the prevailing party to remit a portion of the damages awarded, and then deprive the other party of the benefit of the reduction unless he submits to onerous terms. Had this defendant paid the \$3,000 and costs, and taken a discharge of the judgment, probably it would thereby have lost the right to have the case reviewed by this court on appeal." In Young v. Cowden, 98 Tenn. 577, 40 S. W. 1091, it is said the defendant cannot be required to forego his appeal by the terms of an order for new trial. We have examined the authorities cited by respondent's counsel and many others, but we have found no case where a court of last resort has sustained such a condition as was here attached to the order for a new trial.

The order of Judge Prince is adjudged to be erroneous in imposing the condition that the defendant should tender the reduced amount within 30 days from the date of the order. The substantial effect is to modify the order so that the defendant is adjudged to be entitled to a new trial, unless the plaintiff shall within 30 days from the filing of the remittitur in the court of common pleas for Kershaw county remit by due entry on the record the sum of \$5,000.

Upon such entry being so made. it is adjudged that the judgment of the circuit court be affirmed.

**JACKSON v. SOUTHERN COTTON OIL CO.**  
(Supreme Court of South Carolina. Nov. 17, 1908.)

**1. PLEADING (§ 248\*)—AMENDMENT—ALLOWANCE.**

Where the complaint in an action for injury to an employé alleged that he fell into a hole in the floor negligently left unguarded, and that his foot was caught in a conveyor, an amendment, alleging that the employer was negligent in leaving the conveyor so unprotected that the employé in walking over the floor had his foot caught and injured, did not substantially change the claim of the employé, and was properly allowed at the trial, under Code Civ. Proc. 1902, §§ 191, 194, authorizing amendments not changing substantially the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 693-694; Dec. Dig. § 248.\*]

**2. NEW TRIAL (§ 162\*)—GROUNDS—EXCESSIVE VERDICT—FORM OF ORDER.**

An order granting a new trial because of the excessiveness of the verdict, which imposes the condition that defendant shall pay within a specified time a specified sum, is erroneous, and must be modified so as to give defendant a new trial, unless plaintiff will remit the amount found excessive.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 162.\*]

Appeal from Common Pleas Circuit Court, Richland County; Geo. E. Prince, Judge.

Action by Joseph Jackson, by his guardian ad litem, Martin Hardin, against the Southern Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Mordecai & Gadsden, Rutledge & Hagood, and J. S. Muller, for appellant. Frank G. Tompkins, for respondent.

**WOODS, J.** This appeal relates to an order allowing an amendment to the complaint while the trial was in progress, and to conditions imposed in an order for a new trial nisi. The plaintiff recovered a verdict for \$1,500 for personal injuries. The negligence of the defendant, to which the plaintiff, a laborer in defendant's employment, ascribed his injuries, was thus set out in the original complaint: "That the plaintiff's duties as such laborer required him to go to and fro about the said mill, and at times hereinafter mentioned, to wit, on the 18th day of December, 1905, while going through the said mill, the plaintiff fell into a hole in the floor in such a way as to get his left foot caught in a conveyor, a piece of machinery for transferring cotton seed, which extended under said floor, and suffered his said foot to be seriously bruised. \* \* \* That the defendant company, not regarding their duty to the plaintiff, conducted themselves so carelessly, negligently, and unskillfully in this behalf: (1) In that they provided an un-

safe place for the plaintiff to work without adequate guards or protection, and with the covering of said conveyor left open and unprotected in such a manner that the same was unsafe and dangerous; (2) that the defendants negligently failed to employ a sufficient number of men and continuously while the machinery was in motion to have some one at the uncovered place in the floor to warn and prevent the plaintiff and others from falling therein, and by reason thereof the plaintiff suffered the said injury to his foot."

Upon the conclusion of plaintiff's testimony, the circuit court allowed the plaintiff to amend the fourth paragraph by striking out "the floor" and "under," and inserting in place thereof the words "a conveyor box" for "the floor," and "over" for "under". The defendant opposed the amendment, and, after it was made, moved that the cause be withdrawn from the jury and time allowed to answer the complaint, as amended. The circuit judge refused the motion, holding that the amendment did not materially change the claim or cause of action. There is no substantial foundation for the appeal on this ground. The essential charge of negligence was leaving the conveyor so unprotected that the plaintiff, in walking over the floor, had his foot caught and injured. Whether the conveyor extended under or over the floor was a matter of detail, and changing the allegation in respect to such detail did not substantially change the plaintiff's claim. Code Civ. Proc. 1902, §§ 191, 194. The case of *Booth v. Langley*, 51 S. C. 412, 29 S. E. 204, is conclusive.

A motion for a new trial was made; one of the grounds being that the verdict of \$1,500 was excessive. The circuit judge held all the grounds insufficient, except the excessiveness of the verdict. In sustaining this ground, an order of new trial nisi was made, imposing the condition that defendant should pay to the clerk of the court for the plaintiff, who was a minor, the sum of \$1,000 within 30 days from the date of the order. The order is the same, in substance, as that which has just been considered in *Hall v. N. W. R. Co.*, 62 S. E. 848, and this case is controlled by the conclusion there reached.

The judgment of this court is that under the order of the circuit court the defendant is entitled to a new trial, unless the plaintiff shall within 30 days from the filing of the remittitur in the court of common pleas for Richland county remit by due entry on the record the sum of \$500.

Upon such entry being so made, it is adjudged that the judgment of the circuit court be affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# RIVERS v. ATLANTIC COAST LUMBER CORP. et al.

(Supreme Court of South Carolina. Nov. 16, 1908.)

## 1. PARTITION (§ 24\*)—ACTION—RIGHT TO PARTITION.

Partition is a matter of right, and not of grace or discretion.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 37; Dec. Dig. § 24.\*]

## 2. PARTITION (§ 77\*)—RELIEF—ACTUAL PARTITION.

Under the direct provisions of Civ. Code 1902, § 2437, partition should be made in kind, when possible, without injury to the parties in interest.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211, 216, 219; Dec. Dig. § 77.\*]

## 3. PARTITION (§ 113\*)—REVIEW—FINDINGS—APPROVAL OF TRIAL COURT.

Where, in partition, each of four devisees owned an equal one fifth interest in the estate, and the remaining fifth had been conveyed to one made a defendant, to whom also one of said four devisees had conveyed her fifth interest in the timber on a part of the land, the circuit court having decided upon the report of commissioners and the master, to whom the question of dividing the property was referred, that the property should be sold, its ruling will not be disturbed.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 113.\*]

## 4. PARTITION (§ 12\*)—ESTATES SUBJECT TO PARTITION—TREES.

An estate in trees may exist independently of the land, so as to be the subject of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 39; Dec. Dig. § 12.\*]

## 5. PARTITION (§ 102\*)—RELIEF—SALE—TREES.

While, in partition, when some of the parties own the timber on the land, equity may order the timber sold separately from the land, it is not bound to do so in all cases.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 102.\*]

## 6. PARTITION (§ 102\*)—REVIEW—DISCRETION OF TRIAL COURT—SALE.

Where a part interest in the timber on a tract had been conveyed separately, the action of the trial court in partition in requiring the timber to be sold with the land was proper, and will not be disturbed; there being nothing in the record requiring a different conclusion.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 102.\*]

## 7. PARTITION (§ 79\*)—RELIEF—REFERENCE.

In partition, the court having decided that a sale of the land and timber thereon together was necessary, some of the timber being owned separately, it was proper to order a reference as to the relative values of the land and timber.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 79.\*]

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

Action for partition by Henrietta M. Rivers against the Atlantic Coast Lumber Corporation and others. From a decree ordering the sale of a tract together with the timber thereon, said defendants appeal. Affirmed.

Le Grand G. Walker and Willcox & Willcox, for appellants. Jervay & Cohen and W. A. Holman, for respondent.

JONES, J. This action is for the partition of lands in Berkeley county, composed of several tracts aggregating 3,764 acres. Charles G. McCay died in April, 1879, seised of the lands described in the complaint. By his will the lands were devised to Thomas A. McCay for life, and, upon his death, to his children then surviving. Thomas McCay died November 1, 1905, leaving surviving him his daughters, Henrietta M. Rivers, plaintiff, and Frances D. McCay, Ella Kinard and Annie Andrews, defendants, and a son, Charles H. McCay, who conveyed his interest in the land to the defendant Atlantic Coast Lumber Corporation; thus entitling each of the parties to one-fifth interest in the lands. It further appears that on February 28, 1907, the plaintiff conveyed to the defendant Atlantic Coast Lumber Corporation her one-fifth interest in all the pine timber standing and fallen of 10 inches stump diameter and upwards 12 inches from the ground at the time of cutting, with right of way, etc., on 492 acres of the lands known as the "McCay Reservation." The Atlantic Coast Lumber Corporation also owns the timber on all of the McCay lands other than the McCay reservation. By consent of all parties, the master appointed five disinterested persons to go upon the premises, and report whether or not the property could be divided in kind. This committee went upon the premises and recommended that the property be sold in five parcels. Thereupon the master made a report recommending the sale, first of the timber on the reservation of 492 acres, and then the sale of the five subdivisions of the property in question as they appear on what is known as the "Richardson plat." The master further recommended that out of the proceeds of sale there be deducted from the interest to which Henrietta M. Rivers would have been entitled the amount of money paid to her by the Atlantic Coast Lumber Corporation for her interest in the timber on the McCay reservation, and that the remainder of the proceeds of sale of her one-fifth interest in the entire property be paid over to her or her attorneys. The matter came up before Judge Memminger; the only question at issue being the proper method to make partition of the reservation tract of 492 acres. Judge Memminger held that it would be impossible to partition the land in kind without injury to one or more of the tenants in common. Judge Memminger disagreed with the master as to the sale of the timber on the McCay reservation tract separate from the land, and ordered a sale of the said tract with the timber thereon. He further directed that the proceeds arising from the sale of the one-fifth interest of Henrietta M. Riv-



ers be held by the master, and ordered a reference to determine the relative value of the timber and the land so that the court might make the proper division between Mrs. Rivers and the Atlantic Coast Lumber Corporation. Under exception to this decree, the Atlantic Coast Lumber Corporation now contends (1) that its interest in the timber should have been set apart in kind; (2) or that all the timber on the reservation tract should have been ordered sold and proceeds divided among the parties according to their respective rights.

It is true that partition is a matter of right and not of grace, and that the court favors partition in kind when it can be fairly so made without injury to any other parties in interest, indeed section 2437 of the Civil Code of 1902 so directs, but in this case the commissioners, the master, and the circuit court all concur in the view that it is impracticable to partition in kind, and there is no such showing as would justify this court in overruling such conclusion. As an estate in trees may exist independently of the estate in the land, and is the subject of partition (*Knotts v. Hydrick*, 12 Rich. Law, 314; *Steedman v. Weeks*, 2 Strob. Eq. 145, 49 Am. Dec. 660), it is within the power of the court of equity to sell the timber separate from the land, but the court is not bound to do so in all cases. The partition sought in this case involved a sale of both land and the timber thereon, and such has been ordered. If Judge Memminger considered that a sale of the land with the timber was the best means of realizing the full value of the property, we find nothing in the record to show reason for a different conclusion. Having determined that it was best to sell the land and timber together, it was proper to order a reference as to the relative value of land and timber with a view to a just partition between the parties.

The judgment of the circuit court is affirmed.

# DAVIS BROS. v. BLUE RIDGE RY. CO. et al.

(Supreme Court of South Carolina. Nov. 16, 1908.)

## 1. EVIDENCE (§ 442\*)—PAROL EVIDENCE—ADDING TO TERMS OF WRITTEN INSTRUMENT.

Where a written contract with a carrier for shipment was silent as to the route, parol evidence as to a separate agreement for a particular route was not incompetent as contradicting or varying the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1893; Dec. Dig. § 442.\*]

## 2. EVIDENCE (§ 543\*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS—DAMAGES—IMPAIRMENT OF VALUE.

In an action for injury to animals during transportation, stock dealers were competent

witnesses as to the impairment of the animals' value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2368; Dec. Dig. § 543.\*]

## 3. CARRIERS (§ 229\*)—CARRIAGE OF LIVE STOCK—INJURY DURING TRANSPORTATION—ACTIONS—MEASURE OF DAMAGES.

The measure of damages for the injury to animals by a carrier during transportation is the difference between their market value at destination uninjured by the carrier and their value there as injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.\*]

## 4. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—INJURY DURING TRANSPORTATION—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action against carriers for injuries to animals during transportation, it was not error to admit evidence that one of the defendants had not quoted witness any other rate than that he paid, as a foundation for the position that, as there was only one rate, there was no consideration for a release from liability except for the carrier's negligence, though the testimony contradicted the written contract of shipment, where defendant had not introduced the written contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.\*]

## 5. APPEAL AND ERROR (§ 1053\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of the evidence was not prejudicial, where, after the subsequent introduction of the contract, the court gave a charge making the testimony valueless to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; Trial, Cent. Dig. § 977.]

## 6. EVIDENCE (§ 317\*)—COMPETENCY—HEARSAY.

In an action for injuries to animals during transportation, evidence as to declarations of a person not plaintiff's agent as to how the ribs of one of the animals were fractured was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1181; Dec. Dig. § 317.\*]

## 7. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—DEVIATION OF CONTRACT ROUTE—EFFECT ON CONTRACT FOR EXEMPTION FROM LIABILITY.

Where a carrier contracts for exemption from certain of its common-law liabilities, and then without necessity due to unforeseen emergencies materially deviates from the route agreed on, the special exemptions in the contract terminate, and the common-law liability attaches; the contract for exemptions applying only to the agreed route.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 218.\*]

## 8. CARRIERS (§ 223\*)—EXEMPTION FROM LIABILITY EXCEPT FOR NEGLIGENCE—BURDEN OF PROOF.

Under a contract exempting a carrier from liability except for negligence, the burden is on the carrier to show that loss or damage did not result from its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 958; Dec. Dig. § 228.\*]

## 9. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—INJURY DURING TRANSPORTATION—WAIVER OF NOTICE—QUESTION FOR JURY.

In an action for injuries to animals during transportation, evidence held sufficient to warrant submission of the issue of waiver by the carrier of the presentation of written notice of claim for injuries before delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**10. TRIAL (§ 295\*)—INSTRUCTIONS—CHARGE ON FACTS—CONSTRUCTION AS A WHOLE.**

In an action for injuries to animals during transportation, a charge that the carriers were prima facie liable for the dead animals was not on the facts, where, in view of the rest of the charge, it meant only that they were liable for the dead animals, unless they showed that the loss was not due to their negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 708-717; Dec. Dig. § 295.\*]

**11. APPEAL AND ERROR (§ 1061\*)—REVIEW—HARMLESS ERROR—REFUSAL TO GRANT NON-SUIT.**

A refusal to grant a nonsuit on the ground that plaintiff, having alleged an express contract, had failed to prove it, was not reversible error where defendant afterwards supplied the lacking evidence by introducing the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. § 1061.\*]

Appeal from Common Pleas Circuit Court of Anderson County; D. E. Hydrick, Judge.

Action by Davis Bros. against the Blue Ridge Railway Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bonham, Watkins & Allen, for appellants.  
Paget & Watkins, for respondents.

WOODS, J. The plaintiffs delivered to the Southern Railway Company at Knoxville, Tenn., 26 mules to be shipped to Anderson, S. C. There was a written contract of shipment, which expressed as its consideration a special freight rate; the regular rate being 20 per cent. higher. The contract contained, among other stipulations, a provision that the shipper would indemnify and save harmless the Southern Railway Company and its connecting carriers against all claims for loss or damage to live stock, except such loss or damage as might be due to negligence of the carrier. Another provision was that \$100 should be taken to be as much as any mule or horse was reasonably worth, and that no claim for a mule or horse should exceed that sum. The complaint sets up another contract with the Southern Railway Company to ship the mules by way of Atlanta, instead of by Spartanburg, and alleges that the plaintiffs, relying on this contract, "had a competent and skillful man at Atlanta, Ga., to attend the unloading, feeding, and watering and care of the said mules upon their arrival en route to their destination." Negligence is thus charged: "That defendants negligently, willfully, and wantonly and in reckless disregard of plaintiffs' rights as shippers transported the said mules by a different and less favorable route than the one directed, and over which they had contracted to transport them, thereby delaying the arrival of the said mules at their destination by several days, and thereby preventing plaintiffs' agent attending to their unloading, feeding, and watering and care in Atlanta, Ga., and also thereby causing them to be badly shaken and bruised up, and that de-

fendants further negligently, willfully, and wantonly, and in reckless disregard of plaintiffs' rights as shippers, refused to give the said mules proper feed, water and rest on their said journey." It is further alleged that, when the mules were unloaded, "it was found that one of said mules was dead in the car, and that the others were in such a damaged and weakened condition that two of them died soon thereafter, and the remainder were unfit for plaintiffs' trade, and had to be sold at greatly reduced prices as damaged and inferior stock." The plaintiffs recovered judgment for \$700 damages.

The question made by the appeal will be discussed without referring to the exceptions in detail. The first point made is that the plaintiffs should not have been allowed to prove by parol evidence a contract with the Southern Railway Company to ship the mules by Atlanta, and not by Spartanburg. It is true there was a written contract of shipment containing many stipulations, but it was silent as to the route, and therefore evidence as to a separate agreement for a particular route was not incompetent, as tending to contradict or vary the written contract. *Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Ashe v. Carolina & N. W. Ry. Co.*, 65 S. C. 134, 43 S. E. 393; *Earle v. Owings*, 72 S. C. 362, 51 S. E. 980. On the issue of the extent to which the value of the mules was impaired, it was competent for the witnesses Gaillard and Davis, both of whom were stock dealers, to give their estimates. *Millam v. So. Ry. Co.*, 58 S. C. 247, 36 S. E. 571; *Sanders v. A. C. L. R. R. Co.*, 79 S. C. 219, 60 S. E. 526. The measure of damages was the difference between the market value of the mules at Anderson, uninjured by defendant's negligence, and their value at Anderson after injuries due to such negligence. No doubt that the prices which the plaintiffs paid at Knoxville and those which they obtained at Anderson for the mules would have had weight with the jury as factors entering into the estimate of the extent of the injuries, but these prices would not have been conclusive and exclusive of all other factors. If the defendants desired to obtain the benefit of evidence of these prices, they had the right to require the plaintiffs to produce the books by a subpoena duces tecum.

The witness J. M. Davis was allowed to testify that the Southern Railway had never quoted him any other rate than that which he paid; the object of the testimony being to lay a foundation for the position that, as there was only one rate, there was no consideration for the release of the defendants from liability, except for negligence, and for the agreement limiting the amount of the recovery for each mule to \$100. This testimony was in direct contradiction of the written contract of shipment already refer-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

red to, but the defendant cannot complain of its admission because when the testimony was admitted the written contract had not been introduced. The circuit judge plainly intimated he would not admit the evidence if at variance with the written contract, and said to defendant's counsel he could then introduce the contract. But defendant's counsel did not accept the suggestion. Afterwards the contract was introduced by defendant, and the circuit judge found it expressed on its face that there was a freight rate for stock shipped without the special limitation of liability, 20 per cent. higher than that allowed plaintiffs; and, in consequence, charged the jury the plaintiffs were presumed to know what was in their written contract and were bound by all its provisions. This instruction that the defendants were entitled to the benefit of all the limitations of liability mentioned in the written contract made valueless to the plaintiffs the testimony that only one rate had been brought to their attention. The plaintiff J. M. Davis testified that he and Anderson, the railroad agent, had requested Mr. Turner, who had special knowledge of such matters, to make an examination of the dead mules. The defendants, claiming that it was to be inferred from this that Turner was plaintiff's agent, offered evidence of Turner's declarations to Dr. Powers as to the manner in which the ribs of one of the mules were fractured. This was hearsay, and therefore inadmissible. Turner, under the evidence, was in the same relation to the defendants as to the plaintiffs, and could not bind either by his declarations or admissions. There was evidence of an oral contract to carry the mules by the Atlanta route, which the plaintiff regarded safer than the Spartanburg route, and the waybill indicated the Atlantic route. The carriage was by the Spartanburg route. As to this deviation, the defendant submitted this request: "That, unless the change of shipment from the route named in the waybill or shipping bill was a proximate cause of injury to the shipment, it does not per se furnish a ground for recovery." The circuit judge in refusing the request charged as follows: "If the route was deviated from, and damage occurred, the common carrier is liable, unless it is made to appear that damage would have occurred if the route had been followed." The defendant has no ground to complain of this instruction. The rule is well established as to transportation by land as well as by water that where the carrier contracts for exemption from certain of its common-law liabilities, and then without necessity due to unforeseen emergency materially deviates from its usual route or the route agreed on, the special exemptions mentioned in the contract are at an end and the common-law liability attached. The contract for exemption applies only to the route which the

shipper has a right to assume will be used because it is the usual one, or because it has been agreed on. *Steidl v. Minneapolis & St. L. R. Co.*, 94 Minn. 233, 102 N. W. 701; *U. S. Express Co. v. Kountze Bros.*, 75 U. S. 342, 19 L. Ed. 457; *Crosby v. Fitch*, 12 Conn. 410, 81 Am. Dec. 745; *Powers v. Davenport*, 7 Blackford, 497, 45 Am. Dec. 105; *Phillips v. Brigham*, 26 Ga. 617, 71 Am. Dec. 237; *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 515, 6 Am. Rep. 124; *Johnson v. New York C. T. Co.*, 33 N. Y. 610, 88 Am. Dec. 416. This is not a case of such slight variation from the route agreed on as not to be a substantial deviation, like *Marande v. Texas & P. R. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487, nor of deviation rendered necessary by an unforeseen emergency like *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co. (C. C.)* 135 Fed. 135, and *International & G. N. R. Co. v. Wentworth*, 8 Tex. Civ. App. 5, 27 S. W. 680. Under a contract of shipment exempting the carrier from liability, except for negligence, the burden is on the defendant to show that loss or damage did not result from its negligence. *Crawford v. Southern Railway Company*, 56 S. C. 136, 34 S. E. 80. The exception assigning error in the instruction stating this rule is without foundation.

The contract of shipment contains this provision: That, as a condition precedent to any right to recover any damage for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock. The presiding judge instructed the jury the plaintiff could not recover unless they had given the required notice or the defendant had waived the notice. The defendant insists there was no evidence of waiver, and that it was error to charge the jury as if there had been such evidence. J. M. Davis, one of the plaintiffs, thus states the agreement with Anderson, the railroad agent, when the mules were taken from the car: "I told Capt. Anderson that I would not receive the stock. It was after dark, and I couldn't tell anything about them, and he said: 'You take them around to the barn, and we will be around in the morning, and you can receive them to-night as railroad stock.'" There was no definite evidence as to the relinquishment of the railroad company and assumption by the plaintiffs of control of the mules or of the date of the filing of the claim. This account of the dealing of the parties with respect to the custody of the mules was some evidence that the defendant did not intend to insist on the presentation of the claim before the delivery of the mules. But, aside from this, the evidence of deviation from the

route agreed on tended to prove the purpose of the defendant to waive all the special stipulations of the contract of shipment. It was not a charge on the facts for the circuit judge to say to the jury the defendants were prima facie liable for the dead mules. Viewed in the light of the remainder of the charge, this meant no more than that the defendants were liable for the dead mules, unless they showed that the loss was not due to their negligence.

The refusal to grant the motion of nonsuit made on the ground that the plaintiff having alleged an express contract of shipment had failed to prove it was not reversible error, because the defendant afterwards supplied the lacking evidence by introducing the contract. *Hicks v. Southern Ry.*, 63 S. C. 559, 41 S. E. 753.

It remains to consider the grounds on which a motion for a new trial was made. The first ground as to waiver has already been disposed of. The second is thus stated in the record: "That having charged at defendant's request that the plaintiffs were bound by the condition of the live stock contract, whereby defendant's liability in case of loss or damage was limited to \$100 per head, plaintiffs should not have recovered more than \$300 for the loss of three mules. J. M. Davis, plaintiff, having testified that the bruises and injuries to the stock were slight, the plaintiff refused, though they repeatedly requested him, to show by their books what the stock cost, so that the jury might determine. The charge contained this general proposition: That where a shipment is made, and, in consideration of a reduced rate of charges, the liability of the transportation company is limited, the shipper cannot claim more than the limitation in the contract." But this is to be taken in connection with the other general rule already stated, which had been adverted to in the charge that the carrier loses the benefit of special exceptions and exemptions respecting its liability when it deviates from the route agreed on. As there was evidence of such deviation, the jury were not limited to \$100 each, as the special contract valued the mules.

A new trial was asked on the further ground that the evidence tended to show that the mules died of pneumonia, and not from injuries received on the car. The evidence as to the cause of death—whether pneumonia, incipient when the mules were shipped—was not so conclusive as to warrant the court in holding that there was no evidence of fatal injuries received on the car. It follows that the judgment of the circuit court refusing a new trial cannot be reversed on this ground.

The judgment of this court is that the judgment of the circuit court be affirmed.

# BUIST v. WILLIAMS et al.

(Supreme Court of South Carolina. Nov. 16, 1908.)

## 1. RECEIVERS (§ 178\*)—AMENDMENT OF COMPLAINT—SUBSTITUTING PLAINTIFF.

The court in its discretion may, in an action by a receiver, suing on behalf of creditors, allow an amendment, by substituting as plaintiff a creditor suing in behalf of himself and other creditors.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 178.\*]

## 2. BANKS AND BANKING (§ 47\*)—STOCKHOLDERS' LIABILITY—FEES AND EXPENSES IN SUIT AGAINST CORPORATION.

While, as between the creditors, in an action against an insolvent bank by one of its creditors on behalf of himself and the other creditors, for distribution of its assets, the fees for plaintiff's counsel are properly first paid from the fund realized for creditors, such fees are not to be considered part of the bank's debt, or to be deducted from its assets, in determining the amount of the bank's debts remaining for which its stockholders are liable; the contrary, however, is the rule as regards the expenses of the receivership, including the fees of the receiver's attorney.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 47.\*]

## 3. BANKS AND BANKING (§ 49\*)—STOCKHOLDERS' LIABILITY—EFFECT OF PROCEEDINGS AGAINST CORPORATION.

The decree, in a suit against an insolvent bank on behalf of its creditors, having merely contemplated that the fees of plaintiff's counsel should be paid from the fund going to creditors, and not adjudged them debts of the bank, or a liability of its stockholders, such stockholders, though appearing in such suit in opposition to the allowance of the fees, are not estopped to assert, in an action against them on their stockholders' liability, that their liability is not increased by allowance of the fees.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 49.\*]

## 4. BANKS AND BANKING (§ 49\*)—STOCKHOLDERS' LIABILITY—EFFECT OF PROCEEDINGS AGAINST CORPORATION.

The stockholders of an insolvent bank, not having been parties to the suit in behalf of its creditors, in which its assets were collected and distributed through a receiver, may, in an action against them on their stockholders' liability, be heard on the accounts of the receiver, and may attack any items as improper or excessive.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 49.\*]

Appeal from Common Pleas Circuit Court, Barnwell County; Geo. E. Prince, Judge.

Action by C. S. Buist against Geo. W. Williams and others. Judgment for plaintiff. Defendants appeal. Modified and remanded for further proceedings.

Simons, Seigling & Cappelmann, Buist & Buist, and Smythe, Lee & Frost, for appellants. Bates & Simms, for respondent.

WOODS, J. The issues made by this appeal had their origin in an action instituted by C. S. Buist, on behalf of himself and all other creditors who might come in and contribute to the expenses of the action, against the Merchants' & Planters' Bank of Blackville, S. C. The complaint in that action al-

leged that the bank had become insolvent, owing the plaintiff and other depositors more than \$10,000. The relief asked was "that an injunction be granted restraining the defendant from making any disposition of its assets; that a receiver be appointed pending the trial of this action; that judgment be rendered against the said defendant for plaintiff's demand as above stated, and for the demands of other creditors who may come in and accept the benefits of this action upon the terms above stated; that an accounting be had with the said bank and the respective liabilities of the parties be paid, and for such other and further relief as may be just and equitable." The bank answered, and under an order to show cause, John O'Gorman, Esq., was appointed receiver on 11th February, 1901, and the assets were collected and distributed by him. The stockholders of the bank were not made parties to the cause. In the course of the distribution counsel fees were paid by the receiver, under orders of the court, to H. F. Buist, Esq., attorney for the plaintiff, Buist, aggregating \$1,000, and to Messrs. Bates & Simms, attorneys for the receiver, \$1,200. The other costs and expenses incurred by the receiver, together with his commissions, amounted to \$2,117.67. All these expenses, aggregating \$4,317.67, were taken from the total sum of \$18,309.48 collected by the receiver, and the remainder, \$13,991.81, was paid to the creditors of the bank. After applying this sum so ascertained as the net credit applicable to these debts, there remained due to creditors, according to the receiver's account, the sum of \$7,332.21. By an order dated March 26, 1904, the receiver's accounts were approved and confirmed, and he was "authorized and directed, as he may be advised by the receiver's attorneys herein," to institute suits against the stockholders to enforce their statutory liability for the amount remaining due to the stockholders. Thereafter this action was instituted in the name of the receiver, for the benefit of creditors, against the stockholders of the bank, to recover \$7,332.21, the remainder alleged to be due on the debts of the bank. The liability of each stockholder was stated to be 105 per cent. of the face value of his shares of stock, instead of 100 per cent., because the bank was incorporated in 1889, and the liability was fixed, therefore, by the Constitution of 1868, and the statute enacted thereunder, and not by the Constitution of 1895. A number of the stockholders appeared and demurred to the complaint, on the ground that the action should have been brought in the name of the creditors, and not in the name of the receiver. On the hearing a decree was made by the circuit judge (1) for judgment against the stockholders who had defaulted, and who had answered and not demurred; (2) sustaining the demurrer; (3) giving leave to plaintiff's attorneys to amend by substituting for the receiver, as plaintiff, C. S. Buist, in behalf of himself and all oth-

er creditors, and by making appropriate changes in the complaint. The defendants George W. Williams, Jos. F. Norris, H. Klatte, J. A. Smyth, F. W. Wagener, George A. Wagener, P. E. Trouche, E. F. Welters, as executor of the will of J. C. Welters, and Carolina Sayings Bank then answered, admitting that they held stock in the insolvent bank, but denying the other material allegations in the complaint. The answer also contained allegations not involved in this appeal, as to the defendants' equity of contribution from other stockholders. The cause was heard under the complaint, as amended, and the answer. The circuit court adjudged the stockholders liable for the entire sum of \$7,332.21, appearing in the accounts of the receiver as the amount of unpaid debts of the bank after exhausting its assets, and also for a reasonable counsel fee for plaintiff's attorneys in this action against the stockholders.

George W. Williams and the other stockholders, who are the appellants, first assign error in allowing the amendment substituting for the receiver, as plaintiff suing on behalf of creditors, C. S. Buist, a creditor suing for himself and other creditors. The power of the circuit judge to allow such an amendment in his discretion has been sustained in a number of decisions. *Jennings v. Springs*, Bailey, Eq. 181; *Coleman v. Heller*, 13 S. C. 491; *Baker v. Hornick*, 51 S. C. 313, 28 S. E. 941; *Sentell v. So. Ry. Co.*, 67 S. C. 229, 45 S. E. 155; *Greenwood L. & G. Assoc. v. Williams*, 71 S. C. 421, 51 S. E. 272. The exception as to the amendment is overruled.

The defendants are not liable for the fees of attorneys employed by creditors to prosecute their action against the bank, or their action against the defendants in this cause, and the circuit court was in error in not sustaining the position of appellants on this point. It is a rule of equity, universally recognized, that where one creditor institutes proceedings for the benefit of all creditors, those creditors who claim the benefit or fruit of the action must contribute to the expenses, including counsel fees, and the court will direct the payment of such fees and expenses before the division of the property recovered. It was therefore quite proper that the fee of Mr. H. F. Buist, who was the attorney who filed the complaint against the bank, asking for the appointment of a receiver and the distribution of the assets among creditors, should be paid from the funds realized for the creditors before distribution among them. *Nimmons v. Stewart*, 13 S. C. 446; *Hand v. Savannah & C. R. R. Co.*, 21 S. C. 162. But the creditors were in no sense the agents, trustees, or representatives of the bank or the stockholders, and they could not have their counsel fees paid by the bank. *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012, and authorities cited. If the amount realized by the receiver from the assets of the bank had been sufficient, over and above the ex-

penses of administration of the receivership, to pay the debts of the bank, and leave a surplus of \$1,000, it is perfectly clear this surplus would have belonged to the bank, and the court would have been without power to apply it to the payment of attorney's fees incurred by creditors in their suit against the bank. No authority seems necessary for the proposition that, in the absence of a contract to that effect, a court has no power to require a defendant to pay the counsel fees of a prevailing plaintiff; but the point was expressly decided in *Wagener v. Mars*, 27 S. C. 106, 2 S. E. 844. That was a successful action, brought by creditors to set aside a sale of property as fraudulent. The court held that attorney's fees incurred by the plaintiff who instituted the proceedings should be paid from the fund going to creditors, realized from the sale of the property made under the order of the court, before distribution among them, but not from any surplus over the debts and costs, because such surplus belonged to the defendants. Authorities to the same effect are collated in 54 L. R. A. 819, note.

The plaintiffs contend, however, that the defendant stockholders, though not parties to the suit against the bank, appeared before Judge Aldrich, and objected to the allowance of fees, and are therefore bound by his decree, and estopped from denying liability for the fees of plaintiffs' counsel. This proposition rests on the following statement appearing in the record: "At the hearing before Judge Aldrich upon the question of fees, Mr. M. Rutledge Rivers appeared on behalf of the defendants herein who were not parties to the proceeding, and with the receiver's attorneys opposed the allowance of fees, but his honor Judge Aldrich overruled the proposition in said order signed by him, and from that order there has been no appeal. Prior to the hearing of the motion for fees before his honor Judge Townsend, the attorneys for the above-named defendant stockholders were notified that they might likewise appear, if they should be so advised, in opposition to the motion for said allowance, but no one appeared, either at their reference or at the hearing before his honor Judge Townsend." The principal difficulty respondents have in the effort to sustain their position is that Judge Aldrich's decree contemplates payment of the fees of plaintiff's counsel from the fund "going to creditors," and to that there could be no ground of objection on the part of stockholders. There is no language in the decree which can be construed into an adjudication that the fees of the attorney for the creditors are to be embraced in the debts of the bank, or in any manner charged up against the stockholders. It follows that counsel fees for the plaintiff, as representative of the creditors, cannot be allowed from the assets of the bank so as to increase, by the amount of such fees, the liability of the

appellants as stockholders for the debts of the bank.

The disbursements necessarily made by the receiver in collecting and distributing the assets of the bank stand on an entirely different footing. Creditors of an insolvent bank are not required to exhaust the assets of the bank before suing the stockholders on their liability fixed by law. *Bird v. Calvert*, 22 S. C. 292; *Parker v. Carolina S. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. Hence, when a bank becomes insolvent, the creditors have two remedies which they may enforce simultaneously: They may sue the bank and have a receiver appointed for the collection of the assets and application of them to the debts, and at the same time sue the stockholders on their liability. The stockholders are entitled to credit on their liability for the amounts realized from the assets of the bank; but such credits can only be ascertained by administration of the affairs of the insolvent bank, and the law prescribes receivership as the only method by which creditors can procure administration. It makes no difference that the stockholders are not parties to the proceeding under which the receiver was appointed. The administration of a receiver is a proceeding in rem, which from its nature can be undertaken and accomplished only once with respect to the same property. In appointing a receiver for an insolvent corporation, the court undertakes to administer its assets through the receiver for the benefit of all concerned stockholders as well as creditors. That the appointment is made at the instance of a creditor, and not a stockholder, is a mere incident, and in no wise affects the interests or rights of the stockholders in the receivership. Under the guidance of the court the receiver is the representative of all.

The stockholders are entitled to credit on their liability for the assets of the bank realized by the receiver, but the assets going to the beneficiaries is the net property after paying the expenses of the trust; for the well-established rule is that a trust estate must bear the expenses of its administration. While the precise question here under consideration was not involved, the rule was applied to the expenses of a receivership, including counsel fees, in *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5. The credit to be allowed here to the stockholders of the bank on their liability is not the gross amount realized by the receiver from the assets of the bank, but the net amount after discharging the expenses of the receivership. In *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864, the court held the stockholders of an insolvent institution to be entitled to credit on their liability for the gross sum derived from a receiver's administration of the assets of the bank, without deducting the expenses of the receivership. So strong is our conviction against

this view, and so cogent the reasons in favor of the conclusion we have reached, that we are unable to yield our convictions even to that authority. The stockholders are not entitled to credit for the gross sum realized from the receivership, but the net sum after taking off the expenses of the administration of the trust.

It may be well to say that, the stockholders not being parties to the cause in which the charges for counsel fees and other expenses were allowed, it is their right to be heard on the accounts of the receiver, and to attack any items thereon that they deem improper or excessive.

It is the judgment of this court that the judgment of the circuit court be modified, according to the conclusions herein expressed, and the cause remanded for such further proceedings as may be necessary.

### SULLIVAN v. CITY OF ANDERSON.

(Supreme Court of South Carolina. Nov. 16, 1908.)

#### 1. BRIDGES (§ 46\*)—DEFECTS—INJURIES—ACTION—EVIDENCE.

In an action against a city for injuries to plaintiff's horse from a defective bridge, evidence held to show that defendant should have observed the defects, and made the requisite repairs.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.\*]

#### 2. BRIDGES (§ 44\*)—DEFECTIVE BRIDGE—CONTRIBUTORY NEGLIGENCE.

Where a plank in a bridge gave way, causing injury to a horse, the driver was not guilty of negligence, though he had pulled the horse to one side of the bridge to avoid a hole on the other side.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 91, 94; Dec. Dig. § 44.\*]

#### 3. BRIDGES (§ 46\*)—DEFECTIVE BRIDGE—SUFFICIENCY OF EVIDENCE—WEIGHT OF LOAD.

In an action for injury to plaintiff's horse caused by a defective plank in a bridge, evidence held sufficient to show that the load on plaintiff's wagon was of no more than ordinary weight.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.\*]

#### 4. DAMAGES (§ 62\*)—REDUCING DAMAGE—DUTY OF PERSON INJURED.

It is the duty of the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119, 124; Dec. Dig. § 62.\*]

#### 5. DAMAGES (§ 44\*)—INJURY TO PROPERTY—EXPENSE INCURRED.

Where the owner of property, injured by the negligence of another, incurs expense to minimize the damage, the wrongdoer is liable therefor, though the effort to reduce the loss was unsuccessful, if there was a reasonable prospect of success, and the expense was prudently and economically incurred.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 90, 91; Dec. Dig. § 44.\*]

#### 6. DAMAGES (§ 113\*)—INJURY TO HORSE—MEASURE OF DAMAGE.

The owner of a horse, injured by the negligence of another, is entitled to recover the

difference between the market value of the animal immediately before and immediately after the injury; and, where by care and treatment there has been a partial restoration, the measure of damages is the difference in the market value of the horse immediately before the injury and what would be its market value at the same time, in its condition of partial restoration, together with the reasonable expense of treatment, care, and loss of service.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 280; Dec. Dig. § 113.\*]

Appeal from Common Pleas Circuit Court of Anderson County; D. E. Hydrick, Judge.

Action by C. P. Sullivan against the city of Anderson. From a judgment for plaintiff, defendant appeals. Affirmed.

John K. Wood, for appellant. G. Cullen Sullivan, for respondent.

WOODS, J. The plaintiff brought this action under section 2023, Civ. Code 1902, to recover \$150 damages for injuries inflicted on a horse, due to a fall caused by the foot of the horse being caught in a bridge in one of the streets of the city of Anderson. The circuit judge instructed the jury, if the plaintiff was entitled to recover at all, the verdict should be for depreciation in value of the horse due to the accident, and the expense of keeping him for a reasonable time thereafter, including the cost of food, care, and medicine. The jury rendered a verdict for \$99.50.

These questions are involved in the appeal: Was there any evidence that the horse was injured through a defect in the bridge due to the neglect or mismanagement of the public authorities of the city of Anderson? Did the evidence admit of no other inference than that the accident and injury were due, either solely to the negligence of the driver in charge of the horse, or that the negligence of the driver contributed to the injury as a proximate cause? Was there any evidence that the load on the wagon exceeded the ordinary weight? Could the expense of care and treatment of the injured horse, for a reasonable time after the injury, be taken into the estimate of damages? There was evidence on the part of the plaintiff that the bridge was in bad condition before the accident; that there was a hole in it, and the timbers were unsound. As the witness Geer testified these defects were apparent to him, there was some evidence from which the jury could conclude it was negligence for the municipal authorities not to observe the defects and make the requisite repairs. The evidence relied on to show negligence of the driver was very far from conclusive. It is true when the plank gave way, causing the horse to fall, he had pulled the horse to one side of the bridge to avoid a hole on the other side, but this was a reasonable precaution, furnishing no evidence of negligence. There was nothing to show excessive speed, or any other act proving conclusively a lack of due care and contributing to the fall and injury

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the horse. As the driver testified he had been out delivering groceries to the customers of the plaintiff, and was returning after such delivery when the accident happened, this was evidence from which the jury might infer that the load on the wagon had been discharged or at least that the wagon did not contain a load of more than ordinary weight.

The charge of the circuit judge as to the right of recovery for expenses reasonably incurred in the effort to cure the horse was in accord with reason and authority. The rule is well established that it is the duty of the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage. *Willis v. Tel. Co.*, 69 S. C. 539, 48 S. E. 538, 104 Am. St. Rep. 828; *Jones v. Tel. Co.*, 75 S. C. 213, 55 S. E. 318. If such effort is successful, the wrongdoer receives the benefit of it, and it is but just that he should bear the expense. He cannot impose the expense upon the owner merely because the effort to save him from loss happened to be unsuccessful. It is of course a condition of the allowance of expense incurred in the effort to minimize the damages by restoring the property or otherwise that it should be undertaken with a reasonable prospect of success, and that it should be prudently and economically incurred. The following authorities hold the wrongdoer liable for such expenses reasonably incurred: *Watson v. Proprietors of Lisbon Bridge*, 14 Me. 201, 31 Am. Dec. 49; *Sullivan Co. v. Arnett*, 116 Ind. 438, 19 N. E. 299; *Gulf, C. & S. F. Ry. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117; *Atwood v. Boston L. & S. Co.*, 185 Mass. 557, 71 N. E. 72; *Ellis v. Hilton*, 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438; *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724; *So. Ry. Co. v. Gilmer*, 143 Ala. 490, 39 South. 265; *Telfair Co. v. Webb*, 119 Ga. 916, 47 S. E. 218; 13 Cyc. 150. Though the facts were different, the same principle was involved in *Strange v. Railroad*, 77 S. C. 182, 57 S. E. 724. There the action was for delay in the delivery of a traveling salesman's sample trunk, and it was held that measure of damages for the delay in carriage was the expense and detriment to the special business, with reference to which the carriage was undertaken, fairly attributable to the delay, including expenses and loss of time reasonably incurred in the effort to find the delayed property.

The general rule is that the owner of a horse or other animal, injured by the negligence of another, is entitled to recover the difference between the market value of the animal immediately before the injury and its market value immediately after the injury. But where, as in this case, by the care and treatment of the owner, there has been a partial restoration, the measure of damages is the difference in the market value of the

animal immediately before the injury and what would be its market value at the same time in its condition of partial restoration, together with the reasonable expenses of treatment and care and loss of service. The market value of the animal in its condition of partial restoration is referred back to the time of the injury, because neither the owner of the property nor the person who inflicts the injury can be required to take the risk of fluctuations in the market after the liability was incurred.

There is difference of judicial opinion as to whether the limitation laid down in some of the cases that the aggregate of damages may not exceed the total value of the animal is sound. As that point is not involved here, we shall not anticipate it.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### PURYEAR v. OULD.

(Supreme Court of South Carolina. Nov. 16, 1908.)

##### 1. MASTER AND SERVANT (§ 7\*)—EMPLOYMENT—CONTRACT—MODIFICATION.

A contract of employment could be modified so as to make it for the year instead of by the month.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 7.\*]

##### 2. MASTER AND SERVANT (§ 39\*)—DISCHARGE—ACTION FOR SALARY—PLEADING—ISSUES AND PROOF.

In an action for salary under a contract for a year made on or about a specified date, plaintiff could testify that about that date defendant employed her for an indefinite term, but that a few days thereafter she and his manager fixed the term at a year.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 39.\*]

##### 3. TRIAL (§ 159\*)—NONSUIT PROPERLY REFUSED—COMPLAINT SUSTAINED BY EVIDENCE.

Nonsuit is properly refused where the evidence tends to sustain the complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 360; Dec. Dig. § 159.\*]

##### 4. EVIDENCE (§ 314\*)—HEARSAY.

On an issue whether plaintiff was employed for a definite term, she could testify that, in the conversation resulting in her employment, she told defendant's manager that C. told her that a friend informed him where plaintiff could get a permanent position; the testimony not being improper as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 314.\*]

##### 5. EVIDENCE (§ 317\*)—HEARSAY.

Where plaintiff relied on a contract of employment as modified in an agreement with employer's manager, the employer could not show that the manager never reported the modification to him.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1177; Dec. Dig. § 317.\*]

##### 6. EVIDENCE (§ 129\*)—TERM OF EMPLOYMENT—OTHER CONTRACTS.

Where plaintiff relied on a contract of employment for a definite term, the employer could



not show the nature of contracts with other employes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 397; Dec. Dig. § 129.\*]

**7. MASTER AND SERVANT (§ 40\*)—DISCHARGE—ACTION FOR SALARY—EMPLOYE'S DECLARATION—ADMISSIBILITY.**

In an action for salary under a contract of employment made with defendant's deceased manager, the succeeding manager could not testify whether plaintiff ever said anything to him about having an established trade, since any declaration made to him did not tend to show that her previous contract was based on such representation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 40.\*]

**8. EVIDENCE (§ 121\*)—ADMISSIBILITY—RES GESTÆ.**

In an action for salary under a contract of employment, plaintiff could show that in discharging her the employer's manager assigned dullness of business as the reason, as part of the res gestæ and as rebutting defendant's testimony as to the unsatisfactory character of plaintiff's services.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 308, 811; Dec. Dig. § 121.\*]

**9. EVIDENCE (§ 118\*)—DECLARATIONS—RES GESTÆ.**

Declarations accompanying an act and explanatory thereof are admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 297; Dec. Dig. § 118.\*]

**10. PLEADING (§ 381\*)—JUSTIFICATION.**

Matter in justification must be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1261, 1263; Dec. Dig. § 381.\*]

Appeal from Common Pleas Circuit Court of Anderson County.

Action by Bertha Puryear against G. W. Ould. From a judgment for plaintiff, defendant appeals. Affirmed.

Bonham, Watkins & Allen, for appellant.  
Quattlebaum & Cochran, for respondent.

**JONES, J.** The plaintiff brought this action to recover of defendant \$160 as salary due her upon a contract made on or about September 15, 1906, for the term ending September 1, 1907, at \$40 per month. Defendant discharged plaintiff from his service on May, 1907, and the suit was for the salary from May 1 to September 1, 1907. Defendant admitted having employed plaintiff, but denied that the employment was for the term as alleged, but alleged that he employed plaintiff by the month, and that he discharged her because her services were unsatisfactory. The judgment was for plaintiff for the amount claimed.

Defendant's exceptions 1, 2, 3, 5, and 12 to this judgment involve in various forms the question whether the contract proved was the contract sued upon. The complaint alleged that the contract for the term was made on or about September 15, 1906. In her testimony plaintiff stated that about September 15, 1906, after negotiations between her and defendant in the presence of W. C. Carpenter, defendant's manager, she began

work for defendant at \$40 per month without any mention of the term of service, but that a few days thereafter, wishing a more definite arrangement, she approached W. C. Carpenter, the manager, and they made an agreement that her employment was for the term ending September 1, 1907, at \$40 per month. Assuming that the first contract did not contemplate employment for the year, it was perfectly competent for the parties to modify the former contract so as to make it for the year instead of by the month. It is not contended, and under the testimony could not be contended, that W. C. Carpenter had no authority to modify the former contract. The evidence was responsive to the allegations of the complaint based upon a contract for a definite term. Hence it was properly admitted. As the complaint alleged a single cause of action, the refusal of the motion to make plaintiff elect upon which cause of action she would proceed was properly refused, and, as there was evidence tending to support the allegations of the complaint, there was no error in refusing motion for nonsuit.

The fourth exception alleges error in allowing plaintiff to testify that, in the conversation with W. C. Carpenter resulting in said agreement, she told him that Miss Cohen had informed her that a friend informed her (Miss Cohen) where plaintiff could get a permanent position. It is objected that this was hearsay. The point at issue was not whether plaintiff could get permanent employment elsewhere, but whether defendant employed plaintiff for a definite term. Hence the testimony was not obnoxious to the rule against hearsay. It was given as a part of the conversation with defendant's manager which resulted in the employment which is the subject-matter of the suit.

The sixth exception charges error in refusing to allow defendant to answer the question: "Did Mr. Carpenter ever report to you any changes being made in her contract?" We think there was no error. It is manifest that a conversation between defendant and his own agent with reference to whether a contract was made or modified with plaintiff would be incompetent as against the plaintiff. If we should concede that the agent made no report to defendant on the subject, it would have no probative value as against the positive testimony that such a contract was made with the agent. The defendant testified that he knew no modification of the contract made with him.

The seventh, eighth, and tenth exceptions assign error in refusing to allow E. A. Carpenter to testify whether his employment or that of any other employes of defendant was by the year or month. The nature of the contract between defendant and other employes was not relevant to the issue as to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his contract with plaintiff. Some of defendant's employes were allowed to testify that they were employed by the month, but we fail to see how such testimony would materially tend to overthrow the positive testimony as to the terms of the particular contract with plaintiff.

The ninth exception complains of error in refusing to allow E. A. Carpenter, who became manager after the death of W. C. Carpenter, to answer the question: "Did Miss Puryear ever say anything to you about having established line of customers and trade?" The contract was not made with E. A. Carpenter, but with W. C. Carpenter as agent for defendant. Any declaration which plaintiff may have afterwards made to E. A. Carpenter as to her having established line of customers would not tend to show that her previous contract was based on such representation. The defendant testified fully as to the representations made by plaintiff in her conversation with defendant in the presence of W. C. Carpenter, when she was first employed, to the effect that plaintiff represented that she had a good trade and would bring trade to his store, and plaintiff in her testimony admitted that she told defendant that she thought she could bring her old customers with her to the store and would if she could. The subsequent declaration, if made, could not have thrown any light on the issue.

The eleventh exception charges error in allowing plaintiff in reply to tell what Mr. Coleman said when he discharged her. Coleman was then managing agent for defendant and was instructed by defendant to discharge her. Plaintiff testified that Coleman when he discharged her assigned dullness of business as the reason. Declarations accompanying an act and explanatory thereof are admissible as part of the *res gestæ*. Besides, the testimony was in reply to the testimony offered by defendant as to the unsatisfactory character of plaintiff's services.

Under the thirteenth and last exception, defendant contends that the court should not have modified his last request to charge, which was: "Where a sufficient cause exists for the discharge of an employe, although not the inducing motive to the discharge, it will justify the discharge." Judge Klugh charged this as a sound proposition of law, but added that matter relied on in justification must be pleaded, and that "any justification pleaded here, if established, would be a sufficient defense for the action." The qualification was in accordance with the general rule that matter in justification must be pleaded. *Latimer v. York Cotton Mills*, 66 S. C. 135, 44 S. E. 559; *Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2; 26 Cyc. 1005.

Similar requests to charge were given without qualification, as, for example, the

jury were instructed, as requested by defendant: "If a justifiable cause for dismissal existed, plaintiff cannot recover, although not dismissed expressly on that ground." "If just cause for dismissal existed, plaintiff could only recover for the services rendered, and not for the remainder of the term." We discover no error of law justifying reversal.

The judgment of the circuit court is affirmed.

#### RUTLAND v. SOUTHERN RY. CO. (two cases).

(Supreme Court of South Carolina. Nov. 16, 1908.)

##### 1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission, in an action against a carrier for delay, of a bill of lading without proper foundation, was harmless, where the carrier actually received and delivered the freight under the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4156; Dec. Dig. § 1050.\*]

##### 2. EVIDENCE (§ 242\*) — ADMISSIONS BY AGENTS.

Declarations by an agent whose duty it was to adjust and pay claims against a carrier, made while attempting to adjust a claim for delay, are binding on the carrier.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 893; Dec. Dig. § 242.\*]

##### 3. CARRIERS (§ 105\*)—CARRIAGE OF FREIGHT—DELAY IN SHIPMENT—MEASURE OF DAMAGES.

Where a carrier was without knowledge that if a shipment of buggies should be delayed the owner would be unable to store the same on arrival, it was not liable for the difference in price between that which the owner might have obtained by sales in the usual course of his business, if the buggies had arrived in due time, and that realized by a forced sale due to a lack of storage capacity when the buggies arrived.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.\*]

##### 4. CARRIERS (§ 105\*)—CARRIAGE OF FREIGHT—MEASURE OF DAMAGES.

The measure of damages for delay in a shipment of buggies is the difference in the market price at the time they ought to have been delivered and of actual delivery, irrespective of whether the buggies were purchased at a high or low price.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.\*]

Appeal from Common Pleas Circuit Court of Lexington County; John S. Wilson, Judge.

Two actions by M. E. Rutland against the Southern Railway Company. Judgments for plaintiff, and defendant appeals. Reversed, and new trial granted.

E. M. Thomson, for appellant. Efrd & Dreher, for respondent.

POPE, C. J. These two cases were commenced in the court of common pleas for Lexington county, July 9, 1907. By agreement of counsel the two cases were tried to-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 62 S.E.—65

gether before Hon. John S. Wilson, presiding judge, and a jury, at Lexington, S. C., February 11, 1908; it being agreed, except as to the officers of court, only one set of costs was to be taxed. The complaints are as follows: "The plaintiff, complaining of the defendant, alleges: (1) That the defendant is a common carrier of passengers and freight, incorporated under the laws of the state of Virginia, and owns tracks, rolling stock, does its business as a common carrier, and has and maintains freight depots and offices in said county and state, one of which is at Batesburg in the county of Lexington and state of South Carolina, on the line of railroad of said defendant company, which extends from the city of Columbia through said county on to the city of Augusta, Ga. (2) That previous to the 2d day of November, 1906, the plaintiff bought of the Oxford Buggy Company, of Oxford, N. C., 25 top buggies. (3) That on the 2d day of November, 1906, the said Oxford Buggy Company delivered to the said defendant, a common carrier of freight, at the station of Oxford, N. C., on defendant's line of railroad, the said 25 buggies and shafts, to be transported by the defendant over its lines of railway from the said station of Oxford to the station at Batesburg, S. C., to be by it delivered to this plaintiff. That the defendant accepted the said shipment and issued its bill of lading therefor on the 2d day of November, 1906. (4) That by ordinary diligence the defendant could have transported and delivered the said freight to the plaintiff at Batesburg, S. C., on or before the 6th day of November, 1906; but, by reason of its negligence, carelessness, and unreasonable delay in transporting said freight, it did not arrive at Batesburg until February 5, 1907, which delay greatly misput plaintiff in his business, caused him to buy other buggies for his trade, greatly inconvenienced him, and when the said shipment did arrive he had no need for the said buggies, and no sale for them at regular market prices. (5) That some time after the arrival of the said shipment, plaintiff accepted the said buggies from the defendant, under protest, paid the freight charges thereon, and sold the same to the best advantage on the market for \$1,350. (6) That if the said buggies had been delivered at Batesburg, S. C., within a reasonable time after delivery to the defendant carrier, the same would have been worth to the plaintiff the sum of \$1,875, for which amount he could have sold them. Hence, by reason of the said unreasonable delay, carelessness, and negligence on the part of the defendant in the handling and transporting of said freight, the plaintiff was damaged in the sum of \$525 by the said defendant. Wherefore, plaintiff demands judgment against the defendant for the sum of \$525, with interest from November 6, 1906, and his costs and disbursements." The complaint in the second case is practically the same as in the first

case, except as to the time of shipment, the name of the parties, and the amount claimed; the amount being \$455. The answer of the defendant in each case is a complete denial. The presiding judge charged the jury, in part, as follows: "It is for you to say \* \* \* what the market value of the goods at the time they ought to have been delivered \* \* \* and at the time they were received." The jury rendered a verdict in favor of the plaintiff for \$375 in the case for \$525 damages, and \$240 in the case for \$455 damages. A motion was then made for a new trial, which was refused. After entry of judgment, the defendant has appealed to this court upon five grounds, which we will now consider.

"1. Excepts because his honor erred in admitting in evidence, over the objection of defendant, the bill of lading of New York Central & Hudson River Railroad Company, of date October 20, 1906; whereas, it is submitted that the foundation had not been laid for its introduction, no evidence having been offered as to genuineness and correctness, nor any proof as to its execution." The first ground of appeal is overruled, because the Southern Railway actually received and delivered the freight under the bill of lading. The ruling was harmless.

"2. Excepts because his honor erred in allowing the plaintiff to testify, over the defendant's objection, what Mr. Adams told him about the car load of buggies from Wassertown, N. Y.; whereas, it is submitted that there was no evidence showing that the alleged statements of Mr. Adams were within the scope of his authority as agent of the defendant company, or in any way binding upon the defendant company." It appearing that Mr. Adams was claim agent with duty to adjust and pay claims against defendant, and that the declaration was made while attempting to adjust plaintiff's claim, we hold that Mr. Adams was acting within the scope of his authority as agent of the Southern Railway, and therefore overrule this exception.

"3. Excepts because his honor erred in overruling the first ground of the motion for new trial; the same being as follows: 'Because there is no evidence to support the verdict.' It is submitted that no construction of plaintiff's testimony will support the respective verdicts of \$375 and \$240 as being the difference between the market value of the buggies when they did arrive and when they should have arrived." There was evidence that plaintiff had storage room for the buggies if they had arrived within a reasonable time after shipment, and of what he could have realized at that time in the Batesburg market by gradually selling them from his warehouse in the usual course of trade. There was also evidence that when the buggies did arrive, after long delay, the plaintiff did not have storage room, and that he therefore threw them on the market and

sold them for cost; but there was no evidence that the defendant undertook the carriage, contemplating that if the shipment should be delayed the plaintiff would be unable to store the buggies. The defendant was not liable for the difference in price realized by a forced sale due to lack of storage capacity when the goods arrived, and the price plaintiff might have obtained by sales in the usual course of his business if the buggies had arrived in due time. The evidence should have been directed to the difference in the market price of the buggies at the time of actual delivery and the time when they should have been delivered, due to variation in the Batesburg market. The verdicts were not supported by any evidence on this issue.

It may be well to say, further, that in the trial of this issue the defendant has no concern with the plaintiff's profits; that is, whether he bought the buggies at a high or low price. The measure of damages for the delay would be the same whether the plaintiff had shipped buggies which had been given to him or which he had been deluded into buying at 10 times their value. In either case, where the goods are manifestly intended for sale, the measure of damages would be the difference in the market price at the point of destination at the time they ought to have been delivered, and market price at the time of actual delivery.

The judgment of this court is that the judgment of the circuit court should be reversed, and a new trial granted.

#### CONTOS et al. v. JAMISON et al.

(Supreme Court of South Carolina. Nov. 16, 1908.)

##### 1. APPEAL AND ERROR (§ 1050\*)—REVIEW—ADMISSION OF TESTIMONY.

Where testimony objected to had previously been admitted without objection and had some relevancy, its admission was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

##### 2. ADJOINING LANDOWNERS (§ 4\*)—EXCAVATIONS AFFECTING ADJOINING PREMISES.

A proprietor excavating on his own premises is liable for damage done to the adjacent owner's soil if in its natural condition, whether the damage results from negligence or not; but, when buildings or other improvements are erected upon the soil, the excavator is not liable for such damage unless caused by his negligence.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-44; Dec. Dig. § 4.\*]

##### 3. NEGLIGENCE (§ 89\*)—IMPUTED NEGLIGENCE.

The concurrent negligence of a third person cannot be imputed to an injured person so as to preclude recovery, unless the injured person and the third person were so related as to the transaction that in law the negligence of the third person was, upon the principle of agen-

cy or co-operation in a common enterprise, the act of the injured person.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 180-187; Dec. Dig. § 89.\*]

##### 4. NEGLIGENCE (§ 89\*)—EXCAVATIONS AFFECTING ADJOINING PREMISES.

The negligence of a lessor will not preclude recovery by his lessee in possession of a building against an adjoining proprietor whose negligent excavating caused the wall of the building to fall.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 89.\*]

Appeal from Common Pleas Circuit Court of Greenville County; D. E. Hydrick, Judge.

Action by George Contos and another, copartners, against Thomas F. Jamison and another, copartners. Judgment for defendants, and plaintiffs appeal. Reversed and remanded for a new trial.

Sirrine & Charles, for appellants. B. A. Morgan and Cothran, Dean & Cothran, for respondents.

JONES, J. The plaintiffs occupied a store-room known as 210 North Main street, Greenville, S. C., as lessees of W. C. Gibson, owner. Defendant Carrie V. Cauble, as guardian and agent, owned the lot adjacent to the south side and employed the defendants Jamison & Morris as contractors to erect certain buildings thereon. On August 8, 1908, while said contractors were excavating close to the side wall of the store occupied by plaintiffs, the wall collapsed and fell, destroying the goods and property of plaintiffs in their storeroom. This action was brought to recover damages, actual and punitive, for the destruction of their property, alleged to have resulted from the grossly negligent and reckless manner in which the work of excavating was done. A nonsuit was granted as to the Cauble defendants, and they are now eliminated from the case. The defendants Jamison & Morris answered, setting up, besides a general denial, that plaintiffs and W. C. Gibson, the owner, had notice of the progress of the excavation and of the manner in which it was done and of the character of the soil, and made no objection to the progress and manner of the work, and did nothing to protect said wall, which negligence on their part contributed as a proximate cause to the injury. The suit resulted in a verdict and judgment for defendants.

The exceptions of plaintiffs-appellants to the admission of certain testimony do not require any extended notice and cannot be sustained. The testimony referred to had been previously admitted without objection and had some relevancy to the question whether defendants were wantonly negligent.

The vital question raised by the appeal relates to the instruction given to the jury. The court in giving certain instructions requested by defendants, and in declining to give certain instructions requested by plain-

tiffs, in the general charge and in the special charge when the jury returned to the courtroom for further instructions on that point, impressed upon the jury that if the negligence of the owner, Gibson, was one of the proximate and efficient causes of the falling of the wall under the circumstances, the plaintiffs could not recover. This we think was erroneous and prejudicial. The general law is well settled that a proprietor excavating on his own premises is liable for damages done to the adjacent owner's soil if in its natural condition, whether damage results from negligence or not; but when buildings or other improvements are erected upon the soil, and its natural condition is thus altered, no action lies against such excavator except upon allegation and proof of negligence. *Bailey v. Gray*, 53 S. C. 518, 31 S. E. 354. There was such allegation in this case and testimony tending to establish negligence proximately causing injury to plaintiff's property; but under the charge plaintiffs, as lessees, were denied right of recovery if the landlord Gibson's negligence proximately contributed to the injury, thus imputing to the lessees the negligence of the lessor. No authority has been cited for such a view, and we have found none. The Supreme Court of Indiana, in *Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827, approved in *Louisville, etc., R. R. Co. v. Moses Creek*, 130 Ind. 143, 29 N. E. 482, 14 L. R. A. 736, declares: "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other in relation to the matter then in progress as that in contemplation of law the negligent act of the third person was, upon the principle of agency or co-operation in a common or joint enterprise, the act of the person injured." In *Kopitz v. St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 75, the Supreme Court of Minnesota declared that "negligence in the conduct of another will not be imputed to a party, if he neither authorized such conduct, nor participated therein, nor had the right or power to control it." These quotations are made the basis of the text in 29 Cyc. 542. In *Watson v. Southern Ry.*, 66 S. C. 50, 44 S. E. 375, this court refused to impute to a child non sui juris the contributory negligence of the child's parent or guardian. There is nothing in the mere relation of lessor and lessee which should affect a lessee without fault himself with the negligence of the lessor. There is no agency nor co-operation in a common enterprise nor power of lessee to control applicable here which should excuse the negligence of others. There is a privity between the lessee and the lessor in the

lessee's right of possession, but such privity cannot excuse the negligence of another, whether combined with that of the lessor or not. The lessor, Gibson, is not a party in this case, and it was improper to confuse the case with the question of his contributory negligence. The question was: Did the negligence of the defendants Jamison & Morris injure plaintiffs as alleged, and, if so, were the plaintiffs themselves guilty of contributory negligence, excusing the defendants from liability?

The judgment of the circuit court is reversed, and the case remanded for a new trial.

#### LEWIS v. COOLEY.

(Supreme Court of South Carolina. Nov. 16, 1908.)

#### 1. LANDLORD AND TENANT (§ 296\*)—RECOVERY OF POSSESSION BY LANDLORD—RELATION OF LANDLORD AND TENANT—NECESSITY.

Where defendant was in possession of land under a contract of sale on payment of a certain sum, defendant, on default in payment, to pay a certain rental for each year he remained in possession, there was a possession under contract of purchase which made defendant the equitable owner and prevented ejectment in summary proceedings, under Civ. Code 1902, § 2423.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1273; Dec. Dig. § 296.\*]

#### 2. VENDOR AND PURCHASER (§ 85\*)—CONTRACT FOR SALE OF LAND—PAROL RESCISSION.

A written contract of sale of land may be rescinded and a rent contract substituted by parol.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 141; Dec. Dig. § 85.\*]

#### 3. LANDLORD AND TENANT (§ 18\*)—EXISTENCE OF RELATION—SUFFICIENCY OF EVIDENCE.

Defendant was in possession of land under a contract of sale on payment of a certain sum, defendant, on default in payment, to pay a certain annual rental for each year he remained in possession. He failed to pay the purchase money and surrendered his bond for title, giving notes for the rent. There was no evidence that he paid the taxes after giving up the bond which required him to pay such taxes, or that he thereafter made any improvements on the land; but there was testimony that he stated that he had given the land up. *Held*, that the evidence would not support a finding that the relations between the parties were those of mortgagor and mortgagee, but required a finding of the relation of landlord and tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 18.\*]

#### 4. APPEAL AND ERROR (§ 1094\*)—APPEALS FROM INTERMEDIATE COURT—QUESTIONS REVIEWABLE—FINDINGS OF FACT.

The Supreme Court may not review findings of fact by the circuit court on appeal from a magistrate's court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.\*]

Appeal from Common Pleas Circuit Court, Greenville County; D. E. Hydrick, Judge.

Action by R. A. Lewis against Reuben Cooley. From a judgment of the circuit

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court reversing the judgment of a magistrate in plaintiff's favor, plaintiff appeals. Reversed, and judgment of magistrate affirmed.

J. J. McSwain, for appellant. B. M. Shuman, for respondent.

JONES, J. This was a summary proceeding in ejectment before a magistrate under section 2423, Civ. Code 1902. The defendant made return, which admitted that legal title to the premises was in plaintiff, but denied that he was tenant of plaintiff, alleging that the relation between defendant and plaintiff was that of mortgagor and mortgagee, that defendant was in possession as equitable owner of the premises, and that upon an accounting between them defendant would owe plaintiff very little. Upon the evidence submitted the magistrate granted the writ of ejectment, holding that defendant was tenant of said premises under plaintiff as landlord, holding over after expiration of lease, after due notice to quit and demand for possession. On appeal by defendant to the circuit court, Judge Hydrick reversed the judgment of the magistrate and dismissed the proceedings, holding that the relation of mortgagor and mortgagee existed between defendant and plaintiff, and that the plaintiff must seek his relief in equity.

The facts as found by the circuit court are as follows: "The testimony shows: That the defendant has been in possession of the land from which it is sought to eject him since 1876; that at one time he had the legal title to it, and mortgaged it to G. A. Norwood, who foreclosed his mortgage, and the land was sold by the master to one Seaborn, who bought and held the title for defendant under some arrangement which does not appear; that on November 26, 1894, Seaborn, by consent and agreement between the defendant and R. A. Lewis & Co., who were to hold the title for the defendant, and they gave him a bond for title, and took his note for the purchase money. Subsequently, the other members of the firm of R. A. Lewis & Co. conveyed their interest in the land to R. A. Lewis. During all these transfers defendant continued in possession, paying the taxes, making some improvements, and treating the land as his own. These facts constitute the relation of mortgagor and mortgagee between the defendant and the plaintiff. *Tant v. Guess*, 37 S. C. 489, 16 S. E. 472. On December 9, 1903, the defendant surrendered to R. A. Lewis the bond for title which had been given him by R. A. Lewis & Co., and gave R. A. Lewis a note, agreeing to pay him \$100, as rent, for the place for the year 1904. Similar notes were given for the years 1905 and 1906. Having defaulted in his payments, the plaintiff gave him notice to quit, and, upon his refusal, instituted this proceeding to eject him." There was no evidence whatever of any arrangement between Seaborn and defendant concern-

ing the land. Hence it could not be said that there was any relation as mortgagor and mortgagee between defendant and Seaborn. R. A. Lewis & Co. purchased from Seaborn and received his deed from the land November 26, 1894, and on February 11, 1896, R. A. Lewis acquired the interests of the other members of the partnership of R. A. Lewis & Co. On the day R. A. Lewis & Co. received the deed from Seaborn, they entered into a contract with defendant binding themselves to sell the land to defendant on condition that he pay them \$771 with interest on December 1, 1895. This contract further stipulated that in case of failure to meet such payment defendant was to pay \$195 as rent for the year 1895 and a like sum for each year he may afterwards remain on or cultivate the land.

There was no evidence whatever of any relation existing at that time between plaintiff and defendant as to the land, except that defendant was in possession under the above contract. This circumstance standing alone would show a possession under contract of purchase which would make defendant equitable owner of the property and prevent ejectment under summary proceedings. *Carlisle v. Prior*, 48 S. C. 189, 26 S. E. 244. But there was default in the payment of the purchase money, and under the contract defendant acknowledged tenancy under plaintiff in the event of such default. There was no evidence that plaintiff had waived his right to hold defendant upon default of payment of purchase money. On the contrary, the delivering up of the bond for title and the giving of the rent notes, which defendant testified he understood to be rent notes, afford evidence of insistence on the part of the plaintiff and recognition on the part of the defendant that the relation was that of landlord and tenant. A written contract of sale may be rescinded and a rent contract substituted even by parol. *Fripp v. Fripp, Rice*, Eq. 108; *Moseley v. Witt*, 79 S. C. 141, 60 S. E. 520. Plaintiff testified that he "paid the taxes"; but there was no evidence that he paid the taxes after giving up the bond for title, which stipulated that he should pay taxes. Nor was there any evidence that he made any improvements on the place after the surrender of the bond for title. On the contrary, plaintiff testified that the houses were repaired before the bond was surrendered, and that he furnished the timber, etc., charging it to defendant's account. Furthermore, there was no testimony that anything had been paid on the purchase price before or after the surrender of the bond for title. C. C. Cooley, son of the defendant, who worked a portion of the land and signed the first rent note, testified: "We did not pay the money we promised on the land." Plaintiff testified: "He never did pay anything on the land." Defendant merely testified: "He got six or seven bales of cotton a year, sometimes eight bales." During all this time plaintiff

furnished supplies to defendant to make the crop and sold him two mules and paid for another. Defendant further testified: "I ran behind \$125, which I owed him. I owed Lewis about \$400 when I carried the mules to him. I signed the note for the mules, and he let me take the mules back." Defendant further testified: "I knew it was a rent contract. I never had the papers taken up, I knew the bond was binding." And further he said: "I have never said I owned the land." J. J. McSwain without contradiction testified that a few days after October 29, 1906, defendant came to see him in response to a letter and said that he had given up the land and wanted to know how much Lewis would take for the land, and also to satisfy the chattel mortgage on the mules upon which he said he owned \$175, and that defendant further stated that he had paid Mr. Lewis on all accounts for 1903 and 1904 \$95 and paid nothing for 1905. It is perfectly manifest that there is nothing in the testimony to support the finding of the circuit court that the relation of plaintiff and defendant as to the land was that of mortgagee and mortgagor, but that the only inference of which the evidence is susceptible is that defendant was tenant of plaintiff. *Swygert v. Goodwin*, 32 S. C. 148, 10 S. E. 933; *Brewster v. McNab*, 36 S. C. 274, 15 S. E. 233.

It is true this court has no jurisdiction to review the findings of fact by the circuit court on appeal from a magistrate's court, but the question presented here is one of law, whether upon the undisputed facts defendant was a tenant holding over after the expiration of lease within the meaning of section 2423. It was within the jurisdiction of the magistrate to determine that defendant was tenant within the meaning of the statute, and we think he rendered the only judgment proper under the circumstances. Magistrates, under article 5, § 1, of the Constitution, have no jurisdiction in cases where the title to land is in question or in cases in chancery; but the proof here made is insufficient to oust the magistrate of jurisdiction under section 2423.

The judgment of the circuit court is reversed, and the judgment of the magistrate's court is affirmed.

#### SPARKMAN v. JONES.

(Supreme Court of South Carolina. Nov. 16, 1908.)

#### 1. ADVERSE POSSESSION (§ 114\*)—EVIDENCE OF POSSESSION.

Evidence, in an action where plaintiff sought to show a presumption of grant by successive possessions by his grantors for 20 years, held sufficient to show possession by one of them.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 114.\*]

#### 2. DEEDS (§ 194\*)—DELIVERY—EVIDENCE.

Delivery of deeds to the proper recording officer is prima facie evidence of their delivery to the grantees.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 580; Dec. Dig. § 194.\*]

#### 3. ESTOPPEL (§ 98\*)—EQUITABLE ESTOPPEL—PERSONS ESTOPPED.

Though plaintiff's grantor, without knowing what she was doing, but simply at the direction of her father, signed the deed to plaintiff, the consideration of which he paid, defendant being a mere occupant of the land by permission of the father, is, like him, estopped to assert the invalidity of the deed and any title in the father.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 98.\*]

Appeal from Common Pleas Circuit Court, Colleton County; R. W. Memminger, Judge.

Action by E. H. Sparkman, trustee, against Robert L. Jones. Judgment for plaintiff. Defendant appeals. Affirmed.

C. C. Tracy, for appellant. Howell & Gruber and Nathans & Sinkler, for respondent.

WOODS, J. This action was brought on May 29, 1905, for the recovery of possession of a tract of land, containing 306 acres, more or less, for damages for cutting and removing timber and for injunction against further cutting or removing timber or other trespass. An order was made by Judge Memminger, dated May 30, 1905, enjoining the defendant from trespassing on the land. Thereafter the legal issue of title and the right of possession was tried before Judge Gage, and a verdict for the plaintiff rendered. On the testimony offered on the trial and the verdict of the jury, Judge Gage made an order, dated December 10, 1905, permanently enjoining the defendant from trespassing upon the land. The exception assigning error in the refusal of the circuit court to sustain the demurrer to the complaint was abandoned.

The record contains this statement of the chain of title introduced by the plaintiff: "Counsel for plaintiff offered in evidence, under agreement, the following original records of the office of the clerk of court of Colleton county: Volume 6, page 202: Conveyance by J. K. Terry, sheriff, to Mary S. Jones; dated October 5, 1869; recorded February 9, 1888; conveying 165 acres. Volume 6, page 203: Conveyance by Mary S. Jones to E. W. Peoples; dated February 4, 1886; recorded February 9, 1888; conveys 306 acres. 'Tract purchased for 165 acres from Sheriff Terry.' Volume 6, page 205; Julia A. Jones to E. W. Peoples; dated February 4, 1888; recorded February 9, 1888; conveys 306 acres. Volume 16, page 16; E. W. Peoples to A. J. Sallinas & Sons; dated March 6, 1895; recorded April 5, 1895; conveys 306 acres. Volume 17, page 263: A. J. Sallinas & Sons to E. H. Sparkman, trustee; dated February 14, 1896; recorded March 3, 1896; conveys 306 acres. The above conveyances are of the same tract of land, namely, that being the subject of this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

action." The plaintiff did not trace title back to a grant from the state, nor did he prove a common source; but his reliance was on the presumption of a grant by successive possessions of the grantors through whom he claimed and himself for an aggregate period of more than 20 years. There was no dispute that evidence was afforded of possession by all the grantors from E. W. Peoples, whose deed was dated, February 4, 1886, down to the commencement of the action, May 29, 1905; but, as this did not make out the period of 20 years it is necessary for plaintiff to prove possession in Mary S. Jones before the date of her deed to Peoples. The defendant moved for a nonsuit on the ground that the plaintiff had failed to introduce any evidence tending to prove Mary S. Jones was ever in possession, and on the further ground that there was no proof of delivery of the deed on which plaintiff relied. The circuit court was not in error in refusing to grant a nonsuit.

On the question of Mary S. Jones' possession, E. W. Peoples testified: "Q. Was the Mary S. Jones who sold to you in possession of that tract of land prior to your purchase? A. That is the way I understood it. She owned the place, and, with her brother, was on it as her place. That is all I can say about it. Q. She owned it, and the defendant here was in possession of it as her tenant? A. That is the way I understood it." This, taken in connection with the further fact appearing in evidence that, when Peoples took his deed for the land from Mary S. Jones, the defendant, on his demand, immediately moved away, was some evidence that Mary S. Jones was in possession, and the defendant was on the land by her permission. The delivery of the deeds to the clerk was prima facie evidence of their delivery to the grantees. *Dingle v. Bowman*, 1 McCord, 177; *McLeod v. Rogers*, 2 Rich. Law, 19; *Darby v. Huffman*, 2 Rich. Law, 532; *Duren v. Sinclair*, 22 S. C. 361; *Stone v. Flitts*, 38 S. C. 397, 17 S. E. 136. But aside from all this, a verdict for the plaintiff was inevitable when the whole testimony is considered. It was proved by the defendant that the land belonged to his father, J. R. Jones, and he testified he held the land under his father, J. R. Jones, and by his permission. The defendant offered as a witness Mary Jones, who testified the deed from Terry, sheriff, was never delivered to her, and, in explanation of her deed purporting to convey to Peoples, she said she signed at the direction of her father and did not know what she signed. Accepting this evidence as true, when J. R. Jones, the father, actively participated in having Mary Jones execute a deed to Peoples, for which he paid the money, J. R. Jones was estopped from alleging against the validity of the deed from her to Peoples. The defendant being by his own testimony an occupant of the land

by permission of J. R. Jones, his father, his rights cannot rise higher than those of J. R. Jones and Mary Jones, and any title of J. R. Jones is equally unavailable to him as to them in a contest with the grantee of Mary Jones.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### MASON v. APALACHE MILLS.

(Supreme Court of South Carolina. Nov. 16, 1906.)

#### 1. WATERS AND WATER COURSES (§ 60\*)—CLEANING OUT STREAM—DECIDING DUTY—BOARD OF HEALTH AND DRAINAGE.

Under Civ. Code 1902, §§ 1465-1468, putting on the commissioners of health and drainage the duty of enforcing the obligations of landowners to clean out streams adjacent to their lands, it is for the commissioners, and not the court, to decide, in the first instance, whether a landowner has failed to perform any duty imposed on him by the statute, and, if so, to take the necessary steps to enforce compliance with the statute.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 60.\*]

#### 2. WATERS AND WATER COURSES (§ 61\*)—INJUNCTION—CONDITION IN GRANTING.

Making an injunction against the use in a certain manner of the waters of a stream conditional on plaintiff, a lower riparian owner, consenting that defendant, an upper owner, may clean out the stream in front of plaintiff's property, does not require defendant to clean it out, or affect any right of his to apply to the commissioners of health and drainage to compel plaintiff to clean it out.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 61.\*]

On rehearing. Denied.

For former opinion, see 62 S. E. 399.

Wm. Henry Parker, John Gary Evans, and Haynsworth, Patterson & Blythe, for petitioner.

PER CURIAM. Upon careful consideration of the petition for rehearing, we are unable to discover any material question of fact or principle of law that has been overlooked or disregarded, and the petition is therefore dismissed.

We wish, however, to remove any impression that the court intended to adjudge that the proposition made by defendant and rejected by plaintiff before the suit was brought had bound defendant to assume the burden of clearing out the Tiger river through the lands of the plaintiff. The court adjudged nothing on this point, except that the plaintiff could not have an injunction without consenting that defendant might clean out the stream if it so desired. Civ. Code 1902, §§ 1465-1468, lays upon the commissioners of health and drainage the duty of enforcing the obligation of landowners to clean out streams adjacent to their lands. It is the duty of that board, and not of the court, to decide, in the first instance, whether



er the plaintiff has failed to perform any duty imposed on him by those sections, and also to take the necessary steps to enforce compliance with the statute. The order making the injunction conditional on plaintiff's consenting that defendant may clean out the stream does not require defendant to clean it out, nor does it in any wise prejudice or affect any right defendant may have to apply to the commissioners of health and drainage to compel plaintiff to clean out any portion of Tiger river at his own expense.

### KOLB v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Nov. 16, 1906.)

#### 1. CARRIERS (§ 105\*)—GOODS—DELAY—SPECIAL DAMAGES.

Special damages for delay in delivering goods are recoverable only on a showing that the carrier had notice of the special circumstances at the time of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 452, 452½; Dec. Dig. § 105.\*]

#### 2. CARRIERS (§ 105\*)—GOODS—NOTICE OF PURPOSE—SUFFICIENCY.

That a carrier was notified that gin machinery delayed in transportation was badly needed was insufficient to charge the carrier with notice that the consignee conducted a public ginnery and had a special need for the machinery.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.\*]

Appeal from Common Pleas Circuit Court, Sumter County; J. C. Klugh, Judge.

Action by H. Spurgeon Kolb against the Southern Railway Company. From the judgment, plaintiff appeals. Affirmed.

A. B. Stuckey, for appellant. B. L. Abney and E. M. Thomson, for respondent.

JONES, J. On August 25, 1905, the Continental Gin Company of Prattville, Ala., delivered to the Louisville & Nashville Railroad Company two gins, with condensers, pulleys, and attachments, consigned to plaintiff at Toumeys, S. C. The shipment was transferred to the defendant company at Atlanta, Ga., on September 7, 1905, and arrived at Sumter, S. C., on September 19, 1905, with certain parts of the machinery broken. This action was brought to recover \$10 damages for injury to the machinery and \$200 as special damages arising from the fact that plaintiff conducted a public ginnery and by reason of the unreasonable and negligent delay in transportation plaintiff was damaged in the loss of customers and profits during such busiest portion of the ginning season. Plaintiff also claims \$100 as special damages in loss of customers and profits arising from a week's further delay in replacing the broken parts of the machinery necessary to its operation. There was no testimony that any notice was given to the Louisville &

Nashville Railroad Company at the time of the original shipment, nor to defendant's agent at Atlanta, when defendant received said shipment, of the circumstances which gave rise to the special damages claimed. There was testimony that about August 31, 1905, the plaintiff inquired of defendant's agent at Toumeys and at Sumter about the gins, telling them that he needed them very badly, and that the agents said they would see about the matter, that such inquiry was made on several occasions thereafter, and that agents informed him that they knew nothing of the shipment but would attend to it. Judge Klugh excluded evidence of the special damages and charged the jury that, in order to recover damages for loss of patronage as a public ginner, plaintiff must allege and prove that when the gins were shipped or received for shipment the carrier had notice that the gins would be used for purposes of running a public ginnery, and that delay would cause plaintiff a special loss, and that there was no such allegation in the complaint. The jury rendered a verdict for \$10 damages, and plaintiff appeals on exceptions to the said rulings of the court as to special damages.

The exceptions cannot be sustained. The general rule is that special damages for losses arising from failure to deliver goods within a reasonable time cannot be recovered except upon allegation and proof that defendant had notice of the special circumstances at the time of the shipment. Traywick v. Railway, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; Wesner v. Railway Co., 71 S. C. 211, 50 S. E. 789; Guess v. Railway Co., 73 S. C. 264, 53 S. E. 421; Milhouse v. Railway Co., 74 S. C. 351, 55 S. E. 764; McKerral v. Railway Co., 76 S. C. 338, 56 S. E. 965; Strange v. Railway Co., 77 S. C. 185, 57 S. E. 724; Matheson v. Railway Co., 79 S. C. 157, 60 S. E. 437. The same general principle is applied in telegraph cases. Mood v. Tel. Co., 40 S. C. 528; Rogers v. Tel. Co., 72 S. C. 293, 51 S. E. 773; Smith v. Tel. Co., 72 S. C. 116, 51 S. E. 537; Poteet v. Tel. Co., 74 S. C. 496, 55 S. E. 112. In the case of Strange v. Railway, supra, the court expressly ruled that it was error to receive testimony as to notice of plaintiff's business as a traveling salesman after the loss of his sample trunks. In this case the complaint did not allege that the carrier had notice of the special circumstances at the time of receiving the shipment. On the contrary, it is alleged that defendant received the shipment of the 28th day of August, 1905, and notice of the special circumstances was given to defendant's agent at Toumeys on August 31, 1905. If we consider the testimony, there was evidence that inquiry as to the machinery was made, and notice given that it was badly needed, at Toumeys and Sumter, before the receipt of the ship-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment by the defendant company on September 7, 1906; but, even if such notice was in proper time, the nature of it was not sufficiently definite to inform defendant of plaintiff's business and the special need of the machinery. In this situation it is unnecessary to discuss whether there may be exceptions to the general rule that notice of special circumstances must be given at the time of the shipment. It is true in *McKerral v. Railway*, supra, the court, while recognizing the general rule, quoted with apparent approval from 6 Cyc. 450, that "subsequent notice, however, of the effect of the further delay after the goods should have been delivered, may render the carrier liable for damages accruing after that time by reason of negligence in not tracing and finding the goods," and in *Matheson v. Railway*, supra, reference was made to the same quotation; but it cannot be concluded that such modification of the general rule must be accepted as the settled law of this state, as in neither of the cases cited was it necessary to the decision of the case. But if such may be the law the present case does not fall within the modification. Whether justice may not in some circumstances require a modification of the general rule need not now be declared. See *Bourland v. Railway Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, and case note.

The judgment of the circuit court is affirmed.

#### CHARLESTON LIGHT & WATER CO. v. LLOYD LAUNDRY & SHIRT MFG. CO.

(Supreme Court of South Carolina. Nov. 16, 1908.)

WATERS AND WATER COURSES (§ 203\*)—MUNICIPAL SUPPLY—WATER RATES—ORDINANCE—CONSTRUCTION.

A city ordinance provided that a water company should at no time charge consumers any rates exceeding certain rates stated, that the company might, at any time, insert a meter and charge meter rates, provided they should not exceed rates fixed in a following schedule, and that a consumer might set a meter and pay the rate indicated by the meter, provided the amount would exceed \$12 per annum. The ordinance then provided the maximum flat rates, after which a schedule of meter rates was specified. Held that, where a meter was installed, the consumer was bound to pay the meter rate provided it exceeded \$12 per annum, though such rate exceed the maximum flat rate specified for the service rendered.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

Appeal from Common Pleas Circuit Court, Charleston County; Geo. W. Gage, Judge.

Action by the Charleston Light & Water Company against the Lloyd Laundry & Shirt Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden and Rutledge & Haggood, for appellant. Miller & Whaley, for respondent.

JONES, J. This is a controversy without action, instituted in the circuit court for Charleston county. The plaintiff is a corporation, under "An act to incorporate the Charleston Light & Water Company, approved February 19, 1898," 22 St. at Large, p. 934, and furnishes water to the city and citizens of Charleston under the terms and conditions of a franchise granted under an ordinance of the city council of Charleston. The defendant is a corporation, conducting the business of a laundry in the city of Charleston, and on May 17, 1906, entered into contract with plaintiff to be furnished with water for laundry purposes, and as a condition precedent agreed "to pay at such rates and use the same in accordance with such rules and regulations as may be established by said company." Prior to January 1, 1907, plaintiff inserted a meter into the service pipe of defendant, in order to measure the quantity of water consumed. During the months of January, February, March, and April, 1907, plaintiff furnished such a quantity of water to defendant as at the meter rates amounted to \$63.74 for the four months, which sum, on the presentation of the bill, defendant refused to pay, on the ground that the maximum rate for which it is liable under the franchise ordinance is \$100 per annum. The controversy involves the proper construction of that portion of section 10 of the ordinance as follows: "At no time during the said period shall the Charleston Light & Water Company charge consumers any rate or rates exceeding the following, which may be made payable quarterly in advance; but the Charleston Light & Water Company may at any time insert a meter into the service pipe of any consumer and supply him at meter rates, provided the meter rates shall not exceed the rates fixed in the following schedule, or any consumer shall have the right to set in an accurate meter and pay the rent indicated by said meter; provided, the amount shown by the meter shall exceed twelve dollars per annum. The maximum rates per annum above referred to shall be as follows: For a faucet in kitchen, for domestic purposes only, for a house of four rooms or less, \$8. For each additional room, \$1. Banks with one basin, \$10. Bakery, each oven \$10 to \$30. \* \* \* Laundry \$24 to \$100. \* \* \* Meter rates, per 1,000 gallons: 1,000 gallons or less per day, 25 cents; 1,000 to 3,000 per day, 20 cents; 3,000 to 5,000 gallons per day, 15 cents; 5,000 to 10,000 gallons per day, 12½ cents; 10,000 to 20,000 gallons per day, 10 cents; 20,000 to 30,000 gallons per day, 7½ cents; over 30,000 gallons per day, not exceeding 7½ cents per 1,000 gallons, special rates." Judge Gage gave judgment for \$63.74 in favor of plaintiff, on the basis of the above meter rates, construing the words in the ordinance "provided the meter rates shall not exceed the rates fixed in the following sched-

ule" as having reference to the meter rates, and not to the flat rates in the schedule. Appellant contends that the proper construction is as if the language had been "provided the meter rates shall not exceed the flat rates as fixed in the following schedule," and that the maximum flat rate was \$100 per annum. We think the circuit judge correctly construed the ordinance, and rendered the proper judgment.

The first clause, "At no time during the said period shall the Charleston Light & Water Company charge consumers any rate or rates exceeding the following, which may be made payable quarterly in advance," clearly refers to the flat rates, as only such rates could be made payable quarterly in advance, the amount due under meter rates being determinable at stated reasonable periods after the water is supplied. Had the schedule of flat and meter rates immediately followed this clause, and nothing further had been said about meter rates, then appellant's contention would have been correct. But as if to avoid such construction the ordinance goes to provide: "But the Charleston Light & Water Company may at any time insert a meter into the service pipe of any consumer and supply him at meter rates, provided, the meter rates shall not exceed the rates fixed in the following schedule." The first clause having provided for maximum flat rates, this second clause was intended to provide for maximum meter rates. The true meaning is indicated by construing "the rates" to mean "such rates" or "the meter rates," the kind of rates being provided for in that clause. This meaning is further brought out in the subsequent provision "or any consumer shall have the right to set in an accurate meter and pay the rent indicated by said meter; provided, the amount shown by the meter shall exceed twelve dollars per annum." The duty to pay the rent indicated by the meter provided it exceeds \$12 is inconsistent with the idea that the meter rate shall never exceed the flat rate. This construction promotes justice, as thereby the water company may protect itself against an improper or wasteful use of its water supply, and proportion its compensation to the service rendered.

The judgment of the circuit court is affirmed.

#### POOLE v. PARIS MOUNTAIN WATER CO.

(Supreme Court of South Carolina. Nov. 16, 1908.)

#### 1. MANDAMUS (§ 133\*)—SCOPE OF REMEDY—PUBLIC SERVICE CORPORATIONS.

Mandamus is an appropriate remedy to compel a public service water company to sup-

ply its customers with water, on compliance with its reasonable rules and regulations.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 263; Dec. Dig. § 133.\*]

#### 2. WATERS AND WATER COURSES (§ 203\*)—PUBLIC SUPPLY—WATER COMPANIES—RULES.

A public service water company may adopt reasonable rules for the conduct of its business, with which it is the duty of customers to comply.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290-293; Dec. Dig. § 203.\*]

#### 3. WATERS AND WATER COURSES (§ 203\*)—PUBLIC SUPPLY—RULES—REASONABLENESS.

In the absence of a statute making water rents a lien or incumbrance on premises, a regulation that, if the rent remains unpaid 30 days from the date of bill, the supply may be cut off without notice is unreasonable, so far as it may be construed to authorize cutting off water supply in case a tenant refuses to pay delinquent water rents due by the landlord or former occupant, but is not unreasonable with respect to a consumer who is under an express or implied contract to pay the rents.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 295; Dec. Dig. § 203.\*]

#### 4. WATERS AND WATER COURSES (§ 203\*)—PUBLIC SERVICE—METER RATES.

A water ordinance provided that the water company should not charge to consumers, during the existence of the franchise, "exceeding the following maximum rates," but that the company should, at its option, have the right at any time to supply the consumer at meter rates, and that no water was to be supplied to any customer for less than \$5 a year, and then followed a schedule of flat rates, among them, for "residence occupied by one family, five rooms, \$5.00" and a schedule of meter rates, among them, "100 to 1,000 gallons per day at rate of 1,000 gallons, 40 cents." *Held*, that the water company was entitled to subject a five-room householder to reasonable meter rates, and that he was not entitled to a contract for supply at the flat rate of \$5 a year.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

#### 5. WATERS AND WATER COURSES (§ 203\*)—MUNICIPAL SUPPLY—METER RATES—REASONABLENESS.

In the absence of adverse evidence, ordinance rates for meter water service are presumptively reasonable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

#### 6. WATERS AND WATER COURSES (§ 203\*)—MUNICIPAL SUPPLY—TERMINATION—EVIDENCE.

In a mandamus proceeding to compel a water company to furnish water to petitioner, which it had refused to do because of petitioner's refusal to pay an admittedly exorbitant bill for alleged prior service, evidence *held* to require a finding that there was a bona fide dispute as to the accuracy of defendant's meter, by which the former service had been measured.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

#### 7. WATERS AND WATER COURSES (§ 203\*)—CONSUMER'S SUPPLY—TERMINATION—MANDAMUS.

Where a water company cut off petitioner's supply because of his refusal to pay an admittedly exorbitant bill for alleged prior service, petitioner, in order to maintain mandamus to compel a continuance of the supply, was not required to establish the inaccuracy of the wa-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter meter by which the prior service had been measured, but it was sufficient to show a bona fide dispute as to the correctness of the amount demanded as a condition to continued service.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

**8. WATERS AND WATER COURSES (§ 203\*)—MUNICIPAL SUPPLY—WATER COMPANIES—RULES.**

Where a municipal water company's rules provided for termination of supply, in case water rent remained unpaid, 30 days from the date of the bill, no bill having been rendered a consumer for water furnished during 1907 until January 1, 1908, the company was not authorized to cut off his supply, for nonpayment of the bill, until 30 days from the later date.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 203.\*]

Appeal from Common Pleas Circuit Court of Greenville County; J. C. Klugh, Judge.

Mandamus by J. B. Poole against the Paris Mountain Water Company. From an order dismissing the petition, petitioner appeals. Reversed and remanded, with instructions.

The decree dismissing the petition, mentioned in the opinion of the Supreme Court, is as follows:

"This case comes before me on petition for a writ of mandamus to compel the respondent to furnish water to the residence of the petitioner on Cox street, in the city of Greenville. Upon reading the application and petition a rule was issued, directed to the respondent, requiring it to show cause why the writ should not be granted as prayed for in said petition. To this the respondent made due return, and argument was had before me on this date. A brief statement of the facts is as follows: During the month of January, 1907, the petitioner took up his residence in a dwelling house on Cox street, which house was owned by one W. A. Hamby. He found that water was at that time in the pipes, and he continued to use it during the whole of that year, paying nothing for it. Near the end of the year 1907, he was notified that, unless the water bills were paid, the water would be cut off. The petitioner refused to pay the water bills, and the water supply was thereupon cut off. The petitioner then endeavored to have a new contract executed for the year 1908, but respondent refused to do so until the water rent for 1907 was paid. He then brought this action to compel the respondent to furnish him with water for the year 1908. It appears that a very large quantity of water passed through the meter into the service pipe of the petitioner during the year 1907, so much, in fact, as to indicate a most excessive use of water or the existence of a leak. The water rent for the year amounted to about \$60. In an endeavor to adjust the matter the respondent offered to settle the entire bill for the year of 1907 for \$12. The petitioner offered to pay \$5, and upon the refusal of the respondent to accept this

offer, all negotiations looking to a settlement were ended. It appears that the respondent is operating under a franchise granted by the city council of Greenville, which fixes the rates and also allows the respondent to make reasonable rules and regulations, one of the regulations being that, for failure to pay water bills the service may be discontinued. The petitioner had no written contract with the respondent for water for the year, 1907, but the use of the water for the year 1907 by the petitioner created an implied contract to pay a reasonable sum for such amount of water as he consumed. The existence of this implied contract is admitted by the petitioner. As for the charge to be made, it is left entirely optional with the respondent whether it shall charge a flat rate of \$5 per year or a meter rate based upon the amount of water actually consumed. Both methods are authorized by the franchise. The respondent chose to charge a meter rate, as it was empowered to do.

"I therefore find as follows: (1) That under the ordinance containing the franchise the respondent had the right to charge 40 cents per 1,000 gallons for the water by meter readings; no question being raised as to the validity of the ordinance, the reasonableness of the rate or the reliability of the meter. (2) That the petitioner used water for the year under an implied contract to pay a reasonable sum for the amount consumed; the existence of the implied contract being admitted by the petitioner, and the reasonableness of the rate not being questioned. (3) That the ordinance granted the respondent the right to make reasonable rules and regulations, and that in pursuance thereof the respondent adopted a rule providing that, if water bills were not paid within 30 days, the water might be cut off. The reasonableness of this rule was not questioned. (4) That the opinion of the petitioner that he has not consumed as much water as the meter registered is not of itself sufficient to justify him in refusing to pay his water bills; the meter readings being taken as true, in the absence of testimony to the contrary. (5) That this is not such a case of disputed account as will prevent the respondent from availing itself of its franchise rights. (6) That the respondent has acted in all respects in accordance with its legal rights under its franchise. It is therefore ordered, adjudged, and decreed, that the application for a writ of mandamus be denied and that the petition be dismissed."

Jas. H. Price and J. J. McSwain, for appellant. Cothran, Dean & Cothran, for respondent.

JONES, J. The Paris Mountain Water Company, respondent, is a corporation under the laws of this state, and is engaged in the business of supplying water to the city of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Greenville and its inhabitants. The petitioner, Poole, is a citizen and resident of the city of Greenville, and the dwelling occupied by him, No. 487 Cox St., was connected by service pipe and meter with defendant's water mains. William A. Hamby was the owner of the dwelling, and water was supplied under a contract made between respondent and Hamby before petitioner became tenant. The petitioner became tenant of the house on January 24, 1907, and, finding the water turned on, used so much of it as he desired during the year 1907. About January 1, 1908, respondent presented petitioner with a bill for \$85, based upon the quantity of water as registered by the meter, at 40 cents per 1,000 gallons. The petitioner, claiming that the amount demanded was exorbitant, refused to pay the same, but offered to pay \$5, the flat rate provided in the schedule for "residence occupied by one family, five rooms," which was refused by respondent. Within 10 days after presenting the bill respondent cut off the water supply from the premises. Respondent offered to adjust the account for \$12, but petitioner refused to pay that amount. Petitioner demanded that respondent supply his premises with water, and offered to sign a contract for the year 1908 on a reasonable basis, and to pay the first quarter in advance, but respondent refused to supply him further with water, unless he pay the amount demanded, reduced to \$12. This proceeding was begun in the circuit court to compel respondent to supply petitioner with water and to execute a contract for the year 1908 at the rate of \$5 per annum, the minimum rate fixed by the city ordinance, upon compliance by petitioner with the reasonable rules of respondent company. Judge Klugh dismissed the petitioner in a decree herewith reported, and the petitioner appeals.

Mandamus is an appropriate remedy to compel a public service water company to supply its customers with water, upon compliance with its reasonable rules and regulations. The right of the company to adopt reasonable rules for the conduct of its business, and the duty of the customer to comply with such rules, is not and cannot be disputed. The rule, adopted by respondent, involved in this case is as follows: "All water rents shall be payable to the treasurer or other authorized person at the office of the company on the first day of January, April, July and October of each year. Should the water rent remain unpaid thirty (30) days from the date of bill, the supply of water may be cut off without notice and the company shall have the right to sue for and recover the amount due for the time that water was furnished prior to cutting off supply." In the absence of a statute making water rents a lien or incumbrance upon the premises, this regulation is not reasonable so far as it may be construed to authorize cutting off water supply should a tenant

refuse to pay delinquent water rents due by the landlord or former occupant, as this would coerce a person to pay the debt of another. *Turner v. Revere Water Company*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 637, 68 Am. St. Rep. 432; *Burke v. City of Water Valley*, 87 Miss. 732, 40 South. 820, 112 Am. St. Rep. 468; *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1070. But with respect to a consumer who is under an express or implied contract to pay water rents, it is reasonable to allow the company to protect itself by cutting off the supply from such consumer until he has paid delinquent water rents due by him. *People v. Manhattan Gaslight Company*, 45 Barb. (N. Y.) 136; *Sherwood v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439; *Tacoma Hotel Co. v. Tacoma Land, etc., Co.*, 8 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; 30 Encyc. Law (2d Ed.) 419, 420.

The petitioner used the water supplied, and he alleges that he was informed, on February 15, 1907, that he would have to pay the water rent, but that he did not know the conditions upon which respondent supplied said place with water; that he went to the offices of respondent to sign a contract therefor, and stood ready and willing, at any time, to sign a reasonable contract, and to pay reasonable charges for what he used. The respondent alleged that it was not aware that petitioner occupied the premises until several months after January 1, 1907, that no application was made to it by petitioner for a contract for water service, that the water was supplied to the premises under a contract with the owner, Hamby, and that quarterly statements or water bills were mailed to said Hamby, and on information alleged that Hamby delivered these bills to petitioner. The petitioner, however, denied under oath that any such bills had ever been presented to him, either by Hamby or respondent. These circumstances, we think, justified the circuit court in holding that there was an implied contract by petitioner to pay reasonable charges for the amount of water consumed. We further agree with the circuit court that petitioner was bound to pay at meter rates. Section 7 of the franchise ordinance provided: "That the said water company should not charge to the consumers during the existence of this franchise exceeding the following maximum rates, but they shall have the right at their option at any time to insert a water meter into the service pipe of any consumer and supply him at meter rates. No water shall be supplied to any consumer per year for less than \$5." Then follows a schedule containing the flat rates, among other items: "Residence occupied by one family, five rooms, \$5.00." Then the schedule of meter rates, among other items: "100 to 1,000 gallons per day at rate of 1,000 gallons—40 cents." Under this authority respondent had the right.

to subject petitioner to reasonable meter rates. Charleston Light & Water Co. v. Lloyd Laundry & Shirt Mfg. Co., 62 S. E. 873. The contention of petitioner that he is only liable on the basis of the flat rate, and that he is entitled to a contract for the year 1908 at the flat rate, cannot be sustained. The circuit court was also correct in holding that the reasonableness of the meter rates as specified in the ordinance was not questioned; and, in the absence of any adverse evidence, the rates fixed in the ordinance are presumptively reasonable.

We think, however, that the circuit court was in error in holding that the reliability of the water meter was not questioned. It is alleged that the house occupied by petitioner contained only four rooms, that his family consisted of himself, wife and three small children aged seven, four, and two years, respectively, that he owned no cow or stock of any kind to consume water, and that the consumption of water did not exceed 80 gallons per day. He further alleged, upon information received from a clerk of respondent, that the average water consumed by customers in residences less than five rooms is about 80 cents per quarter, and that the water rents of W. A. Hamby, who lived in an adjoining house of similar size to one occupied by petitioner, and kept a horse, does not exceed \$1 per quarter; that petitioner is informed and believes that respondent has a great deal of difficulty with water meters, some reading fast and some reading slow, and many complaints are made to respondent about exorbitant water charges. The respondent in its return admitted that the water meter "showed a large consumption, larger than respondent would have thought should exist," and respondent was willing to accept \$12 in settlement of a claim of \$65, based upon the meter reading. It is true respondent alleged, with supporting affidavits, that the meter had been tested and was accurate, and no leaks were discovered. On the other hand, there was no evidence of any wasteful use of the water by petitioner's family. It is as easy to believe that there was some inaccuracy of the water meter, or some leak for which petitioner is not responsible, as to believe that petitioner in the circumstances stated consumed over 450 gallons of water per day after entering the premises. But this is not a suit upon the claim for water rents, and it was not incumbent on petitioner in this proceeding to establish the inaccuracy of the water meter. It is sufficient in this proceeding for petitioner to establish that, at the time his water supply was cut off, there was a bona fide dispute as to the correctness of the bill rendered for water rents, and this we think has been shown. The court realizes that caution must be observed here, and that heed be not given to trivial, captious, whim-

sical, unreasonable disputes as to meter registration; for, in the absence of a contrary showing, the meter is presumptively correct, but in this case we feel that the dispute is not only bona fide, but substantial and serious.

It appears that respondent made no demand on petitioner for water rent until January 1, 1908, when the bill for the year 1907 was first presented. This is the first act of respondent showing recognition of petitioner as liable for water rents. Petitioner then had the right to rely upon compliance by respondent with its own rule authorizing the cutting off of the water supply should the water rent remain unpaid 30 days from the date of the bill. The date of the bill in this case was January 1, 1908, and yet respondent cut off the water before the expiration of the time fixed by its rule. Hence at the time of the commencement of these proceedings, and at the time of the judgment of dismissal, the respondent was acting in breach of its own rules in cutting off the water supply. Here then is the status. The respondent cut off petitioner's water supply contrary to its rules, for nonpayment of a bill which appeared to be exorbitant, and which petitioner in good faith, and with show of reason, disputed, and thereafter respondent refused to enter into a contract to supply petitioner for the current year, except upon payment of the disputed bill. While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term. *State ex rel. Gwynn v. Citizens' Tel. Co.*, 61 S. C. 98, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. 908, 29 L. R. A. 376. The inconvenience arising from subjecting the water company to the necessity of resorting to the regular courts to collect disputed claims is not to be compared to the hardship of the consumer, as a member of the public, involved in permitting the water company to be judge in its own cause, and to coerce the disputant into submission by denying him water.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to issue writ of mandamus compelling respondent to supply petitioner with water upon his complying with respondent's regulations, but without exacting payment of the disputed claim as a condition precedent.

**INMAN v. NORTH CAROLINA R. CO.**

(Supreme Court of North Carolina. Nov. 19, 1908.)

**1. RAILROADS (§ 348\*)—INJURIES—ACTIONS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action against a railroad for injury received at a crossing the evidence *held* to sustain a finding that plaintiff was injured by defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.\*]

**2. RAILROADS (§ 350\*)—ACTIONS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

While one who, when approaching a railroad track, fails to look and listen for danger where he has an unobstructed view of the track, cannot recover, yet, where the view is obstructed, or facts exist which tend to complicate the question as to whether sufficient caution was exercised, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1177-1185; Dec. Dig. § 350.\*]

**3. RAILROADS (§ 350\*)—INJURIES ALONG TRACK—ACTIONS—CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad for injury in a crossing accident whether plaintiff was guilty of contributory negligence, *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.\*]

Appeal from Superior Court, Guilford County; Moore, Judge.

Action by Joseph C. Inman against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Civil action for personal injury at a railroad crossing, caused by alleged negligence on part of defendant company, tried before his honor Fred Moore, J., and a jury, at February term, 1908, of the superior court of Guilford county.

There was evidence tending to show that plaintiff lived on one side, and went to his daily work on the other side, of defendant's railroad, along Spring street, in the city of Greensboro; and that on the 19th of February, 1908, in going from dinner to his work, he was injured at the public crossing of said street over the tracks of defendant road. That at the crossing there were several tracks of defendant road, and a side track to a bobbin factory, this last track terminating a short distance from the crossing; and on the occasion in question, as plaintiff approached the crossing, there were cars on this side track which obstructed the view in one direction, and a freight train of defendant company was running down one of the tracks in an opposite direction. That plaintiff stopped at the end of these box cars on the siding to allow this freight train to pass, and, as this train was about clear of the crossing, he stepped out on the first track of defendant road, and, as he did so, he was knocked off the track and seriously injured by an engine of defendant company, which approached the crossing from an op-

posite direction, and running, according to different estimates of plaintiff's witnesses, from 20 to 35 miles an hour, and without signals or warnings of any kind, and without any one in a position to see or note the condition of the track, or persons upon it at the crossing. That plaintiff's view along the track in the direction from which the engine approached was obstructed by the cars on the side track; and plaintiff listened for signals in that direction, and hearing none, either by bell or whistle, he stepped upon the track, a distance of 4 or 5 feet—one witness said two steps, or a step and a half—from where he started, and, as he put his foot upon the track, the engine was approaching at a distance of 15 or 20 feet, running very fast, and he was struck and injured before he could get out of the way.

An ordinance of the City of Greensboro was also put in evidence, which prohibited trains within the city limits from running at a speed greater than 4 miles an hour, between North and South Switches, and greater than 10 miles an hour anywhere within the city limits, or to blow their whistles within the corporate limits. There was evidence on the part of the defendant to the effect that the speed of the engine in question at the time was not more than 3 miles an hour. That the engineer had given the regular crossing signals, by blowing two long and two short blows, about 300 feet from the crossing.

The evidence of defendant was further to the effect that the engine was running backwards at the time, and they had no one, by reason of coal piled up on the tender, in position to observe or note the conditions on the crossing, and, as a matter of fact, they did not see or observe the plaintiff, but ran on to the shops, and did not know of the injury till looking back they saw a crowd gathered at the crossing.

On issues submitted, the jury rendered the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant's lessee as alleged in the complaint? Answer: 'Yes.'

"(2) Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: 'No.'

"(3) What amount of damages, if any, is the plaintiff entitled to recover? Answer: '\$(2,750.00) Twenty-seven hundred and fifty dollars.'"

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Wilson & Ferguson, for appellant. John A. Barringer, for appellee.

HOKE, J. There was ample evidence to justify a verdict for plaintiff on the first issue, and the objection chiefly urged for error is that the court below declined to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

charge, as requested to do, in substance, that on his own evidence plaintiff was guilty of contributory negligence, and that, if the jury believed the testimony, they would answer that issue in favor of defendant. But, in our opinion, on the facts presented, the authorities will not sustain defendant's position.

In *Sherrill v. Railroad*, 140 N. C. 252, 52 S. E. 940, the court held: "That while one who approaches a railroad crossing is required to look and listen before entering upon the track, and when he fails in this duty and is injured in consequence, the view being unobstructed, under all ordinary conditions such person is guilty of contributory negligence. Yet this obligation to look and listen may, in exceptional instances be so qualified by facts and attendant circumstances as to require the question of a plaintiff's contributory negligence to be submitted to a jury."

This principle, together with the limitation stated, was again upheld in the case of *Morrow v. Railroad*, 146 N. C. 14, 59 S. E. 158, where Mr. Justice Brown quotes with approval from the case of *Lavarens v. Railroad*, 56 Iowa, 689, 10 N. W. 268, as follows: "That a person who voluntarily goes on a railroad track, at a point where there is an unobstructed view of the track, and fails to look and listen for danger, cannot recover for any injury that might have been avoided by so looking and listening, but when the view is obstructed, or other facts exist which tend to complicate the matter, the question of contributory negligence then becomes one for the jury."

This doctrine is in accord with well-considered decisions in other jurisdictions, some of them cited in *Sherrill's Case*, supra; notably, the case of *Lavarens v. Railroad*, supra, and *Jennings v. Railroad*, 112 Mo. 268, 20 S. W. 490. And its correct application to the facts presented here requires that the question of contributory negligence on part of plaintiff should be submitted to the jury. There is doubt, on the facts and attendant circumstances of this case, where there are several tracks, with trains constantly moving in both directions and crossing at intervals, if a signal whistle sounded 300 feet from a crossing should be regarded as adequate warning, even if it had been given as claimed by defendant; and it will be noted that the city ordinance offered in evidence prohibited the blowing of whistles within the corporate limits, and the lawful and usual warning at such places, therefore, must have been the continuous ringing of a bell as a train or engine approached. The plaintiff then standing at most within two paces of the track, with the view obstructed, and having listened for the warning he had a right to expect, and which it was the duty of the engineer to give, steps upon the track and is run over

by an engine running at a rate far beyond what the city ordinance permits, and far beyond what could be at all justified in such a place even if there had been no ordinance.

The facts relevant to this especial feature of the case are not unlike those of *Alexander v. Railroad*, 112 N. C. 720, 16 S. E. 896, in which a recovery by the plaintiff was sustained, and similar decisions have been made in other cases of like import. See, *Hinkle's Case*, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; *Norton's Case*, 122 N. C. 910, 29 S. E. 886.

There was no error, therefore, in submitting the question of contributory negligence to the consideration of the jury, and the judgment below will be affirmed.

No error.

#### MEACHAM v. SOUTHERN R. CO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

##### 1. MASTER AND SERVANT (§ 145\*)—RAILROADS—FREIGHT TRAINS—RULES—APPLICABILITY.

A railway rule, requiring flagmen to go a given distance to the rear of his train when it is stopped at an unusual point, or is delayed at a regular stop, etc., applies to trains on main lines, and not to those on sidings, and does not apply to an engine leaving a train on a siding to go to a distant water station.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 145.\*]

##### 2. MASTER AND SERVANT (§ 248\*)—DISOBEDIENCE OF RULES—INJURY AVOIDABLE BY CARE OF MASTER.

That a railway flagman was boarding a car, when under the rules he should have been elsewhere, would not relieve the company from liability for injury to him caused by a negligent coupling, where the coupling was admittedly made with knowledge of plaintiff's presence in the spot where he was hurt.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 248.\*]

##### 3. MASTER AND SERVANT (§ 278\*)—RAILROADS—COUPLING CARS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railroad for injury to a flagman caused by a violent coupling, held to show the company was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.\*]

##### 4. MASTER AND SERVANT (§ 281\*)—RAILROADS—COUPLING CARS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for injury to a flagman, caused by a violent coupling, held insufficient to establish contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 281.\*]

Appeal from Superior Court, McDowell County; Cooke, Judge.

Personal injury action by O. F. Meacham against the Southern Railroad Company. From a judgment for plaintiff defendant appeals. Affirmed.

The action was to recover damages for personal injuries caused by the alleged neg-



ligence of the defendant company, and on issues submitted the jury rendered the following verdict: "(1) Was the plaintiff, C. F. Meacham, injured by reason of the negligence of the defendants, as alleged in the complaint? Answer. Yes. (2) Did the plaintiff, C. F. Meacham, by his own negligence contribute to his injury? Answer. No. (3) What damages, if any, is the plaintiff entitled to recover? Answer. \$5,800." There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

S. J. Erwin, for appellant. Pless & Winborne, for appellee.

HOKE, J. We are of opinion that no error was committed on the trial of this cause below, and that the judgment in favor of the plaintiff should be affirmed. The evidence tended to show, and the jury have found, that plaintiff, a flagman on a freight train of defendant company, has had his arm crushed so that it had to be amputated, and by reason of the culpable negligence of his co-employees in making a coupling of the engines to the train on which plaintiff was engaged at the time of the injury, and that plaintiff himself is free from blame in the matter. There was testimony to the effect that the train in question was a freight train of 22 cars, going from Spencer to Asheville, and, at the time of the occurrence, had taken a siding at Greenlee, N. C., to let No. 12, a passenger train, pass, and had been upon the siding for some time before that train went by. After No. 12 had passed, it was found that the engine attached to the train was without sufficient water, and would have to proceed to Old Fort, a point on the road about five miles further west, to get water. The engine was detached from the train, pulled out on the main track some distance ahead, and then backed down the main track to the caboose in rear of the freight, where the conductor, Luther Roper, and plaintiff then were. The engineer had also been in the cab, as will be seen from this extract from the testimony: "Q. Which way was your train going? A. Going west. Q. And standing on the side track at Greenlee? A. Yes, sir. Q. No. 12 is a passenger train? A. Yes, sir; passenger train that goes east. We were there some little time, and while we were there, I was busy making out daily reports, and time tickets, etc., and doing conductor's work, which it was my duty to help him do; and after No. 12 passed, the engineer left the cab. He was in the cab before No. 12 passed, and after No. 12 passed he went back to the engine, and in a few minutes he pulled down the main line, and said he was out of water, and would have to go to Old Fort to get water, and the conductor said: 'I believe I will go with him.' Q. Who was the conductor? A. Luther Roper. He said: 'Meacham, hold everything until we get back.' He got on the engine and went off." After the engineer had

gone up the track towards Old Fort, the plaintiff went out to the rear of the caboose to be in a position to carry out the order of the conductor; and plaintiff testified: "After staying there a while, I set down on the main line rail for some time—on the north side of the main line track. I just thought of a chair that was in the cab that we used for writing or a bunk or desk, or any way there was a chair in the cab, and I went back in the cab and got the chair, and I sat in it between the side track and the main line, and I set there for some time. I don't know how long, maybe 40, 45, or 50 minutes, or maybe not that long. It was pretty dark that night and cloudy, and I heard a rumbling like a train coming." While plaintiff was in this position he heard a rumbling noise, which he ascertained to be his engine returning, and witness then picked up his chair preparatory to getting into the cab, where it was his duty to be as soon as the coupling was made, so that the train could move off without delay. As the witness was in the act of mounting the steps with the chair in one hand, and had taken hold of the handle bars with the other, without any signal or warning of any kind, the engine struck the train with great violence, the force being sufficient to drive the entire train of 22 cars back from a car and a half to two car lengths. By the force of the impact the plaintiff was knocked loose from the car, and onto the track in front of the train as it was then moving, and in the effort to save his life, his arm was run over and crushed as stated.

The negligence imputed to the defendant, on this testimony, and established by the verdict, was "(1) in backing up to the train to make the coupling without giving a proper signal; (2) by striking the train with unusual and unnecessary violence." The evidence as to the first proposition is thus stated in the record, page 20: "Q. What signal did the engineer give before striking the train? A. None at all. Q. What is the usual signal that he should have given? (Defendant objects.) Q. What signal, according to the custom of the management of trains? What was the usual signal to be given before striking a train to make coupling? (Defendant objects.) A. In backing in a train or just one car it was the usual custom, and it is the rule— (Defendant objects.) Q. Just state the usual custom. (Defendant objects.) A. It is usual to blow three short blows. (Defendant objects.) Mr. Erwin: This rule that you speak of, was this a printed or written rule? A. It is a printed rule. Court: Do you know what the custom was? A. Yes, sir; certainly I do. (Defendant objects.) Mr. Erwin: The custom, you say, is embodied in a written rule? A. Yes, sir; engineer's rules. Q. In a printed book of rules? A. Engineer's rules. Q. It is in that book? A. I think I have seen it in this book." And the statement already

made is to the effect of the collision, when the coupling was made, in knocking the plaintiff's hold loose, and driving a train of 22 cars that unusual distance. There was the additional evidence on this point to the effect that the track here was practically level, and that the movement of two or three cars at the front of the train was all that was required, or should have taken place, in making an ordinary or proper coupling. It was not seriously contended on the argument that the employes of defendant company were not negligent by reason of the manner in which the coupling was made, but it was earnestly urged that a nonsuit should have been directed on the ground that the plaintiff was not where he had any right to be at the time, and was not there in proper discharge of his duty, and this chiefly by reason of a rule No. 99, to the effect that a flagman is directed to go back a given distance to the rear of his train and place torpedoes in certain places, "when a train is stopped at an unusual point, or is delayed at a regular stop over three minutes, or when it fails to make its schedule time."

It is claimed that, if plaintiff had been acting in obedience to this rule at the time, he would not have been in any position of danger of any kind with reference to the coupling; and for this reason, while the engineer may have been culpably negligent in making the coupling, as a general proposition, he was under no duty or obligation of any kind to the plaintiff. But the court is clearly of the opinion that the rule in question has no bearing on the rights of these parties, and was never intended to apply to the facts presented in this case; and for this position both the language and purpose of the rule itself, and the objective facts, and the testimony and conduct of all the parties in reference to it, afford convincing reason. The rule was made for the protection of trains, and when they were on the main line at an unusual place, or for an unusual length of time, and for the purpose of preventing injury by reason of other trains coming from the rear. It was never intended to apply when a train was on a siding and at a regular station. As said by plaintiff in his evidence: "My train was not in danger from anything but robbery. It was safe by reason of its being on the siding." They had already been on that siding, when No. 12 passed going east, for more than an hour, waiting, and yet the engineer, the conductor, and the flagman were all in the cab at that time, and no one had pretended to go back in obedience to this rule. But it was urged that, while this might be true as to the train, it was not true as to the engine when it passed out of the siding and onto the main line going towards Old Fort. But the rule is made for the government of trains and the crews attached thereto. It begins by saying "when a train is stopped," and in several places it says, "the flagman shall go back a given distance to the

rear of 'his' train." If the plaintiff is to be made a part of the engine crew, and charged with duties concerning it, because the engine had itself become a train, he should be allowed the distance he was behind the engine. There were certainly 22 cars ahead, and how much farther it was to the head of the switch when the engine entered on the main line does not definitely appear, and it should not be presumed against him that it was within the prohibited distance. At Old Fort the plaintiff was five miles behind the engine, and assuredly he was not required to follow along behind the engine, keeping at the specified distance. The truth is that this was an emergency to be dealt with by special orders of the plaintiff's superior, the conductor, and the proof shows that these orders were given and obeyed by plaintiff. The conduct of the parties show that they all so understood it, and it may be noted that this is not an interpretation of a rule by parol testimony. They are facts showing that conditions had arisen to which the rule did not apply.

When the engineer backed his engine down the main line to the cab, preparatory to going to Old Fort, and the conductor got aboard to go with him, he did not tell the flagman to go back and place torpedoes. The order was: "Meacham, hold everything till we get back." The track was straight for a half or three-quarters of a mile each way, and it was a safe order for the conductor to give. And when the engine returned, and just before it coupled, the evidence as to the plaintiff's duty is thus stated: "What did you do then? A. I began to prepare to get in the cab. Q. How soon? A. Immediately. Q. What was your duty when you saw that engine approaching? A. To prepare to be in the cab, and to be ready to move when they got ready. Q. That was your duty? A. Yes, sir. Q. How soon was it your duty to get ready? A. As soon as I could. Q. When the first jolt was given to this train, did it knock you loose? A. Yes, sir; that was what knocked me loose." And he was carrying out this duty when he received his hurt. To show that the statement of plaintiff was true, when the coupling was made, the train moved right on off, without any wait for a flagman, and without any signal to "blow him in," which was always required when a flagman was properly in the rear guarding his train. The engineer, testifying for defendant, undertakes to explain this by saying that the reason he did not blow, he saw, from the flagman light, that he was at the rear of the train, and did not need any signal. If this is true, then a duty arose to plaintiff, even if he had been before that acting in violation of a rule. Defendant's engineer had no right to maim or kill him when he saw he was in a position where he would mount the cab as he did. A coupling made in the usual and proper manner would have caused no such result, and plaintiff was guilty of no negligence in getting into the cab as he did, cer-

tainly none was proved. The correct explanation of the wrong done will no doubt be found in the fact, which appears in evidence, that when the engine of the train was at Old Fort, the engineer asked for and obtained the assistance of the "helper," a powerful engine which assists in pulling the trains over the steep mountain grades, from Old Fort to Swannanoa Tunnel. These two engines were coupled together when they were backed against the train, and this is the reason, no doubt, of the tremendous force of that impact by which a train of 22 freight cars was driven back on a level track  $1\frac{1}{2}$  or 2 car lengths. We are of opinion that actionable negligence on the part of defendant company has been established in a trial free from error and the rule urged for defendant's exoneration is not properly available for the purpose.

Here is testimony where rule 99 did apply: "When the train moved off, after the coupling was made, and was about to enter on the main track, plaintiff sent a brakeman forward to notify the engineer that a flagman's arm was off, and he then turned to the dead-head conductor in the cab, and said: 'Take your suspenders and cord my arm to stop its bleeding so, and take my light, and light a fusee and go back and stop No. 75 from running into us.'" With his body maimed and his life wrecked, he thought of his train and obedience to his duty.

There is no evidence tending to establish contributory negligence on the part of plaintiff, and the judgment below is affirmed.

No error.

#### STATE v. STRATFORD et al.

(Supreme Court of North Carolina. Nov. 19, 1908.)

##### 1. HOMICIDE (§ 167\*)—EVIDENCE—THREATS.

Threats, made by accused two weeks before the homicide, are admissible against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 337; Dec. Dig. § 167.\*]

##### 2. HOMICIDE (§ 166\*)—EVIDENCE—LEWD RELATIONS.

Statements by one accused of murder, tending to show that he and deceased were in lewd intimacy with a woman also indicted for the murder, were admissible, as showing her relationship with accused, and as tending to show jealousy as a motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 328; Dec. Dig. § 166.\*]

##### 3. HOMICIDE (§ 31\*)—MANSLAUGHTER—SUICIDE—PREMEDITATION.

Accused could not be convicted of manslaughter where the evidence showed either death by suicide or a killing by premeditation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 52; Dec. Dig. § 31.\*]

##### 4. HOMICIDE (§ 233\*)—EVIDENCE—MOTIVE.

Though a motive for murder need not be shown, where circumstantial evidence is relied

upon, the circumstances may be strengthened by proof of a motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.\*]

##### 5. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—HARMLESS ERROR.

An instruction that a motive proven against one accused of murder is a "strong" circumstance pointing to guilt, and that failure to prove one is a "strong" circumstance in his favor, was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.\*]

Appeal from Superior Court, Union County; E. B. Jones, Judge.

Charles Stratford and Sue Watts were convicted of murder, and Stratford appeals. Affirmed.

Adams, Jerome & Armfield, for appellant. Assistant Attorney General Clement, for the State.

CLARK, C. J. The prisoner and Sue Watts were indicted for the murder of Thomas Furr. The solicitor elected not to prosecute for the capital offense. Both prisoners were convicted of murder in the second degree. Stratford only appealed. His exceptions are:

Exception 1. Refusal to strike out evidence of threats made by Stratford two weeks before the homicide. Evidence of threats made much longer before the homicide were held competent in *State v. Exum*, 138 N. C. 605, 50 S. E. 283.

Exception 2. Evidence of statements of prisoner, tending to show that he and deceased were in lewd intimacy with Sue Watts was competent, both as showing her relationship with Stratford and in connection with other evidence tending to show jealousy as a motive.

Exceptions 3, 5, and 7 are to his honor's instructions that the jury could not find prisoner guilty of manslaughter, but they should find him guilty, either of murder in the second degree, or not guilty. This instruction was correct. The evidence pointed either to death by suicide or a killing by premeditation, the prisoner either advising or procuring Sue Watts to kill deceased, or conspiring with her to do so. There was no evidence tending to prove manslaughter.

Exception 4. That the court gave the following charge, at request of Sue Watts. "A motive proven against one charged with a crime of this character is a strong circumstance pointing to guilt. The failure to prove motive in a case like this is a strong circumstance to be considered by the jury in favor of the prisoner." It is true that it is not necessary to prove motive (*State v. Turner*, 143 N. C. 642, 57 S. E. 158), but in a case of circumstantial evidence it is permissible to thus strengthen the chain of circumstances (*State v. Green*, 92 N. C. 779; *State v. Adams*, 139 N. C. 697, 50 S. E. 765). The word "strong"

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

might have been omitted, but it was given in the alternative in favor of the prisoners, as well as in that against them. We cannot perceive any prejudice done the prisoner.

Exceptions 6 and 8 are to giving certain contentions of the state. They were, however, warranted by the evidence. The court was favorable to the appellant in permitting him to offer proof of an alibi, which was immaterial if the state's theory of conspiring, which was submitted to the jury, was found by the jury.

Exception 9 that the court refused appellant's prayer to instruct the jury to render a verdict of not guilty "because there was no evidence" is without merit, and requires no discussion of the evidence. It is not necessary to set it forth.

No error.

### BECK v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### MASTER AND SERVANT (§ 233\*)—CONTRIBUTORY NEGLIGENCE.

It is contributory negligence on the part of an employé in crossing defendant's railroad yards to climb between two cars chained together on a track, when, by walking from 70 to 90 feet, he could have walked around the train in which these two cars were.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 702, 703; Dec. Dig. § 233.\*]

Appeal from Superior Court, Rowan County; Council, Judge.

Action by H. H. Beck, administrator, against the Southern Railway Company to recover for the death of plaintiff's intestate, caused by the movement of cars on defendant's track while the intestate, an employé of defendant, was attempting to pass between them. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 146 N. C. 455, 59 S. E. 1015.

Linn & Linn, for appellant. R. Lee Wright and P. S. Carlton, for appellee.

**PER CURIAM.** When this case was before this court at the last term the judgment of nonsuit was set aside, and a new trial was ordered. On this second trial the evidence relating to the conduct of the intestate as bearing upon the issue of contributory negligence is much clearer and stronger. It now appears, not only from the evidence offered by the defendant, but also plainly from the evidence of the plaintiff that the deceased by walking from 70 to 90 feet could easily have walked around the train of cars, and that he had a perfectly safe way to reach his home instead of climbing between the two cars chained together on the live track in constant use.

Upon all the evidence as presented on the

second trial, we are of opinion that the deceased was guilty of contributory negligence, and that the motion to nonsuit should have been granted. It is so ordered.

Reversed.

### THOMPSON v. ABERDEEN & A. R. CO. (Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. TRIAL (§ 165\*)—NONSUIT—HEARING.

On a motion for nonsuit, the evidence must be taken in its most favorable light to plaintiff and with the most favorable inferences the jury would be authorized to draw therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 874; Dec. Dig. § 165.\*]

#### 2. RAILROADS (§ 362\*)—INJURIES TO PERSONS ON TRACKS—RUNNING WITHOUT HEADLIGHT.

A railroad company is negligent in operating a train at night without a headlight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1249; Dec. Dig. § 362.\*]

#### 3. RAILROADS (§ 400\*)—INJURIES TO PERSONS ON TRACKS—EVIDENCE—QUESTION FOR JURY.

Evidence, in an action for death, that a train was operated at a high speed, on a dark night, without a headlight, within an incorporated town, without any signals of its approach, was sufficient to go to the jury on the question of whether decedent's death resulted from negligence of the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1370, 1373; Dec. Dig. § 400.\*]

#### 4. RAILROADS (§ 367\*)—INJURIES TO PERSONS ON OR ABOUT TRACKS—FAILURE TO KEEP LOOKOUT.

Where neither the engineer nor fireman saw a person when he was struck, there was negligence in not keeping a proper lookout, unless they were prevented from seeing by a failure of the railroad company to furnish a headlight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1258; Dec. Dig. § 367.\*]

#### 5. RAILROADS (§ 397\*)—INJURIES TO PERSONS ON OR ABOUT TRACKS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for the death of a person on a railroad track, evidence that the track was habitually used as a way was erroneously excluded; it being stated that it would be followed by proof that this was well known to the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1348; Dec. Dig. § 397.\*]

Appeal from Superior Court, Montgomery County.

Action by Richard Thompson, administrator, against the Aberdeen & Ashboro Railroad Company. From a nonsuit, plaintiff appeals. Reversed.

Morehead & Sapp and C. D. B. Reynolds, for appellant. W. J. Adams, J. T. Brittain, J. A. Spence, and Adams, Jerome & Armfield, for appellee.

**CLARK, C. J.** Appeal from a nonsuit in an action for wrongful death. The evidence must be taken in the most favorable light for the appellant and with the most favor-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able inferences the jury would be authorized to draw from it. *Powell v. Railroad*, 125 N. C. 372, 34 S. E. 530, and cases there cited. If there was any evidence tending to show that the death of the intestate was the result of the negligence of the defendant, it should have been submitted to the jury.

There was evidence that the plaintiff's intestate was seen at the defendant's station at Star about 9 o'clock at night drinking and eating peanuts; that a half hour thereafter a mixed train of the defendant came from the north, running at a high speed—30 or 40 miles an hour—with no headlight; that it was a dark night; that the engine gave no signals, before or after crossing a country road near the corporate limits, nor at a crossing a few hundred yards further north; that about daylight the next morning the deceased was found in a dying condition, 40 yards south of the crossing, in the corporate limits, with his head crushed, between the ends of the cross-ties, his hat torn, cut, and greasy, near him. His clothes were bloody on one side, and blood was on the ground between ends of ties, and there was evidence on his clothes and on the ground near him that he was eating peanuts at the time he was killed or shortly before. His skull was driven in, and there were cuts and bruises on other parts of his body.

The defendant was negligent in operating a train at night without a headlight. *Willis v. Railroad*, 122 N. C. 909, 29 S. E. 941. The evidence was sufficient to authorize a finding that the deceased was killed by the defendant's train. The uncontradicted testimony was that the defendant was operating its train, at a high speed, on a dark night, without a headlight, within the boundaries of an incorporated town, without giving any signals of its approach. The evidence is almost identical with that in *Powell v. Railroad*, 125 N. C. 372, 34 S. E. 530, which was held sufficient to support a verdict for the plaintiff. Besides the authorities cited in that case, *Powell v. Railroad* has itself been cited and approved since in several cases, among them *Hord v. Railroad*, 129 N. C. 307, 40 S. E. 69, *Clegg v. Railroad*, 132 N. C. 294, 43 S. E. 836, and *Butts v. Railroad*, 133 N. C. 83, 45 S. E. 472. There was sufficient evidence to entitle the plaintiff to constitutional right to have it passed on by the jury. As the case goes back, the defendant can, if it chooses, have the circumstances explained by its engineer. If neither the engineer nor fireman saw the man when he was struck, there was negligence (*Arrowood v. Railroad*, 126 N. C. 629, 36 S. E. 151), in not keeping a proper lookout, unless they were prevented from seeing by the negligence of the defendant in not furnishing a headlight, should the jury find that there was no headlight, which, as the evidence now stands, is uncontradicted.

We think it was also error to exclude the

evidence offered to prove that the defendant's track within the town limits was habitually used as a walkway, which, counsel stated, would, if admitted, have been followed by proof that this fact was well known to the defendant.

The judgment of nonsuit is set aside.  
Reversed.

### COX v. ABERDEEN & A. R. CO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. TRIAL (§ 234\*)—INSTRUCTIONS—EVIDENCE.

An instruction that, if the fire which injured plaintiff's property escaped from defendant railroad company's engine, there was a presumption in law of negligence by defendant in operating its train, and the burden of proof was cast upon defendant to satisfy the jury that it was not negligent, was erroneous, as evidently impressing the jury that the emission of sparks raised a legal presumption of defendant's liability, and shifted the burden of proof to defendant, in the sense that, if defendant had failed to satisfy the jury that there was no negligence, they should return a verdict for plaintiff; whereas, though defendant had the burden of going forward and producing evidence, it was not required to disprove plaintiff's case by a preponderance of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 537; Dec. Dig. § 234.\*]

#### 2. EVIDENCE (§ 94\*)—BURDEN OF PROOF.

The burden of the issue—that is, the burden of ultimately establishing the case of the party on whom the burden rests—never shifts, but the burden of going forward and producing evidence does, dependent on the state of the evidence, and, where a plaintiff proves a fact which raises a prima facie case, the burden of proof shifts to defendant, but he is not required to make the evidence preponderate in his favor.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 117; Dec. Dig. § 94.\*]

Appeal from Superior Court, Randolph County; Webb, Judge.

Action by W. M. Cox against the Aberdeen & Ashboro Railroad Company. Judgment for plaintiff, and defendant appeals. New trial.

J. T. Brittain, Adams, Jerome & Armfield, W. J. Adams, and J. A. Spence, for appellant. Morehead & Sapp and Elijah Moffitt, for appellee.

**WALKER, J.** This action was brought to recover damages for burning the plaintiff's timber. There was a verdict for the plaintiff, and judgment was rendered thereon. Defendant appealed.

The evidence tended to show that the fire was caused by sparks emitted from one of the defendant's engines. With respect to this evidence, the court charged the jury as follows: "If you find from the evidence that the fire which injured the plaintiff's property escaped from the defendant's engine, there is a presumption in law of negligence on the part of the defendant in the operation of its train, and in that event the burden of proof

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is cast upon the defendant to satisfy you that it was not negligent in the respect complained of." To this instruction exception was duly taken, and we think it was erroneous. It evidently made the impression upon the jury that the emission of the sparks raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant, in the sense that if it had failed to satisfy them that there was no negligence, or, in other words, that its engine was properly equipped and operated, they should return a verdict for the plaintiff. This charge is not sustained by the decisions of this court. The presumption is one of fact, and not of law. Evidence that the sparks were emitted from the engine, and that they set fire to the timber, made a prima facie case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence. In the recent case of *Winslow v. Hardwood Co.*, 147 N. C. 275, 60 S. E. 1130, we said: "The burden of [establishing] the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. When the plaintiff introduced testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmative of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence." This fits our case exactly and distinctly shows the error in the instruction of the court. Judge Elliott states the general rule which applies in cases of this kind with clearness and accuracy, when he says: "The burden of the issue—that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first

party in response to the call of a prima facie case or presumption in favor of the second party; but the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." 1 Elliott on Evidence, 139. We have approved the rule, as thus stated by Judge Elliott, and notably in *Board of Education v. Makely*, 139 N. C. 31, 51 S. E. 784, and *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796. The charge of the court was, we think, contrary to the principle established by those and the following cases: *Overcash v. Electric Co.*, 144 N. C. 572, 57 S. E. 377; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815; *Furniture Co. v. Express Co.*, 144 N. C. 644, 57 S. E. 458.

There was therefore error in the charge, in the respect indicated, which entitles the defendant to another trial.

New trial.

#### CROMER et al. v. SELF.

(Supreme Court of North Carolina. Nov. 19, 1903)

#### EXEMPTIONS (§ 29\*)—"RESIDENT OF STATE."

Within Const. art. 10, § 1, granting exemptions only to residents of the state, one who, on being sentenced for one crime and indicted for another, fled the state, presumably with no intention to return, is not such a resident, though his family continue to reside in the state, and his domicile may be there.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 33; Dec. Dig. § 29.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6161-6166; vol. 8, p. 7788.]

Appeal from Superior Court, Forsyth County; Councill, Judge.

Action by S. W. Cromer and others against C. C. Self. From a judgment denying defendant an exemption, he appeals. Affirmed.

The plaintiffs, as creditors of the defendant, sued out writs of attachment, which were levied upon personal property belonging to the defendant in the city of Winston under \$500 in value. There were several causes of a like nature pending which were consolidated with this. The defendant, through his attorney, moved, to vacate the attachments upon the ground that he was not a nonresident, and that he was entitled to his personal property exemption. The cause was heard at September term, 1903, of Forsyth County, upon appeal from the justice of the peace upon an agreed statement of facts.

His honor, Judge Council, gave judgment against defendant, who appealed.

Louis M. Swink, for appellant. Watson, Buxton & Watson, for appellees.

BROWN, J. On appeal to this court the defendant assigned error as follows: (1) That his honor erred in that he failed to dismiss the warrant of attachment issued in this cause, on the ground that the defendant, at the time of issuing the said warrant, was not a nonresident, and that the property was not subject to attachment. (2) For that his honor erred in holding that the defendant was not entitled to his personal property exemptions of \$500 out of the property attached.

It appears from the facts agreed: That the defendant had been a resident of the state of North Carolina all his life up to the date of his leaving, and was a merchant in the city of Winston, N. C., for many years. That at July term, 1907, of the superior court of Forsyth county, he was convicted of fornication and adultery and sentenced to 12 months on the county roads, and at the same term of court an indictment was returned by the grand jury for larceny. That immediately after the term of court in which the defendant was convicted and said indictment was found, defendant offered to sell his property to Cromer Bros. Company, stating that he would have to leave the state. That immediately thereafter Self fled the state to avoid the consequences of sentence and indictment, and was absent at the time the warrants of attachment were issued, and is now absent, and his whereabouts is unknown. That the summons in each of these actions was returned by the constable, indorsed: "Not to be found in Forsyth county." That the defendant's wife and children are now living in Winston, N. C., and have been living in said city all the time. That prior to the sale the defendant, Self, through his counsel, demanded his personal property exemptions out of the property levied on, but the constable refused to allot same, but sold all the property, contending that the defendant was not entitled to personal property exemptions, but was a nonresident of the state.

The only question presented by the assignments of error relates to the status of the defendant: Upon the facts agreed, is he, within the spirit and meaning of the Constitution, a resident of this state? Is he entitled to have his personal property exemptions set apart in the fund from the sale of the goods? The counsel for the plaintiffs contends that the question presented has been heretofore decided adversely to the plaintiffs in the case of *Chitty v. Chitty*, 118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394. It is true in that case a question somewhat similar was considered by the court, but the court was divided, and the views of the dissenting justice are set forth strongly and

with much weight of authority. But we are not called upon to determine how much weight we will give the case as a precedent in determining this, for the facts are essentially different. In the *Chitty Case*, it is found as a fact: That the plaintiff, who claimed his homestead, temporarily absented himself to avoid service of a warrant, "with the intention of returning as soon as the case against him should be thrown out of court"; "that the plaintiff spent his time in visiting relatives in various states intending to return," etc. Thus we see that in the *Chitty Case* a most important fact is found in the claimant's favor, and that is the animus revertendi. "A man retains his domicile if he leaves it animus revertendi." 4 Blackstone, 225; 2 Russell on Crimes, 18; Case of Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345. In this case there is not only no such finding, but the facts fully justify the conclusion that the defendant fled the state with no intention to return and serve the sentence which the law has imposed on him. There is no finding that he is temporarily absent visiting relatives, but, on the contrary, it is admitted that his whereabouts is unknown. Assuming that he may be technically a citizen of the state, he is not a resident within the meaning of article 10, § 1, of the Constitution, and only a resident can claim the benefit of our exemption laws. The defendant is not temporarily absent to avoid service of process. From the time of his escape, after sentence pronounced condemning him to an ignominious punishment, he has been a fugitive from justice, for that alone can save him from the vengeance of the law. The motive that led to his flight will induce him to continue his residence beyond the confines of the state indefinitely, for in no other way can he avoid the punishment due to his crime. He has left the state to escape the consequences of his crime and stands in an attitude of defiance to her power. It is not for such that our benevolent exemption laws were made. The fact that his family may continue to reside within the state, and that his domicile may be technically here until he acquires another elsewhere, is not enough, under the circumstances, to render him a resident of this state, for a person may have his domicile in this state and be at the same time a resident of another. In re Thompson, 1 Wend. (N. Y.) 43; Frost v. Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; Haggart v. Morgan, 1 Seld. (N. Y.) 423. The identical question presented on this appeal was decided by the Supreme Court of New York in *Mayor v. Genet*, 4 Hun, 487, and Id., 63 N. Y. 646, in an opinion which fully sustains the view we take. There are a number of authorities cited in the dissenting opinion of Clark, J., in the *Chitty Case*, which fully accord with our judgment in this.

The judgment of the superior court is affirmed.

## MYATT v. MYATT.

(Supreme Court of North Carolina. Nov. 19, 1908.)

**1. WITNESSES (§ 287\*)—CROSS-EXAMINATION OF ONE'S OWN WITNESS—DISCRETION.**

Witness having testified on direct that he did not know the mental condition of another, subsequent questions on direct as to whether such person was sane could be excluded in the trial court's discretion, as an effort to cross-examine one's own witness.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 287.\*]

**2. EVIDENCE (§ 474\*)—NONEXPERT TESTIMONY—SANITY.**

While nonexpert opinions as to one's sanity may be received, they must be deduced from personal observation, and not from circumstances detailed by others; and, witness having stated that he did not know the condition of another's mind, subsequent questions calling for witness' opinion as to whether such person was sane were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.\*]

**3. CANCELLATION OF INSTRUMENTS (§ 51\*)—"UNDUE INFLUENCE"—INSTRUCTIONS.**

In an action to avoid a deed for undue influence in its procurement, an instruction that "undue influence" is a fraudulent influence, controlling the mind of him operated upon, by which the will is perverted from its free exercise, and submitting as issues whether defendant possessed undue influence over grantor, and, if so, whether he fraudulently used it to procure the deed, and whether he exerted a fraudulent influence over grantor sufficient to destroy free agency, etc., was not objectionable as laying too much stress on the element of fraud as part of the definition of undue influence.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 51.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

**4. DEEDS (§ 72\*)—EXECUTION—"UNDUE INFLUENCE"—ELEMENT.**

To constitute "undue influence," it is unnecessary that moral turpitude or improper motive should exist, and if one, from the best of motives, having obtained a dominant influence over a grantor's mind, induces him to execute a deed or other instrument materially affecting his rights, which he would not have otherwise executed, so exercising the influence obtained that the grantor's will is effaced or supplanted, the instrument is fraudulent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 190; Dec. Dig. § 72.\*]

**5. NEW TRIAL (§ 104\*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.**

Cumulative newly discovered evidence is no ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\*]

Appeal from Superior Court, Wake County; Biggs, Judge.

Action by Nannie J. Myatt against W. A. Myatt. From a judgment for defendant, plaintiff appeals. Affirmed.

On the trial it was shown, among other things, that on November 10, 1906, Alfred R. Myatt, husband of feme plaintiff, executed and delivered to his brother, W. A. Myatt, a deed for a certain tract of land, ly-

ing in Wake county, for the sum of \$1,000, which had been paid, and said deed was duly acknowledged and filed for registration on the day of its execution; that prior to that time, to wit, on August 21, 1906, said Alfred R. Myatt had executed a deed for the same tract of land to his wife, the feme plaintiff, acknowledged the day of its execution before Chas. Adams, Esq., a justice of the peace of Wake county, and registered February 20, 1907. Plaintiff complained and alleged that the deed to defendant had been procured by fraud and undue influence on the part of defendant, and issues were submitted and responded to by the jury as follows: "(1) Was the deed of November 10, 1906, from Alfred R. Myatt to the defendant, W. A. Myatt, obtained through undue influence by the defendant, W. A. Myatt? Answer. No. (2) Was the deed of November 10, 1906, from Alfred R. Myatt to the defendant, W. A. Myatt, obtained through fraud by the defendant, W. A. Myatt? Answer. No." There was judgment on the verdict for the defendant, and plaintiff excepted and appealed. Motion was further made in the court for a new trial on account of newly discovered evidence.

B. C. Beckwith, for appellant. Walter Clark, Jr., and Holding & Bunn, for appellee.

HOKE, J. We have given this cause and the exceptions made by appellant—all of them—full and careful consideration, and are of opinion that there has been no error committed in the trial, certainly none that could give the plaintiff any just ground of complaint; nor do we find, in the record or case on appeal, testimony that would justify a verdict either of incapacity in grantor, or of fraud or undue influence, on the part of the grantee, as to the deed in question. True there is evidence tending to show that the grantor, Alfred R. Myatt, was not a provident or a very industrious man; that he had the drinking habit, and was at times incapable of attending properly to his business, but this last was not at all his usual condition. On the contrary, he could, and did as a rule, manage his own affairs, made contracts, executed deeds, including that to feme plaintiff herself, and under which she claims, and transacted business generally on the part of himself and his wife right up to the transaction involved in the litigation. Further, the great weight of the testimony is to the effect that said Alfred R. Myatt was sober and clothed in his right mind at the time he executed the deed in question; and there is very little, if any, evidence that defendant had especial influence over him, and none at all that he exercised, or endeavored to exercise, it on this occasion.

An exception especially urged for error was to the refusal of the court to allow the plaintiff to ask a question of one of her own



witnesses, W. B. Temple, not an expert, in reference to the mental condition of Alfred R. Myatt during the period of three or four weeks just prior to the execution of the deed, as follows: "In your opinion was Alfred R. Myatt at that time a fully responsible man, a sane man? (Defendant objected; sustained, and plaintiff excepted.)" Another question of this witness as to same period was also disallowed: "Q. Was his mind unbalanced?"—the court stating that he declined to allow the question in the exercise of his discretion. There is no allegation in the complaint, as a distinct and independent ground of relief, that Alfred R. Myatt did not have mental capacity to make this deed; but, if it be conceded that his mental condition, during the period in question, was relevant, in so far as it tended to show that he was more susceptible to undue influence at the time, this witness had just made answer to a question addressed to the same period, as follows: "Q. What was the condition of his mind? A. I cannot say as to his mind." And the court might very well conclude that, the witness having just made answer that he could not say as to his mind, the subsequent questions were to some extent an effort on the part of plaintiff to cross-examine her own witness, and in that way subject to be rightfully disallowed in the exercise of his honor's discretion; or the question could have been held incompetent on the ground that, the witness having just stated that he could not say as to the condition of the grantor's mind during the period referred to, an answer to the subsequent questions could only have been a conclusion or inference of the witness, adopted from hearsay or the opinion of others, and, while it is held with us that opinion evidence, in strictness nonexpert, may be received as to the condition of a person's mind, when relevant to the inquiry, such opinion must come from the association or personal observation of such a witness, and not proceed from facts and circumstances detailed to him by others. *McRae v. Malloy*, 93 N. C. 154; *Clary v. Clary*, 24 N. C. 78.

Plaintiff further insists there was error in the portion of his honor's charge, in regard to the question of undue influence, which was, in part, as follows: "Undue influence is a fraudulent influence, overruling or controlling the mind of the person operated upon, the fraudulent influence by which the will of the maker—that is, in this case, the will of Alfred R. Myatt—is perverted from its free exercise, and there is sustained injury, and the will of the influencing party substituted for it. Did the defendant, W. A. Myatt, possess over Alfred R. Myatt, his brother, an undue influence as defined by the court? And, if so, did he make a fraudulent use of it, and thereby procure the deed of November 10, 1906? Did the

defendant possess and exert a fraudulent influence over Alfred R. Myatt sufficient to destroy or pervert free agency in him, so that the act of executing the deed was the result of the domination of the mind of the defendant rather than the expression of the will and mind of Alfred R. Myatt?"—the objection being that too much stress is given to the element of fraud as a part of the definition. But the charge is in substantial accord with our decisions on this subject. In *re Abbe's Will*, 146 N. C. 273, 59 S. E. 700; *Wright v. Howe*, 52 N. C. 412; *Marshall v. Flinn*, 49 N. C. 199. It is true that, to constitute undue influence, it is not necessarily required that there should exist moral turpitude, or even an improper motive; but, if a person from the best of motives, having obtained a dominant influence over the mind of a grantor, thereby induces him to execute a deed, or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction, so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the third person, the actor who procured the result, such an instrument so obtained is not improperly termed "fraudulent." Accordingly it is held, in *Marshall v. Flinn*, supra, "that the influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made." And all of our decisions as stated, are to like effect, and uphold the definition given by the court in the present case.

The motion for new trial for newly discovered testimony must be also overruled. The evidence suggested in the affidavits is at best only cumulative, and under our decisions is entirely insufficient to justify favorable consideration on the part of the court. *Gay v. Mitchell*, 146 N. C. 509, 60 S. E. 426, and authorities there cited.

There is no error in the record to plaintiff's prejudice, and the judgment below is affirmed.

No error.

#### BEESON v. SMITH.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. INSANE PERSONS (§ 60\*)—CONTRACTS AND DEEDS—VALIDITY.

Insane persons' deeds and contracts are voidable, and not void, especially when there has been no adjudication of insanity.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 93; Dec. Dig. § 60.\*]

**2. DEEDS (§ 72\*)—EXECUTION—UNDUE INFLUENCE.**

Deeds procured by undue influence or fraud in the treaty or bargain are voidable, and not void.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 190; Dec. Dig. § 72.\*]

**3. CANCELLATION OF INSTRUMENTS (§ 57\*)—DEEDS—UNDUE INFLUENCE—RELIEF.**

In an action to cancel a deed procured through fraud or undue influence, a court may set it aside altogether, or only sub modo, and administer the relief required by justice.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 115; Dec. Dig. § 57.\*]

**4. CANCELLATION OF INSTRUMENTS (§ 31\*)—DEEDS—UNDUE INFLUENCE—EFFECT ON THIRD PERSONS.**

If deeds were procured by fraud or undue influence of one acting as defendant grantee's agent, or if defendant bought with knowledge of the fraud or undue influence, or knew facts sufficient to put a man of average business prudence on inquiry leading to such knowledge, the grantor is entitled to relief against defendant.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 81.\*]

Appeal from Superior Court, Randolph County; Webb, Judge.

Action by Sophia Beeson against Daniel Smith. From a judgment for defendant, plaintiff appeals. New trial ordered.

The deed from plaintiff to defendant, who was brother to plaintiff, conveyed to defendant the plaintiff's land, recited a valuable consideration of \$10, and contained a stipulation, in effect, that, during the life of the grantor, the land conveyed was to be occupied by the grantee and his heirs as tenants, paying to the grantor one-third of the crop as rent, etc.; and the contract was to the effect that the defendant, Daniel Smith, was to look after the personal interests of Sophia Beeson, and see that she was taken care of during her life and provide her a suitable burial on her death, and that for this service the defendant was to have and own all the "personal property and belongings" of said plaintiff which she should have at her death, etc. There was evidence on the part of plaintiff tending to show mental incapacity in the grantor at the time of the execution of these instruments, and that the same were procured by fraud and undue influence on the part of defendant and of one Dave Ferree, who had married a niece of plaintiff and defendant, and had for some time previous lived on plaintiff's land. Issues were submitted and responded to by the jury, as follows: "(1) Did the plaintiff have sufficient mental capacity to make and execute the deed and contract set out in the complaint on the 25th of January, 1905? Answer. Yes. (2) Was the deed and contract described in the complaint obtained by fraud and undue influence? Answer. No. (3) Was the plaintiff induced to execute said deed and contract by false and fraudulent representations of the defendant, or by any

one for him? Answer. No." Among other things, and on the second and third issue, the court charged the jury as follows: "If the jury should find, to their satisfaction, from the evidence that David Ferree or any other person exerted an undue influence over the plaintiff, or perpetrated a fraud upon her, or made false representation to her, in order to get her to sign the deed and contract in controversy, this would not be sufficient ground for answering the second and third issues 'Yes,' unless the plaintiff has proven to your satisfaction that the same was procured to be done by the defendant, or that he was a party to it." The plaintiff excepted. There was judgment on the verdict for defendant, and the plaintiff excepted and appealed.

Morehead & Sapp, for appellant. Hammer & Spence, for appellee.

HOKE, J. (after stating the facts as above). The authorities of this state are to the effect that the deeds and contracts of insane persons, certainly when there is, no formal adjudication of their insanity in force at the time, are voidable, and not necessarily void; and the same is true of deeds procured by undue influence, or fraud in the treaty or bargain. In actions brought for the purpose courts on established principles of equity may set them aside altogether, or only sub modo, and administer the relief that right and justice may require. In the case of insane persons, and the relief to be afforded, under certain conditions, an instructive case will be found in *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and other decisions in this state are in accord with that well-considered opinion. *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111; *Odom v. Riddick*, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; *Riggan v. Green*, 80 N. C. 237, 30 Am. Rep. 77; *Carr v. Holliday*, 21 N. C. 344. In the case of deeds procured by fraud in the treaty, or undue influence, which is held to partake of the nature of fraud, *Myatt v. Myatt* (at the present term), 62 S. E. 887. Courts are more disposed to set the instruments aside, but, even in these cases, such a decree is not always or necessarily required, and such relief will be given as the merits of the case may require. And this appropriate relief will be afforded, not only against the principal, where he is grantee in the deed, but also against persons who were or have become beneficiaries of the fraud, when they are volunteers or purchasers with notice, or when the deeds have been procured by the fraud or undue influence of one who is acting in the transaction as agent of grantee. *Squires v. Riggs*, 4 N. C. 253, 6 Am. Dec. 564; *Derr v. Dellinger*, 75 N. C. 300; Har-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ris v. Delamar, 38 N. C. 219; Huguenin v. Baseley, 14 Ves. 273; Corbett v. Clute, 137 N. C. 546, 50 S. E. 216; Black v. Baylees, 86 N. C. 527. In Huguenin's Case, supra, in entering a decree setting aside a deed under which third parties, to wit the wife and children of the defendant, as volunteers, had acquired an interest, the chancellor said: "With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others." And in the same opinion he quotes with approval the words of Chief Justice Wilmut, in a similar case, as follows: "There is no pretense that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." And like decision was made in our own court (Harris v. Delamar, supra), in which it was held: "That an instrument obtained by fraud and imposition on the part of a father, in behalf of his infant children, must be set aside in equity." And in Corbett v. Clute, 137 N. C., at page 551, 50 S. E. 217, being a case where an instrument had been procured by the misconduct of an agent, the court said: "It will not be contended that the plaintiff is not bound by the statements of his agent. He is here now, asserting his claims under the note and mortgage obtained for him by this transaction, and if he claims the benefits, he must accept the responsibility"—citing Harris v. Delamar and Black v. Baylees, supra.

The correct application of these principles will show that there was error in the portion of his honor's charge excepted to by plaintiff, and that he should not have restricted the defendant's liability by directing the jury, in effect, "that they could not render a verdict for plaintiff on the second and third issues, unless it was established by proper proof that the execution of the instruments in question had been procured

by the fraud or undue influence of the defendant, or that said defendant was a party to it." For, as indicated in these decisions, if these instruments were procured by the fraud or undue influence of one acting as agent of the defendant, the grantee in the deed, or if the defendant was a volunteer, or bought with notice of the wrong done the plaintiff, if such wrong was done, or of facts sufficient to put a man of average business prudence on inquiry that would lead to knowledge, in either event, the plaintiff would be entitled to adequate and proper relief.

We are of opinion that there was error committed to plaintiff's prejudice, and that there should be a new trial on all the issues. It is so ordered.

New trial.

### RUSHING v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

1. DAMAGES (§ 173\*)—PERSONAL INJURY—DIMINISHED EARNING CAPACITY—EVIDENCE. To establish decreased earning capacity, plaintiff could show what wages he received before injury and at the time of trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 490; Dec. Dig. § 173.\*]

2. MASTER AND SERVANT (§ 274\*)—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

To negative contributory negligence, an employé could testify that he did not cause the fall of a timber which caused his injury while he was helping to carry it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 940; Dec. Dig. § 274.\*]

3. MASTER AND SERVANT (§ 284\*)—INJURY TO EMPLOYÉ—JURY QUESTION.

Under the evidence, in an action for injury to a railway employé, caused by a timber falling while being carried, a nonsuit held properly denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.\*]

4. EVIDENCE (§ 263\*)—PLEADINGS—PART OF PARAGRAPH.

Part of a paragraph of the complaint was properly excluded, where the paragraph was so constructed that the part not offered in evidence was necessary to explain that offered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1026; Dec. Dig. § 263.\*]

5. MASTER AND SERVANT (§ 295\*)—INJURY TO EMPLOYÉ—INSTRUCTIONS.

An instruction, in a personal injury action, that defendant railway company was bound to furnish plaintiff employé with safe and suitable tools with which to do his work, and that plaintiff would not be held to have assumed the risk of a dangerous work unless the act was obviously so dangerous that in careful performance the inherent probabilities of injury were greater than those of safety, was not subject to complaint by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1176; Dec. Dig. § 295.\*]

**6. MASTER AND SERVANT (§ 107\*)—APPLIANCES—DUTY TO PROVIDE.**

If, when a railway employé was injured by the fall of a timber which he was helping to carry, lug hooks were commonly used by railroads in such work, the company was bound to furnish them; and, if the timber was of such character as to lead an ordinarily prudent man to see it was safer to use lug hooks than his hands, the company's failure to provide them was negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 178, 179, 199-202, 212; Dec. Dig. § 107.\*]

**7. MASTER AND SERVANT (§ 177\*)—INJURY TO EMPLOYÉ—FELLOW SERVANTS—NEGLIGENCE.**

If, while helping to carry a timber, an employé stumbled and fell, and while down his fellow servants negligently dropped their end of the timber, and such negligence proximately caused the injury, defendant was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.\*]

**8. APPEAL AND ERROR (§ 1078\*)—EXCEPTIONS ABANDONED—BRIEFS.**

Under Sup. Ct. Rule 34 (27 S. E. ix), exceptions not brought forward in appellant's brief are abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**9. EVIDENCE (§ 574\*)—OPINION OF EXPERT—CONCLUSIVENESS—PERSONAL INJURY—PERMANENCY.**

There being evidence that a personal injury was permanent, it was improper to take as conclusive a doctor's opinion to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.\*]

**10. DAMAGES (§ 26\*)—PERSONAL INJURY—PRESUMPTIONS.**

A personal injury is not presumed to have ended at the time of suit therefor.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 26.\*]

**11. DAMAGES (§ 26\*)—PERSONAL INJURY—GROUNDS—PROSPECTIVE DAMAGES.**

One negligently injured can recover for resulting prospective loss as well as that which is past.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 69, 236; Dec. Dig. § 26.\*]

**12. DAMAGES (§ 95\*)—PERSONAL INJURY—GROUNDS IN GENERAL.**

Damages for negligent personal injury include actual expense for nursing, medical services, also loss of time and earning capacity, and mental and physical suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.\*]

**13. APPEAL AND ERROR (§ 1178\*)—NEW TRIAL—RESTRICTION TO PARTICULAR ISSUE—PROPRIETY.**

It is in the Supreme Court's discretion to restrict a new trial to the issue, or issues, affected by error, where the issues are distinct; and, plaintiff having been prejudiced by an instruction on the measure of his damages, on his appeal from a verdict in his favor a new trial will be restricted to the issue as to damages, especially where on defendant's appeal no errors are found as to the other issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4614; Dec. Dig. § 1178.\*]

Appeal from Superior Court, Anson County; E. B. Jones, Judge.

Personal injury action by Noah Rushing,

by next friend, against the Seaboard Air Line Railway Company. From the judgment, both parties appeal. Affirmed as to defendant's appeal, and new trial on a certain issue as to plaintiff's appeal.

Robinson & Caudle, for plaintiff. J. D. Shaw and Day & Allen, for defendant.

**Defendant's Appeal.**

CLARK, C. J. Action of damages for injuries caused by defendant's negligence. Under orders of the foreman the plaintiff and three others took in their hands a stick of timber, which was lying partly submerged in the water, and walked sideways with it, and, while trying to climb up a five-foot embankment, the plaintiff stumbled and fell. The stick of timber fell on him, injuring him. Plaintiff testified that the defendant had for years used lug hooks in such work, which grasp a stick of timber; that if the lug hooks had been used on this occasion, he would have walked forward, instead of sideways, and at some distance from the stick of timber, and could hardly have stumbled and fallen, and if he had, the lug hooks would have held the timber so that it would not have fallen on him at all; that he asked the foreman if they should use the lug hooks with that log, but the foreman told them not to do so, but to carry the log in their hands. The defendant's exceptions cannot be sustained. It was competent, for purpose of showing his decreased earning capacity, to ask the plaintiff what wages he received before the injury, and what he was receiving in his condition at the time of trial. *Wallace v. Railroad*, 104 N. C. 442, 10 S. E. 552. It was also competent, to negative contributory negligence, to ask him if he caused the stick of timber to fall on himself. The motion to nonsuit was properly denied. The case was properly one for the jury.

The defendant having offered in evidence part of paragraph 5 of the complaint, it was proper to refuse to admit it, unless the whole paragraph was offered. The paragraph was not separable into two, as in *Hedrick v. Railroad*, 136 N. C. 513, 48 S. E. 830, but was so connected that the part not offered in evidence was necessary to explain that which was offered. The court charged the jury: "It was the duty of the defendant railroad company to furnish the plaintiff with safe and suitable tools and appliances with which to do the work required of him by the defendant. The plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself was obviously so dangerous that in the careful performance the inherent probabilities of injury were greater than those of safety." The defendant could not complain of this. *Orr v. Telegraph Co.*, 132 N. C. 694, 44 S. E. 401.

The court committed no error in charging the jury as follows (which was duly excepted to): "That if the jury should find by the greater weight of the evidence, that lug hooks were at the time of the injury used by railroads, doing like work, such as moving heavy timbers, then it was the duty of the defendant to furnish the foreman with lug hooks; and should you further find, by the greater weight of the evidence, that the timber which the plaintiff was handling was such timber, because of weight, length, ground, and surroundings, such as would lead a man of ordinary prudence to see it was safer to use lug hooks than to use his hands, then failure of defendant to provide and have them for use would be negligence, and should the jury find that this negligent act was the proximate cause of the injury, they should answer the first issue 'Yes.'"

And the court also correctly charged though excepted to: "If the jury should find, by the greater weight of the evidence, that while the plaintiff was carrying the log he stumbled and fell, and while down, his fellow servants, when they could have prevented the injury by holding the log, negligently and carelessly threw down their end of the log, when by the exercise of ordinary prudence they could have held it and prevented the injury, then it would be chargeable to the negligence of defendant's employees, and if this negligence of fellow servants was the proximate cause of the injury, the jury would answer the first issue 'Yes.'"

Several of the exceptions taken are abandoned because not brought forward in the defendant's brief. Rule 34 (27 S. E. ix). Those not thus abandoned, and not discussed by us above, are without merit.

No error.

#### Plaintiff's Appeal.

The court instructed the jury: "Whatever you may allow, if you do allow damages, is the end of it. He could not sue any more if his pain and suffering were to go on. The doctor says that the injury is not permanent. The presumption is that it is ended. If you allow damages, therefore, you will not allow for any pain or suffering, or diminished capacity for labor, beyond the present. Your inquiry as to damages will not extend to the future, but shall be limited to such damages as he has sustained up to the present moment." The plaintiff's exception to this must be sustained. There was other evidence for the plaintiff that his injury was permanent. It was error to take the doctor's opinion as conclusive. It was error to hold that there was a presumption that all the injury was ended. It was also error to charge that the inquiry as to damages could not extend to the future, but should be limited to the damages sustained up to the trial. The true rule is that, where the plaintiff has been injured by

the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss, resulting from the defendant's wrongful and negligent act; and this may embrace indemnity for actual expense incurred in nursing, medical attention, loss of time, loss from inability to perform mental or physical labor, and capacity to earn money, and for actual suffering of body and mind, which are the immediate and necessary consequences of his injury. *Wallace v. Railroad*, 104 N. C. 442, 10 S. E. 552; *Hansley v. Railroad*, 115 N. C. 611, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474; 3 *Sutherland on Damages*, 261 (1st Ed.); *Burns v. Railroad*, 125 N. C. 309, 34 S. E. 495. These errors affect only the issue as to damages, and in no wise relate to the findings upon the other issues. In such cases, the court, in its discretion, usually grants a new trial only upon the issue as to damages. The practice is thus stated in *Hall v. Hall*, 131 N. C. 186, 42 S. E. 562 (in a case in which the issues were not as severable and distinct as an issue as to damage usually is from the issues determining liability): "It is in the power of the superior court to grant a new trial on one or more of several issues, and to let the verdict on the other stand (*Benton v. Collins*, 125 N. C. 90, 34 S. E. 242, 47 L. R. A. 33, and list of cases there cited), but this is in the discretion of the court, and not a right of the party (*Nathan v. Railroad*, 118 N. C. 1070, 24 S. E. 511), and it must clearly appear that the matter involved is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters." When such is the condition, the almost uniform practice in this court also is, in its discretion, to restrict the new trial to the issue or issues affected by the error. See *Strother v. Railroad*, 123 N. C. 199, 31 S. E. 386, and numerous cases there cited. To same effect, *Gray v. Little*, 126 N. C. 385, 35 S. E. 611; *Wilkie v. Railroad*, 128 N. C. 114, 38 S. E. 289, and many other cases since.

This is especially a case in which the new trial should be limited to the issue as to damages, for the defendant excepted and appealed, and on examination of his exceptions we found no error as to the other issues. We grant a new trial on the only issue brought up for review by plaintiff's appeal.

Partial new trial.

SMITH v. MOORE et al.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—IMMATERIAL TESTIMONY.

In an action to set aside a deed for fraud of the grantee, since deceased, plaintiff's testimony that, when she signed the deed, she was in bed, was immaterial, and therefore nonprejudi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cial, even if within Revisal 1905, § 1631, as a communication or transaction with the deceased grantee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4155; Dec. Dig. § 1050.\*]

**2. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE SHOWN.**

In an action to set aside a deed for fraud of the grantee, since deceased, plaintiff's testimony that, when she signed the deed, she was in bed, even if within Rev. § 1631, as a communication or transaction with the deceased grantee, was clearly nonprejudicial; there being no controversy in regard to such fact, and other evidence thereof not objected to having been admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action to set aside a deed for fraud, plaintiff, after testifying in regard to a conversation between herself and the grantee, was permitted to testify that she told him, if he had the deed, he got it by fraud. *Held* that, while such declaration was not competent as substantial evidence to show that the grantee procured the deed by fraud, its admission was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.\*]

**4. EVIDENCE (§ 273\*)—RES GESTÆ.**

When one is in possession of land, his acts and declarations qualifying and explaining such possession are competent as part of the *res gestæ*; that is, the fact of possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1111; Dec. Dig. § 273.\*]

**5. APPEAL AND ERROR (§ 1078\*)—BRIEFS—ASSIGNMENTS NOT REFERRED TO—ABANDONMENT.**

An assignment of error not referred to in the brief is to be regarded as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**6. EVIDENCE (§ 581\*)—TESTIMONY AT FORMER TRIAL—PRACTICE.**

Where testimony given at the former trial is offered on the ground of the sickness of the witness, the court should find the facts in regard to the physical condition of the witness, how long she has been sick, the character of her sickness, its probable duration, whether known to the opposite party, and, if so, whether it was practicable to have taken her deposition.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 581.\*]

**7. APPEAL AND ERROR (§ 1008\*)—REVIEW—FINDING OF FACT—ADMISSIBILITY OF FORMER TESTIMONY.**

The finding of fact as to the sickness of a witness justifying the admission of testimony given at a former trial is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.\*]

**8. EVIDENCE (§ 581\*)—TESTIMONY AT FORMER TRIAL—ADMISSION—CONDITION PRECEDENT.**

The party offering testimony of a witness on a former trial must, as a condition precedent to its admission, show the nonavailability of the witness, either in person or by deposition, and that he has used due diligence in endeavoring to secure his attendance or take his deposition; and the certificate of a physician that

the witness was too unwell to attend court was insufficient.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 581.\*]

**9. DEEDS (§ 66\*)—DELIVERY—QUESTION OF LAW AND FACT.**

What constitutes delivery of a deed is a mixed question of law and fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.\*]

**10. DEEDS (§ 56\*)—"DELIVERY"—SUFFICIENCY.**

It is essential to the delivery of a deed that it pass out of the control of the grantor and into the actual or constructive control of the grantee, and, so long as the grantor retains control or power to recall the possession of the paper, there is no delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 119; Dec. Dig. § 56.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1958-1970; vol. 8, p. 7632.]

**11. DEEDS (§ 64\*)—"DELIVERY"—ACCEPTANCE.**

To constitute delivery, there must not only be a parting with control of the deed by the grantor, with present intention that it shall operate as a conveyance of land, but there must likewise be an acceptance, either by the grantee or by some one for him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 142, 143; Dec. Dig. § 64.\*]

**12. LANDLORD AND TENANT (§ 25\*)—LEASE—DELIVERY—BURDEN OF PROOF.**

In an action to set aside a deed for the fraud of the grantee, since deceased, it appeared that the grantee was the general agent of plaintiff and her mother, the grantors. A lease from the grantee to the grantors which had been found among the papers of the grantee after his death was offered in evidence as showing the title under which plaintiff held possession of the premises. *Held*, that the burden of proof to show that the lease was delivered was on defendants.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 25.\*]

**13. LANDLORD AND TENANT (§ 25\*)—LEASE—DELIVERY.**

Where an unregistered lease from a general agent to his principal was found among the agent's papers, after his death such possession of the lease, in the absence of a showing that he was authorized to accept it as agent, does not show a valid delivery.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 25.\*]

**14. PRINCIPAL AND AGENT (§ 69\*)—DEED FROM PRINCIPAL TO AGENT—PRESUMPTION OF FRAUD.**

Where a general agent has entire management of his principal's affairs, so as, in effect, to be as much his guardian as the regularly appointed guardian of an infant, the presumption of fraud as matter of law arises from a conveyance from the principal to the agent for the latter's benefit, and it will be decisive of the issue in favor of the principal, unless rebutted by evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 135; Dec. Dig. § 69.\*]

Appeal from Superior Court, New Hanover County; Neal, Judge.

Action by Louise B. Smith against Susan E. Moore and others. Judgment for plaintiff. Defendants appeal. No error.

This cause has been before the court in two appeals and will be found reported in 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N.

S.) 684, and 145 N. C. 269, 59 S. E. 63. On both appeals the court granted a new trial for error in the conduct of the trial and form of the verdict. The subject-matter of the litigation is set forth in the appeal reported in 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684, rendering it unnecessary to repeat it at this time. Reference may be had to the statement made by Mr. Justice Walker in 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684. The cause was brought to trial for the third time before Judge Neal and a jury, when a verdict was rendered for plaintiff. Several exceptions were taken to his honor's rulings upon the admission and rejection of testimony, and to instructions to the jury. Those not abandoned in the brief are referred to in the opinion. From a judgment upon the verdict, the defendants appealed.

Bellamy & Bellamy, Rountree & Carr, and H. McClammy, for appellants. John D. Bellamy, for appellee.

CONNOR, J. The issue submitted to the jury upon the pleadings presented the question whether the deed executed by plaintiff and her mother, Mrs. Mary E. Smith, was procured by fraud. The defendants claim the property as the widow and heirs of Roger Moore, the grantee. It is conceded that every person present at the execution of the deed, except plaintiff and Alcenia Reed, are dead. Plaintiff was introduced in her own behalf, and testified, without objection, that at the time she executed the deed she was sick—was very ill with typhoid pneumonia from February to April, 1885; the date of the deed being March 4, 1885. She was asked: "Where were you when you signed the paper?" To this she responded, over defendants' objection, "In the bed." Defendants excepted. The ground of the exception is that the testimony concerned a transaction between witness and the ancestor of defendants, the grantee in the deed. It was in regard to the matters in controversy entirely immaterial whether plaintiff was sitting on a chair or lying on a bed when she signed the deed. We do not perceive how the fact could throw the slightest light upon the issue or prejudice the defendants. While we do not think that the testimony comes within the spirit or the language of the statute (Revisal 1906, § 1631), as a communication or transaction with the deceased grantee, if it did, we should not deem its admission ground for granting a new trial. It is clearly nonprejudicial. The witness Alcenia Reed, who was present, testified without objection or contradiction that plaintiff was "in the bed" when she signed the deed. There was no controversy in regard to the fact. The exception cannot be sustained.

After the execution of the deed, plaintiff and her mother continued to reside upon the property until the latter died. Plain-

tiff remained there undisturbed by Col. Roger Moore during his life. Some time after his death, Henry Moore, sometimes referred to as Roger, one of the children of Col. Roger Moore, and one of the defendants, went to the home of the plaintiff and demanded possession, or that some arrangement in regard to the rent be made. After testifying in regard to the conversation between Henry Moore and herself, plaintiff was asked: "What claim did he set up to the property—what did he say to you, and what did you say to him?" She answered, over defendants' objection: "He said he had a deed for the property, and I told him, if he had, he got it by fraud." Defendants excepted. Of course, it would not have been competent as substantial evidence for plaintiff to say that defendants' ancestor procured the deed by fraud. That was the very question to be decided by the jury. She could not state, either as a fact or as an opinion, how the deed was obtained. We do not understand that the question was asked or permitted to be answered for any such purpose. It was clearly competent for her to give her version of the conversation between herself and Henry Moore, one of the defendants, when he claimed the property and demanded possession. It may have been proper for his honor to have stricken the answer from the record. It was saying nothing more than she had alleged in her complaint, and could not, in the light of the instruction given by his honor, upon the issue, have misled the jury. The case was made to depend largely upon the presumption of fraud arising out of the relation of the parties. His honor, in view of the opinion of the court on the former appeal, carefully excluded any testimony from plaintiff in regard to the transaction between Col. Roger Moore and herself. No reference was made in the conversation with Henry Moore to the circumstances attending the execution of the deed. It is the well-settled rule that, when one is in possession of land, his acts and declarations qualifying and explaining such possession are competent as part of the res gestæ; that is, the fact of possession. Henry Moore was making claim that he owned the land, had a deed for it, demanding that she surrender possession. She simply said: "If you have a deed, you got it by fraud." We cannot think this language constitutes prejudicial error. The record contains an assignment of error directed to the testimony of plaintiff that she made a will. It is not referred to in the brief, and is therefore under the rule to be regarded as abandoned.

"Counsel for defendants offered to read in evidence the testimony given on the last trial by Mrs. Sarah J. Wilson upon the presentation to the court of a doctor's certificate that Mrs. Wilson was too unwell to attend court. That the evidence (stenographer's

notes) was what the witness testified to at the last trial. The court was of the opinion that the evidence was not competent, even though it should be made to appear that the witness was sick, and also that the evidence offered was what she said at a former trial. It was excluded upon plaintiff's objection, and the defendants excepted." It would have been more satisfactory and better practice for his honor to have found the facts in regard to the physical condition of Mrs. Wilson—how long she had been sick, the character of her sickness, its probable duration, whether known to defendants, and, if so, whether it was practicable to have taken her deposition. This would have enabled him to pass upon the admissibility of her testimony given on the former trial, preserved by the stenographer's notes, as a question of law, and, upon appeal, we could have reviewed his conclusion. His finding of fact would have been final, as in cases of dying declarations, etc. To say that a witness is "sick" or "unable to attend court" is indefinite, and by no means determinative of the admissibility of her former testimony as original substantive evidence. The general rule excluding hearsay evidence is too well settled upon reasons too obvious to justify a discussion or citation of authority. Experience has demonstrated the necessity of some exceptions to the rule. Statutory provisions have been made for taking depositions and prescribing the conditions under which they may be substituted for oral evidence before the jury. The courts have, with caution, and, because of necessity, made other exceptions. Some of these are as well settled as the rule itself. The testimony of a witness who, since his examination, has died, become insane, or otherwise nonavailable, may be introduced upon a second trial, provided it has been preserved or notes taken thereof, or some person who heard the witness testify can reproduce it. There are other exceptions not necessary to be considered in this connection. Illustrations of the exceptions, so far as they have been applied by this court, will be found in *Jones v. Ward*, 48 N. C. 24, 64 Am. Dec. 590, where an attorney who took notes of the testimony on the first trial was permitted to testify to what the deceased witness swore. This ruling was followed in *Wright v. Stowe*, 49 N. C. 516; *Ashe v. De Rossett*, 50 N. C. 299, 72 Am. Dec. 552; *Carpenter v. Tucker*, 98 N. C. 316, 8 S. E. 831. In this class of exceptions the non-availability of the witness is manifest; the only question being as to the mode of preserving and reproducing the testimony. The courts have also made an exception when the witness has gone beyond the jurisdiction of the court, without the procurement of the party offering his former evidence and he has no means of taking his deposition, or when the witness is sick, and probably still others not material to this discussion. In

this last class of exceptions the party offering the testimony must, as a condition precedent to its admission, show the necessity for the exception based upon the non-availability of the witness, either in person or by deposition, and that he has used due diligence in endeavoring to secure his attendance or take his deposition. "In case of disability, other than death, it has been held that the court must be satisfied that the party has used due diligence to obtain the personal attendance of the witness." 1 Elliott, Ev. § 517. We do not find that the question involved in this case has been decided in this court. In other jurisdictions it has received careful consideration, and has, we think, been settled upon sound principle and safe policy. In *Wabash R. R. v. Miller*, 158 Ind. 174, 61 N. E. 1005, Hadley, J., says: "The admissibility of such evidence constitutes an exception to the general rule of exclusion of hearsay evidence, and rests upon a kind of legal necessity springing from an apparent impossibility or impracticability of procuring the testimony of the person from whom the information emanates. It is therefore incumbent upon the party offering such testimony to show affirmatively the existence of all facts necessary to the bringing of the secondary evidence clearly within the exception, and, unless this is done, the evidence should be excluded." In this case the witness was temporarily absent from the state. No reason being shown why his deposition was not taken, his testimony upon a former trial was excluded. In *Siefert v. Siefert*, 123 Mich. 664, 82 N. W. 511, Grant, J., says: "I find no authority which holds temporary illness is sufficient to justify the reading of the testimony taken upon a former trial. When the illness is only temporary, certainly the opposite party should be allowed the choice to consent to a continuance or to the introduction of the former testimony. \* \* \* The only safe rule is that the illness must be of a permanent character." In *Berney v. Mitchell*, 34 N. J. Law, 837, we find a well-considered discussion, citing English and American cases, by Dairmple, J. He says: "It must be recollected that the rule by which the evidence of a deceased witness given on a former trial is admitted is an exception to the rule rejecting all hearsay evidence. \* \* \* In my opinion neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, except in case of the death or insanity of the witness, or when it appeared at the time of the trial, by reason of physical inability of a permanent character, he is unable to be examined, and that, by the exercise of due diligence, his deposition could not have been taken." We quote this language to show how cautiously the most respectable courts in this country have proceeded in extending the exception to the general rule. In *Miller's Case*, supra,



the court, referring to the use of stenographer's notes, says: "It is suggested that since the employment of stenographers in court and when testimony which has been sifted and its truth tested by cross-examination, under the supervision of the court, has been preserved by it, the reasons previously existing for diligence in procuring the evidence direct from the original witness for use upon a retrial have ceased to exist, and that evidence so preserved can no longer be looked upon with distrust. But the suggestion does not go to the bottom of the question. A witness may be never more honest in giving his testimony, yet, after the lapse of time and increase of knowledge, he may desire to modify or altogether change the statements made by him as a witness in the case; and the adverse party may desire to cross-examine the witness more at length, or upon new points, and may be able thereby to change materially the probative force of the testimony previously given, and grounds of successful impeachment may be discovered after the former trial, which would be made available by presenting to the adversary party an opportunity to lay the foundation. These and other like considerations are not affected by the art of stenography, however perfect it is or may become. It is clearly the duty of the court, when engaged in the administration of justice, to see to it that the best and most reliable evidence obtainable is brought before it, and this can only be accomplished by requiring, as far as reasonably possible, the examination of witness from the stock of knowledge possessed by them and the parties at the time of the trial." The stenographer's notes, while doubtless accurate, do not have the degree of "circumstantial trustworthiness" which Prof. Wigmore regards as essential to the admission of secondary or hearsay evidence, which a deposition, carefully taken by a commissioner, read over to and signed by the witness, possesses. When a deposition is taken, the opposite party is put upon notice that it will probably be offered in evidence, and he is given an opportunity to prepare for trial in view of this fact. We think that upon the authority of the decisions cited and upon principle the defendants did not show to the court either the legal necessity for admitting the notes of Mrs. Wilson's testimony on the former trial, or that they had used due diligence in securing her deposition, or if the exigencies of the case rendered this impossible asking for a continuance of the cause. It was but just to the plaintiff and conducive to the due administration of justice that in some way the plaintiff should have been notified that the witness would not be present to testify, and that the stenographer's notes would be offered. We place our decision upon the general rule and the exception, subject to the limitation put upon it, and not because we have any thought that the learned counsel

for defendants were not acting in perfect good faith in offering the testimony. To enlarge the exception or relax the conditions upon which it may be invoked would endanger the integrity of the rule itself and the rights of parties in trials before juries. *State v. King*, 86 N. C. 603, does not conflict with the conclusion reached by us.

While not next in order, we deem it convenient to consider the exception and assignment of error pointed to his honor's charge upon the contention that Col. Moore, the grantee, executed and delivered to Mrs. M. E. Smith and plaintiff a lease of the property for their joint lives and the life of the survivor. The plaintiff introduced a paper writing signed by Roger Moore, bearing date March 15, 1885, leasing to plaintiff and her mother the property in controversy, reserving a nominal rent. The testimony showed that this paper was in the handwriting of Mr. Cutlar, who drew the deed of March 4, 1885. It was witnessed by him and admitted to probate and registration by defendants April 11, 1907, upon proof of his handwriting; he having died prior thereto. The evidence tended to show that Col. Moore was the general agent of Mrs. Smith, and that he kept in his possession, as such agent, her papers; that it was the purpose of Mrs. Smith to reserve in said property an estate for the life of herself and her daughter, the plaintiff, and of the survivor. The evidence tended to show that some time after the death of Col. Moore the lease was found in his iron safe, in a bundle of papers in an envelope. The words "Mary E. Smith and Louise B. Smith" where written on the envelope, which was in a tin box containing some silver, etc., the property of Mrs. Smith. The papers were found in Col. Moore's office. The lease was tendered to plaintiff after the death of Col. Moore, and she declined to receive it. It does not appear that either Mrs. Smith or plaintiff ever had possession of it. There was very much evidence in regard to the conduct of the parties and their counsel, respecting the possession, etc., of the lease; defendants insisting that the lease was executed by Col. Moore pursuant to the terms of Mrs. Smith's and plaintiff's contract with him, for the purpose and having the effect of vesting in them a life estate in the property, and that the evidence showed a delivery by Col. Moore by placing it in an envelope in his safe among the other papers, etc., of Mrs. Smith; that Col. Moore, being the agent of Mrs. Smith, held the actual possession of the paper for her benefit. Plaintiff denied that such was the contract, contending that she knew nothing of the execution or existence of the lease; that her mother and herself thought that they signed a will, and never intended to sign a deed conveying the property. It thus became material to inquire as an evidentiary fact relevant to the issue whether the lease had been delivered either to Mrs. Smith or the plaintiff. Mrs.

Smith and Mr. Outlar being dead, it was impossible to show by direct evidence what was done by them in respect to the lease. The offer to deliver it to the plaintiff by defendants, after the death of Col. Moore, throws but little, if any, light upon the question. His honor instructed the jury: "That Roger Moore could not deliver the lease from him to the plaintiff and her mother by simply putting the lease among their papers, but, in order to make it effective, the jury must find from the evidence that the lease was delivered to them personally, or to their duly authorized agent, and that agent must be some one other than Col. Moore, and a delivery to Mrs. Smith would not be a valid delivery to the plaintiff, Louise, unless the jury should find that Mrs. Smith was authorized by the plaintiff to accept the lease for her." This instruction is assigned as error. What constitutes delivery of a deed is a mixed question of law and fact. When the conduct of the parties leaves the question of delivery in doubt, their intent, gathered from their conduct and declarations, control. It is in all cases essential to the delivery of a deed that it pass out of and beyond the control of the grantor, and into the actual or constructive control of the grantee. So long as the grantor retains control or the power to recall the possession of the paper, it cannot be said to have been delivered. The custody of the deed may remain with the grantor, provided the control or power to recall it has passed from him. There must be not only a parting with control of the deed by the grantor with the present intention that it shall operate as a conveyance of the land, but there must likewise be an acceptance, either by the grantee or by some one for him. *Devlin on Deeds*, § 278 et seq. In this case the burden of proof to show that the lease was delivered to Mrs. Smith by Col. Moore was on the defendants. We concur with his honor that such delivery was not shown in the absence of any evidence that Col. Moore was authorized to receive it, as her agent, from himself. If Mrs. Smith or the plaintiff was claiming under the deed, and the jury found the facts set out in the record to be true, and that Col. Moore intended, by his act, to put the deed beyond his legal control, they would be justified in presuming that Mrs. Smith assented to the act as and for her benefit. In the aspect in which the question is presented here, no such presumption can be indulged. It was his duty to have had the lease registered—which act would have placed his intention beyond question—or to have delivered it to the parties interested. He was, in the view most favorable to the plaintiff's contention, the agent of Mrs. Smith and his retention of the lease under his control, without registration, falls short of showing a valid, lawful delivery. We do not find any error in his honor's instructions regarding the weight to be given by the jury to the

evidence concerning the lease. The failure to have it registered was a circumstance which the jury could consider upon the issue of fraud.

The other assignments of error relate to his honor's charge upon the question of fraud in the light of the evidence tending to show that at, before and after the execution of the deed Col. Moore was the general agent of Mrs. Smith. His honor said to the jury: "When one is the general agent of another, and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud as a matter of law, arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted."

"That if the jury find from the evidence that Roger Moore was the general agent of the plaintiff and her mother in the management of this property at the time he procured the deed to be executed, then the law presumes that the transaction was fraudulent, and unless the defendants have satisfied you, from all their evidence, by the greater weight of the evidence, that the transaction was open, fair and honest, it would be the duty of the jury to answer the issue 'Yes.'"

"If the jury find by the greater weight of the evidence that Roger Moore at the time he procured the deed from the plaintiff and her mother was the general agent of the plaintiff and her mother, in the management of their property and affairs, and that they relied upon him for his advice in their business transactions, and that this relationship existed at the time he procured the deed, then the law presumes that the deed was obtained fraudulently, and the burden would be on the defendants to show that Roger Moore obtained the deed fairly; and, unless the defendants have satisfied you that the deed was obtained fairly by the greater weight of the evidence, it would be your duty to answer the issue 'Yes,' because, when such an agent deals with his principal in a transaction by which he is to be benefited, and the transaction is questioned by his principal, the fiduciary relationship being established, the law puts the burden on such agent to show there was no fraud, and if you find, by the greater weight of the evidence, that Roger Moore at the time he procured the deed was such general agent, then the burden is on the defendants to satisfy you by the greater weight of the evidence that the deed was obtained fairly, and, unless you are so satisfied, you should answer the issue, 'Yes,' even though you should be of the opinion that the plaintiff has not shown that any fraud was committed."

The learned counsel for defendants contend that these instructions are not in accord with the opinion in this cause on the former

appeal. 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684. We have examined the careful and well-considered language of Mr. Justice Walker in the case as reported in that appeal. It was our purpose, and we think that the language correctly expressed it, to adhere to the law as laid down by Pearson, C. J., in *Lee v. Pearce*, 68 N. C. 76. In that case it is said: "After a full consideration of the authorities, and 'the reason of the thing,' we are of the opinion that only 'the known and definite fiduciary relations' by which one person is put in the power of another are sufficient under our present judiciary system to raise a presumption of fraud, as a matter of law, to be laid down by the judge as decisive of the issue, unless rebutted." Among "the known and definite fiduciary relations," the chief justice says that, "When one is the general agent of another and has entire management so as to be, in effect, as much his guardian as the regularly appointed guardian of an infant," the presumption applies. It is conceded that there is evidence tending to show that the relations existing between Col. Moore and Mrs. Smith and plaintiff were within the language quoted. In *McRae v. Battle*, 69 N. C. 98, the doctrine of *Lee v. Pearce* was argued by learned and eminent counsel, and adhered to by the court; Pearson, C. J., saying: "The relation raises a presumption of fraud which annuls the act, unless such presumption is rebutted. The doctrine rests on the idea not that there is fraud, but that there may be fraud and gives an artificial effect to the relation beyond its natural tendency to produce belief. The doctrine was adopted from motives of public policy to prevent fraud, as well as to redress it, and to discourage all dealings between parties standing in these fiduciary relations." *Lee v. Pearce* has been cited with approval in *Harris v. Carstarphen*, 69 N. C. 416; *Timmons v. Westmoreland*, 72 N. C. 587; *Edgerton v. Logan*, 81 N. C. 172; where the relation was attorney and client. Smith, C. J., citing *Lee's Case*, italicizes the words "presumption of fraud as a matter of law." *Wessell v. Rathjohn*, 89 N. C. 377, 45 Am. Rep. 696, and many other cases. It is the controlling authority with us. We think that his honor's instruction to the jury is in accord with the law and the decisions of this court. There was much evidence strongly tending to rebut the presumption showing that the entire transaction originated in the mind of Mrs. Smith, and that both Col. Moore and the attorney selected by her to draw the paper acted in perfect good faith. She writes Mr. Outlar on March 2, 1885: "It is my first and greatest wish, should I outlive my only remaining child, that my house and lot on Red Cross and 2nd street shall descend to my son-in-law Roger Moore and his children. His loving kindness and sympathy to me in all time of trouble unswerving and in all times of need, his hand

and his alone has been stretched out for my help and comfort. He has buried my dead, paid my taxes and insurance for twenty years. \* \* \* Another strong claim in his favor is from his child, my grandchild lately dead." So far as this record shows, no word had passed between Col. Moore and Mrs. Smith in regard to her property at the time she wrote this letter. The gentleman to whom it was addressed was an attorney of the highest character and professional skill. There is ample evidence to sustain the statements made in the letter. It is not claimed that there was any secrecy in the manner, time, or place of executing the deed. It was placed on record January 23, 1886. It is one of the tragedies so frequently occurring in human life that a transaction, originating in the most benevolent and kindest motives, concludes in dissension and rupture of the ties of family and friendship. The evidence taken as a whole falls far short of showing that any fraud was committed or intentional wrong done by those who have passed away. That a mistake was made in interpreting Mrs. Smith's purpose, that a will was intended to be executed by her and so understood by the plaintiff, and not a deed as understood by her attorney and Col. Moore, is not impossible or improbable. That the lease was prepared and signed securing to Mrs. Smith and the plaintiff the possession and enjoyment of the property is conceded. Unfortunately it was not registered, and, as we have seen, its delivery not established. While we find no error in the conduct of the trial entitling the defendants to a new trial, we think that, in view of the fact that in neither appeal has it been necessary to set out the testimony, it is but just to the dead, whose conduct has come under investigation, to say that we think that the verdict of the jury (as in the second trial, 145 N. C. 269, 59 S. E. 63) was founded upon the presumption of law as to which they were correctly instructed by the court. We have given to the entire record our most anxious and careful consideration. The testimony and contentions of the parties were fairly submitted to the jury. As we have endeavored to show, his honor's rulings are in accord with the decisions of this court. It may not be improper to say in conclusion that the wisdom of the law discouraging transactions between persons occupying fiduciary relations, whereby any advantage is gained by the one whose duty it is to protect the other is illustrated in this case. It was, in the light of the defendants' contention, the manifest duty of Col. Moore to have registered the lease for the protection of Mrs. Smith and the plaintiff. His failure to do so, however free from intentional wrong, exposed the home and other property of these aged and infirm ladies to be sold at any time during his life or since his death. The lease was invalid, until registered, against the deed as to purchasers for value and creditors. The law

seeks to enforce the elementary truth that men should not have "a divided duty" or occupy antagonistic relations towards those who have intrusted to their care important interests.

There is no error.

### HALL v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. DEATH (§ 39\*)—TIME TO SUE.

Under Revisal 1905, § 59, giving a right of action for negligent death, to be brought within a year thereafter by decedent's personal representative, where a foreign administrator who had commenced an action for negligent death thereafter qualified as a domestic administrator, and became a party to the action by amendment, but not until after a year from decedent's death, the action by him, as domestic administrator, was barred.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 54, 55; Dec. Dig. § 39.\*]

#### 2. DEATH (§ 31\*)—PERSONS ENTITLED TO SUE—FOREIGN ADMINISTRATOR.

A foreign administrator cannot sue in the state for the negligent death therein of his intestate by virtue of Revisal 1905, § 59, giving a right of action for negligent death to be brought by decedent's personal representative.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 38, 39; Dec. Dig. § 31.\*]

Appeal from Superior Court, Person County; E. B. Jones, Judge.

Action for death by R. J. Hall, administrator, against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

B. S. Royster and E. P. Buford, for appellant. W. B. Adams, A. B. Andrews, Jr., and P. H. Busbee, for appellee.

**WALKER, J.** This case was before us at the fall term, 1907, and is reported in 146 N. C. 345, 59 S. E. 879. We then dismissed the appeal of the defendant as having been improperly taken, but intimated that the plaintiff could not maintain this action. The plaintiff, who had qualified as administrator in the state of Virginia, brought this suit to recover damages for the negligent killing in this state of his intestate by the defendant. Since the decision in the former appeal the plaintiff has qualified as administrator in this state, and has become a party to this action and an amended complaint has been filed, stating the fact of his qualification, and further alleging that the death of the intestate was caused by the defendant's negligence; the allegations in this respect being similar to those of the first complaint. As the plaintiff did not qualify as administrator of the intestate in this state until after the commencement of this suit and the expiration of one year from the death of his intestate, he cannot maintain this action as such administrator. This is

settled by the recent decision of the court in *Gulledge v. Railway*, 147 N. C. 234, 60 S. E. 1134, approving *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997; *Taylor v. Cranberry Co.*, 94 N. C. 526; *Roberts v. Insurance Co.*, 118 N. C. 434, 24 S. E. 780; *Taylor v. Parker*, 137 N. C. 418, 49 S. E. 921. See, also, *Gulledge v. Railway* (at this term, on rehearing), 62 S. E. 732, where the question is fully considered by Justice Brown, with a full citation of the authorities. The action by the plaintiff as administrator, qualified in this state, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint. *Hester v. Mullen*, 107 N. C. 724, 12 S. E. 447. Indeed, the court should not have allowed the amendment, but the plaintiff, under his qualification as administrator in this state, should have been required to bring a separate and independent action.

The plaintiff contends, however, that he is entitled to recover in his capacity as administrator by virtue of his qualification in Virginia. We adhere to the opinion expressed in the former appeal, that, by virtue of his qualification in Virginia, the plaintiff cannot maintain this action. The statute under which this suit was brought is, of course, not penal, but remedial, in its nature, and we should give it such a construction as will effectuate the intention of the Legislature in enacting it. It creates a new cause of action not existing at the common law, and allows damages for the death of a person which is caused by the wrongful act, neglect, or default of another, but requires that the action shall be brought by the executor, administrator, or collector of the decedent. Can it be that this refers to a foreign administrator? We think not, but that the reference is to a representative appointed by a local court. *Vance v. Railway*, 138 N. C. 460, 50 S. E. 860; *Hartness v. Pharr*, 133 N. C. 566, 45 S. E. 901, 98 Am. St. Rep. 725. In the absence of any intimation to the contrary, this is the clear meaning of the statute, and we think that it has been regarded as the true construction of similar statutes by the courts of other states. In *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674, we held that Revisal 1905, § 59, by which a cause of action is given for the death of a person caused by a wrongful or negligent act, impresses upon the right of action the character of property for the purpose only of distribution here, under the provisions of the statute in cases of intestacy, and that the rights of the beneficiaries should be determined as of the time of the testator's death. It is no part of the estate, as assets for the purpose of paying debts. *Hartness v. Pharr*, supra.

It is hardly necessary to add much, if anything, to what we said in our former opinion, as we then considered the question fully,

citing authorities which we think sustain our position. But, as the right of action arises under the statute of this state, where the death occurred, if the meaning of the statute is that an administrator appointed in this state is the only person who can sue, and we so hold, decisions in other states, even if they permit a recovery by a foreign administrator, can be of little aid to us. We have carefully examined the numerous cases cited by Mr. Buford (who evidently prepared his brief with great diligence and argued the case before us with much ability and learning), and we have been able to find none which conflicts with our view of the law. Counsel insisted that the case of *Railroad v. Brantley*, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291, cited in the former opinion, does not apply to this case. But it will be found by a careful reading of the opinion that the court held the "doctrine to be universal that an administrator appointed in a foreign state can maintain no action in another state, unless authorized by statute, and, if there is no authority given the foreign administrator to sue here (in Kentucky) in such a case as the one presented, the general demurrer should have been sustained"; and, secondly, that the statute of that state authorizing a foreign administrator to sue for "debts" due the decedent does not authorize a foreign administrator to prosecute an action for a tort. "The mere right to recover for a tort is not, and cannot be, regarded as assets to which the foreign administrator has title or the right to convert into a debt by a judgment. This right is denied him by the statute." In *Wooden v. Railroad*, 126 N. Y. 16, 28 N. E. 1051, 13 L. R. A. 458, 22 Am. St. Rep. 803, relied on by the plaintiff, the court says: "It is claimed, however, that even in that event the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff not as widow, but as administratrix, to which office she has been appointed in this state. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons: One, that the party defendant may not be subjected to different and varying responsibilities; and, the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our

law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and therefore must be prosecuted here in the name of the party to whom alone belongs the right of action." It appears in *Brown v. Railroad*, 97 Ky. 228, 80 S. W. 639, which we have already cited, that a previous action had been brought in Kentucky by the foreign administrator of the person who was killed in that state by the defendant's negligent act, and was dismissed by the court upon the ground that a foreign administrator could not sue, on a demand of this kind, under the statute in Kentucky. We have not been able to find a case like the one at bar, in which a foreign administrator was permitted to sue in a court of a state where there was no statute permitting him to do so. The Indiana cases are decided upon a construction of the statute of that state allowing foreign administrators to sue in its courts.

Whether, if the death had occurred in Virginia, the plaintiff as a foreign administrator could have sued the defendant in our courts, under the statute of Virginia, assuming that it is substantially like ours, is a question which is not before us now.

The defendant demurred to the complaint as amended, the demurrer was sustained, and the action dismissed. In this ruling of the court we concur.

Affirmed.

#### DAVIS v. STEPHENSON.

(Supreme Court of North Carolina. Nov. 19, 1908.)

##### 1. ACCOUNT STATED (§ 20\*)—QUESTION FOR JURY.

Whether an account rendered and kept by the debtor for a reasonable time without objection to it thereby became an account stated was for the jury.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. § 40; Dec. Dig. § 20.\*]

##### 2. TRIAL (§ 258\*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

In an action on an account, a mere contention of plaintiff's counsel during the trial that there was an account stated by reason of defendant's failure to object within reasonable time after it was rendered cannot be regarded as a request for an instruction on such issue.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 258.\*]

##### 3. APPEAL AND ERROR (§ 928\*)—PRESUMPTIONS—INSTRUCTIONS NOT IN RECORD.

Where it is stated in the record that the court called the attention of the jury to an issue, it must be assumed on appeal that the instruction in such issue was correct when it is not set out in the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3760; Dec. Dig. § 928.\*]

##### 4. ACCOUNT STATED (§ 6\*)—FAILURE TO OBJECT TO ACCOUNT.

When an account is rendered, a failure to object to it within reasonable time will be re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

garded as an admission of its correctness by the party charged.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 31; Dec. Dig. § 6.\*]

**5. ACCOUNT, ACTION ON (§ 7\*)—EVIDENCE—COMPETENCY OF PLAINTIFF.**

In an action on an account, evidence as to plaintiff's habit of drinking liquor excessively was admissible to show that plaintiff was not competent to transact business, or to keep the account correctly.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 7.\*]

Appeal from Superior Court, Union County; Long, Judge.

Action by D. S. Davis against A. J. Stephenson. From a judgment for defendant, plaintiff appeals. No error.

This action was brought to recover the amount of an account for goods sold and delivered to the defendant, cash advanced and money paid for him at his request; the amount claimed by the plaintiff being \$171.75. There were two accounts, one for \$128.59 and the other for \$43.16. The defendant denied his liability, and set up a counterclaim for \$39.08. The issues submitted with the answers thereto were as follows:

"(1) In what amount, if any, is the defendant indebted to the plaintiff? Ans. None.

"(2) In what amount, if any, is the plaintiff indebted to the defendant on his counterclaim? Ans. \$10."

There was a motion by the plaintiff for a new trial, which was overruled. Judgment was entered upon the verdict for the defendant, and the plaintiff appealed.

A. M. Stack, for appellant. Williams & Lemmond, for appellee.

**WALKER, J.** (after stating the facts as above). There was evidence in support of the contentions of the respective parties. The plaintiff contended during the course of the trial that the account for \$128.59 had been rendered to the defendant, that he kept it a reasonable time and failed to object to it, and it thereby became an account stated, and he now complains and excepts because the court refused to charge in accordance with that contention. There are two reasons why this exception cannot be sustained. In the "contention," as it is called, the plaintiff assumes as a fact that the account was rendered, and there was no objection to it within a reasonable time. There was evidence, and very strong evidence, it may be conceded, of the fact, but it was for the jury to find the fact from all the evidence. The second reason is that there was no request for an instruction, and a mere "contention" of counsel during the trial cannot be regarded as a compliance with the statute. But it is stated in the record that the court had "called the attention" of the jury to this matter—that is, had instructed them about it—and we must assume here that the instruction

was correct, when it is not set out in the case. The court then proceeded to charge the jury as follows: "The plaintiff insists that if there was the statement of account submitted to the defendant, which he promised to pay, if that is so, that would establish that \$128.59. If he assented to it, he would be obliged to pay it. There would be no presumption of law about it. If it was submitted to him, and accepted by him, it would devolve upon him to pay it. That is one of the contentions between plaintiff and defendant. Plaintiff says it was submitted to him, and he agreed to pay it. The defendant says it is not so. It was not submitted to him, and was not agreed to by him." To this instruction the plaintiff excepted. We can see no inherent error in this instruction. Indeed, the court charged the jury in accordance with the plaintiff's contention, as it is stated by the court in that part of the charge we have quoted.

If the account was presented for \$129.76 and a demand made for that amount, as stated in the defendant's "contention," and of which there was evidence in the case, it was incorrect, as the amount now appears to be only \$128.59. Besides, the defendant did dispute the account, and asked for a settlement as soon as he could find the plaintiff sober and in a condition to transact business. It is true that, "when an account rendered is not objected to in a reasonable time, the failure to object will be regarded as an admission of (or assent to) its correctness by the party charged." *Hawkins v. Long*, 74 N. C. 782; *Daniel v. Whitfield*, 44 N. C. 297; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884. In *Webb v. Chambers*, 25 N. C. 374, *Ruffin, C. J.*, thus states the rule: "There can be no doubt of the correctness of the opinion given to the jury. It is the ordinary evidence of the justice of a merchant's account when he renders it to his customer and the latter keeps it without objection to any of its items. Without a denial of it in toto or of some part of it, the jury may infer an admission of its correctness and a promise to pay the balance." It is expressed in *Gooch v. Vaughan*, 92 N. C. 617, as follows: "The account rendered and the long delay in objecting to it on account of suggested errors therein do not necessarily conclude Gooch. The strong presumption is that he examined and accepted it as correct, and he is bound by it, and it ought not to be disturbed, unless he shall allege and prove some substantial error, mistake, omission, or fraud vitiating it. This he has the right to do, if he can, and, in case of success, to have just correction made. The burden is on him to prove such allegation." But, however the rule is stated, we do not think it applies to this case, in view of its facts and circumstances. It also appears that the court did in fact charge the jury that, if they found from the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence the defendant had assented to the plaintiff's account as rendered, "he would be obliged to pay it." We do not see why the evidence as to the plaintiff's habit of drinking liquor excessively was not competent and relevant. It was offered for the purpose of showing that the plaintiff was not competent to transact business or to keep the account correctly. The court admitted it for that purpose alone, and we think it was some evidence for the consideration of the jury upon that question in dispute between the parties. It was competent also for other reasons.

No error.

# **PICKLER et al. v. BOARD OF EDUCATION OF DAVIE COUNTY.**

(Supreme Court of North Carolina. Nov. 19, 1908.)

## **1. INJUNCTION (§ 36\*)—SCHOOL BOARD—ERECTION OF BUILDING.**

Under Revisal 1905, §§ 4116, 4121, 4124, the duty of dividing townships into school districts and the erection and maintenance of school buildings is left to the judgment of the school board, and, in the absence of misconduct, their action cannot be restrained by courts unless in violation of statute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 59½; Dec. Dig. § 36.\*]

## **2. SCHOOLS AND SCHOOL DISTRICTS (§ 68\*)—ERECTION OF BUILDINGS—AUTHORITY OF BOARD OF EDUCATION.**

Revisal 1905, § 4129, providing that the county board of education shall establish no new school in any township within less than three miles of some school already established in said township, does not prohibit the board from repairing or building a new house on the site where a school has long been established.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 68.\*]

Appeal from Superior Court, Davie County; Long, Judge.

Suit by L. J. C. Pickler and another against the Board of Education of Davie County to restrain the erection of a new school building. From a judgment dissolving a temporary restraining order, plaintiffs appeal. Affirmed.

Burton Craig and Jacob Stewart, for appellants. E. L. Gaither and T. B. Bailey, for appellees.

CLARK, C. J. Revisal 1905, § 4129, provides that the county board of education, upon whom is placed the duty of dividing the townships into school districts, "shall establish no new school in any township within less than three miles, by the nearest traveled route, of some school already established in said township." The public school district of Cherry Hill, Davie county, was laid off, site bought, and building erected 50 or 60 years ago. It is now nearer than three miles to another public school. The building need-

ing repairs, an effort was made to induce the defendant board to remove the site and build a new schoolhouse at another point a mile away. After hearing those in favor of and those opposed to the removal, the board decided not to change the site, and, instead of repairing, to build a new school building at the old site. The plaintiffs obtained a temporary restraining order, which, on affidavits filed and after hearing, was dissolved by Judge Long.

There was no error. The duty of dividing the townships into school districts and the erection and maintenance of school buildings is left to the judgment of the school board, Revisal 1905, §§ 4116, 4121, 4124. There being no allegation of misconduct, their action cannot be supervised nor restrained by the courts unless in violation of some provision of the statute. Smith v. School Trustees, 141 N. C. 160, 53 S. E. 524. It does not appear whether the other schoolhouse, "nearer than three miles," was erected before, or since, this was erected at Cherry Hill 50 or 60 years ago; but, at any rate, the prohibition that the board "shall establish no new school in any township within less than three miles, by the nearest traveled route, of some school already established in said township" cannot be construed to prohibit the board from repairing, or building a new house, on the site where a school has long been established.

Pending the appeal the new schoolhouse has doubtless been built. If that appeared, we would not decide an abstract question.

In any event, the judgment dissolving the restraining order should be affirmed.

# **VENABLE v. SCHOOL COMMITTEE OF PILOT MOUNTAIN.**

(Supreme Court of North Carolina. Nov. 19, 1908.)

## **1. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—REBUILDING SCHOOLHOUSES—CHANGING SITES—JUDICIAL INTERFERENCE.**

The rebuilding of a schoolhouse and the changing of school site are matters vested by the statute in the sound discretion of the school committee, and will not be interfered with by the courts unless there is a violation of law, or unless the committee was influenced by improper motives, or there was misconduct on their part.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 174; Dec. Dig. § 69.\*]

## **2. APPEAL AND ERROR (§ 1008\*)—FINDINGS—CONCLUSIVENESS.**

The Supreme Court, on appeal from a judgment dissolving an injunction restraining a school committee from changing the school site and rebuilding a schoolhouse, is not bound by the facts found by the trial judge, but may review the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.\*]

**3. OFFICERS (§ 110\*)—JUDICIAL CONTROL—PERSONAL INTEREST OF OFFICER—INTERFERENCE WITH ADMINISTRATIVE OFFICERS.**

Courts are astute to impeach and invalidate any transaction where an official has any personal interest in the matter decided by him.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 110.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—CHANGING SCHOOL SITE—VALIDITY.**

The fact that the brothers of two of the school committee contributed to the purchase of a new school site does not per se invalidate the action of the board changing the site, in the absence of any evidence that they influenced any member thereof.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 69.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 69\*)—CHANGING SCHOOL SITE—VALIDITY.**

The fact that a member of the school committee purchasing a lot for a new school site, in consideration of a conveyance of the old site and the payment of a specified sum in cash donated by the citizens, contributed to the donated sum, does not invalidate the transaction; the old site being conveyed for full value, and the new site being purchased at its fair value.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 69.\*]

Appeal from Superior Court, Surry County; E. B. Jones, Judge.

Action by S. H. Venable against the School Committee of Pilot Mountain. From a judgment for defendant, plaintiff appeals. Affirmed.

L. M. Swink, for appellant. Lindsay Patterson, for appellee.

CLARK, C. J. The school building at Pilot Mountain was burnt down. It stood on a four-acre lot on the edge of town. A large majority of the citizens (four-fifths) presented a petition to the defendant, asking that the new building be erected near the center of the town, on a lot of one acre, which could be bought for \$400. It was proposed to raise the \$400 by popular subscription and convey the new lot to the school committee, provided the latter would convey the old lot to the donors in exchange. The value of the old lot was estimated to be \$300; the transaction being practically a contribution of \$100 by those desiring a change of site. Those opposing the change of site procured a temporary restraining order, alleging that three of the defendant board were interested in having the exchange of lots made. On a motion to dissolve the restraining order, the motion was allowed; the court finding as facts: That the site of the school was changed, upon petition of about four-fifths of the citizens of Pilot Mountain, to the new lot near the center of the town, which was bought for \$400, to be conveyed to the school committee in exchange for the old lot. That one member of the school committee contributed \$20 to raising the \$400 to buy the new lot. That no other member of the defendant committee contributed, though the brother of one of the others subscribed \$75 towards the purchase

of the new lot, and the brother of another member subscribed \$30 and was owner of part of the new lot which is to be conveyed to the school committee upon payment for it out of the \$400 fund to be raised by the citizens for that purpose. The court found as a fact that there was "no fraud or collusion on the part of the committee, and that the members of the defendant committee have no financial interest in the change from the old site to the new, except as above stated," and that "the change of sites is in accordance with the wishes of a majority of the patrons of the school and to the best interests of the school."

This is a contest between those favoring and those opposing the removal of the school and rebuilding it on a new site. The rebuilding of the school and the change of site are matters vested by the statute in the sound discretion of the school committee, and not to be restrained by the courts, unless in violation of some provision of law (*Pickler v. County Board* [at this term] 62 S. E. 902), or the committee is influenced by improper motives, or there is misconduct on their part (*Smith v. School Trustees*, 141 N. C. 160, 53 S. E. 524). The court below having found that there was no fraud or collusion, and that the change of site was in accordance with the wishes of a majority of the patrons of the school and to the best interests of the school, this court cannot reverse that judgment or interfere with the removal, unless we could find that upon the evidence or on the facts found there was fraud or collusion. In a matter of this kind, we are not bound by the facts found by the judge, but can review the evidence ourselves.

The courts are astute to impeach and invalidate any transaction where an official has any personal interest whatever in the matter decided by him. The very "appearance of evil" must be avoided; but here the fact that the brothers of two of the committee contributed to the purchase of the new site cannot be held per se any interest invalidating the action of the board, in the absence of any evidence whatever that they influenced any member of the board. The affidavits for plaintiffs are chiefly as to disadvantages of removal, which is a matter for the defendant. There is nothing to authorize a finding that the old lot was worth more than \$300, nor that the new lot was worth less than \$400, nor that any member of the committee had any financial interest whatever in the exchange of lots. In a small town the raising of \$400 to buy the new lot could hardly have been possible if every one related to either of the five members of the school committee was prohibited from contributing. As the new lot conveyed to the school committee required the raising of \$400 cash, and the old lot, worth \$300 (and there is no evidence or finding impeaching these values), was conveyed in exchange, it cannot be seen



how the contribution by one member of the board of \$20 towards the purchase of the lot to be donated to the board created any interest invalidating the action of the board. The transaction was practically a sale of the old lot, worth \$800, for its full value, and the investment of that money and \$100 more donated by citizens in the purchase of the new lot at \$400, its fair value, or it was the sale of a \$300 lot for \$400 cash and its investment in the new lot. The contributor of \$20 was not profiting, but giving.

The judgment dissolving the restraining order is affirmed.

**HENDERSON-SNYDER CO. v. POLK,**  
(Supreme Court of North Carolina. Nov. 19, 1908.)

**1. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.**

Where the evidence in support of a fact, though slight, was fit for the consideration of the jury, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**2. EVIDENCE (§ 253\*)—ADMISSIONS—CONSPIRATORS.**

Where a mortgagor and the senior mortgagee conspired to have the property sold at an undervaluation, and thereby defeat the rights of the junior mortgagee, the acts and declarations of the mortgagor in furtherance of the common design were admissible against the senior mortgagee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994, 996; Dec. Dig. § 253.\*]

**3. EVIDENCE (§ 260\*)—ADMISSIONS—CONSPIRATORS—PROOF OF CONSPIRACY.**

Evidence held to show a common purpose of a chattel mortgagor and the senior mortgagee to make a sham sale of the mortgaged chattels to defeat the rights of the junior mortgagee, authorizing the admission in evidence of the acts and declarations of the mortgagor in furtherance of the common design.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1010; Dec. Dig. § 260.\*]

**4. EVIDENCE (§ 253\*)—ADMISSIONS—CONSPIRATORS.**

Where two or more persons combine for any illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the res gestæ, may be given in evidence against the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994, 996; Dec. Dig. § 253.\*]

**5. EVIDENCE (§ 253\*)—ADMISSIONS—CONSPIRATORS.**

Substantially the same rule applies in criminal and civil cases as to the admissibility of acts and declarations of one conspirator as original evidence against each member of the conspiracy.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 253.\*]

**6. CHATTEL MORTGAGES (§ 262\*)—"SALES AT AUCTION"—VALIDITY.**

A sale of mortgaged chattels at auction is a sale to the highest bidder, its object a fair price, and its means competition; and any agreement to stifle competition is a fraud, and the act of the mortgagor in trying to induce persons

not to bid, stating that it was a sham sale, is improper.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 262.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 637, 638.]

Appeal from Superior Court, Union County; E. B. Jones, Judge.

Action by the Henderson-Snyder Company against J. A. Polk. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover the possession of a mule. The plaintiff claimed the mule under a mortgage of J. Lee Polk to it and the defendant under a mortgage from J. Lee Polk of prior date which conveyed two mules, one of which is the mule in controversy. The defendant alleged that the note and mortgage under which the plaintiff claimed were given to suppress a criminal prosecution, and, further, that the two mules had been sold under the senior mortgage at a fair sale and purchased by him. The plaintiff denied that the consideration of the debt and mortgage held by it was the suppression of a criminal prosecution, and alleged that, at the sale under the senior mortgage, there was a fraudulent suppression of biddings for the purpose of defeating its rights under the junior mortgage. The issues submitted to the jury, with the answers thereto, were as follows:

"(1) Was the agreement to nol. pros. the criminal prosecution against J. Lee Polk any part of the consideration in execution of the note and mortgage sued on? Answer. No.

"(2) Was the bidding at the sale by the mortgagee, J. F. Doster, chilled and suppressed by the conduct of J. Lee Polk with the knowledge and consent of J. A. Polk, and did the defendant, J. A. Polk, purchase the property sold at an inadequate price? Answer. Yes.

"(3) What was the value of said mules on the day of sale? Answer. \$250.

"(4) Is plaintiff the owner of and entitled to the possession of the mule described in the pleadings? Answer. Yes.

"(5) What is the value of said mule? Answer. \$125."

The defendant, in apt time, requested the court to instruct the jury as follows:

"(1) There is no evidence from which the jury can find that the defendant, J. A. Polk, did anything or used any words calculated to chill or stifle biddings at the said sale (under the senior mortgage), and the jury should answer the second issue, 'No.'

"(2) If the jury believe the evidence, they should answer the first issue, 'Yes.'"

The court refused to give either of the instructions, and the defendant excepted. The defendant objected to the submission of the second issue, the objection was overruled, and the defendant excepted. Judgment was rendered upon the verdict for the plaintiff.

and the defendant appealed. The other facts are stated in the opinion of the court.

Redwine & Sikes, for appellant.

**WALKER, J.** We have carefully examined the testimony in this case, and think there was at least some evidence that the plaintiff's mortgage was not given to procure the withdrawal of the criminal prosecution, or, in other words, that the suppression of the prosecution was not the consideration of the debt and the mortgage securing its payment. There was some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage. The evidence may have been slight, but it was fit for the consideration of the jury in our opinion.

The defendants objected to the evidence as to the declarations of J. Lee Polk as to the suppression of biddings at the sale under the senior mortgage, upon the ground that it was hearsay, and therefore not competent against J. A. Polk, but the evidence tends to show that J. Lee Polk and J. A. Polk, the latter being the father of the former, were acting together in making the sale; the mortgagee, J. F. Doster, having little or nothing to do with it. There were facts and circumstances the jury might well find to have existed and relations and conduct of the parties, which tend to show that the sale was not a fair one, but that J. Lee Polk and J. A. Polk had conspired for the purpose of having the property sold at an undervalue, so as to defeat the plaintiff's rights under his mortgage. This made competent the acts and declarations of J. Lee Polk in furtherance of the common design. The jury found that it was a collusive sale, and upon evidence, as we think, which justified the finding. That J. Lee Polk acted with the full knowledge and consent of the defendant in all he did with respect to the sale seems to be clearly shown by the evidence. J. Lee Polk procured the bidder, a stranger who had no interest in the matter, but who really acted in the interest of J. A. Polk at the request of J. Lee Polk. The property sold was worth \$250, and was bought at the sale for \$100 and J. F. Doster's debt of \$75 was paid. J. A. Polk afterwards sold one of the mules for \$125, retaining the other one. There were other facts shown which tended to establish a common purpose to make a sham sale, and that it was understood how the illegal sale should be effected. "Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence." *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106. Judge Elliott thus states the rule in such cases: "It is perhaps the universal rule that any act

done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy, may be given in evidence against himself or his co-conspirators. This rule has been more aptly stated as follows: 'The law undoubtedly is that, where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ*, may be given in evidence against the other.' Of this rule the Supreme Court of Indiana said: 'The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one in furtherance of that design a part of the *res gestæ*, and therefore the act of all.' Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy." 4 Elliott on Evidence, § 2039; citing *Card v. State*, 100 Ind. 415, 9 N. E. 591. See, also, *Cuyler v. McCartney*, 40 N. Y. 221; *State v. George*, 29 N. C. 327; *Cabiness v. Martin*, 15 N. C. 110.

What J. Lee Polk said at the sale was calculated to deter others from bidding and to depress the price of the property. In express words, he tried to induce others not to bid, stating that it was a sham sale. "A sale at auction is a sale to the highest bidder, its object a fair price, its means competition. Any agreement to stifle competition is a fraud upon the principles on which the sale is founded." *Smith v. Greenlee*, 13 N. C. 126, 18 Am. Dec. 564; *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359.

We have found no reversible error in the other rulings of the court to which the defendant excepted.

No error.

## ROSENTHAL v. CITY OF GOLDSBORO.

(Supreme Court of North Carolina. Nov. 19, 1908.)

### 1. MUNICIPAL CORPORATIONS (§ 696\*)—USES OF PUBLIC PLACES—STREET—OBSTRUCTIONS—REMOVAL.

The decision of a municipal corporation that the removal of trees was necessary for the proper use of a street will not be interfered with by the courts, unless the action was so unreasonable as to amount to an oppressive and manifest abuse of the discretion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1498; Dec. Dig. § 696.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. MUNICIPAL CORPORATIONS (§ 696\*)—USES OF PUBLIC PLACES—STREETS.

The general power of a municipal government over its streets extends as well to the power to order removal of trees for the preservation of city sewers laid in the streets as for their removal as an obstruction to travel.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 696.\*]

## 3. EMINENT DOMAIN (§ 82\*)—COMPENSATION—ADDITIONAL USES.

A municipal corporation having a right, in its discretionary power to care for its streets, to order the removal of shade trees for preservation of sewers laid in the street, an abutting owner was not entitled to compensation for the trees removed, and therefore was not entitled to notice of the proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 82.\*]

Appeal from Superior Court, Wayne County; Gulon, Judge.

Action by Eva Rosenthal against the City of Goldsboro. Judgment for plaintiff, and defendant appeals. Reversed.

It appeared that the city authorities in charge and control of the matter, having concluded that the roots from certain shade trees along the streets of the city obstructed and threatened the safety of the city sewerage, ordered removal of the trees, and thereupon the plaintiff, owning and occupying a residence abutting on the streets, and which would be injuriously affected by the execution of the order, instituted the present suit to restrain the contemplated removal.

From the facts stated in the pleadings, and admitted by the parties in open court, it appeared:

"This cause coming on to be heard, and the pleadings being read, the defendant thereupon admits that the elm trees described in the complaint are no more obstruction to the free use of the streets and sidewalks for travel than any other trees located on the streets of the city, but reiterates its allegation that the said elms and all other elms of the city are nuisances, in that they obstruct the sewerage of the said city. The court thereupon, from the pleadings in the case and the admissions in open court, finds the following facts:

"(1) That the defendant is a municipal corporation, duly chartered and organized.

"(2) That the plaintiff is and has been for many years a resident of the said city, and owns and occupies a dwelling house situated on the eastern side of James street, in said city, and fronting about 105 feet on said street; that in front of said residence, and on the western side thereof, extending along the whole front thereof, and just inside the curb line of the sidewalk of said city, there have been for the last 20 years, and now are, seven or eight large handsome elm trees, planted by the plaintiff and those through whom she claims title to the said lot, which said trees add greatly to the appearance and enjoyment of her said premises,

and said trees make no more obstruction to the free use of the said sidewalk and street by the public for passage over it than is made by all other trees in said city.

"(3) That the plaintiff has a property right in said trees.

"(4) That about 12 years ago the defendant constructed in said city a general system of sewerage, a portion of which passed through the middle of the street in front of the premises of the plaintiff, and which is now, in use, that roots from some of the elm trees in the said city have penetrated in some portions of said city into the said sewer, and have thereby rendered the same less useful.

"(5) That the said city is the owner of a system of waterworks, supplying water to residents of said city for compensation, and furnishing water to the city for public use, which system of waterworks is used in connection with the said system of sewerage by both said city and the citizens thereof, both constituting one system for the purpose of furnishing water, and after its use for the purpose of carrying off same.

"(6) That on the 7th day of January, 1907, the defendant took action to cause the trees of the plaintiff and all other citizens of the town to be cut down and removed from the streets of the city, as appears from the minutes of the meeting of the board of aldermen of said city held on January 7, 1907, which is as follows: 'The street committee was empowered to have all the elm trees along the line of the city sewers removed, and chief of police instructed to employ a force of hands for that purpose, and to sell wood from said trees to help in defraying the expense of the removal of the same, having been condemned as injurious to sewers.' That, pursuant to said order, the authorities of the said city have cut and removed from the streets of said city a number of elm trees, and were, at the beginning of this action, threatening to cut down and remove the trees of the plaintiff. That the plaintiff had no other notice of the purpose to cut down her trees than arises from the knowledge of the existence of the said order, and afterwards an appearance by her agent before the board to effect a compromise, which was refused.

"(7) That no proceedings were had or begun to condemn plaintiff's trees, and no compensation was tendered or offered to her for their destruction.

"(8) That section 27 of the charter of the city of Goldsboro provides that, among the powers herein conferred on the board of aldermen, they shall provide water, provided for repairing and draining the streets, \* \* \* regulate, suppress, and remove nuisances. \* \* \*

"(9) That section 39 of the charter provides that the board of aldermen shall have power to lay open the new streets within

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the corporate limits of the city whenever by them deemed necessary, and have power at any time to widen, enlarge, change, or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the city, and shall have full power and authority to condemn, appropriate to use any land or lands necessary for any of the provisions named in this section.

"(10) That section 46 of the charter provides that the board of aldermen shall cause to be kept clean and in good repair the streets, sidewalks, and alleys. They may establish the width, ascertain the location of those already provided, and lay out and open up others, and may reduce or increase the width of all of them."

And it was thereupon considered and adjudged by the court: "That it is not within the power of the defendant to destroy the trees in which the plaintiff has a property right without just compensation to be ascertained upon due notice, and it is further considered and adjudged that the defendant be perpetually enjoined from proceeding to cut down said trees until and unless a proper proceeding is instituted to condemn the same. It is further adjudged that the plaintiff recover the costs of the defendant, to be taxed by the clerk."

Defendant excepted and appealed.

J. L. Barham, for appellant. Isaac F. Dortch and Aycock & Daniels, for appellee.

HOKE, J. (after stating the facts as above). The decisions of this state are against the plaintiff's position, and the ruling of the court below upholding it, notably the case of *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671. That was a case involving the right of a city to remove shade trees from the streets and sidewalks, and the court held as follows:

"(1) A city has exactly the same rights in and is under the same responsibilities for a street which it controls by dedication only as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned.

"(2) The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid.

"(3) The charter of the city of Greensboro and the general law of the state (2 Code 1883, c. 62) give to the municipal authorities of that city wide discretion in the control and improvement of its streets, and, if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*.

"(4) The courts will not interfere with

the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion."

In order to show how far the principle was applied in that decision, it appeared that the city authorities, having concluded that the trees from their shade and placing tended to prevent the proper maintenance of the streets in reference to the public benefit and convenience, ordered their removal, and on the hearing the judge found: "That the trees did not obstruct the passage of persons on the sidewalks; that the public convenience did not require their destruction; that the mudhole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting down the trees." And on the facts *Burwell, J.*, in his well-considered opinion, thus stated the question presented: "This phase of the case presents for our consideration this question: Can the courts review the exercise by the city of Greensboro of its power to repair and improve its streets and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city which the municipal authorities honestly believe were injurious and obstructive to the public were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?" And in reference thereto, among other things, said: "Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. Illustrative of this is the provision of Code 1883, § 3803, that the commissioners of towns 'shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best.' We think that under its charter and under the general law of the state (2 Code 1883, c. 62) the city of Greensboro was clothed with such discretion in the control and improvement of its streets, and, if damage comes to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria*. *Smith v. Washington*, 20 How. 135; 15 L. Ed. 858; *Brush v. City of Carbondale*, 78 Ill. 74; *Pontiac v. Carter*, 32 Mich. 164." The opinion further quotes with approval from the case of *Chase v. City*, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898, as follows: "The right of the public to the use of the street

for the purpose of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to the entire width, and whether it will so open and improve it, or whether it should be opened and improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities courts cannot ordinarily interfere upon the complaint of the lot owner so long as the easement continues to exist. \* \* \* The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner no action can be maintained against the city." This doctrine, so clearly and forcibly stated by the learned justice, was apparently qualified to some extent in *State v. Higgs*, a decision of this court, reported in 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446, but this last decision was itself overruled in the recent case of *Small v. Edenton*, 146 N. C. 527, 60 S. E. 413, and it may now be considered as established with us that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority. *Brodnax v. Groom*, 64 N. C. 244; *Chase v. City*, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898; *City v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311; *Smith's Mod. Law Munic. Corporation*, § 1811. True, the doctrine announced in *Tate v. Greensboro* was in reference to the removal of shade trees when considered as an obstruction to travel, but the dominant principle discussed and applied was in reference to the general power of a municipal government over its streets when exercised for the benefit and convenience of the public; and this principle is none the less potent, and its application none the less necessary, because the motive and purpose of exercising the power was for the preservation of the city sewerage. It is well established that the right of user for the last purpose

arises to the public by reason of the dedication (*Elliott on Streets*, § 17), and in a matter of such supreme and controlling importance it would lead to most deplorable results if municipal governments could be stopped or hindered in their efforts taken in good faith to preserve the public health, unless their action should come clearly under condemnation within the principle announced as law in that decision.

Nor can any valid objection be made because no notice was given plaintiff. It is true that, where condemnation is required, notice must be provided for or given at some stage of the proceedings, though we have held in *State v. Jones*, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313, that such notice is not required when the order of appropriation is made, but is sufficient if provided for when the appraisal is made or the amount of compensation is to be fixed; but that is where some right of the injured party is wrongfully invaded, making condemnation proceedings necessary. In the present case, as we have endeavored to show, the authorities of the city, being in the exercise of discretionary powers, conferred upon them by the law for the welfare of the public, and, there being no evidence tending to show a want of good faith or oppressive abuse of their discretion, there is no legal right of plaintiff infringed upon. The injury, if any, suffered by her is *damnum absque injuria*. We again refer to *Tate v. Greensboro*, supra, as authority for the position that no notice was required.

There is nothing here said which conflicts, or is intended to conflict, with the decision of this court in *Brown v. Electric Co.*, 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554, cited, and to a great extent relied upon, by plaintiff. In that valuable opinion, delivered in protection of the just rights of the individual citizen, it was held that a municipal government had no power to confer upon a corporation exercising its privileges for purposes of private gain the right to construct and operate a street railway along the public streets of a city or town, so as to deprive abutting owners of their right to compensation by reason of the additional burden thus placed upon the streets. A perusal of the opinion will show that the decision was placed distinctly on the ground that such action of the city government was clearly not taken for the benefit of the public, nor in the exercise of powers conferred for its benefit, and which were contemplated and included in the original act of dedication, but in promotion of a private enterprise. Accordingly it was held in that case: "(3) An abutting owner has property in shade trees standing along the sidewalk which the law will protect, and they may not be removed except where their removal is necessary for the use of the street as a public highway."

There was error in the judgment entered below, and, on the facts stated and admitted, there should be judgment entered that defendant go without day, and it is so ordered. Reversed.

### KUKER v. SNOW et al.

(Supreme Court of North Carolina. Nov. 19, 1908.)

#### 1. APPEAL AND ERROR (§ 863\*)—JUDGMENT ON PLEADINGS—REVIEW.

The court on appeal from a judgment on the pleadings for plaintiff must treat the allegations in the answer as true.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 863.\*]

#### 2. CORPORATIONS (§ 121\*)—STOCK—SALE OF SHARES.

A contract for the sale of corporate stock required the buyer to pay a specified sum in cash, and to deliver other stock to a third person to be sold within six days for the benefit of the seller to one agreeable to a designated person. *Held*, that the seller before enforcing a sale of the other stock must allege and prove that the third person had failed to make any effort to make a sale of it to parties agreeable to the designated person, since the limitation put the third person on notice that in some way the designated person was entitled to be consulted in finding a purchaser.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.\*]

#### 3. CORPORATIONS (§ 121\*)—STOCK—SALE OF SHARES.

A contract for the sale of corporate stock required the buyer to pay to the seller a specified sum in cash, and to deliver to a third person other stock to be sold within six days to one agreeable to a designated person. Whether the latter held an option to purchase the stock at any time within three years was disputed. *Held*, that, before the seller was entitled to final judgment directing the sale of the other stock, the disputed question must be settled by a jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.\*]

Appeal from Superior Court, Durham County; Webb, Judge.

Action by W. R. Kuker against H. N. Snow and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

The plaintiff alleged: That on the 21st day of February, 1907, he entered into a contract, in writing, with defendant H. N. Snow, which he sets out in the complaint. He contracted to sell to defendant Snow 91 shares of the capital stock of the Durham Iron Works Company, of the par value of \$9,100, "for the following price, to wit: Thirty-five hundred dollars in cash and sixty shares of the capital stock of the Durham Book & Stationery Company of the par value of \$3,000.00. \* \* \* It is mutually agreed between the parties hereto that said H. N. Snow shall deliver said \$3,000.00 of the capital stock in said Durham Book & Stationery Company to W. B. Guthrie, Esq., to be held by him and sold for the benefit of said Kuker,

to some party or parties agreeable to the Mess. Newsome Bros., and the said Snow agrees on his part that the said stock shall net Kuker \$3,000.00 in cash. It is further agreed by the parties hereto that this agreement shall be perfected and carried out in every detail, within six days from this date." That, pursuant to said contract, plaintiff delivered to defendant Snow the shares of stock in the Durham Iron Works, and Snow paid plaintiff \$3,500 cash. He also delivered to Mr. Guthrie \$3,000 par value of stock in the Durham Book & Stationery Company. That, although more than 90 days have elapsed since said agreement was made, said Guthrie "has failed and refused to sell said stock and pay the amount received to plaintiff, although demand has been made upon both defendant Snow and Guthrie to carry out the terms of said contract. Plaintiff demands judgment against Snow for \$3,000 and interest, and against Guthrie that he sell said stock and apply the proceeds to the payment of the judgment against Snow. At the January term, 1908, the court made an order that notice issue to Newsome Bros. to appear and show cause why they should not be made parties and be bound by the judgment in this cause. No exception was made to this order, nor does it appear at whose instance it was made. Notice having been served, they were made parties defendant. The defendants Snow and Guthrie filed an answer, admitting the execution of the contract and the delivery of the stock to Guthrie in accordance therewith. For a defense they alleged that some time prior to the execution of the contract defendant Snow had sold to Newsome Bros. a controlling interest in the Durham Book & Stationery Company, retaining \$3,000 of the stock; that he entered into a written contract with said parties, whereby he agreed that said Newsome Bros. "are to have the privilege of purchasing the said sixty shares of stock now held, or any stock which may hereafter be acquired, or which may now be retained by said H. N. Snow and H. N. Snow, Jr., and Mrs. H. N. Snow, in the aforesaid company, at any time within the next three years if they may so desire, upon the payment to said H. N. Snow, H. N. Snow, Jr., and Mrs. H. N. Snow of the par value of said stock." This agreement is dated January 3, 1907. That at the time defendant Snow entered into the contract with plaintiff he advised and informed him personally of the contract with Newsome Bros. in regard to the sale of said stock, and that he told him if he, plaintiff, took said stock, he would do so subject to the said prior option contract, to all of which plaintiff then and there assented. That Newsome Bros. have never waived their option, nor have they assented that said stock should be sold to any other person. Defendants say that they are

ready and willing to carry out the contract, so far as they may be able, in a lawful way, to do so. They ask to be protected and saved harmless on account of the prior option contract. Newsome Bros., in accordance with the notice served on them, came in and filed an answer, setting up the contract referred to in the answer of Snow and Guthrie. They allege that they have not waived their rights under said contract, but, on the contrary, assert them by claiming the right to buy said stock at any time within three years from January 3, 1907. Plaintiff replied to the new matter set up in the answer of defendants Snow and Guthrie, denying all knowledge of the contract with Newsome Bros., and alleging that they are not parties thereto nor affected thereby. His honor rendered judgment upon the pleadings that defendant Guthrie sell the stock deposited with him pursuant to the terms of the contract between plaintiff and defendant Snow of February 21, 1907; that he advertise the sale for 30 days, and make report of the price, etc., to the next term of the court; that the cause be retained for further orders. To this judgment defendants excepted and appealed.

Guthrie & Guthrie and R. O. Everett, for appellants. Manning & Foushee, for appellee.

CONNOR, J. The appeal presents the question whether, in the light of the pleadings, his honor was correct in rendering the judgment set out in the record. For the purpose of disposing of this question, the allegations in the answers must be taken as true. So taken, they present a peculiar series of contracts on the part of defendant Snow. He enters into the contract with Newsome Bros. on January 3, 1907, giving them an option on the stock at par for three years. On February 21, 1907, he enters into a contract with plaintiff, placing the stock in the hands of Mr. Guthrie to sell in six days "to some party or parties agreeable to Mess. Newsome Bros." We cannot ignore this limitation upon Guthrie's power to sell. If nothing else appeared, before plaintiff could enforce a sale, he would have to allege and prove that Guthrie had failed or refused to make an effort to make a sale to "parties agreeable to Newsome Bros." The limitation put Guthrie upon notice that in some way Newsome Bros. were entitled to be consulted in finding a purchaser, or, at least, that the person who purchased should be agreeable to them; otherwise the language, in that respect, has no significance. If he should disregard the limitation upon his power to sell, he might incur liability either to Newsome Bros., or, if they had a prior right to the stock, to the purchaser. Of course, he could not arbitrarily refuse to act in the premises. It is true that plaintiff alleges that he has demanded of Guthrie to sell the stock, but he does not al-

lege that a sale can be made in accordance with the terms of the contract to some person agreeable to Newsome Bros. This, however, is not all that appears. It is alleged in the answer that Newsome Bros. have the right to purchase the stock at par at any time within three years, and that plaintiff had notice of this right and made the contract subject to Newsome Bros.' option. This allegation is denied by plaintiff. Before any order of sale is made or final judgment rendered, this issue of fact should be settled by the jury. We forbear discussing the question respecting the right of Newsome Bros. to demand specific performance of the contract with Snow, and to that end to enjoin the sale until the expiration of their option; also, whether a purchaser from Snow or from Guthrie, trustee, would take the stock subject to Newsome Bros.' rights. In the light of Snow's guaranty that the stock shall bring par value when sold, and that he will make good any deficiency to the extent of \$3,000, it is difficult to see how he is interested in delaying a sale. In any event, he is liable to plaintiff for \$3,000; the only question being whether he can, if he make good his allegation, postpone the sale for three years, or until Newsome Bros. see fit to close their option either by taking the stock at par, or surrendering their claim to it.

The judgment of his honor must be set aside, and a new trial had, to the end that the controverted matters may be settled. It is so ordered.

New trial.

#### SPRINKLE v. SPAINHOUR et al.

(Supreme Court of North Carolina. Nov. 19, 1908.)

##### 1. DEEDS (§ 129\*)—ESTATE CREATED—LIFE ESTATE.

Where heirs, one of whom, S., was a married woman, partitioned lands by mutual conveyances, a deed to "J. and wife, S., and S.'s heirs," effectuated the plain intention of the parties that, if the husband survived the wife, he should enjoy the land for his life, and afterwards it should go to her heirs, and the husband did not acquire a fee under Revisal 1905, § 946, providing that a conveyance shall be construed to be in fee whether the words "heirs" should be used or not, unless such conveyance shall in plain and express words show, or it shall be plainly intended by the conveyance, or some part thereof, that the grantor meant to convey an estate of less dignity.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 129.\*]

##### 2. HUSBAND AND WIFE (§ 14\*)—CONVEYANCES.

It is an essential of the estate by entireties by husband and wife that they be jointly entitled as well as jointly named in the deed, and, where a wife was entitled to a conveyance in partition of lands as one of the heirs, a deed to her and her husband jointly did not entitle him to retain the whole by survivorship, though the conveyance was so made at her request.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 73-80; Dec. Dig. § 14.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. TRUSTS (§ 81\*)—CONTRACTS—ADVANCES BY HUSBAND—GIFTS.

Where, on voluntary partition of lands between heirs of whom a married woman was one, a deed was made to her and her husband and her heirs, the fact that he paid part of the owelty did not create a resulting trust in his favor to the extent of the money advanced, as the law presumes he intended it as a benefit or gift to his wife.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 116; Dec. Dig. 81.\*]

Appeal from Superior Court, Forsyth County; W. B. Council, Judge.

Petition for dower by Mary Jane Sprinkle against Mattie V. Spainhour and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The court upon the facts admitted gave judgment against the plaintiff, who appealed. The facts are stated in the opinion of the court by Justice Brown.

Benbow & Hall, for appellant. Watson, Buxton & Watson, for appellees.

BROWN, J. The plaintiff claims dower as the widow of J. H. Sprinkle, having been his second wife. The defendants claim the land as the heirs at law of S. E. V. Sprinkle, the first wife of J. H. Sprinkle.

The land in controversy was the property of Washington Payne and descended to his heirs at law, S. E. V. Sprinkle, P. W. Payne, and others. These heirs at law, on the same day, January 12, 1887, executed deeds to each other. These deeds were evidently executed to effect a voluntary partition of the land, and, while inartificially drawn, they were not intended to change the character of the estate of the heirs of Washington Payne in the lands inherited from him. *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57. It was evidently not the purpose of the parties to divest the fee simple of S. E. V. Sprinkle and vest it in her husband.

The plaintiff claims dower in the land described in the deed to J. H. and E. V. S. Sprinkle upon the theory that it is a deed made to husband and wife after marriage, that they became tenants by entireties, and that upon the death of the wife the entire fee vested in the husband by survivorship. There would be more plausibility in the position if the estate conveyed to the husband and wife were the same; but the language of the deed both in the premise and in the habendum conveys the land "to J. H. Sprinkle and wife, S. E. V. Sprinkle, and S. E. V. Sprinkle's heirs." These words effectuated the plain intention of the parties that, if the husband survived the wife, he should enjoy the land for his life, and afterwards it should go to her heirs. That is the disposition the law would have made of it had the deed never been made and the wife had died intestate before the husband, having

had children by him born alive. It is not an unprecedented method of conveying land that in the same instrument a joint estate should be created in two and the fee vested in one only. It was recognized at common law. "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple, and if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." Coke on Littleton, §§ 285, 191; Butler's Note 78; 2 Cruise, 510, 511; 1 Washburn on Real Property, 648, and cases cited; *Den v. Hardenburg*, 10 N. J. Law, 42, 18 Am. Dec. 371.

But it is contended that J. H. Sprinkle took a fee as much so as his wife under this deed, although the word "heirs" is omitted as to him, and that this is by virtue of Acts 1879, p. 279, c. 148 (Revisal 1905, § 946). This statute does not help the plaintiff, for the statute does not create a fee without the word "heirs," where "it shall be plainly intended by the conveyance or some part thereof that the grantor meant to convey an estate of less dignity." That intention, so far as J. H. Sprinkle is concerned, is too plain to be doubted.

There is another insuperable obstacle in the way of the plaintiff's claim for dower: Assuming for the sake of the argument that this particular deed, under the circumstances attending it, had conveyed an estate in fee to husband and wife both, the husband and those claiming as his heirs would not be permitted to set up a claim to the land. It descended to S. E. V. Sprinkle from her ancestor, and this partition deed was made during her coverture. At the date of its execution the land belonged to her separate estate. It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife that the spouses be jointly entitled as well as jointly named in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because, being a married woman, she is presumed to have acted under the coercion of her husband. *Moore v. Moore*, 12 B. Mon. (Ky.) 664; *Babbitt v. Scroggin*, 1 Duv. (Ky.) 273; *Gillan v. Dixon*, 65 Pa. 395—all cited in 18 Am. Dec. pp. 383, 384. The same principle is recognized by this court in *Harrington v. Rawls*, 136 N. C. 65, 48 S. E. 571, and *Carson v. Carson*, 122 N. C. 645, 30 S. E. 4.

The fact that J. H. Sprinkle paid some of the owelty money for his wife to equalize the partition would not create a resulting trust in his favor to that extent, because the law presumes he intended it as a benefit or gift to his wife; nothing else appearing.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



Upon a review of the record we think the judgment of the superior court is correct. Affirmed.

**BAILEY v. NORTH CAROLINA R. CO.**  
(Supreme Court of North Carolina. Nov. 19, 1908.)

**1. RAILROADS (§ 276\*)—TRESPASSERS ON LOCOMOTIVES—COMPANY'S DUTY.**

One who boarded a switch engine in a switching yard, without invitation and in violation of the company's rule, was a trespasser, to whom the company did not owe the duty it owes its employes rightfully on the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 878; Dec. Dig. § 276.\*]

**2. RAILROADS (§ 276\*)—TRESPASSERS ON LOCOMOTIVE—INJURY TO—LIABILITY.**

A railway company is not liable for the death of a trespasser on one of its locomotives, in the absence of willful or wanton negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 878; Dec. Dig. § 276.\*]

**3. NEGLIGENCE (§ 11\*)—WANTONNESS—FORGETFULNESS.**

Mere forgetfulness, however grievous the consequences, is not a willful or wanton neglect of duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.\*]

**4. NEGLIGENCE (§ 11\*)—“WANTON NEGLIGENCE.”**

“Wanton negligence” always implies something more than mere negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7385, 7382.]

**5. NEGLIGENCE (§ 11\*)—“WANTON.”**

The word “wanton” implies turpitude, and that the act to which it is applied was committed, or omitted, of willful, wicked purpose.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7384, 7385.]

**5. NEGLIGENCE (§ 11\*)—ACTS DONE “WILLFULLY.”**

The word “willfully” implies the doing of an act knowingly, and with stubborn purpose, but without malice.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7468–7481, 7385, 7386.]

**7. NEGLIGENCE (§ 11\*)—ACTS—“RECKLESSLY” AND “WANTONLY” PERFORMED.**

The word “recklessly,” when used conjunctively with “wantonly,” means more than “negligently,” and the conjoined words never import less than such conscious disregard or an indifference to the probable consequences of the act to which they refer as is the legal equivalent of willful misconduct and intentional wrong.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5999–6001; vol. 8, pp. 7781, 7385, 7386, 7382.]

**8. NEGLIGENCE (§ 119\*)—PLEADING—PROOF.**

To recover for a willful, reckless, and wanton omission of duty, plaintiff must offer evidence tending to give the omission the character alleged.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 119.\*]

**9. RAILROADS (§ 281\*)—NEGLIGENCE—OPEN SWITCH.**

That a switchman left a cross-over switch open from 5 to 15 minutes before a resulting wreck does not show wanton negligence towards those on an engine which afterwards stood near the switch; the act not negating mere forgetfulness or a careless mistake, without evil intent or purpose or consciousness of probable injury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 281.\*]

Appeal from Superior Court, Guilford County; Moore, Judge.

Action by Gattie A. Bailey, administratrix, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

The action was brought by plaintiff, as administratrix of her son W. L. Bailey, for damages for the death of intestate, alleging that the same was caused by the willful negligence of the defendant's lessee, the Southern Railway. The court submitted these issues: “(1) Was the plaintiff's intestate injured and killed by the wanton negligence of the defendant's lessee? Answer. Yes. (2) What damage, if any, has plaintiff sustained? Answer. \$7,000.” At the conclusion of the evidence the defendant moved to nonsuit. Motion denied. Defendant excepted. From the judgment rendered, the defendant appealed.

Wilson & Ferguson, for appellant. Stedman & Cooke, for appellee.

**BROWN, J.** The lessee of the defendant operates certain large switching yards near Greensboro, called the “Pomona Yards,” in which are laid a number of parallel tracks, upon which are constantly running the switch engines, transfer trains, and the other trains of the company. Two of these tracks are known as the main line tracks, one for south-bound and the other for north-bound trains. There is a cross-over switch, used by trains when necessary in crossing from one main line track to the other. The plaintiff's intestate was on switch engine No. 1683 on the night of February 11, 1906, and was killed in a collision near this switch in the Pomona yards with train No. 34, a north-bound passenger train.

The evidence offered in the case, except one rule of the company, was introduced by plaintiff. All the evidence bearing on this unfortunate disaster is that of C. T. Malcolm, a brakeman and a survivor of the crew of the wrecked switch engine, who testifies substantially as follows: “I was working on the yard at Greensboro on February 11, 1906; was on engine No. 1683, a switch engine. I was at the yard about the time, or just before, train No. 34 was due from the South, and went with the engine to the coal chute after water. There are parallel tracks in the yard, south-bound track and north-bound track. All trains going from Greensboro to

Charlotte go on the south-bound and all trains coming to Greensboro from Charlotte, on north-bound. The track that lies nearest south is the north-bound track; the track that lies nearest north, is the south-bound. Engineer Sellers, Conductor Newman, Cary Saunders, and myself were on the switch engine. As we were going down to get water, we saw another train going up toward the yard. A transfer crew was standing on south-bound main line when we came out of the new yard. That transfer train had somewhere between 25 and 50 cars. The engine was shoving the cars. The engineer of the train was Mr. Allred, and the brakemen were Will Logan and C. T. Welker. When an engine is proceeding backwards through a switch, the rear man opens it. The one next to the engine is supposed to close it. C. T. Welker was the front brakeman on this train. After we had gotten water, I first saw the deceased, W. L. Bailey, when we were about two-thirds of the way back to the new yard. He came over the back of the tender, and sat down on the coal gate of the tender. As we got to the switch, we could see the headlight of No. 34 coming toward Greensboro. Just ahead of us was the switch. Somewhere between 5 and 15 minutes before we got to the switch, the transfer train had backed through there; it went across. When No. 34 got to the place where the switch was, it came through the switch. It went from the north-bound track to the south-bound track and there was a wreck with the switch engine No. 1688. I had seen W. L. Bailey just before this wreck, from a minute to three minutes before. The last I saw of him he was sitting on the coal gate, a gate that holds the coal in the tender. He was laughing and talking with Conductor Newman and Fireman Johnson. They are both dead; Henry Sellers, who was on the engine, is dead—all killed at that wreck. I was in about 30 feet of the engine when the wreck occurred; was going toward the switch. I do not know but the switch must have been open. I saw the switch after the collision, somewhere less than 15 minutes. I think Mr. Hinton was with me. Mr. Hinton and all met at the switch, about the same time. It was open at that time. The lock was found at the switch stand. I saw the lock. It was not mutilated. I saw Bailey after the wreck. He was down in the coal. I did not see him taken out." Upon cross-examination the witness stated that Bailey, the deceased, was not a member of the switch engine crew. The first thing he saw of W. L. Bailey after they got the water, the pipe was thrown around, and some water was thrown over the back of the tender, and the engineer, who was giving the engine water, remarked that he came mighty near drowning somebody; that after the engine started to the new yard, and while the engine was going up to the yard, W. L. Bailey climbed from back of the tender over on to

the coal, and sat down on the coal. No one gave him permission to come on the engine. The witness further testifies: "I do not know whether the switch was left open or not. I could not say that it was left open. I don't know whether it was locked at the time the collision occurred or not. I do not know whether the lock was taken out afterwards and laid down there, or whether it was out at the time of the collision. I do not know who left the switch open, if it was open. Neither I, nor any member of the crew of the engine I was on, knew anything about it being open. I do not know whether No. 34, when it came in, ran through an open switch, or from some other reason it crossed over." The witness further said that the transfer train Welker was on had passed over the switch "about 15 or 20 minutes" before the collision, and that it was Welker's duty, when his train passed, to close the switch. The rules of the company introduced in evidence require that switches be kept locked for the main track, except when passing trains to or from another track, and also forbids any person to ride on the tenders and engines of the company, except certain designated employes and officials. It is admitted in the record that the deceased was not an employe of the company.

1. It must be conceded at the outset that the company did not owe to the deceased the duty it owed its employes rightfully on the switching engine, for the deceased was wrongfully there, and in violation of the company's rules, a copy of which was found in his possession. He was a trespasser in entering upon the company's switching yards and climbing up at night on the back of a moving tender. He was not invited by the crew, and they had no such authority. *Vasor v. Railroad*, 142 N. C. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950; *Peterson v. Railroad*, 143 N. C. 260, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799. Not only did the published rules of the company prohibit such conduct, but the dictates of common prudence forbade it. In a railway switching yard, in which there are numerous tracks in constant use for the purpose of switching cars, making up trains, and the like, and where the extremely dangerous character of the place is perfectly manifest to all, there can be no implied license to the public to enter. *Railroad v. Rylee*, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; *Wagner v. Railroad*, 122 Iowa, 360, 98 N. W. 141. And certainly, for still stronger reasons, there can be no implied license to climb up surreptitiously on the company's engines and tenders and distract the attention of the crew from their exceedingly important duties.

2. There is no evidence that the deceased was killed by any willful or wanton negligence of the defendant's lessee, and therefore his honor should have sustained the motion to nonsuit. There is evidence tending to prove that the transfer train passed over

the switch from 15 to 20 minutes prior to the collision, and that it was brakeman Welker's duty to close the switch. Although there is no positive evidence, it may be inferred from the fact that the switch was open that Welker failed to lock it when his train passed over, but there is a conspicuous absence of any fact tending to show why he failed to lock it. So far as the evidence discloses, it was the old case of "I forgot," which has cost thousands of lives before this sad occurrence took place. We have in the books other cases where engineers, conductors, and switchmen have forgotten their orders and brought disaster to themselves, their passengers, and employers. But mere forgetfulness, however grievous the consequences, does not constitute a willful or wanton neglect of duty. The Indiana court says that "to constitute a willful injury the act which produced it must have been intentional, and must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." *Railroad Co. v. Bryan*, 107 Ind. 53, 7 N. E. 808. To same effect is *Railroad Co. v. Murphy*, 9 Bush. (Ky.) 528; *Railroad v. Filbern*, 6 Bush. (Ky.) 574, 99 Am. Dec. 690; *Bridge Asso. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263; *Beach on Neg.* § 64. The term "wanton negligence" (whether correctly joined it is needless to discuss) always implies something more than a negligent act. This court has said that the word "wanton" implies turpitude, and that the act is committed, or omitted, of willful, wicked purpose; that the term "willfully" implies that the act is done knowingly and of stubborn purpose, but not of malice. *State v. Massey*, 97 N. C. 468, 2 S. E. 446; *State v. Brigman*, 94 N. C. 888. Judge Thompson says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention, whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." *Thompson on Neg.* (2d Ed.) § 20 et seq. It was held in the case of *Bolin v. Railroad Company*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, that a trespasser could not recover for an injury alleged to have been caused by the wanton negligence of the railroad through its conductor, "unless

the misconduct of the trainman was of that degree necessary to render the fact that the deceased was a willful trespasser immaterial: that is, unless his conduct was such as to evince an intention to injure the deceased, or such an utter disregard of the consequences of his act as to indicate that willingness to injure him which is equivalent, in respect to legal damages, to intent to produce the result." The fact that the complaint charges that the act of omission imputed to Welker was willfully, recklessly, as well as wantonly, done, does not help the plaintiff, even if such words were all used in the issue. The word "recklessly," when used conjunctively with "wantonly," always means something more than negligently, the two words thus conjoined can never import less than such conscious disregard, or an indifference to the probable consequences of the act to which they refer, as is the legal equivalent of willful misconduct and intentional wrong. *Railroad v. Robinson*, 125 Ala. 483, 28 South. 28. The plaintiff must do more than characterize the alleged omission of duty upon the part of Welker in her complaint. She must offer evidence tending to give it the character she imputes to it.

There is no evidence of a deliberate or willful purpose, on the part of any employé of the defendant's lessee, to injure plaintiff's intestate, or of a willful or conscious indifference to consequences whereby plaintiff's intestate was killed. There is no evidence that Welker knew that engine No. 1688 was standing on the south-bound track near the switch, or that the intestate was on it. On the contrary it appears that the switch engine passed the transfer train while on its way to Greensboro for water, and the transfer train had passed through the cross-over switch before said engine returned to the switch. There is no evidence that Welker, or any of the crew of the transfer train, knew that train 34 was coming in on the north-bound track shortly thereafter. The only evidence that the switch was left open is that it was found open 15 minutes after the wreck, and there was from 5 to 15 minutes between the time the transfer train passed through the switch until the wreck, so that the switch was found open from 20 to 30 minutes after the transfer train had gone through. Conceding that Welker left the switch open, this evidence does not at all negative the fact that it was mere forgetfulness, or a careless mistake having no evil intent or purpose, nor any consciousness of probable injury.

The court below erred in refusing the motion to nonsuit. It is so ordered.

Reversed.

HOKE, J., concurs in result.

**HAYWOOD et al. v. WACHOVIA LOAN & TRUST CO. et al.**

(Supreme Court of North Carolina. Nov. 19, 1908.)

**1. WILLS (§ 698\*)—CONSTRUCTION—JURISDICTION OF COURTS.**

The superior court, by virtue of the jurisdiction vested in the court of equity as existing prior to the Constitution of 1868, by which the court of equity is abolished and the jurisdiction conferred on the superior court, has jurisdiction of a suit by executors and trustees for construction of the will essential for a direction from the court as to their duties in the premises.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.\*]

**2. WILLS (§ 698\*)—CONSTRUCTION—JURISDICTION OF COURTS.**

The jurisdiction of the court of equity in matters of construction of wills grew out of its general control over trusts and trustees, and equity can only take jurisdiction when trusts are involved, or when devises and legacies are so blended and dependent on each other to make it necessary to construe the whole to ascertain the legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.\*]

**3. WILLS (§ 471\*)—CONSTRUCTION—INTENTION OF TESTATOR.**

The courts in construing a will must, if possible, give effect to every provision in it, and not nullify any provision, unless manifestly repugnant to some other one, in which event they will give effect to the last provision.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. § 471.\*]

**4. WILLS (§ 676\*)—TESTAMENTARY TRUSTS—CREATION.**

A trust by implication of law will be decreed when it is essential to carrying into effect the provisions of a will, and, though no trust is created by the will, the court will have regard to the intention gathered from the entire instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 676.\*]

**5. WILLS (§ 676\*)—TESTAMENTARY TRUSTS—CREATION.**

To constitute a valid declaration of a trust, it must appear from the language used that such was the intention of testator; but specific language declaratory of a trust is not necessary, provided the intention is clear and the requisites of a trust are found, and it is not necessary that the title should be given in express terms to the trustees, since, where a trust is otherwise manifested, and a trustee is named, he will by implication take such title as is necessary to enable him to execute the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 676.\*]

**6. WILLS (§ 671\*)—CONSTRUCTION—ESTATES DEVISED.**

Testator gave real and personal property to his infant daughter, subject to the condition that she should leave at her death a child or children or issue of such child or children, and that, if she died leaving no child or children or issue thereof, the property should go to testator's sisters. He appointed executors and trustees to carry out the trusts declared. He also appointed a guardian for the daughter. *Held*, that the will created a trust, and on the settlement of the estate by the executors they should, as trustees, hold the corpus given to the daughter for her benefit for her life, and at her death deliver it to those entitled thereto,

and that the fact that a guardian was appointed was not inconsistent with the appointment of trustees, since the guardian would receive the income for the support of the daughter until she attained full age.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1577–1581; Dec. Dig. § 671.\*]

**7. WILLS (§ 656\*)—CONSTRUCTION—ESTATES DEVISED.**

Testator gave real and personal property to an infant daughter, subject to the condition that she should leave alive at her death a child or children or issue of such child or children, and that, on her death leaving no child or children or issue thereof, the property should go to testator's sisters. He appointed executors and trustees to carry the will into effect and appointed a guardian for the daughter. *Held*, that the condition did not apply to the income; that being given absolutely to the daughter.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 656.\*]

**8. WILLS (§ 705\*)—CONSTRUCTION—ESTATES DEVISED.**

Where a will appointed executors and trustees to carry into effect the provisions thereof and appointed a guardian for an infant beneficiary entitled to the income of an estate for life, the court, in an action for the construction of the will and for a direction as to the duties of the executors and trustees, had jurisdiction to provide for a fair division of the commissions on the income between the trustee and the guardian, and both should not receive full commissions.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 705.\*]

**9. CONVERSION (§ 19\*)—TIME OF TAKING PLACE.**

Where testator directed his executors to sell real estate, there was an equitable conversion which took place at the death of testator, so that the beneficiaries took the proceeds as personality.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 45–47; Dec. Dig. § 19.\*]

Appeal from Superior Court, Alamance County; Moore, Judge.

Action by A. W. Haywood and another, executors and trustees under the will of Charles T. Holt, deceased, against the Wachovia Loan & Trust Company and others, for the construction of the will and directions of the court as to their duties. From a judgment construing the will, defendants, the Wachovia Loan & Trust Company and another, appeal. *Affirmed*.

This action, in the nature of a bill in equity, is brought by A. W. Haywood and B. S. Robertson, executors and trustees under the last will and testament of Charles T. Holt, deceased, against defendants Wachovia Loan & Trust Company, guardian of the estate of Louise M. Holt, an infant, and Mrs. Gena J. Owen, guardian of the person of said infant, and the other defendants, who claim an interest in remainder, in the property disposed of by the will of the said Chas. T. Holt, deceased. The facts in regard to which there is no substantial controversy are: Chas. T. Holt, lately domiciled in the county of Alamance in this state, on the 23d day of August, 1899, made and published his last will and testament, in which he gave to his

mother, Mrs. Louise M. Holt, "for and during her natural life, the proceeds of a policy of insurance on his life, for the sum of \$10,000, with the remainder after the life estate given my said mother to my daughter Louise M. Holt and her issue, and to my sisters, Cora M. Laird, Louise M. Haywood and Ella M. Wright and their issue, in the estates and manner and subject to the limitations and conditions mentioned, stated and set out in item 4 of this my last will and testament. I hereby direct my executors, hereinafter named, to collect said policy of insurance as soon after my death as possible and invest the proceeds thereof for the benefit of the parties in this item mentioned, paying to my said mother the net income thereof as long as she shall live." He gives to his wife the proceeds of certain insurance policies on his life, amounting to \$81,000; also, certain real estate and other personal property. He directs his executors to collect the insurance policies and pay the proceeds over to his wife. He expresses a wish that she shall, at her death, make certain disposition of the proceeds of said policies, but expressly says that his wish is not to be treated as obligatory. The fourth item of the will is in the following words:

"(4) I give, devise and bequeath to my daughter Louise M. Holt and her heirs, subject to the limitations and conditions in this item annexed and imposed, all the balance of my property and estate, real, personal and mixed, wheresoever the same may be or be situated, including all my stock in the Granite Mfg. Co., the Thomas M. Holt Mfg. Co., and the Cora Mfg. Co., and the remainder after the life estate of my mother Louise M. Holt, in the proceeds of policy No. 582170 in the New York Life Insurance Co. of New York City, for ten thousand dollars; to her, the said Louise M. Holt in fee simple provided and subject to the limitation and condition that she shall have and leave alive at the time of her death a child or children, or the issue of such child or children, should any such child or children of hers predecease her and leave issue alive at the time of her death, but should my said daughter Louise M. Holt die leaving no child or children or the issue of such alive at the time of her death, then and in that case, I do hereby will, give, devise and bequeath all the property and estate in this my last will and testament given, devised and bequeathed to my said daughter Louise M. Holt, to my sisters Cora M. Laird, Louise M. Haywood and Ella M. Wright absolutely and in fee simple, equally and share and share alike, alive at the time of the death of my said daughter Louise M. Holt and to the issue then alive, of such of my said sisters as may be dead at that time, the issue representing their parents, and taking such share as he or she would have taken if alive at that time, to them and their heirs absolutely and in fee simple. And I hereby direct my executors

hereinafter named to pay all my just and honest debts and funeral expenses out of the dividends that may be earned and declared on my stock in the Granite Mfg. Co., the Thomas M. Holt Mfg. Co., and the Cora Mfg. Co., and I hereby charge said stock with the payment of said debts and funeral expenses and no dividends from said stock shall be paid to any of the legatees under this my last will and testament, until and after said debts and funeral expenses shall have been paid in full.

"(5) I hereby nominate, constitute and appoint A. W. Haywood and B. S. Robertson of Haw River, N. C., executors and trustees to carry out and perform the trusts therein declared, and I hereby revoke all former wills by me made."

On ——— day of ———, 1900, said testator executed the following codicil to his will: "Whereas by my said last will and testament, I did in item second thereof give, devise and bequeath the proceeds of policy No. 582170 in the New York Life Insurance Co. of New York City for ten thousand dollars to the parties and in the manner, upon the terms, conditions and estates in said item set out and mentioned, and whereas since the execution by me of said last will and testament, my mother Louise M. Holt has died, and I desire to make other and different disposition of the proceeds of said policy of insurance, I hereby direct my executors to pay all my just and honest debts and funeral expenses out of the proceeds of the said policy of insurance. In case all of the proceeds of said policy of insurance are not necessary for the payment of said debts and expenses, I give, devise and bequeath any balance of said proceeds that may remain, after the payment of said debts and expenses to the parties, save and except my said mother, Louise M. Holt, now dead, and in the estates and upon the same terms and conditions as are set out in my said last will and testament. And in case said proceeds of said policy of insurance are not sufficient to pay all my just and honest debts, then I hereby direct my executors to pay such portions of them as remain unpaid after applying said proceeds of said policy of insurance as above directed, in the manner and from the funds named, mentioned and set out in item fourth of my said last will and testament. And whereas in my said last will and testament, I have made no provisions for the guardianship, custody and tuition of my infant daughter, Louise M. Holt, I do hereby, in case she shall be living at the time of my death and be under the age of twenty-one years, appoint and my will is that my wife Gena M. Holt, sometimes called Gena J. Holt, shall have the possession, custody and tuition of my said daughter, Louise M. Holt, for such time as she may remain under twenty-one years of age; and in case of her death during the minority of my said daughter, then and in that case, I will and appoint that my

sister Louise M. Haywood, sometimes called Daisy Haywood, shall have the custody and tuition of my said daughter during her minority. And I earnestly entreat their utmost care respectively, in and about the morals and education of my said daughter, and desire that she may be brought up and instructed in the doctrines of religion. And it is my will and desire and I hereby will and appoint and request that the Wachovia Loan & Trust Co. of Winston, N. C., of which Mr. Frank Fries is now the president, be made and appointed by the proper legal authorities the guardian of the property and estate of my said daughter for such time as she may remain under twenty-one years of age. And in all other respects, I do hereby ratify and confirm my said last will and testament, of which this codicil is hereby declared to be a part."

The testator died on the ——— day of December, 1900, the will and codicil were duly admitted to probate, and the plaintiffs duly qualified as executors thereto. Defendant trust company was, on the 20th day of December, 1902, duly appointed guardian of the estate of the infant defendant, Louise M. Holt. The executors have paid the debts and made a final accounting and settlement of the estate of their testator, which has been audited by the clerk of the superior court of Alamance county. They hold, subject to the provisions of the will and codicil thereto: 1,230 shares of the common stock of the Holt Granite Manufacturing Company, of the par value of \$123,000; \$14,000, full value, North Carolina 4 per cent. bonds with coupons attached; and \$601.89 to their credit in bank. Since the death of the said Chas. T. Holt his widow, Mrs. Gena J. Holt, has intermarried with defendant Horace T. Owen, and with her infant daughter, defendant Louise M. Holt, resides at Trenton, in the state of New Jersey. She is about the age of eight years. The amount invested in the North Carolina bonds is derived from the sale of the Linwood Plantation, pursuant to the terms of the will of the late Gov. Thos. M. Holt, father of the testator, and of certain "trustee notes," referred to in the pleadings. The shares of stock in the Holt Granite Manufacturing Company represent the stock owned by the testator at the time of his death, as set forth in the complaint.

The plaintiffs allege: "That said A. W. Haywood and B. S. Robertson, executors as aforesaid, are ready and anxious to make a final settlement of the estate of their said testator, and to pay, deliver, and turn over to the parties entitled thereto all the assets belonging to the estate of their said testator as soon as they can safely do so, but, owing to difficulty arising from the obscure and uncertain terms of some of the clauses of his last will and testament and codicil thereto, they desire for their protection to obtain the

construction of the terms of said will and codicil by the court, and directions from the court as to their duties in the premises, and to that end they ask of the court a solution of the following questions arising upon the construction of said Chas. T. Holt's will and codicil, as follows: First. Is it the duty of said A. W. Haywood and B. S. Robertson, as executors under said last will and testament and codicil thereto of Chas. T. Holt, to hold, invest, and manage all the estate of said Chas. T. Holt now in their possession as aforesaid (except said North Carolina bonds bought with his share of the proceeds of sale of said Linwood Plantation), until the death of the said Louise M. Holt, paying the income therefrom during her life to her, or to said trust company as her guardian until her arrival at the age of 21 years, and thereafter to said Louise herself until her death, and at her death to pay over and deliver the corpus thereof to the parties entitled thereto under the provisions of said Chas. T. Holt's will and codicil? Second. Is it the duty of said A. W. Haywood and B. S. Robertson, under said last will and testament and the codicil thereto of Chas. T. Holt, to hold, invest, and manage said North Carolina bonds bought with his share of the proceeds of sale of said Linwood Plantation until the death of said Louise M. Holt, paying the income therefrom during her life to her, or to said trust company as her guardian until her arrival at the age of 21 years, and thereafter to said Louise herself until her death, and at her death to pay over and deliver the corpus thereof to the parties entitled thereto under the provision of said Chas. T. Holt's will and codicil?"

The plaintiffs ask the instruction of the court whether it is their duty to turn over and deliver to themselves, as trustees, the property set out in the complaint. They also ask a construction of the will in regard to their duty when Louise M. Holt reaches the age of 21 years. His honor held that the plaintiffs A. W. Haywood and B. S. Robertson are constituted trustees, by said will, and that as such trustees it is their duty to receive from themselves as executors, upon a final accounting and settlement of the estate of their testator, the property and estate given to Louise M. Holt, subject to the limitations set forth in the will, to invest and hold said estate and pay the income therefrom, less cost and expenses, to defendant Wachovia Loan & Trust Company until her arrival at the full age of 21 years, and thereafter to the said Louise M. Holt, and upon her death to deliver the corpus of the estate to the parties then entitled under the terms of the will of said Chas. T. Holt and the codicil thereto. His honor further held that any accumulation of income, in the hands of the guardian, be paid over to said Louise M. Holt upon

her arrival at full age. From the judgment rendered the defendant Wachovia Loan & Trust Company, guardian, and Horace T. Owen, guardian ad litem of the said Louise M. Holt, appealed.

Manly & Hendren and Parker & Parker, for appellants. Shepherd & Shepherd and Ernest Haywood, for appellees.

CONNOR, J. (after stating the facts as above). The jurisdiction of the superior court to entertain and decide this action is derived from the jurisdiction vested in the court of equity, as it was constituted in this state, prior to the Constitution of 1868, by which the court of equity, as distinct branches of our judicial system, was abolished, and the jurisdiction vested in them conferred upon the superior court. The jurisdiction of the court of equity grew out of its general control over trusts and trustees. In *Taylor v. Bond*, 45 N. C. 5, Pearson, J., says: "The jurisdiction, in matters of construction (of wills), is limited to such as are necessary for the present action of the court, and upon which it may enter a decree, or direction in the nature of a decree. \* \* \* A court of equity can only take jurisdiction when trusts are involved, or when devises and legacies are so blended and dependent on each other as to make it necessary to construe the whole, in order to ascertain the legacies, in which case the court having a jurisdiction, in regard to the legacies, takes jurisdiction over all matters necessary for its exercise." We do not entertain any doubt, nor is it denied, that the estate given by the testator to his infant daughter, Louise M. Holt, is subject to the limitations imposed upon it. That she takes the property in fee, if that term may be used as descriptive of an estate or interest in personalty, subject to the "limitation and condition that she shall have and leave alive, at the time of her death, a child or children, or the issue of such." Upon failure of such child or children or the issue of a child or children living at her death, the property is given to the defendants, who are the sisters of the testator, absolutely, etc. It is not necessary, to enable the executors to discharge the trust reposed in them, for us to decide whether, by implication, the property is limited to such child or children or the issue thereof, who may be living at the death of Louise M. Holt, or whether she takes the absolute interest, subject to be divested by her death without a child or children, or the issue of such, living at her death. This question may never arise, and, if it does, it is by no means certain that the present defendants will be interested in its settlement. That the limitation is valid, and that the sisters of Chas. T. Holt are interested in the preservation of the corpus of the property, to meet the contingency of Louise M. Holt dying without issue or the issue of such living at her death, is clear. That the testa-

tor recognized and provided for this contingency by the appointment of trustees to hold the corpus of the property is manifest from the language of the will. It is, of course, of vital interest to the trustees and the Wachovia Loan & Trust Company to know what duties are imposed upon them and what rights are vested in them in respect to the control of the property. Whether, in view of the size of the estate, the age of the child, and the probable income expected from the property, the case falls within that class of cases decided by this court, wherein the executors are required to hold the property and pay over the income to the first beneficiary, is doubtful. The property is given as the residue of the estate, after payment of debts. *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721, and *Ritch v. Morris*, 78 N. C. 377, represent one class, while *Taylor v. Bond*, supra, and *Britt v. Smith*, 86 N. C. 305, fall in the other class, wherein it is held that the first taker is entitled to the possession of the property. While the courts endeavor to follow the general rule announced in these cases, in construing wills, yet, as said by Ruffin, J., in *Britt v. Smith*, supra: "At most, the rule is one of construction, designed to give effect to the intention of the testator, and will yield whenever he manifests a different one, or when it cannot be applied without defeating what seems to be his purpose; and it is therefore the duty of the court, in every such case, to look at the whole will to ascertain, if possible, the intention there disclosed." We had occasion to examine the question and review the decided cases at this term. *Knowles' Estate*, 148 N. C. —, 62 S. E. 549. It is an elementary and universal principle that in the construction of a will the courts will, if possible, effectuate every provision contained in it, and not nullify any provision, unless manifestly repugnant to some other one, in which event they will give effect to the last provision. With this principle as our guide, we seek to ascertain the intention of the testator with regard to the persons who should control the property given to his infant child, to meet the contingencies created by him.

He was a man of intelligence, evidently well advised as to the condition of his estate and of his family. His will was evidently made in view of the probability that he would not long survive its execution. He knew that the income from his estate would exceed the amount necessary for the support and education of his child. He had made ample provision for his wife. He must have known that, pursuant to the limitations placed upon the estate given his daughter, it would be necessary to provide some means for giving effect to them by retaining, in the hands of some one, the corpus of the estate, that when she arrived at 21 years of age the guardianship of her person and her estate would cease, and that the guardian would have no power to retain the property.

In view of these conditions he provided, in effect, that, after the settlement of his estate, payment of his debts, etc., A. W. Haywood and B. S. Robertson should be "trustees to carry out and perform the trusts therein declared." He appoints them "executors and trustees." To give both terms effect, we must find an intention on his part to provide for the settlement of his estate in the usual way by his executors and the preservation of the property to meet the "limitations and conditions" by placing it in the hands of trustees. In the codicil he expresses a desire that the Wachovia Loan & Trust Company be appointed guardian. This is not inconsistent with the appointment of trustees to hold and control the property. The office and duty of the guardian is distinct from that of a trustee. The guardian receives the income, disburses it for the support and education of the infant until she attains full age, when his office and duty comes to an end; the trustees thereafter paying the income directly to Louise M. Holt. Thus construed, every provision and clause of the will is effectuated. This intention we gather from the entire will and codicil. The latter is not repugnant to the former. On the contrary, the testator, after disposing of the legacy given his mother, who had died since the execution of the will and making some other provisions, expressly "ratifies and confirms" the will. The fact that the estate is not given to the trustees, and the "limitations and conditions" imposed declared in the form of specific trusts, does not affect the question. "When it is essential to the carrying into effect the provisions of a will, a trust, by implication of law, will be decreed. Though no trust is created by the will, the court will have regard to the intention as gathered from the entire document." Beach on Trusts, § 88. While it is true that, to constitute a valid declaration of a trust, it must appear from the language used that such was the intention of the testator, and that the terms—subject-matter, beneficiaries, etc.—must be so reasonably certain as to be capable of enforcement, it is equally true that specific language, declaratory of a trust, is not necessary, provided the intention is clear and the other requisites are found. It is not necessary that the title be given in express terms to the trustees. If the trust is otherwise manifested, and a trustee be named, he will, by implication, take such title and estate as is necessary to enable him to execute the trust. *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172. In *Payne v. Sale*, 22 N. C. 455, it is held, in accordance with the authorities both in England and this country, that, in the construction of wills, the estate given to a trustee is to continue for so long a period as is necessary to enable him to execute the trust. Looking to the entire will

and the codicil, we have no doubt that it was the purpose and intention of the testator to create a trust, and that, upon the settlement of his estate by Mr. Haywood and Mr. Robertson as executors, they should, as trustees, at once hold and invest the corpus of the residue given to his daughter to preserve for her use and benefit during her life, and at her death to pay over and deliver to those who may be entitled, under the "limitations and conditions" imposed upon the estate. We should be inclined to the same opinion if he had not named trustees, but any doubt of his intention is removed by the fact that he has named plaintiffs as trustees "to perform and carry out the trusts therein declared." We see no difficulty in carrying out his intention. The plaintiffs, as executors, will turn over to themselves, as trustees, the estate in their hands, keep the same invested, and pay over the income during her minority to the Wachovia Loan & Trust Company, guardian, and, when she shall arrive at full age, pay over such income to her during the remainder of her life, and, at her death, deliver the property to such person or persons as may be entitled under the terms and provisions of the will.

It is conceded that the "limitations and conditions" applied to the estate do not apply to the excess of the income; that being given absolutely to Louise M. Holt. The court has the power and upon application may, in this action, provide for a fair division of the commissions on the income between the trustees and the guardian. Both should not receive full commissions. It is also within the power of the court to make such other and further orders as may, upon due notice, be found necessary to meet such conditions as may arise. No difference in respect to the rights of the legatees of Chas. T. Holt, or the duty of the trustees, exists, between the proceeds of the insurance policies and stocks, or other personalty, and the proceeds of the "Linwood Plantation." The direction contained in the will of Gov. Holt to his executors to sell the land operated as an equitable conversion, so that the beneficiaries, including Chas. T. Holt, took the proceeds as personalty. Although the sale was not made until after his death, his interest passed as money to his executors. The conversion took place at the death of Gov. Holt. *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 158.

The judgment of his honor, as indicated in this opinion, must be affirmed.

WADE v. McLEAN CONTRACTING CO.  
(Supreme Court of North Carolina. Nov. 19, 1908.)

1. EVIDENCE (§ 208\*)—ADMISSIONS—PLEADINGS—ADMISSIBILITY.

A portion of a paragraph of the answer containing an admission of a distinct and sepa-



rate fact is admissible in evidence without introducing explanatory matter which does not modify or alter the admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 713; Dec. Dig. § 208.\*]

**2. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY—MASTER'S NEGLIGENCE.**

Where plaintiff's employer was present and gave the order, the execution of which caused plaintiff's injury, the injury was imputable to the employer, even though the physical act causing the injury was that of a co-employee acting in obedience to the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 533; Dec. Dig. § 201.\*]

**3. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT — CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.**

A master is liable for injuries to a servant caused by the concurrent negligence of himself and a fellow servant which would not have happened except for the master's negligence, and hence the employee could recover, though his injuries were caused by the concurrent negligence of a co-servant and a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

**4. TRIAL (§ 253\*)—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.**

Where plaintiff was injured by the concurrent negligence of a vice principal in giving an order and of a fellow servant in executing it, an instruction that, if plaintiff was injured by the misconduct of a co-employee, he could not recover, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 618, 620; Dec. Dig. § 253.\*]

**5. TRIAL (§ 139\*)—NONSUIT—SUFFICIENCY OF EVIDENCE.**

There being evidence tending to show that plaintiff's injury was caused by his employer's negligence, a motion for nonsuit was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-340; Dec. Dig. § 139.\*]

Appeal from Superior Court, Carteret County; W. R. Allen, Judge.

Action by Eugene H. Wade, by his next friend, against the McLean Contracting Company. From a judgment for plaintiff, defendant appealed. Affirmed.

The remainder of the paragraph of the answer containing the admission mentioned in the opinion simply denied the other allegations of the paragraph of the complaint which it answered.

There was evidence to show that plaintiff, 19 years of age, employed chiefly to keep the books of defendant company, and do other work, was called upon by Mr. Crow, who was directing the work at the time for defendant company, to assist in raising a pile driver, and this by working some jackscrews, a few feet apart, and placed under two heavy pieces of timber, 24 feet in length, one end of the pieces being a foot or so under the object and the other ends being raised something like 10 feet from the ground. There was further testimony tending to show that said Crow stood towards plaintiff and other hands there employed as vice principal of defendant company, and that he was present at the

time, exercising personal supervision of the work, and giving immediate directions concerning it; that the jackscrews were improperly placed and timber insecurely fastened, and that, by reason of these facts and of an ill-considered and negligent order on the part of Crow, one of the pieces of timber became loose, the elevated end, swinging around, striking plaintiff and inflicting the injuries complained of. In the presentation of plaintiff's case he was allowed, over defendant's objection, to put in a clause from defendant's answer by way of admission, to the effect "that plaintiff in discharge of the duties of his employment, under the direction of J. M. Crow, foreman, was working with one Charles Bennet"; the exception being made on the ground "that a part of the section could not be admitted without the whole."

On issues submitted the jury rendered the following verdict:

"(1) Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"(2) Was plaintiff guilty of contributory negligence? Answer. No.

"(3) What damages, if any, is plaintiff entitled to recover therefor? Answer. \$720."

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Moore & Dunn, for appellant. Simmons, Ward & Allen and D. L. Ward, for appellee.

HOKE, J. In *Sawyer v. Railroad*, 145 N. C. 24, 58 S. E. 593, the approved rule in reference to the admission of excerpts from pleadings by way of admission is stated as follows: "It is competent for the plaintiff to put in evidence a portion of the answer containing an allegation or admission of a distinct or separate fact relevant to the inquiry, though it is only a part of an entire paragraph, without introducing qualifying or explanatory matter, inserted by way of defense, which does not modify or alter the fact alleged." And its correct application here sustains the ruling of the judge admitting the excerpt from the answer offered by the plaintiff. It was further contended by defendant that as the statute, known as the "Fellow Servant Act," is confined in its operation to railroads, the defense which arises under certain circumstances by reason of the negligence of a fellow servant is available to defendant. The position is correct so far as relates to the statute in question. In express terms, the act is restricted to railroads and their employees, but the facts of the case do not require or permit the application of the doctrine referred to; for the evidence is to the effect that J. M. Crow, who held the position of vice principal towards the plaintiff, and the other employees, was present, exercising personal supervision of the work in which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

these hands were employed, and that he gave the order which immediately caused the injury. The physical act may have been that of Bennet, the co-employé, but the order was given by Crow, the vice principal, and, if it was negligently given, the result is imputable to defendant; for there is no suggestion or claim that Bennet acted in disobedience of Crow's order, or that he failed to carry it out. And, if it were otherwise, if the evidence tended to show that the plaintiff's injury resulted as the proximate consequence of negligence on the part of Crow, the vice principal, and that a negligent act of Bennet, the co-employé, of plaintiff concurred in bringing it about, in that event defendant would be responsible; for it is recognized doctrine that, if the negligence of the employer and a fellow employé concurs in producing an injury, the injured employé can recover of either if he himself is free from blame. As stated in 12 A. & E. (2d Ed.) p. 905: "A master is liable for an injury to his servant caused by the concurrent negligence of himself and a fellow servant, but which would not have happened had the master performed his duty. And it is only when the negligence of the fellow servant is the whole cause of the injury that the master is excused." The court, therefore, made a correct ruling in refusing to give defendant's prayer for instructions, to the effect "that, if plaintiff was injured by the misconduct of a co-employé, he could not recover." And the defendant's motion to nonsuit was also properly overruled. There was evidence tending to show negligence on the part of defendant, both in the means provided for the work and the method and manner of conducting it, and the facts presented required that the cause should be submitted to the jury.

There is no error, and the judgment below is affirmed.

No error.

#### CONDOR et al. v. SECREST et al.

(Supreme Court of North Carolina. Nov. 19, 1903.)

#### 1. APPEAL AND ERROR (§ 1078\*)—REVIEW—ABANDONMENT OF EXCEPTIONS—FAILURE TO DISCUSS IN BRIEF.

Exceptions not discussed in the party's brief on appeal are considered abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 14\*)—MATTER SUBJECT—LEGAL OPERATION—MISTAKE OF LAW—CORRECTION.

If parties, in drawing a deed intending to convey a life estate, placed the words of limitation in the habendum instead of the premises, under the impression that it was immaterial in which part they appeared, their error was a

mistake of law which a court of equity will correct to effectuate the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 63; Dec. Dig. § 14.\*]

#### 3. REFORMATION OF INSTRUMENTS (§ 45\*)—MISTAKE OF LAW—DESCRIPTION OF ESTATE IN DEED.

Evidence held to show that the placing of words limiting an estate conveyed in the habendum, instead of in the premises of a deed was a mistake of law of the draughtsman and the parties, and not a mistake of fact of the draughtsman.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 45.\*]

#### 4. DEEDS (§ 105\*)—VALIDITY—FORM—CONTENTS OF HABENDUM.

While the habendum of a deed cannot introduce one who is a stranger to the premises to take as grantee, one not named in the premises may take an estate in remainder by limitation in the habendum, where that appears to be the intention of the parties gleaned from the deed as a whole.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 279-282; Dec. Dig. § 105.\*]

#### 5. DEEDS (§ 95\*)—CONSTRUCTION—INTENTION OF PARTIES.

In construing deeds the intention of the parties will be gathered from the whole instrument, and every word given effect, except that, when the law has given to words a definite meaning, they will be given effect according to their legal signification.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 241-250; Dec. Dig. § 95.\*]

#### 6. WITNESSES (§ 143\*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Evidence of the declarations of the assignee, since deceased, of a bidder at an executor's sale of land, as to how he wanted the deed to another person made out, where the assignee had no interest in the land, was not inadmissible in an action involving title to the land, under Revisal 1906, § 1631, providing that a party or person interested in the event, or a person through whom he derives his interest, shall not testify against an administrator or survivor of a deceased person.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 143.\*]

#### 7. DEEDS (§ 31\*)—REQUISITES—DESIGNATION OF PARTIES—"HEIRS"—STATUTORY PROVISIONS.

Under the express provisions of Revisal 1906, § 1583, a limitation by deed to the "heirs" of a living person is construed to be to the children of the person, if a contrary intention do not appear in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 63; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

Appeal from Superior Court, Union County; Long, Judge.

Action by Lee Condor and others against J. D. A. Secrest and others to correct a deed. Judgment for plaintiffs, and defendants appeal. Affirmed.

The pleadings, evidence, and verdict disclose the following case: J. E. Broom and John Hill, executors, sold the lands in controversy at public auction to J. L. Orr, who transferred his bid to L. M. Secrest, upon the understanding with said Secrest that

title should be made by the executors to Nancy Doolin "for and during her natural life, then to the heirs of L. M. Secrest." Pursuant to said agreement, the deed was drawn and signed by the executors, with the words in the premises, to said "Nancy Doolin, her heirs and assigns," and, in the habendum, "to hold the aforesaid premises to her, the said Nancy Doolin, during her natural life, and at her death to the heirs of L. M. Secrest." The deed, so executed, was delivered to Nancy Doolin, who took possession of the land and remained therein until she intermarried with said L. M. Secrest. They continued to reside thereon until the death of said Secrest, during the month of February, 1904. It was the purpose and intention of the parties to have the deed so drawn as to vest in Nancy Doolin a life estate, with remainder to the heirs of L. M. Secrest, and the words imposing the limitation were placed in the habendum of the deed by the mutual mistake of the draughtsman and the parties to the deed. The deed was not registered during the life of Secrest. The words limiting the estate to Nancy Doolin for life, remainder to the heirs of Secrest, were "clipped" from the deed, and thereafter it was presented for registration by his administrator in its mutilated condition. Thereafter said Secrest and his wife, formerly Nancy Doolin, conveyed the land in fee to R. T. Broom, who executed a mortgage to secure the purchase money, no part of which has been paid. Plaintiffs are the grandchildren of L. M. Secrest, being the children of two deceased daughters. One of the grandchildren having assigned his interest to James Helms, he was permitted to become a party plaintiff. Nancy Secrest, formerly Doolin, having died pending the action, her administrator was made a party defendant. R. T. Broom made no defense to the action. The administrator of Nancy Secrest asked that the mortgage to her be foreclosed. Such of the foregoing facts as were not admitted were found, in response to a series of issues submitted to the jury. His honor rendered judgment for the plaintiffs, correcting the deed and directing such corrections to be entered on the records, etc., as were necessary to vest the title in the plaintiffs. The deed to Broom and mortgage from him to secure the purchase money are directed to be canceled. The defendants, having noted exceptions and assigned errors, which are noted in the opinion, appealed.

H. B. Adams, Jr., and Williams & Lemmond, for appellants. Redwine & Sikes, for appellees.

CONNOR, J. Defendants lodged a number of exceptions, several of which presented the same question. Such as are not discussed in the brief are abandoned. The first exception is pointed to the submission, over defendants' objection, of the fifth issue, directed to the mistake in drawing the deed.

Plaintiffs' cause of action was twofold: (1) That the deed, as written, contained the language limiting the estate of Nancy Doolin for life, remainder to the heirs of L. M. Secrest. That these words in the habendum had been "clipped" out, and the deed registered after its mutilation. That, as registered, the deed conveyed to Nancy Doolin an absolute fee-simple estate. (2) That the words of limitation were put in the habendum, instead of the premises, of the deed, by the mutual mistake of the draughtsman and the parties. The relief which was essential, from the plaintiffs' point of view, to make the deed conform to and effectuate the intention of the parties, required the court to reinstate the words of limitation and, by way of correcting the mistake, to insert them in the premises. This is what his honor did. To present the last contention, his honor submitted the fifth issue: "Were the said words, 'to her, the said Nancy Doolin, for and during her natural life, and at her death to the heirs of L. M. Secrest,' placed in the habendum clause instead of in the premises of the deed, and allowed to remain there after the execution and delivery, by reason of a mutual mistake of the draughtsman and the parties to the deed, and by reason of the mutual mistake of the said draughtsman and the parties in supposing that the words so placed in the habendum of the deed would have the effect of conveying a life estate to the said Nancy Doolin, and the remainder to the heirs of L. M. Secrest?" And defendants assign his action, in this respect, as error.

We presume that plaintiffs tendered this issue because of the principle announced by this court in *Blair v. Osborne*, 84 N. C. 417, and stated in *1 Jones on Conv.* 564, that the habendum in a deed shall never introduce one who is a stranger to the premises, or cut down an estate in fee to a life estate, and that the habendum may be used "to explain, enlarge, or qualify the premises, but not be totally contrary or repugnant." If the plaintiffs are correct in assuming that, by reason of the placing of the words of limitation in the habendum instead of the premises, the deed, as written, conveyed the fee simple to Nancy Doolin, they were compelled to seek the aid of the court for correction or reformation. The mistake made in drawing the deed was one of law and not of fact. We do not find any evidence tending to show that, as a matter of fact, the draughtsman intended to put the words in the premises and by mistake put them in the habendum. It is probable that the parties did not know that it was material in which part of the deed the words were inserted—none of them were lawyers. That a mistake of law under such circumstances will be corrected, so that the intention of the parties may be effectuated, is settled by decisions of this court and, with well-defined limitations, is a doctrine of equity. *Kornegay v. Everett*, 99 N. C. 30, 5 S. E.

418; Bispham's Eq. § 186; 20 Am. & Eng. Enc. 824. The evidence is plenary that Secrest, who gave direction what estate he wished conveyed to Nancy Doolin, supposed that the deed, as drawn, effected such purpose. The language which he wished was inserted. It is equally clear that the draughtsman supposed that, as inserted, Secrest's intention was effectuated. It is found, as a fact, that Nancy Doolin accepted the deed and went into possession of the land under the impression that she had only a life estate. The fact that the words of limitation were afterwards "clipped" from the deed manifests clearly that the parties who did it understood that, as written, it conveyed only a life estate to Nancy with remainder to the heirs of Secrest. From that point of view there was a clear equity for reformation of the deed. It is by no means clear, however, that any reformation was necessary—that the words of limitation, fraudulently "clipped," did not, as a matter of law, effectuate the intention of the parties. A careful examination of the opinion of Judge Ashe in *Blair v. Osborne*, supra, discloses that the court, in that case, held that, while a stranger to the premises could not be introduced in the habendum to take as grantee, he could take in remainder by way of limitation. In that case the land was given to A. in the premises, and in the habendum to A. and her children by her then husband. A gift to "A. and her children" vests the present interest in them as tenants in common. Therefore if the gift be to A. in the premises, and "A. and her children" in the habendum, the children, if they take at all, take a present interest as tenants in common with their mother, and the principle which prohibits the introduction of a stranger, as grantee, of a present interest, applies; but the learned justice says: "The deed should have such a construction as is most favorable to the minds and intention of the parties as the rules of law will permit." After saying what he gathered from the language of a deed to be the intention of the parties, he concludes: "If that was the intention, the form of the deed for that purpose comports with the rules of construction, for the doctrine is laid down in *Shepherd's Touchstone*, 151, that 'one who is not named in the premises may nevertheless take an estate in remainder by limitation in the habendum,' citing other authorities for the proposition that 'while the habendum shall never introduce one who is a stranger to the premises to take as grantee, he may take by way of remainder.'" The deed in *Osborne's Case* was construed to give to A. an estate for life, remainder to her children. In our case the manifest purpose of the parties was to give Nancy Doolin an estate for life, remainder to the heirs of L. M. Secrest. *Osborne's Case* is therefore a direct authority for holding that, notwithstanding the placing of the words of limitation in the habendum instead of the prem-

ises, the limitation is valid, and the "minds and intent of the parties" are given effect. It is an elementary principle controlling the construction of deeds, as other contracts, that the intention of the parties will be gathered from the whole instrument, and every word given effect. The only limitation placed upon this general principle is that, when the law has given to words a definite meaning, they will be so interpreted as to give effect to this legal signification. The court, if necessary to ascertain the intention of the parties, will transpose sentences. In *Phillips v. Thompson*, 73 N. C. 543, the word "heirs" was in the warranty and not in the premises or habendum. Hence, under the decisions, only a life estate was conveyed. The court transposed, rearranged the placing of the word "heirs," and gave effect to them to convey the fee. The same was done in *Allen v. Bowen*, 74 N. C. 155. In *Staton v. Mullis*, 92 N. C. 623, Smith, C. J., said: "The instrument expresses the intent to convey the inheritance, and that intent may be effectuated with equal, if not stronger, reasons by transposing and annexing to the conveying words, the concluding part of the sentence." Along the same line of thought, it is said: "The inclination of many courts, at the present day, is to regard the whole instrument, without regard to formal divisions. The deed is so construed, if possible, as to give effect to all of its provisions, and thus effectuate the intent of the parties." *Jones on Conv.* § 568. In *Faivre v. Daley*, 93 Cal. 604, 29 Pac. 236, it is said: "If it appears from an inspection of the whole deed that the grantor intended by the habendum clause to restrict, limit or enlarge the estate named in the enlarging clause, the habendum will prevail over the granting clause." *Edwards v. Beall*, 75 Ind. 401; *Breed v. Osborne*, 113 Mass. 318; *Bartholomew v. Muzzy*, 61 Conn. 387, 23 Atl. 604, 29 Am. St. Rep. 206. It would seem that the fifth issue was unnecessary and immaterial—hence, in any point of view, nonprejudicial.

Defendants except to the admission of the testimony of J. E. Broom, one of the executors who made the deed, in regard to the declarations and directions of L. M. Secrest respecting the manner in which the deed was to be drawn. Secrest had no interest in the land, nor does the administrator of Nancy Doolin claim under him. We do not perceive how this testimony, in any aspect of the case, comes within the prohibition of section 1631, Revisal 1905. The plaintiffs do not claim under Secrest. He never had any interest in the land, but, as the assignee of the bidder at the sale, directed how it should be conveyed. The limitations to his "heirs" would be void under the familiar maxim, "nemo est hæres viventis," but for the provisions of the statute, Revisal 1905, § 1583, which enacts that in such cases the word "heirs" shall be construed to mean children. *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598. No question of agency is presented. Secrest

was not acting as agent of Nancy Doolin. He was acting, so far as the record shows, for himself and carrying out his own declared purpose to secure to her a home for her life and then to his children. It is true that Mr. Broom says that Secrest said "something about some of her money being in it." This is too indefinite to form the basis of any conclusion.

We find no error in his honor's instruction or refusal to give those submitted. We have examined the entire record with care, and find no error. The jury, upon ample and competent testimony, under proper instructions from the court, have found the facts as contended by plaintiffs. The only possible question, in regard to which any doubt could exist, was whether the evidence showed a mistake of fact in regard to the placing of the words of limitation. For the reasons we have pointed out, when the words in the habendum were restored, we are of the opinion that, by giving effect to the intention of the parties, the children of Secrest were entitled to the land by way of remainder, upon the death of Nancy Doolin. His honor has reached the same conclusion by a different route. The "clipping" of the words from the habendum of the deed and having it recorded in a mutilated condition was wrongful. The judgment restores the parties to their rights.

There is no error.

#### N. M. MATTHEWS & CO. v. PROGRESS DISTILLING CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### APPEAL AND ERROR (§ 1195\*)—TIME OF TAKING PROCEEDINGS—FINALITY OF DECISION.

Proceedings were instituted by creditors to ascertain the liens against their common debtor, the order of their priority, and to subject his property to their payment. An exception was filed to the report of the commissioner which was sustained by the court, and an appeal taken. The Supreme Court reversed the decree of the lower court, and pronounced the decree which should have been pronounced below, and the case was remanded for further proceedings. *Held*, that the decision of the Supreme Court was final and imparted finality to the decision of the court below on the expiration of the period within which under the rules of the Supreme Court a petition to rehear could be filed, and a petition to review the judgment of the lower court must be brought within one year after the allowance of the final decree as provided by Code 1904, § 3435.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1195.\*]

Appeal from Circuit Court, Rockingham County.

The Progress Distilling Company, filed a petition in proceedings by creditors of P. J. Lamb to ascertain the liens against the said Lamb, the order of their priority, and subject his property to their payment, in which petition they asked that certain judgments held

by the said distilling company shall be given priority to a judgment by N. M. Matthews & Co. The relief prayed for was granted, and Matthews & Co. appeal. Reversed.

Roller & Martz, for appellant. Conrad & Conrad, for appellee.

KEITH, P. A bill was filed in the circuit court of Rockingham county by Rosenheim & Son, the Progress Distilling Company, and others, suing on behalf of themselves and all other lien creditors of P. J. Lamb, in order to ascertain the liens against the defendant, the order of their priority, and to subject his property to their payment. There was a reference to a commissioner, who made his report, to which certain exceptions were filed, one of which assigned as error that "more than one year's rent, as against the other judgment creditors of Lamb, was allowed in favor of his landlord, C. A. Sprinkel." The court sustained this exception, the case was brought here on appeal, and a decree was rendered at the November term, 1904, in which the decree of the circuit court was reversed and annulled, "and, this court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it further adjudged, ordered, and decreed that the second exception filed by the complainants in said circuit court to the report of Commissioner Bryant, returned and filed in this cause on the 16th day of March, 1904, be overruled, and the said report be and the same is hereby confirmed." *Sprinkel v. Rosenheim & Son*, 103 Va. 185, 48 S. E. 883. The cause was remanded for further proceedings in the circuit court not in conflict with the written opinion of this court.

It will be observed that the decree appealed from was rendered on the 8th of June, 1904. The decree of this court was rendered on the 29th day of November, 1904, and at the June term, 1906, of the circuit court of Rockingham county, the Progress Distilling Company and Roskam, Gerstley & Co. filed their petition, in which they show that certain debts established by the report of the commissioner of date March 16, 1904, were incorrectly stated, in this: That a debt by judgment due to Matthews & Co. was reported in the fifth class, and petitioners' judgments were reported, respectively, as in classes 6 and 7, while, if these judgments had been correctly reported, the debt of Matthews & Co. would have been subordinated to the liens of the petitioners.

The mistake occurred in this way: All three judgments were rendered at the October term, 1902, of the circuit court of Rockingham county. They were rendered in accordance with the statute which authorizes a judgment against a defendant after 15 days' notice. The 15 days' notice in the case of Roskam, Gerstley & Co. expired on the 13th

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

day of October, 1902, and judgment was rendered thereon as of that date; that of the Progress Distilling Company matured on the 17th day of October, 1902, and judgment was rendered as of that date. In the case of Matthews & Co. the 15 days' notice it seems did not expire until October 25th, and judgment was rendered thereon as of that date. In entering these judgments on the judgment docket, in the column under the head of "Date of Judgment," the clerk should have noted that the judgment was not rendered until the 25th day of October, but instead he simply entered under that heading that it was rendered at the October term, 1902. When he came to record the judgments of petitioners, however, he properly indicated the date at which their judgments were rendered during the term; so that, when the master commissioner examined the judgment docket to ascertain what judgments there were against Lamb and the order of their priority, finding the Matthews judgment entered upon the docket as of the October term, 1902, without giving the date of its rendition, he assumed that it related back to the first day of that term, and accordingly gave it priority.

Without going further into the petition, it suffices to say that leave was given the petitioners to file their petition, and that such proceedings thereon were had that on the 10th day of April, 1907, a decree was rendered granting the relief prayed for, and from that decree an appeal was allowed by this court.

By section 3435 of the Code of 1904 it is provided that "no bill of review shall be allowed to a final decree, unless it be exhibited within one year next after such decree, except that an infant or insane person may exhibit the same within one year after the removal of his or her disability."

None of the parties interested in this proceeding are within the excepted classes, and the decree of the circuit court which was appealed from, and the decree of this court which disposed of that appeal, were both entered more than one year before the petition in this case was filed.

Every decision of this court, whether it be upon an interlocutory or a final decree, is in its nature final, "except possibly where this court disposes of only a part of the case at one term and reserves it for further and final action at another." *Campbell's Ex'rs v. Campbell's Ex'r*, 22 Grat. 649.

That case is of the highest authority. In it Judge Moncure, speaking for the whole court, reviews all the authorities bearing upon the subject. It has since been cited in cases almost without number, and always with approval. At page 671 of 22 Grat., the opinion says, in part: "The decree of this court is certainly not interlocutory, and is none the less final because it is upon an appeal from an interlocutory decree of the court below. The latter decree does not impart its inter-

locutory nature to the decree of this court which affirms or reverses it in whole or in part, or adjudicates the principles of the cause. The case made for the Court of Appeals by an appeal from a decree of the court below, whether final or interlocutory, is, as to the Court of Appeals, a complete case in itself, and the decree of that court therein is final and conclusive between the parties, as well upon that court itself as upon the court below; and the Court of Appeals can do nothing more in the course of the same litigation until a new and different appeal is brought up to it from some decree of the court below, rendered in the cause upon subsequent proceedings in that court; and then the Court of Appeals can only review and revise that decree without interfering with its own former decree. The two appeals are different and independent cases in this court. The decision of this court is not only final in regard to the decree appealed from, but also in regard to all the prior orders and decrees in the case between the appellants and appellees."

From which it appears that the interlocutory character of the decree appealed from does not impart that quality to the decree of this court, but that, on the contrary, all the decrees of this court being final in their nature, the quality of finality is imparted to the decree appealed from, whether that decree was final or interlocutory. *Lore v. Hash*, 89 Va. 277, 15 S. E. 549; *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241; *Rosenbaum v. Seddon*, 94 Va. 575, 27 S. E. 425.

It is contended by appellees that the limitation of section 3435 did not begin to run until the mistake which had been committed to their prejudice was discovered.

In *Bickle v. Chrisman's Adm'x*, 76 Va. 678, this court construed section 2929 of the Code, which is as follows: "No gift, conveyance, assignment, transfer, or charge, which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless, within five years after the right to avoid the same has accrued, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied on by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer, or charge is declared to be void by section twenty-four hundred and fifty-nine." The contention in that case was that the statute did not begin to run until a right of action had accrued to him against whom it was pleaded; but the court, conceding that to be "undoubtedly correct with respect to almost all of our statutes of limitation," was of opinion that with respect to the limitation prescribed by section 2929 it began to run from the date of the execution of the deed; that the exceptions to the operation of the statute must be found in the statute itself; that the doctrine of an inherent equity creating an exception where the statute makes none has now been univer-

sally exploded; and that mere want of knowledge in the creditor is insufficient to suspend the operation of the statute.

In *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200, Judge Buchanan citing *Bickle v. Chrisman's Adm'x.*, supra, says in the course of his opinion that the mere fact that the complainant did not know that the conveyance was without consideration until the year 1897 cannot repel the bar of the statute of limitations; that to have that effect such ignorance must proceed from the fraud of the grantee, and this should be plainly charged in the pleadings.

*Craufurd v. Smith*, 93 Va. 628, 23 S. E. 235, 25 S. E. 637, is relied upon by appellees; but we do not find that it is in conflict with the cases already cited. It was there held that no lapse of time and no delay in bringing a suit, however long, will defeat the remedy in case of fraud or mutual mistake, provided the injured party during such interval was ignorant of the fraud or mistake, without fault on his part.

We are of opinion, therefore, that the decree of this court entered at its November term, 1904, was a final decree; that it imparted the attribute of finality to the decree appealed from; that it became final and irreversible, except upon the ground of after-discovered evidence, upon the expiration of the period within which, under the rules of this court, a petition to rehear could be filed; that whether regard be had to the decree of this court, or to that of the circuit court of Rockingham from which the former appeal was taken, the limitation of one year prescribed by section 3435 constitutes a bar to this proceeding; and that the petition or bill of review should have been rejected by the circuit court.

The decree of the circuit court must be reversed, and the cause remanded for further proceedings not in conflict with this opinion. Reversed.

#### HOPKINS et al. v. WAMPLER.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. WILLS (§ 52\*)—PROBATE—PROCEEDINGS TO ESTABLISH.

In probate proceedings, it is necessary to show, not only that the will was executed pursuant to the statute, but that it was the will of a capable testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 101; Dec. Dig. § 52.\*]

#### 2. WILLS (§ 52\*)—PROBATE—PRESUMPTIONS—CAPACITY OF TESTATOR.

The due execution of a will being proved, it is presumed that it is the will of a capable testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 101; Dec. Dig. § 52.\*]

#### 3. WILLS (§ 52\*)—TESTAMENTARY CAPACITY—BURDEN OF PROOF—PRESUMPTION.

Where testator's sanity is put in issue by evidence, the burden is on proponent to show

his testamentary capacity, but the presumption of sanity obtains upon the trial of that issue until it is overcome by contestant's evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 104-109; Dec. Dig. § 52.\*]

#### 4. EVIDENCE (§ 63\*)—PRESUMPTIONS—SANITY.

Every man is presumed sane until evidence to the contrary is produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.\*]

#### 5. WILLS (§ 329\*)—PROBATE—ACTIONS—INSTRUCTIONS—SANITY OF TESTATOR.

In a will contest, an instruction that a proponent must prove by a preponderance of the evidence that the instrument offered was the true will of a capable testator, and nothing short of clear and convincing evidence will suffice, but which omitted to state the presumption in favor of testator's sanity, was erroneous and misleading.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 776, 777; Dec. Dig. § 329.\*]

#### 6. WILLS (§ 53\*)—PROBATE—EVIDENCE—SUFFICIENCY—TESTAMENTARY CAPACITY.

In a will contest, proponent need establish the instrument as the last will of a competent testator only by a preponderance of the evidence, and it was error to require such proof by clear and convincing evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 138; Dec. Dig. § 55.\*]

#### 7. EVIDENCE (§ 478\*)—OPINION EVIDENCE—SANITY.

A nonexpert witness may give his opinion of a testator's sanity if he states the facts and circumstances within his personal knowledge upon which his opinion is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2242; Dec. Dig. § 478; Wills, Cent. Dig. §§ 113-115.]

#### 8. EVIDENCE (§ 474\*)—OPINION EVIDENCE—MENTAL CONDITION.

That witnesses did not have sufficient opportunity of observing testatrix to enable them to give a reliable opinion as to her sanity went only to the weight of their testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474; Wills, Cent. Dig. § 116.]

#### 9. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.

In a will contest, upon the issue of testator's sanity, it is competent to prove the manner in which he was treated by his family.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 53.\*]

#### 10. EVIDENCE (§ 317\*)—HEARSAY—MENTAL CONDITION.

Evidence by others of the opinion of testatrix's family as to her mental condition is inadmissible, being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1176; Dec. Dig. § 317.\*]

Error to Circuit Court, Rockingham County.

Application by J. H. Hopkins and another for the probate of the last will of Amanda E. Miller, deceased. Judgment for contestant, Ida E. Wampler, denying the probate, and proponents bring error. Reversed and remanded for new trial.

E. B. Crawford and D. O. Dechert, for plaintiffs in error. Sipe & Harris, for defendant in error.

WHITTLE, J. The plaintiffs in error, J. H. Hopkins and Susannah Hildebrand, proponents of a paper writing purporting to be the last will of Amanda E. Miller, deceased, bring error to the final sentence and judgment of the trial court approving the finding of the jury, on an issue devisavit vel non, that said paper was not, nor was any part thereof, the true last will of Amanda E. Miller.

The sole question submitted to the jury was the testamentary capacity of the testatrix, and the principal error assigned relates to the ruling of the court in the matter of the degree of proof which rested upon the proponents on the trial of that issue.

The instruction complained of told the jury "that a party who seeks to set up a will must prove by a preponderance of evidence that the paper offered for probate is the true will of a capable testator. and that nothing short of clear and convincing evidence will suffice; and, unless the jury believe that it has been established by clear and convincing evidence that Amanda Miller was a capable testatrix at the time of the execution of the paper, \* \* \* they must find a verdict against the same."

The unqualified language of this instruction, which wholly omits the presumption in favor of sanity and announces the proposition that the burden of proving testamentary capacity by clear and convincing testimony is upon the proponents, is not in harmony with the established rule on that subject, and was calculated to mislead the jury.

It is true that in probate proceedings the court or jury must be satisfied, not only that the will has been executed in accordance with the statute, but also that it is the last will of a free and capable testator. Yet in general the latter is presumed when the due execution of the will is proved. 2 Min. Inst. (2d Ed.) pp. 939, 940; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

In *Burton v. Scott*, 3 Rand. 399, Judge Carr, in discussing the rules of evidence which govern questions of insanity in cases of probate, observes: "I understood the counsel for the appellants [the contestants] to lay it down, as a general rule, that it was incumbent on the devisee claiming under a will to prove the sanity of the testator; that the onus was upon him in every question of this sort. Taken in this latitude, I do not consider the position correct. The natural presumption is that every man is sane and competent to make a will, and this presumption must stand until destroyed by proof on the other side. To say that insanity must be presumed until sanity be proved would seem to be saying that insanity is the natural state of the human mind." *Temple v. Temple*, 1 Hen. & M. 476; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500; *Wallen v. Wallen*, supra.

Where, however, the sanity of the testator is put in issue by the evidence of the con-

testant, the onus probandi lies upon the proponent to satisfy the court or jury that the writing propounded is the will of a capable testator. Yet, upon the trial of that issue, there is an existent presumption in favor of the testator's sanity. Indeed, of such force is that presumption in our jurisprudence that though one be on trial for a felony, involving life or liberty, when the defense of insanity is relied on, it must be proved to the satisfaction of the jury.

In *Wallen v. Wallen*, supra, the doctrine is thus formulated: "The burden of proving testamentary capacity is on the proponent of a will, but, when a will is offered for probate and it is shown that all the statutory formalities have been complied with, and especially when it appears that the will is wholly in the handwriting of and is signed by the testator, there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced."

On the question of the quantum of proof of testator's sanity, the court approved an instruction that it must be established by "a preponderance of testimony" rather than by "clear proof."

In the leading case of *Riddell v. Johnson's Ex'r*, 26 Grat. 152 (a suit in equity to set aside a bequest to testator's attorney who wrote the will), the court upon a review of the authorities in this country and in England, at page 177, quotes with approval the rule laid down by Baron Parke in *Barry v. Butlin*, 1 Curt. Ecc. R. 637: "That the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

It was suggested in the argument of the case in judgment that a higher degree of proof of testamentary capacity was required in *Tucker v. Sandidge*, 85 Va. 546, 8 S. E. 650, *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314, and *Gray v. Rumrill*, 101 Va. 512, 44 S. E. 697.

In those cases, it is true, the court does say that "nothing short of clear and convincing evidence will suffice," or that the proof must be "clear and convincing." But to sustain that proposition *Tucker v. Sandidge* cites *Riddell v. Johnson*. *Chappell v. Trent* refers to no authority, and *Gray v. Rumrill* cites the two former cases. So it will be observed that these cases rely upon *Riddell v. Johnson*, and, while they change the phraseology of the rule, it is not believed that it was intended to modify the well-settled doctrine of the degree of proof required in that class of cases.

We conclude on that branch of the case (testatrix's sanity having been drawn in question) that the burden of proving her sanity at the time of the execution of the alleged will to the satisfaction of the jury



rested upon the propounders; and in determining that question the jury should also have taken into consideration the presumption in favor of testatrix's sanity.

The other assignments of error requiring notice direct attention to rulings of the court permitting certain witnesses to give their opinions on the question of testatrix's sanity.

It is conceded that a nonexpert witness may give his opinion on that subject when he states the facts and circumstances within his personal knowledge upon which his opinion is based. *Young v. Barner*, 27 Grat. 96; *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536. But the exception to the admissibility of the testimony rests upon the contention that these witnesses do not show that they had sufficient opportunity of knowing and observing the testatrix to form a reliable opinion as to her mental condition.

We are of opinion that the objection affects the weight rather than the admissibility of the testimony, and is therefore not well taken.

Other exceptions are to the admission of testimony tending to show that the testatrix was regarded in her family as weak-minded and childish.

It is competent to prove the treatment of the testatrix by the family, but not their opinions of her mental condition. *Wigmore on Ev.* § 1621, citing *Foster v. Brooks*, 6 Ga. 290, where it is said: "Hazardous in the extreme would it be to the rights of parties under the law if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals. Hearsay evidence is excluded, because a witness ought to be subjected to cross-examination; that being a test of truth. It ought to appear what were his powers of perception, his opportunities of observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth." See, also, *State v. Coley*, 114 N. C. 879, 19 S. E. 705.

Upon these considerations we are of opinion that the sentence and judgment of the trial court should be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with this opinion.

Reversed.

#### STAUNTON MUT. TELEPHONE CO. v. BUCHANAN.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. TORTS (§ 22\*)—JOINT AND SEVERAL LIABILITY.

Joint tort-feasors are jointly and severally liable, and may all be sued jointly, or two or more of them jointly, or either of them may be sued severally, by the injured party.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 29; Dec. Dig. § 22.\*]

#### 2. JUDGMENT (§ 630\*)—BAR—PERSONS WHO MAY PLEAD BAR—JOINT WRONGDOERS.

Since plaintiff could sue a telephone company and a city either jointly or severally if his store was burned by their joint negligence, after suing them jointly he could dismis or discontinue as to either, and afterward take a nonsuit as to the other, without releasing the liability of either, or barring another action against either for the same cause.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1146; Dec. Dig. § 630.\*]

#### 3. JUDGMENT (§ 630\*)—BAR—PERSONS WHO MAY PLEAD BAR—SATISFACTION BY JOINT WRONGDOER.

A judgment against one of joint tort-feasors is not a bar to an action against the others until plaintiff is deemed to have received satisfaction for the wrong or to have elected to rely upon one proceeding and abandon the others, so that a former judgment for one joint wrongdoer would not bar a subsequent action against another for the same wrong.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1146; Dec. Dig. § 630.\*]

#### 4. JUDGMENT (§ 630\*)—BAR—PERSONS ENTITLED TO PLEAD BAR—JOINT WRONGDOERS—SATISFACTION OF CLAIM.

The general rule is that a right of action against joint wrongdoers is not satisfied, so as to bar subsequent actions against either of them, until an actual satisfaction has been received, but in Virginia a recovery and judgment against one of the wrongdoers bars a subsequent action against the others, whether it is deemed a satisfaction of the claim or a final election to proceed against that defendant alone.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1146; Dec. Dig. § 630.\*]

#### 5. JUDGMENT (§ 585\*)—BAR—ACTIONS CONCLUDED—IDENTITY OF ISSUES.

In an action against a telephone company for damage to a store by fire, one count charged its negligence in permitting its wires to come in contact with the city's electric light wires, and the other count charged defendant's negligence in not installing a fuse block in the store. A special plea to the entire declaration alleged that defendant was a joint wrongdoer with the city, if negligent, and pleaded a former action against the city for the same cause in which it had judgment. *Held* that, even if the plea was good as to the first count, it was no defense to the second count.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 585.\*]

#### 6. PLEADING (§ 88\*)—PLEA—RESPONSIVENESS—PLEA GOOD IN PART.

A plea which purported to go to the whole declaration, but only answered a part of it, was bad, and was properly stricken.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 181; Dec. Dig. § 88.\*]

#### 7. ELECTRICITY (§ 19\*)—INJURIES INCIDENT TO USE—ACTIONS—EVIDENCE.

In an action against a telephone company for damage to a store by fire caused by the negligent maintenance of defendant's wires, the evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19\*]

Error to Corporation Court of City of Staunton.

Action by B. B. Buchanan against the Staunton Mutual Telephone Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. S. Ker and Patrick & Gordon, for plaintiff in error. S. S. Patterson, Jos. A. Glasgow, and Timberlake & Nelson, for defendant in error.

BUCHANAN, J. The first error assigned is to the action of the court in striking out three special pleas filed by the plaintiff in error, the defendant in the corporation court.

In the month of December, 1905, a fire occurred in the storehouse of the defendant in error, the plaintiff in the court below. In the following February the plaintiff instituted his action of trespass on the case against the Staunton Mutual Telephone Company and the city of Staunton. The declaration in that case contained two counts, one against the telephone company, and the other against the city of Staunton, for negligently causing the fire.

The telephone company demurred to the declaration, upon the ground, among others, that "the declaration does not state a joint cause of action against the defendants, but sets up a separate cause of action against each defendant, thus bringing two suits in one action, and that the whole declaration is bad." The city of Staunton united in the demurrer.

The circuit court, being of opinion that there was a misjoinder of parties, sustained the demurrer, ordered the cause to be abated as to the city of Staunton, and gave the plaintiff leave to amend his declaration by striking out the count against the city. After the amendment and a mistrial in the case, the plaintiff took a nonsuit.

During the same month in which that action was instituted, the plaintiff brought his action against the city of Staunton in the same court. In the declaration in that cause it was averred that the fire was caused by the negligence of the city. The trial in that cause upon the plea of not guilty resulted in a verdict and judgment in favor of the city.

After the plaintiff had taken the nonsuit in the former, and there had been a judgment against him in the latter, cause, he brought this action against the said telephone company. It filed the plea of not guilty and three special pleas, which special pleas, as before stated, were stricken out upon motion of the plaintiff.

The defense set up in special pleas numbered 1 and 3 was in substance that, if the telephone company was guilty of the trespass complained of, it was jointly guilty with the city of Staunton, and, as there had been a verdict and judgment in favor of the city in the said action against it by the plaintiff, he was estopped from prosecuting this action against the telephone company.

The defense relied on in special plea numbered 2 was that the dismissal or abatement of the said action as to the city of Staunton in the said action in which the nonsuit was afterwards taken operates as a release of

that city of the injury complained of, and that the release of the city inured to the benefit of, and was a release of, the defendant telephone company from all liability on account of the said trespass, which it was alleged was the same as that upon which this action is based.

Upon the motion to strike out the special pleas, it was agreed by the parties that the records in the said causes lately pending in the circuit court should be considered as evidence.

The facts set up in special plea No. 2 constituted no defense to the plaintiff's action, even if the telephone company and the city of Staunton had been sued in the first-named cause as joint-trespassers.

Co-trespassers are jointly and severally liable, and the party injured may sue all of them jointly, or two or more of them jointly, or one of them severally, as he may see proper. *Riverside Cotton Mills v. Lanier*, 102 Va. 143, 45 S. E. 875; 5 Rob. Pr. 73; 1 Cooley on Torts (3d Ed.) 224.

As the plaintiff had the right to sue the telephone company and the city of Staunton (if they were joint wrongdoers) jointly or severally, he had the right after he had sued them jointly to dismiss, discontinue, non pros. or nolle pros. as to either, and afterwards take a nonsuit as to the other; and there would be no release of the liability of either or bar to a future action against either for the same cause. See 1 Chitty's Pl. (10th Ed.) 567, 568; Note 2 of Sergeant Williams in the case of *Salmon v. Smith*, 1 Saunderson's Rep. 203, 207; 4 Min. Inst. (1st Ed.) 781, 782; *Ammonett v. Harris*, etc., 1 Hen. & M. 488; *Coffman & Richardson v. Russell*, 4 Munf. 207; *Muse v. Farmers' Bank*, 27 Grat. 252, 257.

Neither do special pleas numbered 1 and 3 set up such a state of facts as would bar the plaintiff's right to recover in this case. Since the injured party may bring a several action against every co-trespasser, if he desires to do so, neither action is a bar to the others until a stage has been reached in some one of the actions at which the plaintiff is deemed in law, neither to have received satisfaction or to have elected to rely upon one proceeding for his remedy to the abandonment of the others. 1 Cooley on Torts (3d Ed.) 231.

As to what that stage is, the cases are not in accord. In some jurisdictions it is held that it is not reached until an actual satisfaction has been received, and that is the doctrine generally prevailing in this country. 1 Cooley on Torts, 232-234; 7 Rob. Pr. 209.

In other jurisdictions it is held that it is reached when the plaintiff has recovered a judgment upon which he has caused an execution to be issued. 1 Cooley on Torts, 234.

In England and in this state that stage is held to be arrived at when there is a re-

covery and judgment against one of the wrongdoers. Such a judgment, whether it be deemed in law a satisfaction of the plaintiff's claim, so far as the other tortfeasors are concerned, or a final election to proceed against that wrongdoer alone, is a discharge of the others and a bar to any further action against them for that cause of action. 7 Rob. Pr. 205, 208, 219, 220; *Ammonett v. Harris*, supra; *Wilkes v. Jackson*, 2 Hen. & M. 355; *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811.

It may be (but it is unnecessary to consider that question), as insisted by the defendant, that a judgment in favor of one of two tortfeasors, when sued alone, would bar an action against the other for the same cause, if the judgment was based upon a defense which showed that the plaintiff could have no cause of action against either. 23 Cyc. 1213. But, if this were true, the judgment relied on in this case in said pleas (1 and 3) would not be a bar. Those pleas, when read in connection with the record in the case in which that judgment was rendered, not only do not show that the plaintiff could have no cause of action against either, but only shows that he did not have a cause of action against the city of Staunton. There are two counts in the declaration in this case—one based upon the negligence of the telephone company in permitting its wires to come in contact with the wires of the city's electric lighting system, heavily charged with electricity, and the other based upon the negligence of the telephone company in failing to use and install a device in general use among telephone companies, known as a "fuse block," in the plaintiff's store.

The special pleas (1 and 3) professed to go to the whole of the plaintiff's declaration, but, at most, only answered the cause of action set up in the first count, and furnished no defense to that set up in the second count. The pleas, even if they set up a good defense to the case, made by the first count, were bad, and properly stricken out by the court, for it is well settled that plea is not good which professes to go to the whole action, but only answers a part of it. *Hunt's Adm'r v. Martin's Adm'r*, 8 Grat. 578; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851; *Merriman v. Cover*, *Drayton*, etc., 104 Va. 428, 51 S. E. 817; 4 Min. Inst. (1st Ed.) 653, 654; 5 Rob. Pr. 165.

The second error assigned is to the action of the court in instructing the jury. That assignment of error, which is very general, does not seem to be much relied on, either in the petition or the brief of the plaintiff in error, and, if it were, does not require any discussion of the instructions in detail. When considered as a whole, it is clear that the jury could not have been misled by any of them, as is contended, and that they submitted the case to the jury as favorably to

the defendant as it was entitled to have it done.

The remaining assignment of error is to the refusal of the court to set aside the verdict.

There is no question that there was a fuse in the plaintiff's storehouse, and that the damages resulting to him therefrom were equal to the amount found by the jury. There was evidence that the fire started in the corner of the building where the phone was located; that about two hours before the storehouse was discovered to be burning a fire did occur in a cable box on a telephone pole near Gibson's corner, from which point the wires ran into the plaintiff's storehouse; that the defendant's wires not far from that corner crossed under the heavily charged wires of the city's electric light system, and so near to them (one inch) that they might come in contact with them, and had on several occasions given trouble because of such contact; that the city wires were as high as they could be placed on the poles, and that it had notified the telephone company that the latter's wires had been placed too near the electric light wires, and requested it to lower them, as could have been done, but no attention was paid to the request, though several times made; that the defendant had failed, when the phone was installed in the storehouse, to put in a fuse block, an appliance in common use, which was intended to and did prevent the flow of electricity when unduly heavy, and the consequent damages resulting therefrom; that on the night of the fire there was trouble with the phone, of which the defendant had notice. The conduct and admissions of the president and general manager of the defendant at and about the time of the fire tended to show that they believed that the phone was the cause of the fire, as did the statement of the electrician of the Southeastern Tariff Association, who represented 50 or more insurance companies, and was sent to the scene of the fire to examine into its origin. There is no evidence in the cause which shows that it was reasonably probable that the fire originated in any other manner.

There is sufficient evidence to sustain the verdict of the jury, whether they based it upon one or both counts of the declaration.

We are of opinion that the judgment complained of should be affirmed.

Affirmed.

McINTYRE et al. v. SMYTH.†  
(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

1. PLEADING (§ 288\*)—SIGNATURE OF COUNSEL.

Good practice requires all pleadings to be signed by counsel.

[Ed. Note.—For other cases, see Pleading Cent. Dig. § 854; Dec. Dig. § 288.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied.

## 2. PLEADING (§ 271\*)—DEMURRER—PERMITTING AMENDMENT.

On demurrer to a pleading because not signed by counsel, it was within the discretion of the court to permit counsel to sign it, and thus remove the ground of objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 819; Dec. Dig. § 271.\*]

## 3. PARTIES (§ 95\*)—AMENDMENT OF DECLARATION—NEW PARTIES.

Where a declaration as originally framed was against M., trading and doing business as M. & Co., plaintiff, on subsequently ascertaining that the firm was composed of a number of persons, was entitled to amend his declaration by the insertion of their names.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 164; Dec. Dig. § 95.\*]

## 4. TRIAL (§ 60\*)—ORDER OF PROOF.

The order in which proof is introduced, is a matter within the discretion of the trial court, and, while it is more regular to establish first the agency and then introduce proof as to the liability of the principal by reason of the agent's acts, a different order of proof is not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 144; Dec. Dig. § 60.\*]

## 5. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE OF AGENCY—SUFFICIENCY.

In an action against an alleged principal for the acts of his agent, evidence held sufficient to show the agency as to plaintiff, even though as between the alleged principal and agent such relation did not in fact exist.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

## 6. GAMING (§ 26\*)—CONSTRUCTION OF STATUTE.

Under Code 1904, § 3837, providing that all laws for suppressing gaming shall be construed as remedial, which requires that such statutes shall be liberally construed, section 2837, providing for the recovery of money lost at gaming must be construed as including stock gambling, though such statute was first introduced into 1 Rev. Code 1819, c. 147, § 3, at a time when stock gambling was unknown.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 26.\*]

[For other definitions, see Words and Phrases, vol. 4, pp. 3023-3028; vol. 8, p. 7668.]

## 7. GAMING (§ 50\*)—RECOVERY OF MONEY LOST—INSTRUCTIONS.

Code 1904, § 2837, provides that if any person "lose to another within 24 hours \$7.00 or more," and pay the same, the loser may recover it back from the winner. In an action under such statute, the court instructed that, if plaintiff "paid \$7.00 or more" to the defendant, he was entitled to recover. Held, that the use of the word "paid," instead of "lose," in the instruction, was not misleading.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 50.\*]

## 8. PRINCIPAL AND AGENT (§ 194\*)—ACTION AGAINST PRINCIPAL—INSTRUCTIONS.

An instruction on the question of the existence of an agency as to third parties held to sufficiently state the law as applied to the evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 727; Dec. Dig. § 194.\*]

## 9. PRINCIPAL AND AGENT (§ 194\*)—ACTION AGAINST PRINCIPAL—INSTRUCTION AS TO AGENCY.

In an action against an alleged principal, an instruction, given at defendant's request, "that, in order to establish the agency of A., the mere fact that he held himself out to the

public as correspondent of" defendant "is not sufficient, although said" defendant "may have known that he so held himself out, but there must have been some other act or representation of agency done or made by A., with the knowledge or acquiescence of" defendant "from which the jury may reasonably and fairly infer that such agency existed, before the jury can find a verdict for plaintiff," was sufficiently favorable to defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 727; Dec. Dig. § 194.\*]

## 10. GAMING (§ 50\*)—ACTION—INSTRUCTIONS.

In an action against a stock broker, a requested instruction that if plaintiff bought from defendants stocks and grain, and that the amount sued for is that put up by plaintiff as margins, and if plaintiff had no intention of purchasing and receiving the stocks and grain, and there was no intention on the part of the sellers to deliver the same, there can be no recovery, was properly modified by adding that, if the parties intended that the goods were actually to be delivered by the seller and paid for by the buyer, said transactions are valid, even though at the time of the sale the seller had not the goods, and no means of getting them except in the open market.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 104; Dec. Dig. § 50.\*]

## 11. JUDGMENT (§ 236\*)—JOINT DEFENDANTS.

Under Code 1904, § 3395, providing that, in an action on contract against two or more defendants, plaintiff may have judgment against any one from whom he would have been entitled to recover if sued alone, a defendant against whom judgment is rendered cannot complain that as to his codefendant the verdict is set aside as contrary to the evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 413-422; Dec. Dig. § 236.\*]

## 12. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict is conclusive on all the controverted questions supported by sufficient evidence to require that submission to a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928, 3929; Dec. Dig. § 1001.\*]

## 13. NEW TRIAL (§ 76\*)—GROUNDS—EXCESSIVE VERDICT.

If the evidence shows that the damages awarded by the jury are too large, the trial court may award a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.\*]

## 14. NEW TRIAL (§ 162\*)—EXCESSIVE RECOVERY—REMISSION.

Where the jury has awarded excessive damages, the court, may, on a motion for new trial, put plaintiff on terms to abate the excess if there is plain proof as to the correct sum which should be awarded.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.\*]

## 15. APPEAL AND ERROR (§ 1153\*)—DETERMINATION OF CAUSE—FINAL JUDGMENT.

Where the record affords certain proof by which an excessive verdict can be corrected, a final judgment for the correct amount may be entered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4507-4512; Dec. Dig. § 1153.\*]

Error to Corporation Court of Staunton.

Action by Thomas Smyth against T. A. McIntyre and others. From a judgment for plaintiff, defendant McIntyre brings error. Amended and affirmed.

John W. Stephenson and Patrick & Gordon, for plaintiff in error. R. S. Ker and Timberlake & Nelson, for defendant in error.

**KEITH, P.** This was an action in assumption, instituted by Thomas Smyth against T. A. McIntyre & Co. in the corporation court of the city of Staunton, which resulted in a verdict and judgment for the plaintiff, and the case is before us upon a petition which assigns certain errors in the rulings of the trial court.

It appears that one R. D. Armstrong, prior to the institution of this suit, had been conducting a broker's office in the city of Staunton, and had made arrangements with the firm of T. A. McIntyre & Co. of New York to furnish him market quotations of stocks, grain, and cotton over a private wire owned by McIntyre & Co., connecting their office at Hot Springs, Va., with their office in New York. Over this wire Armstrong was furnished by McIntyre & Co. with daily quotations from various exchanges in New York City of which their firm was a member.

The first assignment of error is that the corporation court overruled the demurrer of the defendant to the plaintiff's declaration; the demurrer being interposed upon the ground that the declaration was not signed. The court overruled the demurrer, permitted the declaration to be signed, and the case was thereupon proceeded with.

It is the better practice to require all pleadings to be signed by counsel. It is said by Mr. Minor to be a wholesome rule. But, without stopping now to inquire whether the objection can be made by demurrer, it is certain that the court was within the proper exercise of its discretion when it permitted counsel to sign the declaration, and thus remove the ground of objection.

The second error assigned is that the trial court allowed the defendant in error to amend his declaration by inserting the names of the firm of T. A. McIntyre & Co., to wit, T. A. McIntyre, J. Edward Hulshizer, John G. McIntyre, and Edward T. White. The declaration, as originally framed, was against T. A. McIntyre, trading and doing business as T. A. McIntyre & Co. Defendant in error subsequently ascertained that the firm was composed of a number of persons, and the trial court permitted him to amend his declaration by the insertion of their names.

There was no error in this ruling.

The third assignment of error is that the corporation court erred in overruling the motion of plaintiff in error to reject the testimony of certain witnesses, as tending to establish the liability of plaintiff in error as principal of Armstrong, before proof of the fact of Armstrong's agency had been first introduced.

One of the principal contentions in the case was as to whether or not R. D. Armstrong was the agent of T. A. McIntyre & Co. in Staunton. The testimony of the witnesses

objected to tended to prove the liability of T. A. McIntyre & Co. as principal to the defendant in error.

The order in which proof is introduced is a matter within the discretion of the trial court. It is more regular to establish first the agency and then introduce proof as to the liability of the principal by reason of the agent's acts; but, if upon the whole case the agency of Armstrong and the liability of T. A. McIntyre & Co. as principal for his acts as their agent be established, the order in which the evidence tending to establish those facts was introduced would not constitute reversible error.

The fourth assignment of error is that the corporation court erred in giving the first four instructions asked for by the defendant in error.

In the first instruction the court sets out in detail the facts relied upon by the defendant in error to entitle him to recover. We have examined the evidence with much care, and we are of opinion that, with respect to every fact upon which that instruction is predicated there was evidence before the jury sufficient to warrant the court in granting the instruction as prayed for.

The instruction is as follows: "The court instructs the jury that if they believe from the evidence that R. D. Armstrong represented himself to be the 'correspondent' of T. A. McIntyre & Co., that this representation was made with the knowledge of T. A. McIntyre & Co., and without objection on their part; that Armstrong used in his office a quotation board furnished him by T. A. McIntyre & Co. containing in conspicuous letters the name and address of T. A. McIntyre & Co.; that T. A. McIntyre & Co. installed at their own expense a private telegraph wire connecting the office of Armstrong with their principal office in New York City; that T. A. McIntyre & Co. furnished over this private wire to Armstrong during the business hours of the Stock Exchange continuous market quotations on stocks, bonds, grain, and cotton, which were immediately posted on the said quotation board for the information of patrons resorting to Armstrong's office to trade; that over said private wire T. A. McIntyre & Co. also caused to be transmitted their daily market letters; that customers resorting to Armstrong's office, and desiring to trade in any one of the different stocks or commodities whose quotations were posted, gave a verbal or written order to buy or sell certain cotton, grain, or stocks, and that such order was thereupon transmitted by the said Armstrong in his own name over the said private wire to the office of the said T. A. McIntyre & Co. at New York, and executed by them; that immediately thereupon confirmation was wired back by McIntyre & Co. which consummated the deal; that customers trading at Armstrong's office were designated by a certain number which was used

by Armstrong in transmitting the order and by McIntyre & Co. in confirming the same; that Armstrong did not participate in the loss nor the profit incurred in the trades of the customers, but received as compensation a fixed sum whether the trade resulted in a profit to T. A. McIntyre & Co. or to the customer; that said compensation was the compensation received by said McIntyre & Co. and none other; that the said Armstrong deposited the margins received by him from customers to the credit of T. A. McIntyre & Co. in a local bank; that an account in the name of T. A. McIntyre & Co. was regularly run in said local bank, and that the said T. A. McIntyre & Co. drew out the money to their credit in said account directly; that said Armstrong drew on said McIntyre & Co. through said local bank for sums due to him or to said customers, which said drafts were paid by McIntyre & Co.—then the jury will be warranted in finding that the said Armstrong was the agent of the said T. A. McIntyre & Co. so far as the rights of the plaintiff here are affected, notwithstanding the fact the relations between the said McIntyre & Co. and said Armstrong are expressly disclaimed by them to be those of principal and agent, and even though as between themselves such relation did not in fact exist.”

The right of defendant in error to recover depends upon whether or not Armstrong was the agent of McIntyre & Co., and the instruction under consideration embodies the facts relied upon to establish the agency of Armstrong.

In *Board of Trade of City of Chicago v. Hammond Elevator Co. and Western Union Telegraph Co.*, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111, the facts are strikingly like those stated in the instruction under consideration. The facts showing the relations between the Chicago Board of Trade and the Hammond Elevator Company and the Western Union Telegraph Company are thus stated in the opinion of the court: “The company maintains a place of business at Hammond, Ind., and had under lease from the Western Union Telegraph Company the exclusive use, during business hours, of certain telegraph wires running from Hammond to certain offices in different cities in Illinois, including Peoria and Aurora, where the parties served with process lived. In the lease of these wires signed by defendant the offices of these ‘correspondents’ are designated as offices of the defendant, and are contained upon regular printed forms prepared by the company. The cost or rental of these wires was paid to the telegraph company by the defendant. Over these wires the defendant caused to be transmitted continuous market quotations of the New York Stock Exchange to persons standing in relation of Babb and Battle & Dickes, who are called ‘correspondents,’ and who posted those quo-

tations upon blackboards in their respective offices.

“Customers resorting to the correspondents’ offices, and desiring to trade in any one of the sixty different stocks whose quotations are posted, give a verbal or written order to buy or sell certain grain or stocks, which is transmitted by the correspondent in his own name over the private wire of the correspondent running into his office from the office of the defendant at Hammond, as an offer by the correspondent to buy from or sell to the defendant. Sometimes the price is mentioned by the customer, and sometimes not. In the latter case it is understood that the trade is to be at whatever the market is. When the order is given, the correspondent exacts from the customer such margin as he sees fit, unless the customer already has money on deposit with the correspondent, or is of known financial responsibility. Defendant accepts these orders when the state of the market justifies by return message over the same wire, the contents of which are communicated by the correspondent to the customer. The individuality of each trade is preserved throughout by a number given to it by the correspondent’s operator at the outset. The correspondent, upon receipt of this return message, gives the trader a memorandum showing the trade and the price to which his margin carries it, and, except in case of a losing trade, where he has failed to protect himself by securing from the customer a sufficient margin, the correspondent neither participates in the loss nor the profit incurred in the trade. He derives as his compensation a fixed sum, whether the trade results in a profit to the defendant or to the customer. Through daily statements and daily settlements of the balance shown thereby the correspondent remits to the defendant, through its local bank, whatever amounts are shown to be due from him to the defendant for margins, wire service, etc. When the trader wishes to close a trade thus opened, the correspondent, in like manner, receives and transmits the order over his wire to the Hammond Company, giving to the telegram the number of the order already given to the trade. The order is executed at Hammond the same way as the opening order. \* \* \*

“The relations of the correspondent with the elevator company are in each case fixed by formal contract, to the effect that the parties shall deal as principals, and that the relations of principal and agent shall neither exist nor be held to exist. There is no evidence that the correspondents Babb and Battle & Dickes have claimed or represented themselves to be agents of the defendants.

“The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the

basis of their being agents are concerned."

It is rare that two cases are found presenting so many points of resemblance as exist between the case before us and that from which the foregoing extract is taken.

The second instruction asked for by defendant in error and given by the court tells the jury that "every contract is presumed to be made with honest intent by the parties making the same, and the burden of proving that the contract in question in this case was not made with such intent rests upon the defendants. The court further instructs the jury that before they can find that the contract between the plaintiff and defendants was illegal, for the reason that it was a gambling contract, the defendants are required to prove by a preponderance of evidence to the satisfaction of the jury, not only that Thos. Smyth did not intend or contemplate the actual purchase of the stocks or the commodities ordered by him from the defendants T. A. McIntyre & Co., but must also prove by a preponderance of evidence to the satisfaction of the jury that the defendants T. A. McIntyre & Co. likewise did not intend or contemplate the actual purchase of such stocks or commodities for the plaintiff."

The third instruction asked for by the defendant in error tells the jury that, "under the statute law of Virginia, one who has lost to another, within 24 hours, \$7 or more, or property of that value, and has paid or delivered the same, may recover it back from the winner by suit, according to the interest or value, provided the suit is brought within three months after such payment or delivery. The court, therefore, instructs the jury that, even though they believe from the evidence in this case that it was never intended by either the plaintiff or the defendant T. A. McIntyre & Co. that there should ever be any actual purchase or delivery of the stock or commodity ordered by the plaintiff from the defendants, yet if the jury further believe from the evidence that the said plaintiff paid \$7 or more, within a period of 24 hours, to the said defendant, or to their agent, and that such payment was made not more than three months prior to the institution of this suit, the jury must find a verdict in favor of the plaintiff for such part of his claim itemized in his bill of particulars as is made up of margins deposited."

The objection to this instruction seems to be that section 2837 of the Code of 1904 was intended to apply to ordinary games of chance with cards, dice, etc., and not to gambling in futures. This statute was first introduced into 1 Rev. Code 1819, c. 147, § 3, p. 562, at a time when, as plaintiff in error asserts, stock gambling was unknown.

If it were conceded that the framers of the statute had in view the suppression of such gambling as is embraced in games of chance with cards, dice, etc., yet, if it appears that the language is broad enough to embrace other forms of gambling, the

courts would be bound to give it effect, and to apply it to every form of gaming which comes fairly within its terms.

By section 3837 it is provided that "all laws for suppressing gaming, lotteries, unchartered banks, and the circulation of bank notes for less than five dollars, shall be construed as remedial"—that is, they shall be given a liberal construction.

It may be well to say at this point that the contention of defendant in error is that the dealings between him and McIntyre & Co. were not gaming transactions. Plaintiff in error, on the other hand, contends that they were mere dealings in futures which never contemplated the actual delivery of stocks, but merely had in view the adjusting of differences in market value. To meet this aspect of the case, in the event the jury should take the plaintiff in error's view of the transaction, defendant in error offered the instruction based upon section 2837; his contention being that, as there was no element of gaming in the transaction between himself and plaintiff in error, he had a plain right to recover upon the evidence submitted by him, but, if the jury were of opinion that the dealings in proof before them constituted a gambling transaction, the plaintiff still had a right to recover under the statute in such cases made and provided.

Another objection taken by plaintiff in error to the instruction is that section 2837 provides that, if any person "lose" to another within 24 hours \$7 or more, he may recover it back, while the instruction in its latter clause uses the word "paid," instead of "lost."

Taking the instruction as a whole, we do not think the jury could have been misled by the change of phraseology.

The fourth instruction tells the jury: "That the question as to whether or not one is agent for another, with power to bind his principal where the interest of outside parties is involved, is one to be determined, not alone by the actual contract between the parties as to whom it is sought to establish the relation of principal and agent, but that is to be considered together with all the facts and circumstances which in addition bear thereon. The question of agency in this case is to be determined by the jury from all the evidence relating to the transaction of the business and all the facts and circumstances connected with the same, both as between T. A. McIntyre & Co. and R. D. Armstrong, and between said McIntyre & Co. and said R. D. Armstrong and parties dealing with them."

We think that these instructions correctly propounded the law as applied to the evidence.

The fifth assignment of error is that the lower court erred in refusing to give the first and third instructions, as offered by plaintiff in error, and in giving the third instruction as amended by the court.

The first instruction is as follows: "The court instructs the jury that the agency of R. D. Armstrong for T. A. McIntyre & Co. as principals must be proven to exist before there can be any introduction of evidence by the plaintiff showing or tending to show acts or statements done or made by said Armstrong as such agent, and, unless the jury shall believe from the evidence that the fact of the agency of Armstrong as aforesaid was proven before the introduction of evidence showing or tending to show such acts or statements by him, then such evidence so showing or tending to show such acts or statements is inadmissible, and cannot be considered by the jury."

We have sufficiently considered the proposition embodied in this instruction in passing upon the admissibility of certain evidence. There, of course, must be evidence that Armstrong was the agent of T. A. McIntyre & Co., and further evidence of such acts on his part as agent as are sufficient to bind T. A. McIntyre & Co. as his principal, in order to maintain the judgment in this case, and, as we have already said, it is safer first to prove the agency, and then the acts of the agent relied upon to bind the principal, but, after all, the question is not so much as to the order of proof as to the sufficiency of the proof to establish those propositions; and if, upon the whole record, it appears that Armstrong was the agent of McIntyre & Co., and as such agent did such acts as would bind his principals, the order in which the proof was introduced will not require a reversal of the judgment.

Instruction No. 2 asked for by plaintiff in error was given by the court, and, as it will tend to show that upon the whole case the jury was properly and sufficiently instructed, it is well that it should appear in this opinion. It is as follows:

"The court instructs the jury that, in order to establish the agency of Armstrong, the mere fact that he held himself out to the public as correspondent of McIntyre & Co. is not sufficient, although said McIntyre & Co. may have known that he so held himself out; but there must have been some other act or representation of agency done or made by Armstrong, with the knowledge or acquiescence of McIntyre & Co., from which the jury may reasonably and fairly infer that such agency existed, before the jury can find a verdict for the plaintiff.

We think that instruction quite as favorable to the plaintiff in error as it should have been.

The third instruction asked for by plaintiff in error is as follows: "The court instructs the jury that if they shall believe from the evidence that the plaintiff, Thomas Smyth, bought from either T. A. McIntyre & Co. or R. D. Armstrong, the defendants in this case, stocks, corn, wheat, or cotton on margins, and that the amount sued for here is the amount put up by said plaintiff, Smyth,

on account of said margins and the profits derived or to be derived from said purchases on margins, and if they shall further believe from the evidence that the said plaintiff, Smyth, had no intention at the time of putting up said margins or any part thereof to purchase and receive the said stocks, corn, wheat, cotton, or any part of any of them, and that there was no intention on the part of the sellers, whether said sellers were T. A. McIntyre & Co. or R. D. Armstrong, to deliver the same, there can be no recovery by the said plaintiff, and the jury must find for the defendant."

This instruction the court refused to give as asked for, but gave it with the following addition: "But, if the parties intended that the goods were actually to be delivered by the seller to the buyer, said transactions are valid, even though at the time of the sale the seller had not the goods and no other means of getting them except to go into the open market and buy them, but such contract is valid where the parties really intended and agreed that the goods were to be delivered by the seller and to be paid for by the buyer."

We are of opinion that there was no error in this instruction, and that upon the whole case the jury were properly instructed.

This brings us to the sixth assignment of error. The suit, as originally brought in the corporation court, was against T. A. McIntyre, doing business as T. A. McIntyre & Co., and R. D. Armstrong. Afterwards it was made to appear that the firm of T. A. McIntyre & Co. was composed of a number of persons; and thereupon the corporation court, by an order, permitted the plaintiff to proceed at once against T. A. McIntyre and R. D. Armstrong, and continued the case as to the other four members of the firm of T. A. McIntyre & Co. The jury found a verdict for the plaintiff against the two defendants, T. A. McIntyre and R. D. Armstrong, and thereupon T. A. McIntyre submitted a motion to set aside the verdict as being contrary to the law and the evidence; but the court, of its own motion, set aside the verdict as to Armstrong as being contrary to the evidence, and entered judgment against T. A. McIntyre.

The contention of plaintiff in error is that the court should have made a final disposition of the case as to Armstrong; and that, in order to make good the judgment against plaintiff in error, the court, after setting aside the verdict as to Armstrong, should have dismissed the case from the docket as to him, or else made some other final disposition of it so far as he was concerned.

We do not perceive how plaintiff in error was injured by the failure of the court to dismiss the case from the docket as to Armstrong; but, however that may be, the action of the court seems to be authorized by section 3395 of the Code of 1904.

"In an action founded on contract against



two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he would have been entitled to recover if he had sued them only."

"Under this section," said this court in *Bush v. Campbell*, 26 Grat. 403, "there may be judgments in favor of some of defendants at one time and against other defendants at another, and it applies to actions on contract against two or more defendants, where defense of some is personal to themselves, though the defense is that they never were parties to the contract sued on, as non est factum."

The seventh assignment of error is that the court refused to set aside the verdict upon the following grounds: "(1) That Armstrong was not the agent of T. A. McIntyre & Co. for any purpose. (2) That Armstrong's dealings with the defendant in error, Smyth, were in the nature of gaming contracts on margins, and that there was no intention on the part either of Smyth or Armstrong to receive or to deliver the stocks and commodities dealt in. The financial condition of the respective parties, as shown by the record, demonstrates the whole business was a gambling speculation in margins. (3) That, if any judgment were rendered for Smyth, it should have been against Armstrong, and not against your petitioner."

In discussing the preceding assignments of error, we have reached the conclusion that the corporation court committed no error in the admission of testimony, that the jury were properly instructed, and that there was evidence tending to prove all the facts upon which the several instructions were predicated, and, without now going further into the evidence, we are of opinion that upon all of the controverted questions there was evidence sufficient to require that the case be submitted to a jury, and upon familiar principles their verdict cannot be disturbed, except upon a point now to be presented.

The jury rendered their verdict for the sum of \$883.25, the full amount claimed by the defendant in error in his declaration. The motion to set aside the verdict as contrary to the evidence authorized and required the court to determine upon the evidence whether the plaintiff had maintained his cause of action in whole or in part. If upon a review of the evidence it plainly appeared that the damages awarded by the jury were too large, the trial court might in its discretion set the verdict aside and award a new trial, or it might put the plaintiff upon terms to abate the amount of the verdict in his favor, if there was in the evidence plain proof as to the correct sum which the jury should have awarded.

Turning to the plaintiff's own evidence, read in connection with the statement of his

account, we find, in the account, items of profit upon several transactions aggregating \$353.25, from which is to be deducted a loss on cotton of \$70, leaving of profits \$283.25, amount invested, \$400, a second item of amount invested, \$200; making an aggregate of \$600 cash, which he claims to have furnished McIntyre & Co., which, added to the \$283.25, makes the sum of \$883.25, for which the jury rendered their verdict. This account is dated May 10, 1906. In the plaintiff's testimony it appears that he was asked:

"Q. I understand you got a check from him [i. e., from Armstrong] for \$400? A. That was for business previous to that time."

"Q. How much did you ever put up with him? A. \$700 or \$800, and I got \$400 at one time."

"Q. You are \$300 or \$400 short? A. Yes, sir. That is right."

Giving the plaintiff the largest sum consistent with his own statement of his case, the verdict should not have been for more than \$400.

We are therefore of opinion that, as the record affords plain and certain proof by which the error can be corrected, it is proper for this court to render such judgment as the corporation court ought to have entered; and that the verdict should be reduced to \$400, and judgment entered for that amount, with interest thereon from May 10, 1906, till paid. *Bowyer v. Hewitt*, 2 Grat. 193; *Lewis v. Arnold*, 13 Grat. 454; 4 Min. Inst. (1st Ed.) pt. 1, p. 870.

In all other respects the judgment of the corporation court is affirmed.

Amended and affirmed.

#### KISER v. KISER.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

##### 1. DIVORCE (§ 215\*)—TEMPORARY ALIMONY.

It is not error in an action by a husband against his wife for divorce to allow the wife \$150 temporary alimony to enable her to employ counsel and pay the costs of the litigation, where she is old and infirm, no longer capable of labor, and without means of support.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 634; Dec. Dig. § 215.\*]

##### 2. DIVORCE (§ 240\*)—PERMANENT ALIMONY.

In an action by a husband for divorce, it was shown that he had sold a tract of land for \$1,680, only \$420 to be paid at the execution of the deed and the balance in installments, the last installment not to become due until the grantor's wife should release her dower right. The prayer for divorce, as well as the prayer in defendant's cross-bill for divorce, was denied, but defendant was given \$500 as permanent alimony, which was to include \$150 temporary alimony, and the grantee, which had been made a defendant, was decreed to pay the wife the amount of her alimony, and on such payment the grantee was released from any claim of the wife to the land. *Held*, that the decree would be sustained, the allowance of the temporary alimony being proper, and the bal-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ance of the award covered the value of the wife's contingent right of dower, and it did not appear just what value was placed upon such right.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678; Dec. Dig. § 240.\*]

Appeal from Circuit Court, Dickenson County.

Action by A. J. Kiser for divorce. From a judgment denying a divorce, but granting alimony to defendant, plaintiff appeals. Affirmed.

Ayers & Smithdeal, for appellant. S. H. Sutherland, C. Phipps, A. A. Skeen, and R. E. Chase, for appellee.

KEITH, P. A. J. Kiser filed his bill asking for a divorce from his wife upon the ground that she had been guilty of adultery, was grossly negligent of her duties as a wife, and insufferably abusive toward him, provoking him beyond measure with her insulting language, and finally culminating in her abandonment of him.

The answer of the wife denies each of these allegations, avers that the defendant had been a faithful wife, had labored to rear her children and to make her home happy and comfortable, that her husband had abandoned and left her without any means of support except her own labor, and she prays that her answer may be treated as a cross-bill, that an allowance sufficient to enable her to carry on her suit be made to her, and that reasonable alimony be granted.

The court made an allowance of \$150 to the defendant for her temporary support, counsel fees, and to pay the costs of the litigation, and subsequently entered a final decree, holding that the plaintiff had failed to prove the allegations of his bill, that neither of the parties was entitled to a divorce, and awarding the defendant a gross sum of \$500, inclusive of the \$150 theretofore allowed, as permanent alimony. Upon the petition of the husband, A. J. Kiser, an appeal was allowed from this decree.

In support of the charge of adultery there is no evidence whatever, nor does the evidence on behalf of the appellant prove that he was abandoned by the defendant.

These parties were married in 1872. Five children have been born to them, of whom four are still alive—all of them over the age of 21 years. Both the husband and the wife seem to have indulged in very unseemly conduct. They were quarrelsome and abusive. She, having a quick temper and being more easily aroused, perhaps indulged more frequently in the use of improper language than he did, but he was certainly not free from fault. Apart from the violent and insulting language which they were in the habit of using to each other, they seem to have gotten along fairly well together. He appears to have been a good provider for his

family within the limit of his means, while she was provident, careful, and industrious. She continues to live at their old home. He has become a wanderer, without any fixed place of abode, and it appears that he had abandoned her rather than that she had abandoned him.

Upon the whole case, however, we incline to the view taken by the circuit court, that neither party has made a case for divorce, either from the marriage bond or from bed and board.

We are further of opinion that there is no error in the first decree appealed from, which allowed the sum of \$150 as temporary alimony and to enable the wife to employ counsel and to pay the costs of the litigation. She is an old and infirm woman, no longer capable of labor, and without means of support. Under such circumstances, the uniform practice is to make such an allowance, and, looking to all the circumstances of the case, we do not think it excessive.

The facts as to the amount allowed in the final decree are that the husband sold a tract of land containing 210 acres to the Clinchfield Coal Company at the price of \$1,680. Of this amount the sum of \$420 was paid at the execution of the deed, and the balance was to be paid in three equal installments of \$420 each. The first two of these deferred payments were due six and twelve months from the date of the deed, and the third or last installment was not to become due until Annie Kiser, the wife of A. J. Kiser, should release her dower right, either contingent or actual, in the land conveyed. The Clinchfield Coal Company was made a party defendant; and the final decree provides that this company shall "pay to the said defendant, Annie Kiser, or her attorneys, the sum of \$500, which sum shall be her permanent alimony, and to include the sum of \$150 heretofore decreed by this court to the defendant, and that the complainant do pay the defendant her costs in this behalf expended, and that execution may issue. And it is further decreed that the remainder of the fund due by the Clinchfield Coal Company on account of the land purchased by them from said A. J. Kiser, as shown by answer of said company filed herein, after deducting the amount of payment of the \$500 to Annie Kiser and the costs of suit, be released from any claim of said Annie Kiser, and that said Clinchfield Coal Company may at any time pay said residue to A. J. Kiser."

It will thus be seen that the payment of \$500 to the defendant represented what is called "suit money," temporary alimony, permanent alimony and the estimated value of her contingent right of dower in the land sold by her husband to the Clinchfield Coal Company. This is not an unreasonable allowance to the wife.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is to be observed that in this case there is no decree for divorce, and we are not free from doubt as to the propriety of allowing alimony at all under such circumstances.

In *Latham v. Latham*, 30 Gratt. 338, Judge Staples, touching upon this subject, says: "Alimony is an allowance made to the wife out of the husband's estate or income upon a decree of separation. In England, and in some of the United States, it is a mere incident to the divorce, and is never allowed when the divorce is refused, or even upon an independent bill for separate maintenance. The reason assigned is that it is against the policy of the law to make a separate judicial provision for the wife out of the husband's estate, to be expended apart from him, except in those cases where the separation is sanctioned by the courts. In Virginia the statutes allow alimony as incident to a decree for a divorce. But this court has gone farther, and held that equity has jurisdiction in an independent suit to decree in favor of the wife in proper cases—as, for example, when she has been abandoned by the husband, or driven from his house by ill treatment, and compelled to seek an asylum elsewhere."

Judge Staples then quotes from *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781, where Judge Carr said: "Suppose the husband turns his wife out of doors, or treats her so cruelly that she cannot live with him; suppose him to persevere in refusing to take her back, or to provide a cent to feed and clothe her—surely, in a civilized country, there must be some tribunal to which she may resort. In such a case a court of equity would unquestionably stretch out its arms to save and protect her." See, also, *Purcell v. Purcell*, 4 Hen. & M. 507.

It is to be observed, however, that the cases cited from 4 Randolph, and from *Hening & Munford* were decided at a time when courts had no jurisdiction to grant divorces, and when divorces could only be obtained by petition to the Legislature of the state. The better opinion may be that, since the courts have been authorized to grant divorces, our statute law upon the subject is to be looked to as the sole fountain of jurisdiction over persons and their property with respect to allowance of alimony to be exercised in proceedings for divorce; and, if that be true, then the remark of Judge Staples is also true that those statutes only allow alimony as incident to a decree for divorce.

In this case, however, all the parties interested are before the court. The allowance of \$150 as temporary alimony and for suit money would be proper in any aspect of the case, whether a divorce should be subsequently granted or not; while, with respect to the additional sum of \$350 awarded by the circuit court, it is plain that one

of the considerations moving the court was the wife's contingent right of dower in real estate which she was required to release as a condition to her enjoyment of the sum decreed in her favor. It does not appear just what the commutation of her inchoate right of dower would have been, nor do facts appear in the record upon which an accurate computation could be made; but, if the decree in her favor had been based wholly upon that consideration as to the \$350, it would perhaps not have been excessive.

Upon the whole case, we are of opinion that the decree should be affirmed.

Affirmed.

## BLUE RIDGE LIGHT & POWER CO. v. PRICE.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

### 1. EVIDENCE (§ 123\*)—RES GESTÆ.

Conversation between the motorman and a third person after a passenger, who, while attempting to board a street car, had been injured, by being thrown to the ground by the starting of the car, had arisen and got on the car, is no part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 354, 365; Dec. Dig. § 123.\*]

### 2. EVIDENCE (§ 244\*)—DECLARATIONS OF EMPLOYÉ AFTER THE EVENT.

The declaration of the motorman, after a passenger had been injured while attempting to board the car, that he had no right to stop on the railroad track, and his failure to reply, when thereupon he was asked, "What did you stop for, then?" are inadmissible against the carrier; he not being in the performance of any duty within his employment in what he said or in his silence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 932; Dec. Dig. § 244.\*]

### 3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—EVIDENCE.

It being a material issue as to whether a street car was still or moving when a passenger attempted to board it with the result of being thrown by the car moving, and the evidence thereon being conflicting, the majority of witnesses testifying it was standing still, it was not harmless to admit evidence that, after the accident, the motorman said he had no right to stop on the railroad track, and made no reply when, thereupon he was asked, "What did you stop for, then?"

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

### 4. EVIDENCE (§ 474\*)—NONEXPERT OPINIONS.

Nonexperts, who were frequently with plaintiff after her alleged injury, and in a situation to know and speak of her condition as lay witnesses could speak, could testify that she did not appear to have such use of her shoulder as enabled her to work as seamstress, and that since the accident she had not been able to do anything with her arm.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2197; Dec. Dig. § 474.\*]

### 5. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACT.

The instruction that if the jury believe defendant, at the time of the alleged injury, was engaged in running street cars, it was bound to use the utmost care and diligence for the safety

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of its passengers, and is liable for injuries to its passengers occasioned by the slightest neglect against which human prudence and foresight might have guarded, has for its object merely the statement of the degree of care defendant owed to its passengers; and does not assume plaintiff was a passenger—a question submitted to the jury by other instructions.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.\*]

6. TRIAL (§ 244\*)—INSTRUCTION—GIVING UNDUE PROMINENCE TO EVIDENCE.

Nor does such instruction call the attention of the jury to any part of the evidence on the questions of negligence or contributory negligence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 244.\*]

7. CARRIERS (§ 320\*)—INJURY TO PASSENGER BOARDING CAR—EVIDENCE—QUESTION FOR JURY.

Evidence in an action for injury to a person while attempting to board a street car held sufficient to authorize submission to the jury of the question of the car having been stopped at the point for the purpose of receiving passengers, and of its having been started suddenly and without notice while she was boarding it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1160; Dec. Dig. § 320.\*]

Appeal from Circuit Court, Augusta County.

Action by Laura V. Price against the Blue Ridge Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Charles & Duncan Curry, for appellant.  
J. M. Perry, for appellee.

BUCHANAN, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the plaintiff in error in moving its car whilst the defendant in error was attempting to board it as a passenger.

The first error assigned is to the action of the court in permitting one of the plaintiff's witnesses to testify to a conversation he had with the defendant's motorman in reference to the accident.

One of the material questions in the case was whether the car was standing still or moving when the plaintiff attempted to get on it. The witness, who was some 20 feet from the point where the plaintiff was injured, had testified that the car was not moving when the plaintiff put her foot on the step, but before she could get on the car pulled out and she fell. He was then asked: "Right there at the time Miss Price was hurt, did you say anything to the conductor?"

"Answer: Yes; I remarked to some one else—

"Question: Did you say anything to the conductor about his moving up?"

"Answer: I don't know whether it was the conductor or motorman; one of them.

"Question: What did you say to them?"

And to this question and to any answer

thereto the defendant, by its counsel, objected, on the grounds that the evidence sought to be so introduced was irrelevant and immaterial; that the said statements, if any, were matters between strangers to the defendant, and not binding upon it, its employés named not being authorized to make the same; and that such statements, if any, were not a part of the *res gestæ*. And thereupon the defendant, by its counsel, interrogated the witness as follows, with the following replies by him thereto:

"Question: Had you picked Miss Price up at the time you made this statement?"

"Answer: I didn't pick her up at all.

"Question: Had Miss Price gotten up at the time the statement was made?"

"Answer: Yes, sir.

"Question: Had she gotten up into the car?"

"Answer: Yes, sir. I went to the window and asked Miss Price if she was hurt—"

And thereupon the court overruled the said objection of the defendant to the said question propounded for the plaintiff and to any answer thereto, and permitted the said witness to answer the said question. And answering the said witness replied:

"The motorman made a remark that he had no right to stop on the railroad track; and I remarked to him: 'What did you stop for, then?'"

What took place between the witness and the motorman was no part of the *res gestæ*. Neither in what he said nor in failing to reply to what was said to him was the motorman performing any duty within the sphere of his employment or agency.

The general rule is that railway companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency, and during the transaction of the business in which they are employed. It has been held that the declarations of the conductor or engineer of a railroad train as to the manner in which an accident occurred, made after its occurrence are not admissible.

In *Luby v. Hudson River, etc., R. Co.*, 17 N. Y. 131, it was held that the declarations of the driver of a car that the reason why he did not stop it, and thus prevent the injury done the plaintiff, was because the brakes were out of order, made after the injury was inflicted and the transaction terminated, was inadmissible against the company, being mere hearsay.

See *Va. & Tenn. R. Co. v. Sayers*, 26 Grat. 328, 330-332, and authorities cited; *Jammlison v. C. & O. Ry. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813; *N. & C. R. Co. v. Suffolk, etc., Co.*, 92 Va. 413, 443, 444, 23 S. E. 737; 1 Greenleaf on Ev. § 114a (Redfield's Ed.); 1 Elliott on Ev. § 253; 2 Wigmore on Ev. § 1078.

Neither upon principle nor under the au-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thorities was the evidence in question admissible.

It is argued, however, that, even if this evidence was not admissible, its admission could not have affected the verdict of the jury. The evidence as to whether or not the car was moving or standing still when the plaintiff attempted to board it is very conflicting. More witnesses testified that it was moving at that time than testified that it was standing still. How much the evidence improperly admitted may have affected the minds of the jury in reaching their verdict it is impossible for this court to estimate, and it would (as was said in *Va. & Tenn. R. Co. v. Sayers*, supra, where similar evidence had been improperly admitted, and a like argument made that it could not have changed the verdict) be going beyond our legitimate function to enter upon any such speculation.

Two of the plaintiff's witnesses who were with her frequently after her alleged injury, and in a situation to know and speak of her condition as far as lay witnesses could speak, were permitted to testify, over the defendant's objection, as follows, in substance: One of them stated that the plaintiff did not appear to have such use of her shoulder as enabled her to carry on her work (that of a seamstress), and the other that since the accident the plaintiff had not been able to do anything with her arm, follow her occupation, or make her living, and that this condition was on account of her arm. This evidence, it is argued, was mere matter of opinion—the conclusion of the witnesses—and since they were not experts it was inadmissible.

In section 440a, 1 Greenleaf on Ev. (Redfield's Ed.), it is said, in reference to giving testimony by way of opinion, that "all witnesses are competent to form a reliable opinion, whether one whom they have the opportunity to observe appears to be sick or well at the time, or whether one is seriously disabled by a wound or a blow. But if the inquiry were more definite as to the particular state of disease under which one is laboring, or its curable or fatal character, or as to the dangerous or fatal character of a wound or a blow, or in what particular mode or with what species of weapon or instrument such blow or wound was inflicted, special study, observation, and experience might be requisite in order to express an opinion entitled to the dignity of being regarded as evidence."

The rule as laid down by Elliott on Evidence is substantially the same. Section 679.

Under that rule, which seems to be a reasonable one, the evidence objected to in this case was properly allowed to go to the jury for what it was worth.

The action of the court in giving at the request of the plaintiff the following instruction is assigned as error:

"The court instructs the jury that if they believe from the evidence in this case that the defendant company, at the time of the occurrence of the alleged injury in the declaration mentioned, was engaged in running and operating street cars in the city of Staunton for the purpose of carrying passengers, that then it was bound to use the utmost care and diligence for the safety of its passengers, and is liable for injuries to its passengers occasioned by the slightest neglect against which human prudence and foresight might have guarded."

Two objections are made to the instruction—one that it assumes that the plaintiff was a passenger of the defendant, and the other that it calls attention to a part of the evidence only, and omits other evidence relevant to the question of negligence and contributory negligence.

The object of the instruction was to tell the jury what degree of care the defendant company owed to passengers. It does not assume that the plaintiff was a passenger. Whether she was or not was submitted to the jury by other instructions. Neither does it call the jury's attention to any part of the evidence upon the question of the negligence of the defendant or the contributory negligence of the plaintiff. Those questions were fully dealt with by other instructions.

The court gave five instructions upon motion of the plaintiff, and nine at the instance of the defendant, in which every phase of the alleged negligence of the defendant and the alleged contributory negligence of the plaintiff which the evidence tended in any way to sustain was dealt with.

The giving of the plaintiff's instruction numbered 4 is assigned as error. That instruction is as follows:

"The court instructs the jury that if they believe from the evidence in this case that the defendant, through its servants and agents, stopped a certain one of its cars near the Baltimore & Ohio depot for the purpose of inviting and receiving passengers on board its cars, and that, while said car was standing for that purpose, the plaintiff attempted to get on board of said car as a passenger and while the car was standing still, and when she had taken hold of the railing of the platform and was attempting to get on the car, and before she had time to get on, the car was suddenly and without any warning to her negligently started, and the plaintiff was thrown, knocked, and jerked down on the street and injured, then the jury ought to find a verdict for the plaintiff, if they believe from the evidence that the said negligent starting of said car was the proximate cause of the plaintiff's injury."

The objections made to this instruction are (1) that there was no evidence that the car was stopped at the point mentioned for the purpose of inviting and receiving passengers on board the car; (2) that, while it

undertakes to detail the facts hypothetically, it omits the evidence of witnesses who stated that the plaintiff was warned not to attempt to board the car at the time she was injured; and (3) that the instruction omits a most material element of the commencement of the relation of carrier and passenger, namely, acceptance of the passenger by the carrier.

We do not think that either of these objections is good. The plaintiff testified that, when she determined to take the car, it was standing still, but, before she reached it, it pulled out; that it stopped again when she started towards it and the conductor came along and took her telescope, walked up in the car, she being immediately behind him; that she took hold of the rod and got about half her weight on the step when the car started off rapidly, causing her to fall and receive the injuries complained of.

This evidence manifestly tended to prove that the car had stopped for the purpose of receiving passengers, that the plaintiff wished to get on it, and that the conductor knew this and was aiding her in her effort to do so. There was also evidence tending to show that the car was suddenly, and without warning to the plaintiff, started, and that she fell or was thrown therefrom and received the injuries complained of. This was the case which her evidence tended to make, and, if the facts hypothetically stated in the instruction were established, there can be no question that she was entitled to recover. It would be a somewhat startling proposition to hold that a person attempting to get on a street car under the circumstances set out in that instruction was not entitled to that high degree of care which companies operating such cars owe to passengers.

We see no error in the instruction.

The defendant's theory of the case—that the car had not stopped for passengers, that plaintiff had been warned not to attempt to get on at the place where she was injured, that the car was moving at that time, and that she had not become a passenger when injured—was fully submitted to the jury by defendant's instructions numbered 4, 5, and 9.

The remaining assignment of error is to the refusal of the court to set aside the verdict as contrary to the evidence. As the case will have to be reversed for the improper admission of evidence, as hereinbefore stated, and the cause remanded for a new trial, upon which the evidence may not be the same, nothing would be gained by passing upon this assignment of error.

The judgment complained of will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

## HARLOW'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

### 1. RAILROADS (§ 358\*)—INJURIES TO PERSONS ON TRACK—CARE REQUIRED AS TO LICENSEES.

A railroad company does not owe the duty of previous preparation for the protection of a bare licensee upon its track or roadbed, as such licensee takes upon himself all ordinary risks attached to the place and the business carried on there.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.\*]

### 2. RAILROADS (§ 398\*)—INJURIES TO PERSONS ON TRACK—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a railroad company for the death of plaintiff's intestate by a passing train while walking by the side of defendant's track held insufficient to show notice to the railroad company that the steps of one of its railroad coaches were so loose that they could swing out and strike a person walking by the side of the track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.\*]

Appeal from Circuit Court, Augusta County.

Action by the administrator of Albert F. Harlow against the Chesapeake & Ohio Railway Company. Demurrer to plaintiff's evidence was sustained, and an appeal taken. Affirmed.

Timberlake & Nelson and Chas. & Duncan Curry, for appellant. Robert L. Parrish, for appellee.

HARRISON, J. This action was brought to recover damages for the death of the plaintiff's intestate, caused, as alleged, by the negligence of the Chesapeake & Ohio Railway Company. A demurrer to the evidence by the defendant company was sustained, and judgment rendered in its favor. To that judgment this writ of error was awarded.

On the 9th of August, 1906, about 10 o'clock at night, the dead body of Albert F. Harlow, 19 years of age, was found lying on the right of way of the defendant company a short distance beyond Augusta Springs, a station about 20 miles west of Staunton. The skull of deceased was crushed back of the left ear and his neck broken. A short distance west of the point where the body was lying, a part of a set of passenger coach steps was found. Shortly before the body of the deceased was discovered, between half past 9 and 10 o'clock, the through passenger train, limited, going west from Jersey City to Cincinnati, passed the point in question, running from 35 to 40 miles an hour. It was a dark night and a slight rain falling. The theory of the plaintiff is that the deceased was walking from the Augusta Springs station, west, to his home, which was near the railroad, and that the steps of the car were loose, and negligently allowed to swing out from the side of the car;

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that these steps, thus swinging out, struck the deceased as the train passed, and caused his death.

The record shows that the relation of the deceased to the defendant was that of a bare licensee; he, together with others, having used the right of way at that point as a walkway from their homes to the station, with the knowledge and acquiescence of the company.

It is properly conceded that a railroad company does not owe the duty of provision or previous preparation for the protection of a bare licensee upon its track or roadbed. *Williamson v. Southern Ry. Co.*, 104 Va. 146, 51 S. E. 195, 70 L. R. A. 1007, 113 Am. St. Rep. 1032.

A bare licensee is only relieved from the responsibility of being a trespasser, and takes upon himself all ordinary risks attached to the place and the business carried on there. *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846.

It is, however, contended that the defendant company had actual knowledge that the steps in question were broken and loose when the train passed Staunton, Va., 20 miles east of the point where Harlow was killed, and that this notice was sufficient to put the defendant on its guard to use ordinary care to protect the deceased, and not to injure him at a point where he might reasonably be expected to be on its roadbed. In support of this contention, the evidence of three witnesses is relied on. The first is the testimony of Samuel Critzer, who says that when the train passed Basic City, a station 13 miles east of Staunton, he saw something like a plank, or it might be steps, sticking out about 2 feet from the car. The second is the testimony of Tim Kennedy, who was on the platform at Staunton, and says that he did not notice that the steps stuck out from the coach, but that he saw the conductor shake them, and kick them into position. The third is the evidence of John McCauley, who says that he was on the platform at Staunton, and saw the steps sticking out about one foot, and that the conductor kicked it back with his foot, and "stuck his hand inside the step like he was screwing up a bolt or something or other."

There is nothing in the testimony of the Basic City witness to bring home to the defendant the slightest knowledge that the steps were out of order. This was a dark night. As already stated, the train was a through passenger train going west from Jersey City to Cincinnati. It made but few stops—one at Charlottesville, a divisional point 40 miles east of Staunton. The uncontradicted evidence is that the train was inspected at Charlottesville and everything reported to be in order. The evidence of the two Staunton witnesses is positively denied by the conductor and others, who testify that

a number of persons alighted over the steps in question that night at the Staunton station. Placing the coach at the point where it is put by these two witnesses, it is difficult to understand how they could have seen what they claim through a high iron railing from the position in which they place themselves. Accepting, however, their evidence as true, we are of opinion that it falls to bring home to the defendant company notice that the steps were sufficiently out of order to be a menace to any one who might be on its right of way. The result of the evidence of these two witnesses is that, if the steps were out of order at Staunton, the trouble was remedied by the conductor before leaving Staunton in such manner as to satisfy him that no danger to any one was to be apprehended therefrom. This was all that an ordinarily prudent man could do, and therefore no liability can attach to the defendant for the death of the plaintiff's intestate, assuming that he was killed by the steps while walking on the railroad right of way, which is not clear from the evidence.

The judgment of the circuit court, sustaining the demurrer to the evidence, is without error, and must be affirmed.

**Affirmed.**

#### BOWMAN v. LISKEY.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. APPEAL AND ERROR (§ 1035\*)—HARMLESS ERROR—FORM OF REMEDY.

Proceedings having been instituted to enforce a vendor's lien to secure purchase money bonds, a special receiver was appointed with petitioner as his surety, and the land was sold and bonds were executed in part payment, and the receiver was authorized to assign the bonds for cash, which he purported to do, and thereafter, the receiver being in default, his surety petitioned to have the purchaser of the bonds from the receiver account for the purchase price, alleging that they were assigned without payment in full, the purchaser and receiver being made parties, and the former was adjudged liable for a certain sum on the bonds. *Held*, that the granting of the relief against the purchaser, on petition in the vendor's lien proceedings, instead of on an original bill, even if error, was not prejudicial to the purchaser under the circumstances; he having had an opportunity to meet the issues as to his liability as fully as upon an original bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4031; Dec. Dig. § 1035.\*]

#### 2. RECEIVERS (§ 217\*)—SALE—PAYMENT BY PURCHASER—EVIDENCE.

On a petition by a surety of a special receiver appointed in vendor's lien proceedings to compel an accounting by the purchaser of bonds from such receiver which he was authorized by the court to sell, the evidence *held* to show that the purchaser paid a part of the purchase money of the bonds to the receiver on the understanding that he was to receive it back in payment of a personal indebtedness of the receiver.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 217.\*]

### 3. RECEIVERS (§ 217\*)—SALE—LIABILITIES OF PURCHASER.

In a suit by the surety of a special receiver appointed in vendor's lien proceedings and authorized by the court to sell a purchase-money bond for cash against the purchaser of the bond to compel an accounting for the purchase price, the receiver being in default, and the surety claiming that the purchaser did not in fact pay cash for the bond, the purchaser from the receiver was entitled to credit for checks given the receiver and actually paid, but was liable for a purported payment thereon, which was applied to a personal debt due him from the receiver.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 217.\*]

### 4. RECEIVERS (§ 212\*)—LIABILITIES ON BOND.

A surety of a special receiver appointed in vendor's lien proceedings, and authorized by the court to sell purchase-money bonds, became responsible for a proper accounting of the money received therefor by such receiver.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 212.\*]

Appeal from Circuit Court, Rockingham County.

Action to foreclose a vendor's lien by Robert Liskey against the Harrisonburg Mineral & Development Company, in which Robert Liskey, as surety for a special receiver appointed therein, intervened and filed a petition against Joseph M. Bowman to compel him to account for certain funds which were payable to the special receiver. From a judgment for intervener, Bowman appealed. Affirmed.

O. B. Roller, Mr. Martz, and Conrad & Conrad, for appellant. Sipe & Harris, for appellee.

**CARDWELL, J.** The question in this case involves the liability of a special receiver of the court and those dealing with him for the devastavit of funds under the control of the court.

It appears that in 1891 Andrew Bazzle sold a tract of land to the Harrisonburg Mineral & Development Company at the price of \$10,000, receiving in payment \$500 cash; the residue being evidenced by deferred purchase-money bonds secured by a vendor's lien on the land. Default being made by the company, Robert Liskey, the assignee of one of the deferred bonds for \$1,000 due October 2, 1892, instituted a suit in chancery to enforce the vendor's lien securing the payment of the deferred purchase-money bonds mentioned, and thereafter such proceedings were had that on the 23d day of October, 1894, a decree was entered wherein Winfield Liggett and E. S. Conrad were appointed special commissioners to sell the land.

Granville Eastham, who was counsel for Liskey in the chancery suit, having died, he was succeeded by Liggett prior to the decree last mentioned, who on the 5th day of April, 1895, executed bond as special receiver in the sum of \$8,000, in which the said Robert Liskey became his surety. Thereafter payments

were made to Liggett as receiver, and subsequently the decree of sale was executed and Andrew Bazzle became the purchaser of the land on the 10th day of March, 1901, at a sum sufficient to cover the then outstanding liens, paying \$200 cash to the receiver, and executing three bonds, each in the sum of \$1,400.

This sale was confirmed by decree entered in May, 1901, and the case was referred to a commissioner to settle the accounts of Liggett as special receiver, and to report to whom the funds were payable. The commissioner, acting under this decree, on the 30th of October, 1901, filed his report, and on that day a decree was entered reciting: "Winfield Liggett, the special receiver in this cause, is directed to assign, without recourse, the bond executed by Andrew Bazzle for the first deferred payment for the sum of fourteen hundred dollars, with J. W. Bazzle as surety, bearing date March 10, 1901, and payable on or before March 2, 1902, with interest from date, to Winfield Liggett and Ed. S. Conrad, special commissioners, to any person who will cash the same for its face value and interest on the date of said assignment, and out of the money so realized from said assignment said special receiver shall pay off the liens reported in classes 1 and 2 of Commissioner Stephenson's report. \* \* \* And it is further ordered that said special receiver, Liggett, do assign on like terms and conditions the bond executed by said Andrew Bazzle and J. W. Bazzle for the second deferred payment on the land to any person who will cash the same for its face value and interest; said bond bearing date March 10, 1901, and payable, with interest, on the 2d day of March, 1903, and apply the same to the debts reported in class three of the report."

On the 10th of April, 1903, the cause was again referred to a commissioner, with direction to ascertain and report what funds there were in the cause, and how the same should be disbursed; and Liggett being in default as receiver, as appears by a subsequent decree of May 25, 1904, he was directed to turn over to the general receiver of the circuit court the Bazzle bonds not assigned by him, and to settle his accounts as such special receiver; Liggett at the same time resigning as receiver.

On August 1, 1904, Robert Liskey filed his petition in the cause, reciting, among other things, that portion of the decree of October 30, 1901, which authorized the assignment of the Bazzle bonds "to any person who will cash the same for its face value and interest to the date of said assignment," and charging that what purported to be an assignment of one of the bonds to one Jos. M. Bowman was made without Bowman having paid to Liggett the amount due in cash on the bond at the date of the assignment, and that the



bond was delivered to him without receiving the amount due thereon in cash, as Liggett was alone authorized to do under the decree. The petition further recited that the petitioner Liskey, was not fully advised as to the details of the transaction between Bowman and Liggett, but charged that Bowman did not pay the cash on the assignment and delivery of the bond, etc. Reference was also made to the decree of April 10, 1903, which directed Liggett to settle his accounts as receiver before commissioner Bryan, and that this account had not been reported; and the charge of the petition is that, under the circumstances of the transaction and the facts connected with the alleged transfer of the bond to Bowman, Bowman is bound to account for and pay to such persons as the court may direct the amount due on the bond at the date of the assignment, with interest on the principal sum of \$1,400 to date of payment, to the end that the fund in the cause might be properly received and applied to the parties entitled thereto; it being further alleged that Liggett was insolvent, and that whatever liability there was upon him would doubtless have to be made good by the petitioner, Liskey. Bowman, Liggett, Ed. S. Conrad, and Andrew Bazzle were made parties defendant to the petition, and the prayer is "that all proper accounts may be ordered and taken on this petition; that your petitioner may have a decree requiring the said Joseph M. Bowman to account for and pay to such person as this court may direct the amount due on said bond for \$1,400, with interest thereon from its date."

While Liggett never answered the petition or settled his account as receiver, he turned over to the general receiver, Sipe, the two unassigned bonds which had been in his hands, and therefore the controversy here relates only to the bond which he assigned to Bowman.

Liggett died on the 16th day of February, 1905, without making the settlement of his accounts required by the decree of court referred to, but his personal representative, J. Frank Blackburn, appeared before Commissioner Bryan, and the account of Liggett was then settled, from which it appears that he was indebted to the fund as of the 10th of June, 1905, in the sum of \$1,810.15, of which \$1,484 purported to have been received on March 10, 1902, from Bowman as the assignee of the first deferred purchase-money bond of Andrew Bazzle. Out of this balance due by Liggett, there was payable to Reuben Armentrout \$781.16, to Robert Liskey \$773.36, and to Mrs. Miller a certain named sum.

The cause coming on again to be heard on the 18th day of May, 1905, upon Commissioner Bryan's report and the settlement of the accounts of Liggett made by Blackburn, his personal representative, the report was confirmed, and Robert Liskey, the surety of Liggett on his bond as special receiver, was authorized to pay off and discharge the lia-

bilities due from his principal, Liggett being insolvent, and John T. Harris was appointed a special commissioner to convey the property to the purchaser as soon as Liskey should have discharged said liability, and Bazzle should have paid to Mrs. Miller the amount due her.

In the meantime, as already mentioned, and while Liggett was still living, on August 1, 1904, Liskey had filed his petition in the cause, and, after Liggett's death, Bowman answered the petition and averred that he paid in cash the face value and interest of the said bond to the date of the assignment of the same to him by Liggett. Mr. Conrad also filed his answer in the cause, in which he disclaimed any knowledge of the transactions and denied any liability on account thereof, which seems clearly from the record to be the fact as to Mr. Conrad.

In September, 1905, a decree was entered reciting that Liskey had discharged the liabilities resting upon him as surety of Liggett, and that Bazzle had paid off and discharged the debt to Mrs. Miller, that Harris had conveyed the property in accordance with the decree of May, 1905, and directing that Liskey be subrogated to all the rights of the general receiver in the case by reason of his having discharged for Liggett the recovery against him in the name of Sipe, receiver, and the cause was retired from the docket, but was at the same term of the court reinstated, for reasons satisfactory to the court; and thereafter, at the November term, 1905, the cause was again referred to a commissioner, with directions to ascertain whether Liggett, late receiver, had received cash for the face value and interest of the bond of \$1,400 at the time the same was assigned by him to Bowman.

Before Commissioner Harnsberger, to whom the cause was referred, the depositions of Andrew Bazzle and Joseph M. Bowman were taken, and Commissioner Harnsberger then filed his report in the cause, in which he exonerated Bowman from any liability on account of his dealings with Liggett, receiver, as charged in the petition of Liskey. To this report Liskey excepted, on the ground that the evidence did not sustain the findings of the commissioner; and, the cause coming on to be heard again on the 22d day of April, 1907, the court sustained the exceptions of Liskey, to the extent of adjudging that Bowman was liable in the sum of \$397.90, with interest thereon from the 2d day of February, 1902, and directed a recovery in favor of Liskey for that amount. A decree to that effect was accordingly entered, and from that decree the case is before us on appeal.

The first, second, third, and fifth assignments of error relate to the pleadings and decrees of the circuit court by which the default of Liggett as the late special receiver of the court was put in issue in this cause, the amount of his default ascertained, and the recovery authorized in favor of appellee; the

complaint of appellant being that the proceedings were irregular, and that the relief decreed could only be granted upon original bill.

With respect to these assignments of error we consider it only necessary to say, first, that the personal representative of Liggett voluntarily appeared before the commissioner of the court and rendered an account of the transactions of Liggett as the late special receiver of the court in this cause, and he is not complaining of the report of the commissioner as to the amount of Liggett's default inquired into, or of the decree of the court establishing the amount of his liability; second, it is not made to appear in any way that the appellant was at all prejudiced by these proceedings and decrees. True, the relief thus afforded appellee, Liskey, as surety for Liggett, who it is admitted was in default, might have been obtained upon an original bill, but we are unable to see that the granting of the relief on the petition of appellee, Liskey, in this pending cause, instead of upon an original bill, was reversible error, if indeed error at all, since appellant does not point out how he was thereby prejudiced. The issue between him and appellee, as the surety for Liggett, was as sharply drawn on the petition filed by the latter in this cause as it would have been upon an original bill, and every opportunity afforded appellant to meet the issue that could have been afforded him upon an original bill filed against him touching the same matter.

The questions presented were: (1) Did Liggett, when he assigned the bond in question, under the decree of October 30, 1901, to Jos. M. Bowman (appellant), receive cash for the entire amount of said bond? (2) If not, what amount of said bond was not paid in cash? (3) Is appellant liable for the amount of the bond not paid in cash?

It will be observed that the decree which authorized Liggett to assign the bond provided only for an assignment thereof "to any person who will cash the same for its face value and the interest to the date of said assignment"; and the indorsement (without date) found on the bond when the obligor therein, Andrew Bazzle, paid the same in full to appellant, is as follows: "For value received, in pursuance of a decree rendered by the Cir. Ct. of Rockingham county, I assign this bond to Joseph M. Bowman, without recourse. Winfield Liggett, Special Receiver in Robert Liskey v. Harrisonburg Mineral & Development Company."

In answer to the charge made in the petition of appellee, that appellant did not pay Liggett the face value of the bond in cash, he says that he did take up the bond "for cash" for its face value and interest to the date of the assignment, and the bond was assigned to him "by Ed. S. Conrad & Winfield Liggett, commissioners, without recourse"; but Ed. S. Conrad's name is not affixed to

the assignment on the bond, and the record plainly shows that he had nothing whatever to do with the transaction. He does say in his answer to appellee's petition that he was informed by both Liggett and appellant that the latter had paid the former the full amount of the principal and interest of the bond; yet he does not undertake to say, as doubtless he could not, that Liggett received in cash the entire amount of the bond, or that Liggett and appellant in their statements to him intended to be so understood.

Now, conceding the competency of appellant as a witness in his own behalf, what is his position? He states: That Liggett came to his place about the 10th of February, 1902, and said "he had to have some money to pay his dues on his life insurance. That they were due and he had to have the money that day." That he (appellant) had about \$400 in his pocket—that he expected to go to the mountains in a few days to purchase horses, and Liggett knew it, but insisted on having the \$400, and he got it "on the ground that it was to be applied on the note when I came up to Harrisonburg in a few days. I let him have \$400 in money, cash, out of my pocket. Q. How much money was to be paid on the assignment of this bond? A. Well, I was to pay him all of the interest that had accrued on it. He said he did not just know how much interest had accrued on it at that time. He couldn't tell until he got up town and saw the bond." Appellant then produced two checks to Liggett, both dated February 17, 1902, one for \$200 and the other for \$881, and stated as the reason for giving two checks that he did not have as much as the amount of both checks in bank, and therefore told Liggett to hold up one of them until he (appellant) "sold some cattle or some stuff, and he agreed to hold that check a few days, which was dated ahead." On cross-examination, appellant repeated that Liggett told him that he (Liggett) had some insurance to pay, and claims that, when Liggett figured up the interest, it was found that the two checks and the \$400 in cash amounted to more than what was due on the bond, and Liggett gave him back about \$20.

Unfortunately for appellant it clearly appears from his own admissions, not only that Liggett wanted the \$400 to pay his life insurance dues, but that he was indebted to him, and that he at least expected Liggett to pay him this indebtedness out of the money he (appellant) was to pay for the bond, and dealt with Liggett with that end in view, and paid no attention whatever to the authority to Liggett conferred by the decree under which he could alone act. He admits that Liggett was to take up some paper held by appellant. "Q. You did not give up to him any of his paper—any bonds or notes which you held against him? A. No; he promised to do that, but he said he would have to have all the money to make his

settlement, he said, and then he would get about \$400. I had taken up a note that Crawford was pressing him on for Mrs. Basore, and he said he would take it up, but he didn't do that."

These statements of appellant amount to no less than an admission that when he paid to Liggett, the receiver, \$400 on account of the face value and interest due on the bond which was to be assigned to him, if in fact he made that payment, the receiver was to receive the money in one hand, and pay it, or part thereof, at least, with his other hand back to appellant in discharge or on account of the personal and private indebtedness of Liggett to him. The probative force of this evidence is not overcome by the fact that appellant retained in his possession the evidence of Liggett's indebtedness to him.

If any doubt existed that by his own showing appellant dealt with Liggett, the receiver, improperly as to the amount due on the bond assigned to him beyond the amount of the two checks produced, it is removed by the testimony of Andrew Bazzle, a totally disinterested witness, examined on behalf of appellee. He says that, before appellant took the assignment of the bond from Liggett, he came to see witness about the bond, probably two or three weeks or more before he bought it, and asked if the bond was all right; and "I told him it was. That I thought I could pay it. I would pay it as soon as possible."

"Q. Did he make any statement to you then as to why he wanted to buy the bond? A. Well, I don't know whether it was then or when it was. It was probably, I think, before he did buy it, though I am not certain whether it was before he purchased it or after, he said to me Mr. Liggett owed him a little—a couple of hundred dollars—is my recollection of what he said, which he could get by taking up the bond. \* \* \*"

The witness further states that subsequently, and after he had made the last payment to appellant on the bond, appellant told him "that it was more than that." While the witness was unable to recall that appellant told him the amount, he did recall the talks he had with appellant, and his statement is: "He [appellant] said it was more than \$200, more than he has first said. I do not remember that he said how much exactly it was."

"Q. What was more than \$200? A. That Mr. Liggett owed him; that he got off something over that amount. I don't know that there was any amount fixed.

"Q. What did he say he had gotten it off of? A. Well, he said Win [Mr. Liggett] owed him, and he had taken it off the bond.

"Q. What bond? A. This bond he purchased.

"Q. Which bond that he purchased? A. For this bond I mean that he was taking from Win Liggett.

"Q. Do you mean the bond of \$1,400 referred to by you? A. Yes, sir."

The decree complained of allows appellant credit for the amount of the two checks given to Liggett and afterwards paid to him, as representing the true amount that actually went into his hands as the receiver of the court on the purchase of the bond in question by appellant, authorizing a recovery against him for only the amount of the difference between the aggregate of the two checks and the amount due on the bond at the date of its assignment to appellant; and this ruling is not only justified by the evidence, but is in accordance with the only safe rule that can rightly be applied to such a case. Any other rule would encourage, if not authorize, fiduciaries generally, as well as officers of the courts, to make any disposition of trust funds they please, leaving their sureties to bear the loss without any relief whatever.

We think it needless to protract this opinion by a discussion of the cross-error assigned by appellee, to the effect that the court erred in not decreeing against appellant for the full amount due on the bond in question with interest. The right and justice of the case, as we view it, has been reached by the adjudication of the circuit court, the judgment of which is, under the well-established rule in this court, entitled to great weight. To the extent that appellant proved that he had paid to Liggett in cash for the bond, Liggett then became responsible for the money, and his surety became responsible that he would account for and pay it out as the court might direct. It is not a case where a profit is made by a purchaser of fiduciary assets sold at a "ruinous discount," or where the purchase price was wholly paid in the obligations of the fiduciary, as in some of the cases cited for appellee, but a case where the authority to sell the bond was clear and explicit, but only a part of the purchase money therefor was misapplied with the knowledge of the purchaser of the bond.

The decree appealed from is affirmed.

Affirmed.

AULTMAN & TAYLOR MACHINERY CO.  
v. GAY.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

1. SALES (§ 161\*)—PERFORMANCE—DELIVERY.

F., acting as agent for defendant, sold an engine to the T. Company at H., and the engine was consigned by defendant to itself, care of F. at H., pursuant to an order contained in a printed form furnished by defendant to be signed by the purchaser. On arrival, the engine was put together on the car by F., assisted by another person employed by him. The printed order specified no particular place for delivery, but stipulated that the engine was shipped as the property of defendant. *Held*, that the act

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of F. and his assistant in setting up the engine and in removing it from the car, and testing it, did not constitute a delivery to the T. Company.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 161.\*]

**2. PRINCIPAL AND AGENT (§ 159\*)—INJURY TO THIRD PERSON—SCOPE OF AUTHORITY.**

Where F., acting as the seller's agent, sold an engine to the T. Company, and the engine was consigned by the seller to itself, in care of F., his act in securing an assistant, setting up the engine, running it from the car and testing it was within the scope of his authority, so that the seller was liable for damages from fire resulting from the negligent operation of the engine during the test.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 600-603; Dec. Dig. § 159.\*]

**3. APPEAL AND ERROR (§ 1151\*)—DISPOSITION OF CAUSE—MODIFICATION—AMOUNT.**

In an action for damages to a house which plaintiff owned in common with others, the court instructed the jury to assess plaintiff's damages at a certain fractional part of the value of the property, which part, it was admitted on appeal, was slightly too large. The jury placed a valuation on the house. *Held*, that the court on appeal would modify the judgment by giving plaintiff the true fractional portion of such valuation to which he was entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4501; Dec. Dig. § 1151.\*]

**4. WORDS AND PHRASES—"KNOCKED DOWN."**

The term "knocked down," used to describe the condition of a traction engine on arrival at its destination, means that its several parts had to be put together in order to its operation.

Appeal from Circuit Court, Rockingham County.

Action by Marcellus C. Gay against the Aultman & Taylor Machinery Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Conrad & Conrad, for appellant. E. B. Crawford and D. O. Dechert, for appellee.

**HARRISON, J.** This action was brought by Marcellus C. Gay to recover of the defendant machinery company damages for the loss of his house by fire, alleged to have been caused by its negligent operation of a traction engine. There was a verdict and judgment thereon in favor of the plaintiff for \$1,096, which the defendant company seeks to have reviewed and set aside by this court.

The record, considered (as it must be here) as upon a demurrer to the evidence, shows that the traction engine in question arrived at Harrisonburg, Va., in a "knocked down" condition; that is, its several parts had to be put together in order to its operation. The engine was consigned by the defendant company to itself, in care of R. L. Floyd, at Harrisonburg, and was intended for the Valley Turnpike Company, which had negotiated for its purchase with said R. L. Floyd, acting on behalf of the defendant. The shipment was made to the defendant company in pursuance of an order contained in one of the printed forms furnished by the defendant

to be signed by the purchaser of its machinery, which in this instance was signed by a committee of the Valley Turnpike Company. When the engine arrived at Harrisonburg, it was put together on the flat car on which it was carried by R. L. Floyd, who, acting on behalf of the defendant, had negotiated its sale to the turnpike company. In the performance of this work of reconstruction, Floyd was assisted by one Elmer Evans. Immediately after it was put together, the engine, though intended for the use of coal, was fired with wood, and, without a spark arrester, was propelled rapidly three times up and down a steep hill, passing the plaintiff's house each time and throwing sparks toward the house, in which direction the wind was blowing. About the time the last trip was made up the hill the house was found to be on fire, and was rapidly consumed.

The theory sought to be maintained by the defendant is that the fire started from a flue on the inside of the "L" of the house. It is useless to review the evidence on this subject. Its careful consideration shows that the jury were abundantly justified in their conclusion that the fire was caused by sparks emitted from the engine in consequence of its negligent operation.

It is contended on behalf of the defendant that at the time of the fire the engine was not its property. It is insisted, as the basis of this proposition, that delivery of the engine to the turnpike company was complete at the moment of its removal from the flat car.

The printed order for the engine, which was signed by the committee of the turnpike company, furnishes no warrant for this conclusion. There is no stipulation therein that the engine was to be delivered at the railroad station, or any other specified place. The mere arrival of the engine did not, under this contract, constitute delivery. The engine arrived at Harrisonburg, under the express terms of the shipment, as the property of the defendant, in care of its agent, R. L. Floyd. Prior to the fire nothing was said or done evidencing a relinquishment of dominion over the engine by the defendant, or an assumption of dominion by the turnpike company. The only notice the turnpike company had that the engine had arrived was a postal card from Floyd, the day before the fire, saying: "The engine has arrived here, and I unload it to-morrow. Would like for you to be on hand to see the work well done." The member of the purchasing committee to whom the postal was addressed was not present when the engine was unloaded. The only person connected with the turnpike company who was present was C. H. Hetzel, the superintendent, who says that he did not assume charge of the engine prior to the fire,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he had nothing to do with it in any capacity, and that at no time did any representative of the defendant company inform him that the engine was in his charge or under his control. The order constituting the contract of purchase, which was prepared by the defendant, taken as a whole, precludes the idea that the arrival of the engine at Harrisonburg was to be regarded as its delivery to the purchaser. The turnpike company was under no obligation to receive the engine until it was constructed and in good working order. The inference is irresistible that, after Floyd and his assistant had put the engine together, it was run by them up and down the hill mentioned for the purpose of testing it, and determining whether it was in proper condition to be delivered to the company.

It is further contended on behalf of the defendant that, even though the engine was its property when the fire occurred, its operation up and down the hill was not by an agent of said company acting within the scope of his authority.

This view cannot be sustained. Floyd, who was acting for the defendant company, had negotiated the sale of the engine. The defendant, a corporation, had of necessity to act through an agent in setting up the engine and delivering it to the purchaser; and Floyd had manifestly been designated by the company for those purposes. The engine was shipped to the defendant company in his care, and he had, therefore, entire control over its disposition. In the discharge of the duties thus imposed upon him he was necessarily authorized to employ such ministerial servants as he might require to enable him to perform the duties growing out of his relation to the engine and the defendant. There is nothing to suggest that, in employing the assistance of Evans, he exceeded his authority. He personally took charge of the work of setting up and unloading the engine, and directing its operation after it was removed from the car. The jury were well justified in finding that Floyd and Evans were agents of the defendant in the operation of the engine at the time of the fire.

A number of exceptions were taken to the action of the circuit court in the matter of giving and refusing instructions. A careful examination of these objections shows that the defendant has suffered no prejudice from this cause, except in one minor particular, which is readily corrected; otherwise, the case was fairly submitted to the jury, and upon the issues presented to them their verdict cannot be disturbed.

The record shows that the plaintiff owned the house, which was burned, in common with others. Instruction No. 3, given by the court, tells the jury that, should they find for the plaintiff, they must assess his damages at  $\frac{99}{140}$  of the value of the property

at the time of the fire. It is admitted that this fraction is slightly too large. It should have been  $\frac{881}{490}$ , instead of  $\frac{99}{140}$ . A simple calculation shows that the jury valued the house at \$1,550. Upon this basis, the plaintiff's interest in the house was \$1,047, instead of \$1,096, or \$49 less than the verdict of the jury.

The judgment complained of must, therefore, be reduced to the extent of \$49, making the true amount thereof \$1,047, and, as thus modified and corrected, it must be affirmed.

Affirmed.

WRIGHT et al. v. JOHNSON et al.  
(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

1. PARTITION (§ 95\*)—DECREE—OPERATION AND EFFECT.

Acts 1885-86, p. 525, c. 466 (Code 1887, § 2565 [Code 1904, p. 1313]), providing that a decree of partition *ex proprio vigore* shall vest title in the several co-owners without execution of conveyances, and that the act shall be held retrospective, can operate retrospectively only where the decree allotted the lands to the rightful owner, and cannot apply to vest in a husband title to lands allotted to him by partition, but which belonged to his wife as heir.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 95.\*]

2. STATUTES (§ 268\*)—CONSTRUCTION—RETROACTIVE OPERATION.

A curative act can operate only on something which the Legislature might validly have enacted in the first instance.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 360, 361; Dec. Dig. § 268.\*]

3. JUDGMENT (§ 495\*)—COLLATERAL ATTACK—PRESUMPTIONS.

In ejectment involving a decree in partition, it would be presumed that the county court in which the proceedings were had, being a court of general jurisdiction, had jurisdiction both of the subject-matter and the parties, as against the objection that it did not appear that the wife of an allottee was a party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.\*]

4. EJECTMENT (§ 71\*)—PLEADING—WITHDRAWAL—DISCLAIMER.

In ejectment it was not error to permit one of the defendants to withdraw a plea of not guilty inadvertently filed by counsel of the other defendants, and to permit him to file a disclaimer.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 194; Dec. Dig. § 71.\*]

5. EJECTMENT (§ 71\*)—PLEADING—DISCLAIMER.

Defendant in ejectment, who was the grantor to the other defendants, with covenants of general warranty, was entitled to file a disclaimer, and escape costs if he was without interest in the land.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 71.\*]

6. WITNESSES (§ 112\*)—COMPETENCY—INTEREST.

Under Code 1887, § 3345 (Code 1904, p. 1766), making witnesses competent notwithstanding interest, the grantor of defendants in ejectment, though having conveyed with cove-

nants of general warranty, was a competent witness for his grantees.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 434-436; Dec. Dig. § 112.\*]

**7. EJECTMENT (§ 142\*)—IMPROVEMENTS—GOOD FAITH.**

Under Code 1904, § 2760, permitting any defendant against whom a judgment for land has been rendered to recover for permanent improvements made thereon, the improvement must have been in good faith; and, where the person making them knew that the land belonged to his wife, and that he held only a life estate, he could not recover.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 500; Dec. Dig. § 142.\*]

**8. EJECTMENT (§ 141\*)—IMPROVEMENTS—CHARACTER — PERMANENCY — "PERMANENT IMPROVEMENT."**

Crops of wheat and potatoes were of no permanent value to land, and fertilizers used with the wheat crop, being for the special benefit of that crop, was not a permanent improvement within Code 1904, § 2760, permitting recovery for permanent improvements.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 141.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5312.]

Error to Circuit Court, Rockingham County.

Ejectment by C. H. Johnson and others against Lydia A. Wright and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John E. Roller and Sipe & Harris, for plaintiffs in error. Jas. B. Stephenson and D. O. Dechert, for defendants in error.

BUCHANAN, J. This is an action of ejectment, brought in the circuit court for Rockingham county against the plaintiffs in error and others, to recover a tract of land containing 158 acres, in which there was a verdict and judgment in favor of the defendants in error.

A suit was instituted in the county court of that county in or prior to the year 1865 for the partition of the lands of Catherine Haynes, deceased. The commissioners appointed to make the partition among her heirs at law reported that they had ascertained that she had seven legal heirs; that they had laid off and assigned the lands in the manner set out in their report.

The land in controversy in this case was assigned in the following language, viz.: "We assign to William Haynes lot No. 5"—describing it. Their report of partition was confirmed by the court at its January term, 1866, and ordered to be recorded, which was done. All the papers in the partition suit seem to have been lost or destroyed, except the report of the commissioners and the decree confirming it. No deeds of conveyance were executed by any of the parties, nor were any required by the decree of the court.

It appears, further, that William Haynes was the husband of Mary Ann Haynes, a daughter of Catherine Haynes, deceased, and

one of her legal heirs. Mary Ann died in the year 1900, without having had issue. In the year 1906 William Haynes executed a deed which conveyed, if he had legal title to it, the land in controversy to the plaintiffs in error, and in the year 1907 this action was instituted against them and others by the heirs at law of Mary Ann Haynes.

The principal question involved in the case is whether or not the effect of the partition suit, aided by section 2565 of the Code, was to divest Mary Ann Haynes of the title to the lands inherited from her mother, and invest her husband with the legal title thereto. If that was the effect, then the defendants in error were not entitled to recover in this action.

It is conceded, as we understand the argument of the counsel for the plaintiffs in error (and, if it were not, it is clear, we think), that if the law had remained as it was when *Bolling v. Teel*, 76 Va. 487, was decided, that the assignment of the wife's lands to the husband in the partition suit would not have operated to deprive her of her inheritance, and to invest her husband with the legal title thereto. See, also, *Yancey v. Redford*, 86 Va. 638, 10 S. E. 972; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Sharitz v. Moyers*, 99 Va. 519, 39 S. E. 166.

The object of the act of March 6, 1886 (Acts 1885-86, p. 525, c. 466), which in substance was carried into the Code of 1887 as section 2565 (Code 1904, p. 1813), was to do away with the necessity for conveyances between the parties or by a commissioner of the court in partition suits, in order to invest the several co-owners with the legal title to the land allotted to each in the partition suit. Section 2565, in substance, provides that the decree of partition, *ex proprio vigore*, shall vest the ancestor's title in the several co-owners without the necessity of conveyances, and the enactment is expressly made retrospective.

The power of the Legislature to make the provision retrospective is clear, where the persons to whom allotments were made were the real owners of the shares allotted them, and only lacked the naked legal title to make them complete owners of the shares allotted to them, respectively.

The power of the Legislature to make statutes retroactive in such cases is stated by Judge Cooley as follows in his work on Constitutional Limitations (6th Ed.) p. 457: "If the thing wanting or which failed to be done and which constitutes the defect in the proceedings is something the necessity for which the Legislature might have dispensed with prior to the statute, then it is not beyond the powers of the Legislature to dispense with it by a subsequent statute."

"But the healing statute," he says (pages 469, 470) "must in all cases be confined to validating acts which the Legislature might

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

previously have authorized. It cannot make good retrospectively acts or contracts it had and could have no power to permit or sanction in advance."

When the provisions of section 2535 went into effect, the wife of William Haynes, under the law as laid down in *Bolling v. Teel*, supra, was the owner of the land allotted her husband, subject to an estate in him for his life or her life, according as they had or had not issue born during their coverture. To deprive her of her interest in that land and invest her husband with title to it by legislation would be as clear a case, not only of disturbing, but destroying, vested rights as could be conceived of, and was clearly beyond the power of the Legislature.

Whether or not it was the intention of the Legislature that the act in question should apply to a case like this, or only to cases where the lands had been allotted to the real owners and the only defect was a failure to have the legal title conveyed, need not be decided in this case. If that was not the intention, then, under the decision of *Bolling v. Teel*, supra, the legal title to the land in controversy is in the heirs of William Haynes' wife. If it was the intention of the Legislature that the act should apply to a case like this, then to that extent the act is invalid, being in excess of the power of the Legislature, and did not affect the rights of the wife or those who claim under her.

It is insisted that it does not appear that the wife of William Haynes was a party to the partition suit. In the view we have taken of the case, this is not a material inquiry, though it may be proper to say that, the county court in which the partition proceedings were had being a court of general jurisdiction, there is a presumption that it had jurisdiction both of the subject-matter and the parties, unless (as it does not in this case) the contrary appears from the record. See *Cox v. Thomas*, 9 Grat. 323; *Pulaski Co. v. Stuart*, etc., 28 Grat. 872; *Woodhouse v. Fillbates*, 77 Va. 317; *Hill v. Woodward*, 78 Va. 765; *C. & O. Ry. Co. v. Washington*, etc., R. Co., 99 Va. 715, 721, 722, 40 S. E. 20, and cases cited.

The action of the court in permitting William Haynes to withdraw his plea of not guilty, file a disclaimer, and to testify in derogation of his title is assigned as error.

The bill of exceptions upon which this assignment of error is based shows that the plea had been inadvertently filed by counsel of the other defendants, and without authority. He was clearly entitled to withdraw the plea.

Nor do we know of any rule of law or any reason why he was not entitled to file a disclaimer. The fact that he had conveyed with covenants of general warranty the land to some of the other defendants did not deprive him of the right to file a disclaimer. If he did not have any interest in or assert any claim to the land, he could not be compelled

to make defense or incur costs. His liability to his vendees on his warranty was not affected by his disclaimer.

Neither did the court err in permitting him to testify when offered as a witness by the plaintiffs in the action. While at common law a witness was incompetent to testify in favor of his grantee, where he had warranted the title to the property which was in controversy because of interest, he was always a competent witness when produced to testify against his interest (1 Greenleaf on Ev. §§ 397, 410), and now, since incompetency by reason of interest has been abolished (Code 1867, § 3345 [Code 1904, p. 1766]), he is a competent witness for as well as against his grantee.

The remaining assignment of error is to the action of the court in rejecting the petition of the plaintiffs in error for an allowance on account of permanent improvements.

The improvements for which compensation was asked consisted of those alleged to have been placed upon the land by William Haynes during his occupancy of the premises, and expenditures alleged to have been incurred by the plaintiffs in error after his conveyance to them. The expenses incurred by plaintiffs in error were for putting out a wheat crop in 1906 and a potato crop in 1907, and for furnishing fertilizer and seed for the wheat crop.

The section under which the petition for improvements was asked to be filed is as follows:

"Any defendant against whom a decree or judgment shall be rendered for land, where no assessment of damages has been made under the preceding chapter, may, at any time before the execution of the decree or judgment, present a petition to the court rendering such decree or judgment, stating that he, or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment or decree, and impanel a jury to assess the damages of the plaintiff, and the allowances to the defendant for such improvements." Code 1904, § 2760.

In order to entitle an unsuccessful defendant in an action of ejectment to recover for improvements placed upon the land, they must not only have been placed there in good faith (See *Fulkerson v. Taylor*, 102 Va. 314, 320, 46 S. E. 309), but must be of a permanent character, and such as enhance the value of the land. If it were conceded that the improvements alleged to have been placed upon the land by William Haynes were actually placed upon it, and were of permanent value to the land (which may well be doubted under the evidence before the court

in considering the petition), it is clear that they were placed upon it with the knowledge by him that the land was his wife's property, in which he only had an estate, at most, for his life. The crops of wheat and potatoes were of no permanent value to the land, and the fertilizer used with the wheat crop, being for the special benefit of that crop, was not a permanent improvement within the meaning of the section quoted, and under which the petition was filed. See *Effinger v. Kenney*, 92 Va. 245, 250, 23 S. E. 742; *Cullop v. Leonard*, 97 Va. 256, 260, 33 S. E. 611.

We do not think that the court erred in rejecting the petition.

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

Affirmed.

### MANN v. PADDOCK et al.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. PARTNERSHIP (§ 68\*)—PROPERTY—PARTNERSHIP REAL ESTATE.

The owner of a tract agreed to give a part of it to a railroad in consideration of the construction of the road, and thereafter defendants formed a partnership, and a majority of the stockholders in the railroad gave their stock therein to the firm in order to secure the completion of the road, after which the owner of the tract subdivided it under an agreement with defendants and conveyed it to the firm, the deed reciting the grantor's former agreement with the railroad, the transfer of its stock to defendants, and the sale of their interests to the firm. *Held*, that the tract conveyed became partnership property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 101-111; Dec. Dig. § 68.\*]

#### 2. JUDGMENT (§ 776\*)—LIEN—PROPERTY AFFECTED.

In a suit to subject the interest of one of the defendants in a tract of land to the payment of complainant's judgment rendered against him December 31, 1901, the other defendant claiming the land was partnership property, the fact that, after a partnership settlement between defendants in July, 1901, the judgment debtor recovered a money judgment against the other defendant, which was discharged after the beginning of this suit, was immaterial, as complainant's judgment did not bind that recovery.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 776.\*]

#### 3. PARTNERSHIP (§ 68\*)—PROPERTY—REAL ESTATE—CONVERSION—EXTENT.

By the English rule partnership realty is converted into personality to all intents and purposes, but the general rule in this country limits the conversion to the purposes of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 108; Dec. Dig. § 68.\*]

Appeal from Circuit Court, Wise County.

Suit by J. G. Mann against F. S. Paddock and another. From a judgment dismissing the bill, complainant appeals. Affirmed.

Bond & Bruce, for appellant. Ayers & Fulton, for appellees.

KEITH, P. T. G. Mann filed his bill in the circuit court of Wise county, Va., for the purpose of subjecting F. S. Paddock's undivided interest in seven lots of land in the town of Wise, Va., to the payment of his judgment of \$605.09. One of the defendants, John T. Dixon, filed his answer, in which it is claimed that the lots in question, being partnership assets, had been converted into personal property, so that the judgment of Mann was not a lien upon them, and the bill was dismissed.

M. B. Hoback was the owner of a parcel of land in the town of Wise containing 5½ acres, and on the 7th day of September, 1893, he entered into an agreement with the Gladeville Railroad Company, whereby, in consideration of the benefit accruing to him from the construction of a line of railroad, he agreed to give to the railroad company a one-half interest in the land. Some time after this John T. Dixon and F. S. Paddock formed a partnership under the firm name of Dixon-Paddock Lumber Company, for the purpose of manufacturing and shipping lumber and building and operating a railroad, and the holders of a large part of the capital stock of the Gladeville Railroad Company gave to said Dixon and Paddock their shares of stock in the said railroad company free of cost, in order to secure the completion and operation of a railroad to the town of Wise. Dixon and Paddock, owning a majority of the capital stock of the railroad company, procured an agreement from M. B. Hoback and wife to subdivide the tract into lots, and on the 8th day of September, 1900, Hoback and wife conveyed to the Dixon-Paddock Lumber Company the lots in controversy in this suit. This deed recites: "That whereas the said M. B. Hoback on the 7th day of September, 1893, entered into an agreement with the Gladeville Railroad Company, in consideration of the sum of one dollar in hand paid, and further consideration of the benefits to be derived from the construction of the railroad from Ramsey, Virginia, to Wise, Virginia, agreed to convey to said railroad company one-half interest in and to that certain piece or parcel of land lying and being in the east end of the town of Gladeville, and adjoining the college lot, supposed to contain five and one-half acres, as and for his subscription to said company; and whereas, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the subscribers of the capital stock of the Gladeville Railroad transferred their paid-up stock to John T. Dixon and F. S. Paddock in consideration that they would build and equip a line of railroad from Ramsey to Wise, Virginia, and the said M. B. Hoback agreed to convey a one-half in and to the tract before mentioned, as and for a



donation to said company; and whereas, the said John T. Dixon and F. S. Paddock sold the interest which they acquired in the land aforesaid to the Dixon-Paddock Lumber Company, and directs that conveyance be made from the said M. B. Hoback and wife to the said The Dixon-Paddock Lumber Company; and, whereas, The Dixon-Paddock Lumber Company and M. B. Hoback on the — day of —, 18—, laid off into lots, streets, and alleys the said tract of land, and divided the same between them as is shown by the plat of the said lots, recorded in the clerk's office of Wise county circuit court, marked 'Hoback Addition' of the town of Gladeville: Now, therefore, in consideration of the premises aforesaid, and the further consideration of one dollar cash in hand paid, the receipt of which is hereby acknowledged, the parties of the first part do grant, bargain and sell unto the Dixon-Paddock Lumber Company, and do hereby convey with covenants of general warranty, lots 2, 3, 4, 5, 7, 13, 14, 15 and 16, as shown by the plat aforesaid, and recorded as aforesaid, marked 'Hoback Addition of the town of Gladeville.' To have and to hold said lots with all the appurtenances thereto belonging unto the Dixon-Paddock Lumber Company and its assigns forever."

On the 9th day of July, 1901, the partnership known as the "Dixon-Paddock Lumber Company" was dissolved, and a final settlement of the partnership affairs took place as of that date. The assets of the firm, as shown by a memorandum of that settlement, consisted of \$23,851.95, which includes the item of \$800, value of real estate at Wise, Va. The liabilities, which embrace a debt to John T. Dixon of \$14,111.49, aggregated \$17,885, leaving a balance of \$5,966.27, one-half of which (\$2,983.13) was due F. S. Paddock. It appears, however, that Paddock owed Dixon about \$4,000, between \$3,300 and \$3,500 of which was for the purchase of partnership property.

Mann's judgment against Paddock was obtained on the 31st day of December, 1901.

While it does not appear that the Dixon-Paddock Lumber Company paid in cash or in property a consideration for the deed to these lots made to them by Hoback, the consideration moving Hoback to make the deed does appear to have been the construction and equipment by Dixon and Paddock of a line of railway, in the construction of which Hoback was interested. It does appear that Dixon and Paddock had sold their interest in the land in question to the Dixon-Paddock Lumber Company, and that the conveyance was made to that company, which was a partnership composed of John T. Dixon and F. S. Paddock.

These facts, we think, constituted these lots the partnership property of the Dixon-Paddock Lumber Company, the legal title

to which was held in common by the constituent members of that partnership as partnership property for the use and benefit of the partnership. The consideration moved from Paddock and Dixon as partners. The deed from Hoback is to them as partners; and the property itself was finally subjected to partnership uses in the settlement made on the 9th of July, 1901. After that settlement was entered into, it seems that Paddock sued Dixon and recovered a large sum of money from him, but that judgment can cut no figure in this controversy. The judgment sued on did not bind that recovery, and it has been settled and discharged since the institution of this suit.

We do not find it necessary to go into the interesting questions discussed with respect to the rule prevailing in Virginia as to how far real estate held by partners is to be deemed personal property. Whether the English rule—which deems real estate held by persons who are partners as being converted into personalty to all intents and purposes—or the rule which generally prevails in the United States—which limits the conversion to the purposes of the partnership—shall ultimately be adopted into our jurisprudence, we are satisfied that under the facts disclosed by this record there is no error in the decree of the circuit court, which is affirmed.

Affirmed.

#### BRANNER v. BRANNER'S ADM'R.

(Supreme Court of Appeals of Virginia. Nov. 19, 1903.)

##### 1. ACCOUNT (§ 17\*)—AMENDMENT OF BILL.

A general bill for an account may, on a stated or settled account being set up in bar, and being shown, be amended, on leave, to surcharge and falsify the stated or settled account.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 17.\*]

##### 2. ACCOUNT STATED (§ 12\*)—SURCHARGING AND FALSIFYING—LACHES.

A suit to surcharge or falsify a stated or settled account is not barred by laches, being brought within three years after the settlement; the amount and character of the error being clearly established, and there being no loss of evidence likely to produce injustice.

[Ed. Note.—For other cases, see Account Stated, Dec. Dig. § 12.\*]

##### 3. APPEAL AND ERROR (§ 273\*)—ABSENCE OF EXCEPTIONS.

In the absence of exceptions to the report of the commissioner on the ground of his failure to make certain allowances, defendant cannot complain thereof on appeal by complainant from the dismissal of the bill on exceptions to such report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1620; Dec. Dig. § 273.\*]

Appeal from Circuit Court, Rockingham County.

Suit by Charles E. Branner against Michael Branner's administrator. Bill dismissed, and complainant appeals. Reversed and remanded, with directions.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

D. O. Dechert and Roller & Martz, for appellant. Tavenner & Bauserman, for appellee.

HARRISON, J. The object of the original bill in this suit was to obtain a settlement of the accounts of Michael Branner, deceased, who in his lifetime had as receiver taken charge of a fund belonging to his nephew, C. E. Branner, an infant.

A settlement of the accounts was ordered before a commissioner, who ascertained and reported that the late receiver was indebted to the complainant in the sum of \$388.10 as of June 9, 1902, with interest from that date, making a total due as of February 9, 1907, the date of the report, of \$496.66, of which \$388.10 was principal. This result arose from the fact, reported by the commissioner, that in a settlement in pais between the parties, made in June, 1902, the receiver failed to account to his ward for an item of \$225, which the evidence showed he had misappropriated and applied to his own debt due to the personal representative of Joseph Andrick, deceased.

After the evidence was all taken and the report made, the complainant filed an amended and supplemental bill, admitting the personal settlement between the receiver and himself, alleging that said settlement began with an item of \$525.61, which was stated to be the whole amount due complainant as of April 4, 1904; that he had no reason at the time to suppose that there was a mistake or omission of \$225 in ascertaining said balance of \$525.61, and proceeded to settle on that basis; that he had subsequently discovered that the balance of \$525.61 had been arrived at by the receiver charging to complainant the item of \$225, which the receiver had, in fact, applied in part payment of a debt which was due from himself to the estate of Joseph Andrick. The prayer of the amended bill was that this error or mistake in the settlement between the parties be corrected, and the sum of \$225, which was paid to the receiver August 12, 1893, and improperly applied to his own debt, be accounted for to complainant.

The cause was finally heard December 4, 1907, upon the bills, answers, and other proceedings, including the commissioner's report, and exceptions taken thereto by the representative of the receiver. The circuit court sustained the exceptions to the commissioner's report, and dismissed the complainant's bill with costs. From that decree, this appeal was allowed.

There is no merit in the contention made by appellee that the appeal should be dismissed because the amount involved is below the sum requisite to give this court jurisdiction.

It is contended that the settlement in pais between the parties constituted a bar to the original bill, and that the amended bill, not being for the purpose of having an account

generally, but for correcting an error or mistake in that settlement, could not be maintained.

It appears to be clearly established by the evidence filed with the report of the commissioner that there was error in the settlement in pais of June, 1902, to the prejudice of the appellant, to the extent of \$225, as of August 12, 1893, resulting from a misappropriation by the fiduciary of the funds of his cestui que trust. The contention that the amended bill, not being for an account generally, could not be maintained for the purpose of correcting this error in the settlement, is not tenable. The course pursued of amending the bill in order to point out the specific error and have the settlement corrected in that particular, is proper practice. *Shugart v. Thompson*, 10 Leigh, 434; *McNeel v. Baker*, 6 W. Va. 153. The case last cited is directly in point. It was there held that upon a general bill for an account a defendant may set up in his answer, as a bar or defense, a stated or settled account, and, if upon issue joined upon the answer it is found to be true, the court may give leave to the plaintiff to amend his bill, and to surcharge and falsify the stated or settled account by pointing out or indicating specifically any items of error, mistake, or omission existing therein. The course thus sanctioned is precisely that adopted in the case at bar.

It is further contended that the complainant acquiesced in the settlement which is relied on as a bar to his recovery, and was guilty of laches in not presenting sooner his suit to recover the amount now claimed.

The record shows that it was not until very recently before this suit was instituted that the complainant discovered that he had been charged with the item complained of, in order to arrive at the balance of \$525.61 which constituted the basis of the settlement relied on by the defendant.

Length of time is not alone a test of staleness, and mere lapse of time, unaccompanied by some circumstance affording evidence of a presumption that the right has been abandoned, is not laches. Generally, if the sum sought to be recovered is certain, the transaction has not become obscure, and there has been no such loss of evidence as will be likely to produce injustice, a court of equity will not refuse relief merely because there has been delay in asserting the claim. *Tidball, etc., v. Bank*, 100 Va. 741, 42 S. E. 867.

This record furnishes no warrant for denying the right of the complainant to recover upon the ground of laches. The suit was brought about three years after the settlement relied on was had; the amount and character of the error complained of is clearly established; and there has been no such loss of evidence as will be likely to produce injustice. There is nothing to suggest the existence of any evidence that could possibly relieve the receiver from liability.

It is suggested in the brief of appellee that

the commissioner erred in failing to allow the receiver certain commissions, amounting to \$40, and in failing to allow the receiver travelling expenses.

The record does not show that any prejudice has been done the appellee in these particulars, but a sufficient answer to the suggestion is that no exception was taken to the report of the commissioner on these grounds, and it is therefore too late to raise such questions in this court.

Upon the whole case, we are of opinion that the exceptions taken to the report of the commissioner by the appellee should have been overruled and the report confirmed; and that a decree should have been entered in favor of the complainant Charles E. Branner against the estate of Michael Branner, deceased, for the amount ascertained to be due, him, together with his costs about his suit expended.

The decree complained of must, therefore, be reversed and set aside, and the cause remanded for a final decree to be entered therein not in conflict with the views expressed in this opinion.

Reversed.

**CRANE'S NEST COAL & COKE CO. v.  
VIRGINIA IRON, COAL & COKE  
CO. et al.†**

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. MINES AND MINERALS (§ 55\*) — NOTICE — EVIDENCE—SUFFICIENCY.**

Evidence held insufficient to show that defendant and its predecessors acquired title to coal under land with notice of plaintiff's rights thereto.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 55.\*]

**2. VENDOR AND PURCHASER (§ 242\*) — PURCHASERS FOR VALUE — NOTICE — BURDEN OF PROOF.**

The burden to prove notice to a purchaser for value is on the party alleging it, and, while notice may be inferred from circumstances as well as proved by direct evidence, the proof must be such as to affect his conscience, and so clear as to show mala fides.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 242.\*]

**3. SPECIFIC PERFORMANCE (§ 43\*)—ORAL CONTRACT TO CONVEY—PART PERFORMANCE.**

That the purchaser of land under a verbal contract delivered a horse to the vendor, and cleared a small tract upon which he sowed crop, rented part of the land, and built a brush fence around the clearing, etc., does not show such part performance as entitled him to specific performance, since adequate compensation may be had in damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 135, 136; Dec. Dig. § 43.\*]

**4. SPECIFIC PERFORMANCE (§ 41\*) — VERBAL CONTRACT TO CONVEY—PART PERFORMANCE.**

To be subject to specific performance because partly performed a verbal contract to convey must be clear in its terms and clearly proven, the acts of part performance must re-

sult from the agreement proved, and the agreement must be so far executed that a refusal of full execution would operate a fraud on plaintiff, and deprive him of compensation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120, 121, 124, 129, 133; Dec. Dig. § 41.\*]

**Appeal from Circuit Court, Wise County.**

Bill by the Crane's Nest Coal & Coke Company against the Virginia Iron, Coal & Coke Company and others. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Bond & Bruce, for appellant. Vicars & Peery and D. D. Hull, Jr., for appellees.

**KEITH, P.** The Crane's Nest Coal & Coke Company filed its bill in the circuit court of Wise county against the Virginia Iron, Coal & Coke Company, the Manhattan Trust Company, trustee, and the New York Trust Company, trustee, praying that the Virginia Iron, Coal & Coke Company be restrained from mining, removing, and selling the coal under a tract of land sold by Samuel Horn to Clayton Meade. A preliminary injunction was granted, the defendants answered the bill, proof was taken, and a decree entered dismissing the bill, from which an appeal was allowed by this court.

The case made by the plaintiff in its bill is as follows: That one Samuel Horn on April 6, 1886, being the owner of a tract of land, made a written contract with one Clayton Meade to sell to him a parcel of the land on Sandy Ridge in Wise county. The tract was believed to contain about 40 acres, and Meade delivered to Horn a black mare in payment for 40 acres, and agreed to pay \$3 per acre for the remainder of the tract when the area was ascertained, and Horn executed to Meade a receipt to that effect. The land was then uncleared and in a state of nature; but Horn at once delivered possession, and Meade in the spring, summer, and autumn of 1886 exercised various acts of ownership upon it, built a small dwelling house, and cleared, fenced, and cultivated a small portion of it. On September 22, 1886, Horn and Meade went upon the land with a surveyor, and a survey was made, the corners marked, and the area ascertained to be 44 acres, 32 poles. On May 21, 1887, Meade paid to Horn the balance due on the land, and received a conveyance from Horn. This deed was recorded April 15, 1889. The bill claims that Meade's possession has continued ever since, and his title never questioned in any way except by the defendants in this suit.

In March, 1888, Meade conveyed the coal under the land to Ross, trustee, from whom, by various deeds, each for a valuable consideration and without notice to the grantee of any adverse claim, it passed to the com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 62 S. E. 1119.

plainant, the Crane's Nest Coal & Coke Company.

The answer of the Virginia Iron, Coal & Coke Company avers that on October 12, 1886, Horn entered into a contract to sell to one G. V. Litchfield, at 50 cents per acre, the coal under three farms or tracts of land owned by him, that on April 23, 1887, in pursuance of said contract, Samuel Horn and wife executed to Greenway and Warner, trustees, a deed conveying the coal upon two tracts of land, as shown by deed, and respondent then deduces its title through Greenway and Warner, denies all notice, actual or constructive, of any claim or right on the part of the plaintiff or those under whom it claims to the land, avers that for a period of more than 10 years prior to the institution of the suit it was in the open, actual, exclusive, notorious, and peaceable possession of the coal, as conveyed by Samuel Horn to Greenway and Warner, and that it thereby acquired an indefeasible title to the coal in dispute. The answer further states that at the April term, 1903, of the circuit court of Wise county, the Crane's Nest Coal & Coke Company filed its declaration in ejectment against respondent to try the title to and right of possession of the same tract of coal and mining rights and privileges mentioned in the bill of complaint; that to this declaration respondent had appeared and pleaded not guilty; that trial was had upon the issues joined, and upon said trial, by agreement of counsel, an agreed statement of the facts in writing was filed, and all questions of law and of fact were submitted to the court; that on the 14th day of August, 1903, a judgment was rendered by the circuit court of Wise county that the Crane's Nest Coal & Coke Company recover against respondent the coal and mining rights and privileges in the declaration mentioned in fee simple; and that upon a writ of error obtained from this court, an order was entered on the 4th day of February, 1904, reversing and annulling the judgment of the circuit court, and judgment was given that the Crane's Nest Coal & Coke Company take nothing by its declaration, and go hence without day.

The ejectment suit referred to is reported in the name of Virginia Iron, Coal & Coke Co. v. Crane's Nest Co., 102 Va. 405, 46 S. E. 393.

Without undertaking to decide that the judgment in that case is a bar to this litigation, the undisputed fact remains that many of the questions which now arise were then considered and disposed of, and the opinion then delivered upon the facts then in evidence is strongly persuasive as to the proper disposition of the questions now to be considered.

It was there held that the contract between Samuel Horn and Clayton Meade of April 6, 1886, which was as follows:

"Know all men by these presents that I,

Samuel Horne, sold this day to Clayton Mead a certain piece or tract of land, lying on Sandy Ridge, in Wise County, Va., say forty or fifty acres, more or less, for which I received of the said Mead a certain black mare, for which I am to give the said Mead forty acres of land, the remainder the said Mead is to pay me three dollars per acre, in young cattle; day and date above written."

—was void for uncertainty in the description of the land referred to. It was there held that if the deed from Samuel Horn to Greenway and Warner, trustees, of April 23, 1887, recorded August 25, 1887, was sufficient in description to include the coal upon and under the 44 acres and 32 poles of land claimed by Clayton Meade, that the legal title thereto was no longer in Samuel Horn, and could not have been acquired by Meade by his deed of May 21, 1887, not recorded until April 19, 1889, and a decision of that case was therefore held to turn upon whether or not the deed to Greenway and Warner, trustees, was sufficiently clear in the description of the premises conveyed to embrace the coal in question, and, after a full discussion of the terms of the deed, it was held that the description was sufficient to embrace the coal in dispute.

All the facts bearing upon Meade's possession of the disputed land are there considered—that he had cleared a small parcel of the land, upon which he had sowed turnip seed, built upon it a small house, rented a portion of it to Franklin Horn, who sowed millet upon it under a verbal agreement to pay one-third of the crop as rent for the land; that around this clearing a part of the brush was arranged so as to inclose it with an indifferent fence; that the "dwelling house" was a one-room log cabin, which was not begun until after October 12, 1886, and into which Meade did not move until the summer of 1887, subsequent to the deed from Horn to Greenway and Warner, trustees. These acts of ownership are compared with the proof in *Chapman v. Chapman*, 91 Va. 401, 21 S. E. 813, 50 Am. St. Rep. 846, relied upon by appellant, and the court came to the conclusion (at page 411 of 102 Va., page 395 of 46 S. E., Va. Iron, etc., Co. v. Crane's Nest Co.) that *Chapman v. Chapman*, which holds that actual, notorious, and exclusive possession of land takes the place of the recordation of the instrument of title, presented a very different state of facts from the case then under consideration. In other words, that the several acts of ownership shown in evidence with respect to the land purchased by Meade from Horn did not establish that actual, notorious, and exclusive possession referred to in *Chapman v. Chapman*.

The petition claims that the bill stated four grounds for relief: (1) That the land in controversy was included in the contract from Horn to Litchfield and the deed from Horn to Greenway and Warner by mutual mistake, contrary to the intention of all par-

ties (or else by mistake of one and fraud of the other), from which equity will give relief against subsequent alienees with notice; (2) that Litchfield and Greenway and Warner, and all of their alienees including the defendants, had both actual knowledge and constructive notice of the prior contract rights of Meade, and same will be enforced against the defendants; (3) that, if the defendants are correct in their position that the written contract between Horn and Meade is void because of uncertainty of description, then a parol contract existed between Horn and Meade which was rendered valid and enforceable by acts of part performance, and as the law was prior to May 1, 1888, was good even against purchasers for value without notice, and will now be enforced against purchasers of the right, title, and interest of Greenway and Warner; and (4) that the contract from Horn to Litchfield and the deed from Horn to Greenway and Warner are void as to innocent purchasers under Meade (in which class the complainant and its vendees come), because (a) they were not recorded until after Horn conveyed to Meade, and (b) the description is not such as to give notice to third persons.

We have been unable to discover any evidence of mutual mistake, and the first three grounds above stated rest in their last analysis upon the proposition that the Virginia Iron, Coal & Coke Company, and those under whom it claims, acquired title to the property in dispute with notice, either actual or constructive, of the superior rights of the Crane's Nest Coal & Coke Company and those under whom it claims. We have seen that in *Va. Iron, etc., Co. v. Crane's Nest Co.*, supra, the court considered and disposed of the question of notice, so far as it is claimed to have been established by possession and acts of ownership upon the part of Meade. We have, then, to consider whether or not there is proof of actual notice.

In the contract entered into between Samuel Horn and G. V. Litchfield, of date October 12, 1886, Horn agreed to sell at 50 cents per acre 1,207 acres of land described in the contract, for which there was paid at that time in cash \$60.35, and the balance of \$543.35 was to be paid in two equal payments of 6 and 12 months from that date. The acreage in this contract was compiled by Horn from his title papers, and consisted of several tracts, comprising a total of 1,250 acres, from which he deducted 43 acres as being the property he had theretofore sold to Clayton Meade, leaving 1,207 acres, as set forth in the option contract of October 12th. When Horn came to execute the deed of the 23d of April, 1887, 107 acres, known as the Bruce tract, were deducted on account of some defect of title, but this tract was afterwards conveyed on the 29th of April, 1890; so that the deed of April 23, 1887, only conveyed 1,100 acres.

It is claimed that, as a result of what

occurred in ascertaining the acreage at the time of the execution of the contracts and deeds under which the Virginia Iron, Coal & Coke Company claims. Litchfield or his agents were informed that a certain acreage was deducted as being the tract of land sold to Clayton Meade; in other words, that Horn's title papers called for 1,250 acres, from which there was deducted 43 acres, representing the land which he had contracted to sell to Clayton Meade, leaving 1,207 acres, and, deducting the 107 acres representing the Bruce tract left, the 1,100 acres for which the deed was executed.

In the action of ejectment brought by the Crane's Nest Coal & Coke Company against the Virginia Iron, Coal & Coke Company, it was admitted that G. W. Bond, who was the agent of G. V. Litchfield, did not on the 12th of October, 1886, the date of the option contract, on April 23, 1887, the date of the deed to Litchfield, or at any other time, have any knowledge of the method by which the acreage conveyed had been compiled, and that Samuel Horn gave him no information on the subject. It is admitted that Litchfield had no such knowledge or information prior to April 23, 1887; and, as to whether or not Litchfield or his agent were informed on April 23, 1887, that a certain acreage was being left off, being a tract of land sold to Clayton Meade, is said in the facts agreed to be a matter of controversy between the plaintiff and the defendant; " \* \* \* and it is agreed that the evidence of all the witnesses upon this point may be stated, to be considered by the court in connection with the other facts and papers exhibited herewith. In so far as known, Samuel Horn, G. V. Litchfield, Geo. A. Kent, T. G. Wells, and W. A. Carrico were the only persons who had any information upon the subject." The agreed statement then proceeds to summarize the testimony of these witnesses. We shall not follow that summary in detail. Suffice it to say that, while it shows knowledge upon the part of the witnesses of the deduction of the Bruce tract of 107 acres, it wholly fails to prove any knowledge upon the part of those concerned with respect to the 43 acres which Horn had contracted to sell to Meade.

We are of opinion, therefore, that the evidence fails to establish notice, either actual or constructive. *Va. Iron, etc., Co. v. Crane's Nest Co.*, supra.

The burden of proving notice to a purchaser for value is on the party alleging it, and, while the fact of notice may be inferred from circumstances, as well as proved by direct evidence, "yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides. *Arbuckle v. Gates*, 95 Va. 802, 30 S. E. 496; *Vest v. Michle*, 31 Grat. 149, 31 Am. Rep. 722.

"The possession and use of lands by a

person other than the grantor must, in order to afford notice, be open, notorious, and exclusive. It must be unambiguous and unequivocal. It must be under claim of right. In short, like other matter from which constructive notice is sought to be imputed, it must be of such character as will excite inquiry upon the part of a purchaser, and will lead him in the exercise of due diligence to knowledge of the adverse rights in question." 23 A. & E. Enc. Law, 505.

The verbal contract under which Meade claimed from Horn had not been so far performed as to entitle him to have it specifically performed by a court of equity. Such a contract must be clear, definite, and unequivocal in all its terms, and established by clear and satisfactory proof, and the acts of part performance must refer to, result from, or be made in pursuance of the agreement proved. Furthermore, the agreement must have been so far executed that a refusal of full execution would operate as a fraud on the other party and place him in a situation which does not lie in compensation. *Wright v. Pucket*, 22 Grat. 374; *Henley v. Cottrell*, 101 Va. 70, 43 S. E. 191; *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742.

All the acts of part performance relied upon are susceptible of adequate compensation in damages. Where a party has been induced by a verbal agreement to change his condition in life, to expend considerable sums of money, and to do acts whose value cannot be measured in money and compensated for in damages, equity should protect him by a specific execution of the contract. But the facts under review do not establish such a case. As was said by this court in *Wright v. Pucket*, supra: "The tendency of all the modern cases, both in England and in this country, is to prefer giving the party compensation in damages, instead of a specific performance. Wherever damages will answer the purpose of indemnity this alternative will be preferred, as it will equally satisfy justice, and will be coincident with the provisions and in support of the authority of the statute."

We are of opinion that there is no error in the decree of the circuit court, which is affirmed.

Affirmed.

#### HAMILTON'S ADM'X v. ALLEGHANY ORE & IRON CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

MASTER AND SERVANT (§ 118\*)—INJURIES TO SERVANT—MINING—FALLING STONES—TIMBERING—SAFE PLACE.

In an action against a master for injuries to a miner, *held*, that defendant's failure to ex-

tend the timbering over the place where decedent worked was not negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118;\* Mines and Minerals, Cent. Dig. § 219.]

Error from Circuit Court, Rockbridge County.

Action by Hamilton's administratrix against the Alleghany Ore & Iron Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Glasgow & White, for plaintiff in error. R. L. Parrish, G. D. Letcher, and Cabell & Cabell, for defendant in error.

BUCHANAN, J. Mathew Hamilton received injuries from which he died whilst working in a mine of the Alleghany Ore & Iron Company. His administratrix, the plaintiff in error, brought this action to recover damages therefor, on the ground that his death was caused by the negligence of that company.

The defendant demurred to the evidence, and upon that demurrer there was a judgment in its favor. To that judgment this writ of error was awarded.

The negligence charged in the declaration was that the defendant company failed to furnish the plaintiff's decedent, one of its employes, a reasonably safe place in which to work, in this: that it left the rocks and stones in the sides or walls of its mine loose and in such a condition that they were liable to fall from their places upon its servants when working in the mine, and that one of such stones did fall upon and cause the death of the plaintiff's intestate.

The defendant's mine was an old one, which it had been working for several years. Prior to its operation therein, the mine had been worked by other companies. The opening in which the deceased was injured was known as "Cut No. 1." It was made many years before on the side of a mountain, and extends down and into the mountain. The ore which was being mined lay in what is known as "fissure vein," being deposited between two walls, one known as the "hanging wall," and the other as the "foot wall," on opposite sides of the opening as it extends down into the ground. The width of the mine or opening between these two walls is not the same all the way, but, generally speaking, they are parallel to each other, and extend to the bottom or car level, a distance of some 200 feet, at an angle of 60 or 65 degrees.

The place where the plaintiff's intestate was working was from 150 to 175 feet from the top of the opening, and 25 or 30 feet above the car level where the ore was loaded and hauled from the mine. Over this car level or way there was "lagging" or timber placed to prevent stones from falling upon the men loading the cars. This "lagging," which or the most of which had only been

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

put in some 8 or 10 days before the accident, was about 60 feet above the car level, but did not extend as far into the mine as the "stope" or breast of the ore which was being mined.

Some 10 or 15 feet above where the deceased and another employé were drilling holes preparatory to blasting out the ore two other employés were engaged in the same kind of work. While thus employed, a stone weighing from 15 to 20 pounds came down from above, struck the "foot wall" about opposite the point where the last-mentioned employés were at work, burst in a number of pieces, and one of these pieces struck the plaintiff's intestate, who was then near the "hanging wall" some 10 or 15 feet below, causing his death.

The witnesses who attempt to describe the opening where the plaintiff's intestate lost his life and the situation of the employés engaged in blasting ore at that time refer to diagrams which are not before this court, and indicate with their hands, or by other means than words, what they mean, so that it is very difficult, if not impossible, for this court to see the case as it was presented to the trial court. It appears, however, pretty clearly that above the point where the deceased was working there was an uncovered space, not less than 3 nor more than 6½ feet wide, and not less than 5 nor more than 19 feet long, through which stones might fall from above upon the employés engaged in blasting ore.

The plaintiff contends that it was negligence in the defendant not to have "lagged" or covered this open space with timber, and thus have protected its employés from falling stones. The uncontradicted evidence is that, while the mine had been worked for many years, neither the defendant nor any of its predecessors who had worked it had ever done this, and that in working such veins in other mines it was not customary to do this, and very difficult, if not impossible, to keep timbers or "lagging" above the mining, because of the blasting which was going on every day immediately under it.

The evidence of the plaintiff, as well as that of the defendant, shows that, while there is always some danger from falling stones in working such mines, the method of work and the precautions taken and required by the defendant for the protection of its employés engaged in blasting ore were such as were usual, and that nothing more could reasonably have been done than was done for their protection.

It is true the plaintiff insists that it was the intention of the defendant to extend the "lagging" over the place where the deceased was working, and that he continued his work because this was to be done. There is some slight evidence that the "lagging" was ordered to be extended over the blasting em-

ployés, though the weight of the evidence of the plaintiff, as well as that of the defendant, is that the "lagging" had been extended as far as was intended, and that it was erected chiefly, if not entirely, to guard against stones loosened by freezing and thawing during cold weather—a period which had not arrived. There is some evidence tending to show that in one or more casual conversations, when the deceased, the foreman, Groah, and Doc Hamilton and others were present, the safety of the mine was discussed, and the foreman said it was safe. But there is no evidence whatever that the deceased, who was an experienced miner, and who had been working in that mine off and on for seven or eight years, and at the place where he was struck with the falling rock something like a year, ever thought that his place of work was dangerous, much less made complaint that it was and asked to have it made safe. It is certain that it does not appear that the defendant ever promised him expressly or impliedly that it would extend the "lagging" over his place of work, or that he was induced to continue at work there by reason of any such promise.

Neither is there any foundation for the contention that the defendant failed to properly inspect the mine. The proof is that it was inspected daily by the defendant's foreman, and that it was made the duty of the employés engaged in blasting after each blast to see that all stones and ore loosened in their place of work were taken down before going to work again.

Upon the whole case, without further discussing the evidence, it is clear, we think, that plaintiff failed to establish a case of negligence on the part of the defendant, and that the circuit court did not err in sustaining the demurrer to the evidence. Its judgment must, therefore, be affirmed.

Affirmed.

#### JOHNSON et al. v. SMITH.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. WILLS (§ 614\*)—CONSTRUCTION—LIFE ESTATE—"HEIRS OF HER BODY"—"CHILDREN."

In a devise to one "during her natural life then to the heirs of her body, if any; if no children to her sisters," the words "heirs of her body" are equivalent to the word "children," and the effect was to vest in the devisee an estate for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1399-1404; Dec. Dig. § 614.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1140; vol. 8, p. 7601; vol. 4, pp. 3267-3271.]

#### 2. POWERS (§ 43\*)—POWER OF SALE—EXECUTION—ESTATE CONVEYED.

Where a devise was to one for life, with remainder over, and another clause in the will gave such devisee an absolute power to sell the property while she remained unmarried, or in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the event of her becoming a widow, its sale by her, within the limitations imposed, passed a fee-simple estate to a vendee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 159; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Tazewell County.

Action by Taze Smith against Livie E. Johnson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Harman & Pobst, for appellants. H. C. Alderson, for appellee.

KEITH, P. This is an appeal from a decree of the chancery cause of Johnson v. Smith, rendered in the circuit court of Tazewell county upon facts agreed, which are as follows:

Taze Smith and wife conveyed to Livie E. Johnson, with the usual covenants, a certain house and lot at Pounding Mill, in Tazewell county, in consideration of \$750, of which one-third was paid in cash and the balance to be paid in one and two years, evidenced by notes of the vendee, indorsed by M. Johnson, and secured by a vendor's lien retained in the deed. The notes not being paid at maturity, Smith instituted suit in the circuit court of Tazewell county to enforce the vendor's lien.

The defendants answered the bill, and stated that they had only recently learned that the lot purchased by them was a part of the land devised by Thomas Davis to Rebecca Caroline Davis, his daughter, by will dated April 13, 1863; that the plaintiff, Smith, derived such title as he had to the land from Ellen V. Asbury by deed, and that Ellen V. Asbury derived such title as she had thereto by deed from Rebecca Davis, and respondents claim that Rebecca Davis took only a life estate in the lands devised to her by the will of her father, and that under the terms of said will she could not convey a valid fee-simple interest therein, but only an estate for and during her natural life, and that the covenants in said deed were broken. Respondents therefore ask that "the sale be rescinded; that the title to the house and lot be vested in Taze Smith by a commissioner of the court, as his former estate therein; and that Livie E. Johnson recover of Taze Smith the purchase money already paid, and be relieved from the payment of the balance, and her costs."

Among the facts agreed it is shown that Rebecca Caroline Davis, while single, conveyed the property now in controversy to Ellen V. Asbury; and the sole question to be determined is whether or not her deed passed a life estate or a fee-simple interest in the land she undertook to convey.

So much of the will of Thomas Davis as is material to this controversy will be found in the following extracts:

"I give and bequeath to my daughter Re-

becca Caroline Davis the remaining portion of land that I purchased from James Davis, supposed to be 90 or 95 acres, likewise a 60 acre tract that I purchased from Thomas Gillespie east of the James Davis tract.  
\* \* \* To have and to hold said land \* \* \* during her natural life, then the heirs of her body, if any; if no children, to her sisters." And in another part of the will is found this provision: "I desire that no sale made by any of my daughters of the aforesaid land \* \* \* shall be firm, valid or binding, unless the sale is made while single or become widows, except for their own convenience may change land with each other."

We are of opinion that in the second clause of the will the words, "heirs of her body," are the equivalent of the word "children," and that the effect of that clause was to vest in Rebecca Caroline Davis an estate for her life in the land devised to her; that after her death it was to go to her children, if any, and, if she had no children, the remainder passed to her sisters; that by the second clause referred to Rebecca Caroline Davis was vested with a power of sale while she remained unmarried, or in the event of her becoming a widow, and that the power thus conferred upon her, if exercised, passed a fee-simple estate to her vendee.

In the case agreed it appears that while unmarried she did sell the property now in controversy to Ellen V. Asbury, who conveyed by deed to Taze Smith, who, in turn, sold and conveyed to Livie E. Johnson. The sale and deed made by Rebecca Caroline Davis seem to have been strictly within the power conferred upon her by the will.

In the case of Farish v. Wayman, 91 Va. 430, 21 S. E. 810, the court said: "It can no longer be doubted that the law is settled that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee." And in a note to that case (1 Va. Law Reg. 219) Judge Burks says: "It cannot be doubted that, though property is devised or bequeathed to one for life, even in the most express terms, yet, if by other terms in the same instrument it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner, for there can be no better definition of absolute ownership than absolute dominion."

In Honaker v. Duff, 101 Va. 675, 44 S. E. 900, the court sanctions a statement of the law found in 3 Va. Law Reg. 65, to the effect that, when a life estate is given a devisee with power of disposition, the devisee is held to take a fee simple; if otherwise, the manifest intention of the will would be defeated. See, also, Milhollen's Adm'r v. Rice, 13 W. Va. 510, and Rubey v. Barnett, 12



Mo. 8, 40 Am. Dec. 112, where it is said: "When an express estate is given for life by will and a power of disposition is afterwards conferred, the devisee takes but a life estate with power of disposition, and, if no disposition is made, the reservation will go to the heirs of the devisor."

It is true that the cases cited are dealing with the effect of a life estate coupled with an unlimited power of disposition, while here there is a life estate coupled with a limited power of disposition; but that power exercised plainly within the limitations imposed upon it.

It is contended by counsel for appellants that the power of sale granted in the second clause refers to a disposition of the life estate; but, as shown by counsel for appellee, the power to sell the life estate, granted in the first clause, followed and was inherent in the devise itself. The devisee had the right to dispose of it at will, and there was no need of enlargement of her power for this purpose. The words of the second clause clearly indicate that a larger power and estate were intended, and the second clause would be absolutely meaningless if the testator intended by it to dispose of the life estate.

To enforce this position, counsel relies upon the case of *Wooten v. Redd's Ex'r*, 12 Grat. 208, where the court says: "In the construction of wills it is a well-settled rule that effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention of the whole will taken together." This principle has been enforced in numerous decisions.

Upon the whole case, we are of opinion that there is no error in the decree of the circuit court, which holds that appellants took a fee simple to the land in controversy. Decree affirmed.

Affirmed.

#### MILTON'S ADM'X v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. APPEAL AND ERROR (§ 614\*)—RECORD—CERTIFICATION OF EVIDENCE—SUFFICIENCY.

Where a bill of exceptions recited that defendant demurred to the evidence set forth, followed by the words "Here insert stenographer's transcript of the evidence," and where the judge certified that that was the evidence and the bill of exceptions was signed by the judge and attested by the clerk, followed by a transcript of the evidence certified by the clerk as a true transcript of the evidence, the evidence was sufficiently certified to the court on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2713; Dec. Dig. § 614.\*]

#### 2. TRIAL (§ 139\*)—QUESTIONS FOR JURY—WEIGHT OF EVIDENCE.

Where, on a demurrer to the evidence, the evidence is such that a jury might have found

a verdict for the demurree, or where reasonably fair-minded men might differ about the question, the decision must be against the demurrer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.\*]

#### 3. NEGLIGENCE (§ 134\*)—EVIDENCE—EXTENT OF BURDEN.

Plaintiff, in an action for personal injury, is not bound to prove his case beyond a reasonable doubt any more than in any other civil action, but is only required to make out a prima facie case, and make it appear to be more probable that the injuries were the proximate result of defendant's negligence than from any other cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 272, 273; Dec. Dig. § 134.\*]

Error to Circuit Court, Warren County.

Action by Lena May Milton, administratrix of John W. Milton, deceased, against the Norfolk & Western Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed and rendered.

A bill of exceptions recited that defendant demurred to the evidence set forth, and stated: "Here insert stenographer's transcript of the evidence \* \* \* now made a part of the record marked 'Evidence'." The judge certified that that was all the evidence introduced by the parties, and that defendant demurred to the evidence. The bill of exceptions was signed by the judge and attested by the clerk. The clerk followed the bills of exceptions with the statement, and certificate that he, clerk, etc., did certify that the foregoing and annexed copy was a true transcript of the record. Following that on the same page began a transcript of all the evidence. That was page 1 of the stenographer's record. The evidence and all that related to the taking of the evidence was concluded on a specified page of the record, and, at the close thereof, the clerk certified "the foregoing record from pages \* \* \* is a true transcript of the evidence introduced in the case."

Robert F. Teedy and O'Flaherty, Fulton & Waller, for plaintiff in error. Theodore W. Reath, Marshall McCormick, and Downing & Weaver, for defendant in error.

HARRISON, J. This action was brought by Lena May Milton, administratrix of her husband, John W. Milton, deceased, against the Norfolk & Western Railway Company, to recover damages for the alleged negligent killing of her intestate by the defendant company. A demurrer to the evidence by the company was sustained, and judgment rendered in its favor. To that judgment a writ of error was awarded.

There is no merit in the contention made by the defendant company that the evidence delivered at the trial has not been sufficiently certified to this court.

The plaintiff's intestate was employed by the defendant as fireman upon a train con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sisting of tender and engine, seven cars—four loaded and three empty—and a caboose. At the time of the accident the engine was running backwards, with the tender in front, the occasion for this method of running the train being that there was no turntable at Riverton, from which point the train returned with a heavier load to Shenandoah. About one mile north of Limeton, on the 25th of June, 1906, the engine and tender left the track, the former going on one side and the latter on the other. The engine turned over, with the result that both the fireman and engineman were killed.

The evidence tended to prove that this train, with its engine and tender being operated backward, was at the time of the accident six hours behind its schedule time, and running under the circumstances at a dangerous rate of speed downgrade and around an eight-degree curve; that for 150 or more yards before the point of the accident was reached the tender was rocking and swaying backward and forward in an unusual and dangerous manner; that the train, equipped as it was, could have been stopped after the unusual rocking was first seen, and before the engine came to the point where it jumped the track. The evidence further tends to prove that the accident resulted from the train being run with the engine and tender operated backward, and that an engine is more likely to fly the track running backward, as this was, than if run in the usual and ordinary way.

The rule governing courts in considering a case where there is a demurrer to the evidence has been so frequently and clearly stated by this court that it hardly seems necessary to again elaborate that subject. In brief it may be said that if, upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must so find, and grant judgment in his favor. *C. & O. Ry. Co. v. Pierce*, 103 Va. 99, 48 S. E. 534; *Citizens' Bank v. Taylor*, 104 Va. 164, 51 S. E. 159; *Johnston v. Moore Lime Co.*, 104 Va. 550, 52 S. E. 360; *Lane Bros. v. Bott*, 104 Va. 615, 52 S. E. 258. And, further, where reasonably fairminded men might differ about a question, such question must be decided against the demurrant on a demurrer to the evidence. *Bass v. Norfolk, etc., R. Co.*, 100 Va. 1, 40 S. E. 100.

A circumstantial review of the evidence in this case would serve no good purpose. It is enough to say of it that, under the rule adverted to, the evidence and the inferences which might have been drawn from it are quite sufficient to have warranted the jury in finding that the defendant company was guilty of negligence, and that such negligence caused the death of plaintiff's intestate without fault on his part.

Upon all the facts and circumstances of

the case, considered as on a demurrer to the evidence, we cannot say as a matter of law that the injury complained of was not more naturally to be attributed to the negligence of the defendant than to any other cause. A plaintiff in an action to recover damages for personal injuries is no more required to prove his case beyond a reasonable doubt than in any other civil action. All that he is required to do to make out a prima facie case is to make it appear to be more probable that the injury was the proximate result of the defendant's negligence than from any other cause. *Wood v. Southern Ry. Co.*, 104 Va. 650, 52 S. E. 371.

This conclusion makes it unnecessary to consider other grounds of error assigned in the petition to this court.

For these reasons, the judgment complained of must be reversed, the demurrer to the evidence overruled, and judgment entered here in favor of the plaintiff for the damages ascertained by the verdict of the jury.

Reversed.

# ROANOKE RY. & ELECTRIC CO. v. YOUNG. (Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

## 1. APPEAL AND ERROR (§ 1058\*)—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED.

Where the trial court refused to permit the stenographic notes of the testimony of a witness on a former trial to be read in evidence, but permitted the stenographer to give the testimony by using his notes to refresh his memory, the exclusion of the stenographic notes was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

## 2. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS REVIEWABLE—MOOT QUESTIONS.

The Supreme Court of Appeals will not pass upon a question the decision of which is not necessary to the disposition of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

## 3. STREET RAILROADS (§ 114\*)—INJURY FROM COLLISION—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against a street railroad for injuries sustained in a collision, the evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

## 4. NEGLIGENCE (§ 136\*)—ACTIONS—QUESTION FOR JURY.

Where reasonable men might fairly disagree upon the existence of negligence, the question is for the jury; it being for the court only where the inferences from the evidence are certain and incontrovertible, so that fair minded men would not differ in their conclusion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279-306; Dec. Dig. § 136.\*]

Error to Circuit Court of City of Roanoke.

Action by T. G. Young against the Roanoke Railway & Electric Company. Judg-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
62 S.E.—61

ment for plaintiff, and defendant brings error. Affirmed.

The following instructions were given for plaintiff over defendant's objections:

"(1) The court instructs the jury that the defendant company has only the right to use the streets of Roanoke City in common with plaintiff and other citizens, and that it has not a superior right, each has an equal right, and that in the lawful use of the streets at a corner of Jefferson and Church he had the right to presume that the defendant would approach street crossings at populous sections with its cars under proper control and at a reasonable rate of speed to avoid collisions with ordinarily prudent travelers, and if you believe from the evidence that the plaintiff, exercising ordinary care, met with accident herein complained of, was the proximate result of said car running at an excessive rate of speed or not being under proper control, you must find for the plaintiff.

"(2) The court instructs the jury that, if the defendant company seeks to relieve itself of liability by reason of the plaintiff's having been guilty of contributory negligence, the burden of proving such contributory negligence rests upon the defendant, unless such contributory negligence is disclosed by the plaintiff's evidence, or can fairly be inferred from the circumstances.

"(3) The court instructs the jury that reasonable rate of speed of street cars will differ at different places, and that which may be a reasonable rate of speed at one place may be excessive speed at another, that while a rate of speed in excess of the city ordinance is an excessive rate a lesser rate of speed, if inconsistent with the customary use of the street by the public with safety, is also excessive, and may be considered by you in determining the evidence.

"(4) The court instructs the jury that a street car company owes the duty of foresight to persons and vehicles crossing its tracks in a city, and, if the failure to keep a proper lookout was the approximate cause of an injury inflicted upon a person crossing its tracks, the street car company is liable, notwithstanding the fact that the person injured was guilty of negligence in going upon the track.

"(5) The court further instructs the jury that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant company could, by the exercise of ordinary care, have avoided the accident which happened, the plaintiff's negligence will not excuse the defendant company, and they must find for the plaintiff.

"(6) The court instructs the jury that if they believe from the evidence that the motorman in charge of the defendant's car at the time of the accident failed to keep

a vigilant lookout as he was approaching the point where the accident occurred, or failed to keep his car under proper control at such time and place as alleged in the declaration, and if the jury shall further believe from all the evidence that the injury to the plaintiff was caused by the default of the said motorman in the matter of keeping a vigilant lookout, or in failing to keep his car under proper control, then, in either event, the defendant company was guilty of negligence, and the jury must find for the plaintiff, and assess such damages, not exceeding \$2000, in his favor; as they believe he has sustained by reason of such negligence, and in estimating such damages they, the jury, should take into consideration the injuries he has sustained and the bodily and mental suffering caused by the injury, together with all such sums as he may have expended, if any, to be cured of his injury and sickness occasioned by such injury, and also such damages as will compensate him for the loss of time and earning capacity, so far as they, the jury, may believe from the evidence that his injury has caused him.

"(7) The court instructs the jury that, although you may believe from the evidence that the plaintiff was guilty of the want of ordinary care in going upon the tracks of said defendant company to cross same at the time he did, still if you believe from the evidence that the motorman could have avoided the accident by the use of ordinary care, after he saw, or by the use of ordinary care could have seen, that the plaintiff was on or very near the track driving toward said track and in danger of being struck by the car, you must find for the plaintiff.

"(8) The court instructs the jury that if they believe from the evidence that the plaintiff was placed in a dangerous position by the negligent approach of the car, and the plaintiff, being placed in a perilous position, attempted to cross the track instead of backing his horse, he cannot be held responsible for his mistake in attempting to cross the track."

Robertson, Hall & Woods, for plaintiff in error. Hairston, Riley & Hairston and Hunt & Staples, for defendant in error.

KEITH, P. This suit was instituted by T. G. Young to recover damages from the Roanoke Railway & Electric Company for personal injuries, and resulted in a verdict and judgment in his favor, which, upon exceptions taken at the trial, is now before us upon the petition of the railway company.

The first error assigned is that the court erred in overruling the defendant's motion to set aside the verdict as contrary to the law and the evidence; the second that the court erred in giving instructions asked for by defendant in error; and, third, that the

court erred in refusing to permit a witness C. I. Hart to read to the jury the stenographic notes of the testimony of A. O. Rucker at the former trial; it being shown that the said A. O. Rucker was dead.

We shall first dispose of the last assignment of error.

The petitioner sought to prove what A. O. Rucker, deceased, had testified to at a former trial by C. I. Hart, the stenographer who reported the case on that occasion. Hart produced his original notes of the testimony, which were taken down by him as the witness testified, and was asked if he knew, either from having refreshed his recollection by going over the notes, or from his general usage and practice in taking down accurately the testimony of a witness as he testifies that these notes were a correct memorandum of the testimony of Mr. Rucker, as he gave it on the stand. This question was answered in the affirmative, and the witness was asked to read his notes to the jury, to which defendant in error objected, and the court sustained the objection; the court being of opinion that the witness could only use his notes for the purpose of refreshing his memory and that he must then speak from a present recollection refreshed by the notes of the testimony. It appears that the testimony was introduced in accordance with the ruling of the trial court, and that the petitioner was therefore not prejudiced by the ruling of the court by his own admission, but merely desires now to have the opinion of this court as to the proper practice in such cases.

This court has uniformly declined to pass upon a moot question. We think it safer to wait until the question is presented in a form that renders its decision necessary to a proper disposition of the case.

The facts disclosed by the evidence are as follows: On the 5th of April, 1906, T. G. Young was injured in a collision with a car of the railway company at the corner of Jefferson street and Church avenue, in the city of Roanoke. The collision occurred about 7 o'clock in the morning, between a car running north on Jefferson street and a one-horse dray, or market wagon, driven by Young, going west on Church avenue. At the point where the accident occurred, Jefferson street is 40 feet wide from curb to curb, and Church avenue is 30 feet wide from curb to curb. Jefferson street at this point, slopes to the north at a grade of about  $1\frac{1}{2}$  degrees. The car was proceeding north down this grade, and had stopped to take on or let off passengers at the avenue immediately south of Church avenue. Young was driving west along Church avenue in a trot, but before reaching the crossing he checked his horse, looked up the street, and saw the car coming. Thinking that he had time to cross the track safely in front of the car, Young urged his horse forward and attempted to cross. The motorman, seeing the driver

check his horse, assumed that he would not attempt to cross in front of the car, and made no attempt to stop or check its speed. Young testifies that, when he urged his horse forward to cross the track, the car was something like 75 yards distant. The evidence tends to show that the car was moving at the rate of about 20 or 25 miles an hour, and defendant in error states in his evidence that he would have had plenty of time to cross if the car had been going at a proper rate of speed. The car seems to have struck the hind wheel of the wagon near the center or hub of the wheel. That the car was moving at quite a rapid rate is further shown by the fact that after the collision the wagon was carried a distance of between 40 and 50 feet, and the car moved nearly half a block with its brakes applied.

Without doubt the driver of the wagon saw the car. It is equally certain that the motorman of the car saw or could have seen the driver. It may be conceded that the driver was guilty of negligence in taking the chance of being able to cross the street in front of a rapidly approaching car; and the question upon which the decision of the case depends is whether or not, after the motorman saw, or should have seen, the position of danger in which the defendant in error had voluntarily placed himself, he could, by the exercise of ordinary care on his part, have avoided the injury.

We think there was evidence proving, or tending to prove, all the facts upon which the instructions given by the court were predicated, and are of opinion that those instructions correctly propounded the law. We have, then, only to determine whether the verdict is contrary to the evidence, and upon that issue we cannot say that the verdict of the jury is so plainly without evidence, or so contrary to the weight of the evidence as to warrant us in disturbing a verdict which has received the sanction of the trial court.

The case is controlled, we think, by *Carlington v. Ficklin*, 32 Grat. 670, *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, and *Marshall v. Valley R. Co.*, 97 Va. 653, 34 S. E. 455, and cases of like character, in which this court has held that, "when the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inference to be drawn from the evidence must be either certain and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men will differ."

See, also, *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618, where the court said: "A plaintiff, even though a trespasser, may recover of a railway company for an injury inflicted upon him, notwithstanding

his own negligence may have exposed him to the risk of injury, if the company, after it became aware of the plaintiff's danger, could, by the use of ordinary care, have avoided injuring him, and failed to do so."

We are of opinion that there is no error in the rulings complained of, and the judgment is affirmed.

**Affirmed.**

**JACKSON v. VALLEY TIE & LUMBER CO.**  
(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. EQUITY (§ 415\*)—DECREE—FORM AND SUFFICIENCY.**

It is no objection to a decree that the reasons for the decisions are recited therein.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 936; Dec. Dig. § 415.\*]

**2. BANKRUPTCY (§ 199\*) — DISTRIBUTION OF ESTATE—ATTACHMENT—LIEN.**

Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that all attachments or other liens against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him are void in case he is adjudged a bankrupt, the debtor must not only be insolvent, but the insolvency must have existed at the time the lien attached.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 199.\*]

**3. BANKRUPTCY (§ 216\*) — DISTRIBUTION OF ESTATE—ACTIONS—EVIDENCE.**

Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), making void liens created against a bankrupt within four months prior to the filing of the petition, the burden of proving insolvency at the time the lien was created is on the one asserting it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 216.\*]

**4. BANKRUPTCY (§ 200\*) — DISTRIBUTION OF ESTATE—ATTACHMENTS AND OTHER LIENS—INCIPENCY.**

Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that attachments or other liens against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy are void, the lien of an attachment is created when the levy is made, and does not depend on the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 297-300; Dec. Dig. § 200.\*]

**5. BANKRUPTCY (§ 216\*) — DISTRIBUTION OF ESTATE—LIENS—DISSOLUTION—PLEADING.**

After an attachment was levied the debtor was adjudged a bankrupt, and the trustee in bankruptcy filed a petition in the attachment proceedings and moved to abate the attachment, stating verbally that his grounds were that the attachment was void under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), relating to liens created within four months before the petition in bankruptcy, and was informed that the motion would be resisted because the trustee had not shown that the bankrupt was insolvent at the time the lien was created. The trustee announced that he was willing that the court should take the case for decision on the record. *Held* that, after decision against him, the trustee was not entitled to file an amended and

supplemental petition, setting forth the same grounds contained in the motion to abate in order to secure an opportunity to produce the evidence he might have produced under the former petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 216.\*]

**Appeal from Corporation Court of City of Staunton.**

Proceedings in attachment by the Valley Tie & Lumber Company against H. N. Girard, in which E. H. Jackson, trustee, files his petition to abate attachment. From a judgment for the Valley Tie & Lumber Company, said Jackson appeals. **Affirmed.**

Landes & East and Richard S. Ker, for appellant. J. M. Perry, for appellee.

**CARDWELL, J.** On the 13th of September, 1906, E. K. Mercereau sued out of the corporation court of the city of Staunton a chancery attachment against H. N. Girard, the ground of the attachment being that Girard was a nonresident, and on that day the process in the suit was served on the Valley Tie & Lumber Company, a partnership, as garnishee defendants.

On November 5, 1906, in the city of Washington, D. C., the defendant Girard was adjudicated bankrupt on his own petition. February 19, 1907, E. H. Jackson filed his petition in this attachment suit, setting forth the adjudication of Girard a bankrupt, the appointment of petitioner as his trustee; that the plaintiff in this suit had attached a fund of about \$567.37 owing to the estate of Girard by the defendant, the Valley Tie & Lumber Company; and that "inasmuch as the said Girard is now a bankrupt, and as your petitioner has been appointed by the creditors of said bankrupt as trustee to take charge of all the assets of said estate, he has a right to require the said Valley Tie & Lumber Company to pay over to him the said sum of \$567.37," etc., and praying to be made a party defendant in the chancery suit. On the same day the petitioner was made a party defendant in the cause, and thereupon filed a motion in writing to abate the attachment.

At the same term of the court counsel for the complainant, Mercereau, requested the grounds of the trustee's motion to abate, and in response the verbal statement was made that the grounds relied upon were that "Girard had been adjudicated a bankrupt within four months after the attachment in this cause was executed, and that accordingly the said attachment and the levy thereof were null and void, under and by reason of the provisions of the bankruptcy act, and especially section 67f thereof (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450])"; and the cause was then continued to the March term of the court.

On the first day of the March term a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

motion of the complainant to require Jackson, as the bankrupt's trustee, to file a written statement of the grounds of his motion to abate the attachment, was overruled, the court being of opinion that the matter required had already been stated by the trustee with sufficient particularity, thereupon the hearing of the motion to abate was set for Tuesday, March 12th.

On the day named counsel for the trustee was by counsel for the complainant informed of the grounds on which the motion to abate would be resisted, viz.: "That no evidence had been adduced by the trustee or any person showing or tending to show that said Girard was insolvent at the date of the levy and obtaining of the said attachment," whereupon the hearing was continued to the next day, March 13th, and on the last-named day was by consent continued to the 16th.

On March 16th, the day fixed for the hearing, the trustee announced to the court "that he was willing that the court should take the case for decision upon the record as it then stood, and upon the authorities cited by both parties," and then the case was heard, the court reserving it until the 18th for decision.

On the 18th of March the court announced its judgment overruling the motion to abate the attachment on the ground that "there is no evidence or proof in this cause that said Girard, at the date of the obtaining of the attachment and the levy thereunder, as shown by the record, was insolvent."

Owing to the physical indisposition of the judge of the court, the decree prepared in accordance with his ruling was not entered on the 19th, and on the 20th of March, but before the entry of the decree in the order book of the court, the trustee, by counsel, appeared in court, and asked leave to file what was styled "an amended and supplemental petition," wherein he prayed the abatement of the attachment on certain grounds stated, to wit, the provisions of section 67f of the bankruptcy act; but this petition was not allowed to be filed, the court being of opinion that the ground stated therein for abatement of the attachment was merely a written statement of the ground upon which had been based the former motion to abate, which written statement the trustee before the hearing declined to furnish, and, the court being further of opinion that no sufficient grounds for a rehearing of the cause were alleged, proceeded to enter the decree prepared in accordance with its decision of the 18th of March, dismissing the original petition of the trustee filed in the cause, from which decree the cause is brought to this court on appeal.

Complaint is made that the foregoing facts as to what took place in the lower court are all set out in its decree adversely to appellant, but we are unable to appreciate the force of the contention that this method of stating the reasons for the court's decision

is in violation of established rules of equity practice. The court might have with the utmost propriety set out its reasons for the decision rendered in a written opinion filed in the record and made a part of the decree carrying out the decision, and there is no conceivable reason why the grounds for the court's ruling should not be recited in its decree.

The two assignments of error relied on are: First, the refusal of the court to abate the attachment under appellant's original petition filed in the cause; and, second, its refusal to allow the filing of the "amended and supplemental petition" of appellant tendered on the 20th day of March, 1907, the day previous to the entry of the decree appealed from.

Section 67f of the bankruptcy act, so far as material here, is as follows: "That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same."

The essential to the invalidity of any lien falling within the purview and control of the statute is that (a) the lienor must be insolvent; (b) the insolvency must have existed at the time the lien attached, or, as applied to this case, Girard must have been insolvent on September 13, 1906, the date of the levy of the attachment.

Loveland on Bankruptcy (3d Ed.) § 192c, discussing paragraph 67f of the bankruptcy act, says: "It is essential, to bring a case within the prohibition, that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear, the lien is valid. It is not sufficient that the levy caused insolvency." See, also, 1 Remington on Bankruptcy, § 1460.

In *Simpson v. Van Etten* (C. C.) 108 Fed. 199, the opinion of the court quotes with approval from Collier's work on Bankruptcy (3d Ed., p. 434) as follows: "Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created."

The burden of proof of such insolvency as is meant in paragraph 67f is held in *Re Chap-*

pell (D. C.) 118 Fed. 545, to be upon the party alleging it as ground for abatement. The syllabus in that case is as follows: "Where the trustee of one who was adjudicated bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answered that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency."

In the case at bar appellant, neither in his petition filed in the lower court, nor in any statement of his grounds of motion to abate the attachment, relied upon Girard's insolvency within four months previous to his being adjudicated bankrupt, but relied solely on the ground that Girard had been adjudicated bankrupt within four months after the attachment in this case was executed, and that accordingly the attachment and the levy thereof were null and void under and by reason of the provisions of the bankruptcy act, and especially paragraph 87f thereof. So that, although counsel for appellant was called upon to state in writing the grounds of his motion to abate the attachment, and was advised that the grounds of resistance of that motion were that no evidence had been adduced by the appellant, or any person, showing or tending to show that Girard was insolvent at the date of the levy, and the obtaining of the attachment sought to be abated, he declined to furnish any evidence as to insolvency, and agreed that the court should take the case for decision upon the record as it then stood and the authorities cited by counsel. Under these conditions, the judgment of the court overruling the motion to abate the attachment was plainly right.

It is contended, however, for appellant that the attachment constituted no lien, because incomplete and inchoate, for the reason that it did not become full, effectual, and binding as a perfect lien until judgment of the court entered thereon; that such a lien is merely a provisional lien which could only be rendered perfect by judgment; and that, bankruptcy having intervened between the time of the fixing of this provisional lien and the rendition of judgment thereon, no judgment could properly be rendered thereon.

Section 2971 of the Code of 1904 provides: "The plaintiff shall have a lien from the time of the levying of such attachment, or serving a copy thereof as aforesaid \* \* \* upon the personal property, choses in action, and other securities of such defendant in

the hands of or owing by such garnishee on whom it is so served. \* \* \*"

In support of appellant's contention, *Re Lesser* (D. C.) 108 Fed. 201, and *Re Johnson* (D. C.) 108 Fed. 373, are relied on. Aside from the explicit language of the section of the Code, *supra*, expressly giving a lien in favor of the attaching creditor from the time of the levying of the attachment, the weight of authority is expressly against appellant's contention. The cases relied on for appellant, above referred to, may have been justified, to some extent at least, by the peculiar language of the statutes reviewed.

In *Re Beaver Coal Co.*, 118 Fed. 889, 51 C. C. A. 519, those cases were reviewed and disapproved, and there the Circuit Court of Appeals cited with approval *Re Blair* (D. C.) 108 Fed. 529, where the statute of Massachusetts very similar to our statute was reviewed, and held that an attachment creates a lien; the opinion saying: "Where, however, the lien is created by the attachment, the judgment and levy create no new and additional lien, but only enforce a lien already existing. Hence in this case the levy and execution did not affect the property attached with a lien avoided by the bankruptcy act, but only enforced a lien already existing, which lien the bankruptcy act expressly protected. With these views and those of the court herein appealed from we agree."

In other words, that case repudiates the doctrine of "inchoate" or "imperfect" liens with respect to liens by attachment, and holds, in effect, that the lien of the attachment is perfected by the levy thereof, and that a judgment or decree in enforcement of this valid pre-existing lien is not the judgment or decree denounced by the bankruptcy act, which was plainly confined to judgments creating liens.

In *Metcalf Bros. & Co. v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, the Supreme Court of the United States cites with approval *Re Beaver Coal Co.*, *supra*, where had arisen the very question made here as to the validity of an attachment lien as a lien prior to the judgment in the attachment proceeding, and in declaring the lien valid as a lien, in spite of the fact that final judgment was necessary to its enforcement, the court said: "The preponderance of authority is against the rule heretofore adopted in this case, and an examination of the bankruptcy act convinces me that such a rule is contrary to the intent of the law. The phrase, 'or other liens,' in section 87f, makes it clear that the word 'judgments' is used solely with reference to the liens created thereby. The lien, not the judgment, is the thing prescribed; and that the lien of attachments is without reference to the time when the judgment is rendered in the attachment suit is shown by the fact that the operation of the provision in question as to

attachments by its terms affects only such attachments as are levied within four months of the filing of the petition in bankruptcy—a matter wholly immaterial if the judgment rendered within such period is annulled, and with it the lien of any attachment theretofore levied.”

It would seem clear, therefore, from the foregoing authorities that appellant's first assignment of error is without merit.

In considering the second assignment of error, we deem it unnecessary to repeat what has already been said with respect to the opportunities given appellant in the lower court to present his case fully, and showing that, after full opportunity to make out his case, he not only declined to state any other ground for the abatement of the attachment than that the levy of the attachment was within four months prior to the adjudication of Girard as bankrupt, but offered no evidence in the cause that he was insolvent at the date of the levy. The refusal of the court to consider the amended and supplemental petition tendered by appellant was upon the ground that the petition merely stated in writing the ground upon which the trustee's motion to abate was based, which written statement the trustee had formerly refused to furnish, and because this matter had been heard and determined.

It is true that great liberality has been shown by the courts in allowing amendments to pleadings, both in equity and at law, but, when a party has every opportunity afforded him to present his case for consideration and determination by the court, it never has been the practice, and such a practice should not be established, to allow a party to keep back part of his case until he ascertains what the decision of the court will be, and then come forward and obtain another hearing of matters which he might have brought forward when the case was first submitted but declined to do so.

In *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48, the court said that, while amendments are largely in the discretion of the court, where the matters sought to be brought forward by an amended bill had been known to the complainant for months before the case was decided or submitted and no reason was given why the amended bill was not tendered earlier, the trial court did not err in refusing to allow the amended bill to be filed.

In *Vashon v. Barrett*, 99 Va. 346, 38 S. E. 200, at a hearing of the cause in June, 1899, upon the bill, plea of statute of limitations and general replication thereto, the court sustained the plea and ordered the bill to be dismissed, but the order was not actually entered at that term of court, but was entered in December following as a nunc pro tunc order. On the day that the order was

entered a stranger to the suit tendered his petition in the cause, alleging himself to be assignee for value of the complainant, and praying leave to be admitted as a party to the cause and to file an amended and supplemental bill. But the prayer was denied for several reasons stated, among which was because the amended and supplemental bill made out a new case, and because it did not appear on its face or otherwise that the facts therein stated were discovered after the filing of the original bill, and because the court had decided at the last term to dismiss the original bill. In that case, after stating that the question of filing amended pleadings after the court had decided the cause was considered in the recent case of *Alsop v. Catlett*, supra, it is said: “In this case it does not appear from the amended bill or otherwise that the facts upon which the charge of fraud was based were discovered after the original bill was filed. No excuse whatever is given why the charge of fraud was not made before the case was decided. As this delay, unexplained, justified the court's refusal to allow the amended bill to be filed, it is unnecessary to consider the other grounds upon which it based its action.”

In the case here the “amended and supplemental petition” tendered by appellant gave no excuse whatever for the failure to present it before. It alleges no new matter, but is purely and simply a second motion to abate the attachment, based upon the identical grounds upon which was based the previous motion to abate. It alleges no after-discovered evidence, no misconduct or surprise, and tenders no new proof.

In the case of *Vashon v. Barrett*, supra, the opinion further says: “Where a complainant has knowledge of the after-discovered matters before the case is heard, and delays offering an amended bill setting up such matters until after the case is decided against him upon its merits, it cannot be said that the court abused its discretion in refusing to allow the amended bill to be filed.”

The appellant here submitted his case to the court for decision upon the record as it then stood, and it was his failure to prove any facts entitling him an abatement of the attachment, and not his failure to make a proper allegation of the grounds of his motion, that caused the decision to be necessarily against him upon the case made and submitted. He could not reasonably have expected another opportunity to introduce evidence after expressly declining to avail himself of his first opportunity to do so.

Upon the whole case, we are of opinion that the decree of the corporation court should be affirmed.

Affirmed.



**HOOVER v. BAUGH et al.**

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

**1. SPECIFIC PERFORMANCE (§ 97\*) — PERSONS ENTITLED TO SPECIFIC PERFORMANCE—SUB-VENDEE.**

A subvendee of a part of the land agreed to be conveyed cannot compel specific performance by the original vendor except upon payment of the whole amount due from the original vendee for the entire tract, as all the land would stand as security for the entire amount due the vendor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 289; Dec. Dig. § 97.\*]

**2. SPECIFIC PERFORMANCE (§ 41\*)—CONTRACT ENFORCEABLE—PART PERFORMANCE OF ORAL CONTRACT.**

Equity will compel the specific performance of a parol contract to sell land where it is certain and definite, and there has been such part performance thereunder that neither party can be restored to his former position.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-122; Dec. Dig. § 41.\*]

**3. SPECIFIC PERFORMANCE (§ 47\*)—CONTRACTS ENFORCEABLE — PART PERFORMANCE — IMPROVEMENTS AND EXPENDITURES — SUFFICIENCY.**

Where complainant's only acts of part performance under an oral contract to convey were the cutting of briars off the land so as to pasture it, and, after taking possession, the making of costly improvements on his house on an adjoining lot, which would not have been made except on the expectation of acquiring title to the other lot, such acts were capable of compensation in damages, and specific performance was not necessary to give adequate relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. § 47.\*]

**4. FRAUDS, STATUTE OF (§ 74\*)—REAL PROPERTY — CONTRACTS FOR SALE—ORAL CONTRACTS—"VERBAL AGREEMENT FOR SALE OF LAND."**

Where the owner agreed in writing to convey land, and his vendee thereafter agreed verbally to convey a part of the land to complainant, to which agreement the owner verbally assented, the contract to convey to complainant was a verbal agreement for the sale of land within the statute of frauds (Code, § 2840), and not merely an agreement by the original owner to release his vendor's lien on a part of the land.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 123-131; Dec. Dig. § 74.\*]

**5. SPECIFIC PERFORMANCE (§ 114\*)—PROCEEDINGS—PLEADING—OFFER TO PERFORM—NECESSITY.**

A bill for the specific performance of a contract to convey, which did not offer to perform the contract or ask for its enforcement, was bad on demurrer.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 368; Dec. Dig. § 114.\*]

Appeal from Circuit Court, Rockingham County.

Bill for specific performance by Syram E. Hoover against William S. Baugh and others. From a decree dismissing the bill, complainant appealed. Affirmed.

C. R. Winfield and D. O. Dechert, for appellant. Sipe & Harris, for appellees.

CARDWELL, J. Appellant, S. E. Hoover, filed his bill in this cause against appellees, W. S. Baugh and Carson Fitzwater, averring that he was a subvendee of Fitzwater, who had purchased a tract of 22 acres of land from Baugh at the price of \$2,950, and that he, appellant, had purchased 9 acres of said land from Fitzwater, the purchase price thereof to be paid to Baugh. The bill then alleges that Baugh's contract with Fitzwater was in writing, dated the ——— day of August, 1907, whereby it was agreed that in consideration of \$50 in hand paid, and \$2,950 to be paid by Fitzwater to Baugh on the 15th day of December, 1907, Baugh would upon the completion of said payments convey the 22 acres of land to Fitzwater, etc.; that on the next day after the contract in writing between Baugh and Fitzwater appellant had a verbal agreement with Fitzwater, by which appellant was to take, at the sum of \$850, payable \$20 in cash to Fitzwater and \$830 to Baugh on the delivery of a deed on the 15th day of December, 1907, all of the Baugh land on the east side of a certain lane or roadway, about 9 acres; that Baugh verbally assented to this arrangement, but subsequently, about the 1st of December, 1907, canceled the written agreement with Fitzwater without the knowledge or consent of appellant.

While Fitzwater answered this bill, and practically admitted as true its averments, Baugh demurred thereto, and for the purpose of pleading specially the statutes of fraud filed his answer, in which he denied all the allegations of the bill, and avers that the purchase price of the 22 acres of land to be paid by Fitzwater was \$3,000, and, while admitting that he had been informed that Fitzwater and appellant had some verbal understanding as to a subsale of a portion of the land to appellant, he never consented to such sale. It is further admitted as true that appellant had requested him, Baugh, to make a deed for the parcel of land which the latter claimed to have contracted verbally with Fitzwater to purchase, but that he declined to do so, as the sale was of the entire tract of 22 acres, and denies that either Fitzwater or appellant had ever been on the premises, or done a "lick" of work thereon.

The cause being heard upon the bill, demurrer, and answer, the circuit court dismissed the bill, with costs to Baugh, and this ruling is assigned as error.

This court is of opinion that there is no error in the ruling of the circuit court. It will be observed that the bill is not to enforce the contract signed by Baugh, agreeing to sell to Fitzwater the 22 acres of land at the price of \$2,950 or \$3,000, as the case really was, but to compel Baugh to convey to appellant 9 acres of the land upon the receipt of \$830, less than \$100 per acre,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which appellant alleges was the verbal contract between him and Fitzwater, assented to by Baugh.

Counsel for appellees concede that a subvendee of a portion of the land which the vendor had agreed to sell cannot compel the vendor to make a conveyance to the subvendee, except upon payment of the whole amount due from the original vendee of the entire tract, as all of the land would stand as security for the entire amount due the original vendor, who could not be compelled to release any part of his security until the entire purchase money was paid; but the effort is made to distinguish such a case from the case at bar, upon the hypothesis that the original vendor, Baugh, is a party to the contract of subsale, assented thereto, and agreed to receive the proceeds thereof.

This argument leaves wholly out of view the fact that this case is heard on the bill, demurrer, and answer; the answer of Baugh denying any such agreement as is alleged in the bill, and of which no proof is offered. The alleged agreement with appellee Baugh with respect to the subsale to appellant is not only flatly denied, but is unreasonable upon its face. What conceivable reason was there in the alleged agreement of Baugh to receive of appellant \$100 per acre for land he had bargained to sell to Fitzwater at about \$150 per acre? Moreover, if that agreement was ever entered into, there has been no such part performance thereof on the part of appellant as to make it inequitable or unjust to refuse its specific enforcement. It is very true that a court of equity will compel the specific performance of a parol contract for the sale of real estate, where the contract is certain and definite, and there have been such acts of part performance that neither party can be restored to his former position; but that is by no means the case here. Appellant only claims a verbal agreement with Fitzwater, assented to by Baugh, that in consideration of \$830 to be paid to Baugh Fitzwater would, when he obtained a conveyance for the whole of the tract of 22 acres, convey a certain part thereof—a field of about 9 acres—to appellant, and, even if Baugh did assent to this agreement, the only acts of part performance thereof alleged are that appellant got the briars and weeds off the field, so as to pasture the same, and, after taking possession of the field, made costly improvements to his house on his adjoining lot, which he would not have made and would not have been justified in making except on the expectation of acquiring title to said field.

Such acts of part performance are not of such a character as to be incapable of compensation in damages if specific performance of the alleged agreement be denied. *Hudson v. Max Meadows L., etc., Co.*, 97 Va. 341,

33 S. E. 586; *Venable v. Stamper*, 102 Va. 30, 45 S. E. 738; *Clinchfield, etc., Co. v. Powers*, 107 Va. 393, 59 S. E. 370.

The authorities cited in support of the proposition that specific performance will be decreed against the party who signed the contract, although the other party did not sign, and although there was no mutuality of remedies between the parties at the time the contract was made, have no application whatever to this case.

Aside from the foregoing considerations, the alleged contract here sought to be enforced was, as held by the circuit court, a parol contract, so alleged in the bill, and as such is not enforceable. The statute on the subject (commonly spoken of as the "statute of frauds") is explicit, and provides inter alia that no action shall be brought upon any contract for the sale of real estate, unless the contract or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent. Code, § 2840.

The ingenious argument of counsel that the contract which appellant is seeking to enforce is not a contract for the sale of real estate, but a contract by which appellee Baugh agreed that, upon the receipt of the \$830, he would release his vendor's lien on the 9 acres of land which appellant claims to have purchased of Fitzwater, has nothing in the record to rest upon. If we were disposed to concede that such a contract would not be controlled by the statute, that is not the contract appellant's bill asks to be enforced. The contract asked to be enforced is a verbal contract, said to have been made by appellee Baugh with appellant at the time of the surrender and cancellation of the original contract to Fitzwater, by which Baugh bound himself to convey, either directly or through Fitzwater, to appellant a part of the 22 acres of land which Baugh had originally agreed to sell to Fitzwater. If the bill could be construed as a bill to enforce the original contract, it would be clearly demurrable, since it does not allege an offer to perform that contract, nor ask its enforcement.

In any view that may be taken of the case, the decree complained of is without error, and should be affirmed.

Affirmed.

#### BERTRAM v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. STATUTES (§ 114\*)—TITLE—SUFFICIENCY.

The provisions of Acts 1885-86, p. 405, c. 364, entitled "An act to incorporate the Virginia Pharmaceutical Association and to regulate the practice of pharmacy and to guard the sale of poisons in the state of Virginia," relate to the main subject expressed in the title, and are germane to, and not incongruous with,

the general purpose of the enactment, and are not in conflict with Const. 1869, art. 5, § 15, providing that no law shall embrace more than one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 147; Dec. Dig. § 114.\*]

## 2. STATUTES (§ 146\*)—CODIFICATION—EFFECT.

Where the provisions of an act are incorporated into the Code of 1887, which constitutes but one act under a proper title entitled "An act to revise, arrange, and consolidate into a Code the general statutes of the commonwealth," and which by section 4202 (Code 1904, p. 2188) repeals all acts of a general nature in force at the time of its adoption, the provisions are valid, though the original act was in conflict with Const. 1869, art. 5, § 15, providing that no law shall embrace more than one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 215; Dec. Dig. § 148.\*]

## 3. STATUTES (§ 106\*)—ENACTMENT—TITLE—SUFFICIENCY.

Const. 1869, art. 5, § 15, providing that no law shall embrace more than one subject, which shall be expressed in its title, is aimed at separate acts in their original enactment, and does not apply to amendments of general statutes consolidated into a Code; and in amending and re-enacting or repealing any part of the Code, or adding thereto, it is not necessary to do more than refer to the proper chapter and section thereof to be amended or repealed or added to, and adopt and express in the title of the amendatory act the number and subject of such chapter, if the provision of such amendment by re-enactment, or by additional section or sections, is germane to the subject of the chapter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 119; Dec. Dig. § 106.\*]

## 4. STATUTES (§ 87\*)—LOCAL, "SPECIAL, OR PRIVATE LAWS."

Va. Code 1904, §§ 1759, 1766, denouncing certain acts as misdemeanors affecting the interests of the Virginia Pharmaceutical Association, and undertaking to give to the appointees of such association the exclusive right to be prosecutors of such crimes and the exclusive beneficiary in the penalty to the extent of a half of the fines imposed, apply to the whole state, and make a violation of its provisions by any person a misdemeanor punishable by fine, and are not "special or private laws" within Const. 1902, § 63, cl. 1 (Code 1904, p. cccxiii), prohibiting the General Assembly from enacting any local, special, or private law for the punishment of crime.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 96; Dec. Dig. § 87.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 5567-5588; vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

## 5. DRUGGISTS (§ 2\*)—STATUTORY REGULATIONS—VALIDITY—POLICE POWER.

Code Va. 1904, c. 78, §§ 1754-1766, regulating the practice of pharmacy, is a reasonable exercise of the police power enacted in the interest of public health and safety.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 2.\*]

## 6. STATUTES (§ 64\*)—PARTIAL INVALIDITY—EFFECT.

The provision in Code Va. 1904, c. 78, §§ 1754-1766, regulating the practice of pharmacy, which designates the State Board of Pharmacy as informer in prosecutions for violation of the chapter, is separate from the other provisions of

the chapter, and the invalidity thereof does not affect the validity of the other provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

## 7. STATUTES (§ 64\*)—PARTIAL INVALIDITY—EFFECT.

A statute may be constitutional in some of its provisions and unconstitutional in others; but, where the parts can be so separated as that each can stand as the will of the Legislature, the good does not perish with the bad.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

## 8. CONSTITUTIONAL LAW (§ 42\*)—STATUTES—VALIDITY—PERSONS ENTITLED TO ATTACK VALIDITY.

The court will not listen to an objection to the constitutionality of a statute made by a party whose rights it does not affect, and who has no interest in defeating it; and hence a nonregistered pharmacist prosecuted under Code Va. 1904, c. 78, §§ 1754-1766, for retailing carbolic acid, cannot complain of the provision of the chapter giving the board of pharmacy the sole right to institute prosecutions for violations of the chapter, for he cannot be injuriously affected thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 89; Dec. Dig. § 42.\*]

Error to Circuit Court, Rockingham County.

A. D. Bertram was convicted of selling carbolic acid, in violation of Code 1904, c. 78, §§ 1754-1766, and he brings error. Affirmed.

Sipe & Harris and H. W. Bertram, for plaintiff in error. William A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. This is a writ of error to a judgment of a justice of the peace of Rockingham county, affirmed on appeal to the circuit court, convicting the plaintiff in error, A. D. Bertram, of a misdemeanor, and imposing upon him a fine of \$10 and costs.

The prosecution was had under sections 1754-1766, c. 78, Code Va. 1904; and the facts are undisputed that Bertram, not being a registered pharmacist, sold by retail carbolic acid, which was shown to be a deadly poison, as charged in the warrant.

The first and second assignments of error involve the contentions that the title to the act on which the prosecution is founded (Acts 1885-86, p. 405, c. 364) embraces more than one object, and contains provisions not expressed in the title, and is consequently violative of article 5, § 15, of the former Constitution of 1869, and void.

The original act bears the following title: "An act to incorporate the Virginia Pharmaceutical Association and to regulate the practice of pharmacy and to guard the sale of poisons in the state of Virginia."

We are not disposed to admit that the title is amenable to the constitutional objections urged against it. The sections of the act relate to the main subject expressed in the title, and are germane to, and not incongruous with, the general purpose of the enactment. But whatever merit these assignments may have possessed with respect to the original act need not now be considered,

since its provisions have been substantially incorporated in the Code of 1887, which expressly repeals all acts of a general nature in force at the time of its adoption. Code 1887, § 4202 (Code 1904, p. 2188). The Code constitutes but one act, and the practical effect of sustaining the contention of the plaintiff in error would be to strike down the entire fabric.

In *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, Judge Riely, at page 775 of 91 Va., at page 361 of 21 S. E. (28 L. R. A. 110), in delivering the opinion of the court, observes: "They [the laws contained in the Code of 1887] were collated, revised, and digested under appropriate titles and chapters, and divided into sections, in pursuance of an act of the Legislature, and then passed by it as one act under a proper title with the object of the act therein duly expressed, 'An act to revise, arrange, and consolidate into a Code the general statutes of the commonwealth, approved May 16, 1887,' in strict compliance with the Constitution.

"It was not to amendments of general statutes thus consolidated into a Code that section 15 of article 5 of the Constitution of 1869 was intended to apply, but it was aimed at the separate acts in their original enactment, when the opportunity existed for the evils and the mischief to be done which the constitutional provision was designed to prevent or defeat. It is not necessary, therefore, to do more, if so much, in amending and re-enacting or repealing any part of the Code, or adding thereto, than refer to the proper chapter and section thereof to be amended or repealed or added to, and adopt and express in the title of the amendatory act the number and subject of such chapter, if the provision of such amendment by re-enactment or by additional section or sections is germane to the subject of the chapter. *Second German Building Association v. Newman*, 50 Md. 62; *Lankford v. Commissioners*, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491; *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980; *Dogge v. State*, 17 Neb. 140, 22 N. W. 348; *State v. Berka*, 20 Neb. 375, 30 N. W. 267; *People v. Howard*, 73 Mich. 10, 40 N. W. 789; *People v. Parvin* (Cal.) 14 Pac. 783." See, also, *Bank v. Holland*, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898.

We have quoted at some length from the opinion of Judge Riely, because he was one of the revisors of the Code of 1887, and thoroughly acquainted with the philosophy of that excellent compilation; and also for the further reason that his lucid discussion of the subject furnishes a complete answer to the argument against the act in question.

Subsequent amendments are by reference to chapter and sections of the Code, and in other respects conform to requirement as pointed out by Judge Riely in his able opinion.

Lastly, it is insisted that the present statute (sections 1759, 1766, Code 1904) is both a private and special law, enacted in the interest of a private corporation, that it denounces certain acts as misdemeanors affecting the interests of the Virginia Pharmaceutical Association, and then undertakes to give "to the appointees of that private association the exclusive right to be the prosecutors of said crimes and the exclusive beneficiary in the penalty to the extent of one-half the fines imposed." These provisions, it is maintained, violate clauses 1, 18, § 63, of the Constitution of 1902 (Code 1904, pp. cccxiii, cccxiv).

Clause 1 declares that the General Assembly shall not enact any local, special, or private law for the punishment of crime, and clause 18 that it shall not grant to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.

Upon the first proposition the act is in no sense a local, special, or private law for the punishment of crime, because it applies to the state at large, and makes a violation of its provisions by any person a misdemeanor punishable by fine.

With regard to the latter branch of the contention, it may be observed that the legislation is a reasonable and most essential exercise of the police power of the state, and was enacted in the interest of public health and safety. It is true that, in order to render the law more effective, the Legislature has seen proper to designate the board of pharmacy of the state informer in all prosecutions arising under chapter 78. It is not necessary to decide whether that board, in relation to the duty imposed, discharges a private or public function within the meaning of the Constitution, or whether it possesses the exclusive right to set on foot prosecutions for violations of chapter 78; for, if those features of the act be amenable to objection on constitutional grounds, they are separable provisions, which may be dispensed with without invalidating other parts of the statute; and the rule is well settled that "a statute may be constitutional in some of its provisions and unconstitutional in others, but, if the parts can be so separated as that each can stand as the will of the Legislature, the good does not perish with the bad." *Trimble v. Commonwealth*, 96 Va. 818, 32 S. E. 786; *Homestead Cases*, 22 Grat. 266, 12 Am. Rep. 507; *Wise v. Rogers*, 24 Grat. 169; *Robertson v. Preston*, 97 Va. 296, 33 S. E. 618; *City of Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723.

"Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." *Cooley's Const. Lim.* (7th Ed.) 232; *Antoni v. Wright*, 22 Grat. 833; *Speer v. Commonwealth*, 23 Grat. 938, 14 Am. Rep. 164.

If it were conceded, therefore, that the

board of pharmacy can alone institute prosecutions for violations of chapter 78, it is not perceived that the plaintiff in error would be injuriously affected by such provision, since a limitation on the number of his prosecutors would inure to his advantage rather than to his injury.

For these reasons, the judgment under review must be affirmed.

Affirmed.

### WILSON v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

#### 1. MASTER AND SERVANT (§ 177\*)—INJURY TO SERVANT—FELLOW SERVANTS.

The doctrine of fellow servants had no application to the injury of a railroad employé by the turning of a rail on a car while he and his co-servants were unloading a rail from the car in a method directed by the foreman; the reason for the turning of the rail not being proved.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 177.\*]

#### 2. MASTER AND SERVANT (§ 97\*)—INJURY TO SERVANT—NEGLIGENCE.

Where the cause of the turning of a rail, by which plaintiff's foot was caught and injured as he was assisting in unloading a rail car, was not shown, and the evidence at most only showed a mistake in judgment of the foreman as to the manner of unloading the rails, the accident being such as could not have been expected to happen, negligence was not shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

#### 3. NEGLIGENCE (§ 58\*)—"PROXIMATE CAUSE"—ELEMENTS.

The requisites of "proximate cause" are the doing or omitting an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and that such act or omission did produce it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 71, 72; Dec. Dig. § 58.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

#### 4. MASTER AND SERVANT (§ 97\*)—INJURY TO SERVANT—DUTY OF MASTER.

A master is required to anticipate and guard against consequences injurious to his servant, that may be reasonably expected to occur, but he is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

Error to Circuit Court, Albemarle County.

Action by Jake Wilson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. W. Allen and Geo. E. Walker, for plaintiff in error. Perkins & Perkins, for defendant in error.

CARDWELL, J. This action was brought by plaintiff in error to recover of the defendant in error, the Southern Railway Company, damages for an injury alleged to have been sustained by the plaintiff as a laborer while in the employ of the defendant company.

At the trial the plaintiff and one other, Tom Brown, were alone introduced as witnesses on behalf of the plaintiff, and at the conclusion of the testimony given by these witnesses the defendant demurred to the evidence, whereupon the court rendered its judgment in favor of the defendant. The sole question, therefore, to be considered is whether or not the circuit court erred in said judgment.

Both witnesses say that they were employed by one Dudley on a "floating gang" or "extra force" for the duty of putting ballast under the track—surfacing the track—but just what was contemplated in the way of service in this employment is by no means made clearly to appear. It does, however, appear, upon the reading of the entire evidence, that this "floating gang" or "extra force" on which the plaintiff and his witness Brown were employed were hired, not merely to do the regular work of a section force, but to do general section work between certain points on the main line of the defendant company; i. e., their business was, along with the gang under Dudley, consisting of from six to twelve or more men, to do whatever turned up on their section, and to help any of the other gangs that became short of the needed force.

Accordingly the plaintiff, along with the gang with which he was working, on the day of the injury of which he complains and for two weeks prior, without any complaint from him, was engaged in distributing steel rails along the defendant's main track, working in conjunction with another gang under one Murphy. There is nothing whatever in the evidence that would warrant the inference that he was being worked outside of his employment, or to show that he had any regular employment except that in the performance of which he was injured.

At the particular time of the accident to the plaintiff, this combined force under Dudley and Murphy had progressed in unloading a car of these 85 rails to the point where they had been taken and thrown out from the middle of the car down to its floor, leaving rails piled sloping up on either side of the car, and according to the witness Brown it was desirable to have the rails thus sloping up to the sides of the car, "in order to raise them up, so that we could get them off easy; would not have to lift them so high." At this moment the rails on the side of the car from which the men were to continue taking them up and throw them over the side of the car had a surface at the top of the width of four rails, or about ten inches, and just then Dudley, who was at one end of the car, said, "Men, tear down that pile," which the men got ready to do, but Murphy, who was at the opposite end of the car from Dudley, gave the order: "Watch, men! Pull this top rail." Murphy meant by "watch" to pay attention

to what his men were going to do, viz., take up the first top rail, and at once this rail was "cracked"—i. e., the end next to Murphy prized up so that the men could get hold of it, and from that end the men in turn took it up—and while in the act of stepping up on the pile of rails to throw the one in hand out of the car a rail from the pile under the men, for some reason unknown, rolled down, catching one of plaintiff's feet, and breaking it just at or below the ankle.

Murphy had no authority over the men engaged in this work other than to direct the distribution of the rails then in hand, and it unmistakably appears from the evidence that he was directing the work to be cautiously done because necessarily attended with some danger to the men engaged. The witness Brown states that, when Murphy said "watch," he meant "for us to stop and pull at that end, because if you work at both ends, you are liable to cut your fingers off. You just use the word 'watch' to keep everybody noticing this end man." This witness further says that all the men understood the order given by Murphy, and that the men were directed to handle and were handling the rail ordered to be moved in accordance with the "rule" followed on like occasions. While this witness and the plaintiff state that they "thought it was a little dangerous," both agree that they were also of opinion at the time that by being careful the danger could be avoided. Neither, however, say that Murphy knew of the danger they apprehended, or state any facts from which he ought to have known of the danger and guarded against it. The plaintiff states that the rails sloped up ten inches to a level, the space of the length of a man's foot, upon which the men could step from the floor, and that it was when he had put one foot up on the top of the rails, and was about to follow it with his other foot, a rail from the pile turned and caught it. As remarked, no reason is stated why this rail turned, and neither witness makes the statement that the danger of which they speak was from the rails turning, and certainly there is nothing in the evidence whatever to justify the inference that Murphy knew, or ought to have known, of this danger.

We quite agree with counsel for the plaintiff that the doctrine of fellow servant has no application to the facts of the case; but it is also true that the line of cases, to which belongs *Va. P. C. Co. v. Luck*, 103 Va. 444, 49 S. E. 577, do not apply. This is not a case where a servant was put to work in an unusually dangerous place. True the work in a degree was dangerous, but it was work with which the plaintiff was familiar, having been engaged in it for two weeks before this accident to him occurred. His witness Brown, who had been working with him, af-

ter stating that he had helped to distribute steel rails before this accident, was asked, "How did you distribute at that time?" and he answered, "Just like we did this time."

This court has repeatedly sanctioned the rule that "a party should not be adjudged negligent for not conforming to some other method believed by some to be less perilous." *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285, and authorities cited.

In this case, even if the evidence justified the conclusion that it would have been safer for the men engaged in the work to have removed the rails from the car in a way different from that directed by Murphy, the most that can be said of the facts proved is that they but show that a mistake in judgment was made, and there is nothing in the evidence going to show that Murphy was not justified in believing, as did the plaintiff and his witness Brown, that the men would get safely over the pile of rails only ten inches high, and cast the rail they had taken up out of the car, pursuant to his directions. In the absence of proof as to the cause of the turning of the rail which caught plaintiff's foot, the conclusion is irresistible that it resulted from the act of the laborers themselves in the use of their discretion—an accident that could not have been expected to happen, and for which no one could be held liable in damages.

The entire evidence falls to point out any negligence on the defendant company's part which could be fairly considered as the proximate cause of this injury. The requisites of probable cause are, first, the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury; and, second, that such act or omission did produce it. A master is required to anticipate and guard against consequences injurious to his servant that may be reasonably expected to occur, but he is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. *Va. I. C. & C. Co. v. Kiser*, 105 Va. 695, 54 S. E. 889.

We are, therefore, of opinion that the judgment of the circuit court in favor of the defendant, upon its demurrer to the evidence in this case, is without error, and should be affirmed.

Affirmed.

#### BRUCE v. SHULER.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

1. WILLS (§ 116\*)—WITNESSES—COMPETENCY. Under Code 1904, § 2514, requiring non-holographic wills to be attested by two competent witnesses, the witnesses must be competent at the time of attestation.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 293; Dec. Dig. § 116.\*]

## 2. WILLS (§ 116\*)—WITNESSES—COMPETENCY—BENEFICIARIES.

At common law and under Code 1904, § 2529, beneficiaries under a will are not competent witnesses thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 287; Dec. Dig. § 116.\*]

## 3. WILLS (§ 303\*)—EXECUTION—PROOF.

Though under Code 1904, § 2514, a will must be attested by two competent witnesses, its due execution can be proved by one witness, but he must prove all the statutory essentials to a due execution, including attestation by two competent witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711, 715; Dec. Dig. § 303.\*]

## 4. WILLS (§ 116\*)—WITNESSES—COMPETENCY—BENEFICIARY.

Under Code 1904, § 2514, requiring non-holographic wills to be attested by competent witnesses, a beneficiary can only be considered as a witness under section 2529, which renders the devise or bequest to him void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 296; Dec. Dig. § 116.\*]

## 5. WILLS (§ 116\*)—WITNESSES—BENEFICIARIES—STATUTE CONSTRUED.

Code 1904, § 2529, provides that, if a will be attested by a beneficiary thereunder, "if the will may not be otherwise proved," such person shall be deemed a competent witness, but the gift to him shall be void. *Held*, that the quoted phrase refers to a case where the devisee or legatee is needed as an attesting witness to make the number required by law, in which he is made a competent witness by the avoidance of his interest, and he may also be called to testify at the probate, and that, conversely, a will may be otherwise proved where there are more witnesses than required.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 296; Dec. Dig. § 116.\*]

Error to Circuit Court, Rockingham County.

Application by L. H. Bruce for probate of Virginia Dutrow's will, opposed by Sarah Shuler. Probate being refused, proponent brings error. Affirmed.

Chas. A. Hammer and Roller & Martz, for plaintiff in error. Sipe & Harris, for defendant in error.

KEITH, P. L. H. Bruce offered for probate in the circuit court of Rockingham county a paper writing purporting to be the last will of Virginia Dutrow, deceased, of date April 12, 1908. Under the will Bruce was the chief beneficiary. Its probate was opposed by Sarah Shuler, the sole heir at law and distributee of the decedent.

Bruce, who offered the will for probate, was one of the two subscribing witnesses thereto; the other subscribing witness being alive and available for examination as a witness.

The circuit court refused to admit the will to probate, being of opinion that the competency of Bruce as an attesting witness was to be determined as of the date of his attestation, and that, being a beneficiary under the will and one of the two attesting witnesses required by law to the validity of the will, he came under the influence of section

2529, Code 1904, which provides: "If a will be attested by a person to whom \* \* \* any beneficial interest in any estate is there by devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void. \* \* \* " The circuit court was of opinion that the competency of Bruce as an attesting witness was to be determined as of the date of his attestation; that the will could not be otherwise proved; that under the statute the devise or bequest to him in the will became void; and that, as a consequence, he had no interest in the probate of the will. His motion to probate the will was therefore dismissed. To that judgment a writ of error was awarded by this court.

Our statute provides (section 2514) that "no will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Under our statute a will must be proved by two "competent" witnesses. The statute of 29 Car. II, c. 23, § 5, used the word "credible," which was also employed in our statute down to 1850. It was universally agreed, however, that "credible" meant no more and no less than "competent." There was a serious diversity of opinion, however, as to the period to which the statute designed to refer the competency of the witness. Lord Camden was of opinion that it was when he attested the will (*Hindon v. Kersey* [1765] 1 Bro. Adm'y & Civ. L. 284, note [24]; 4 Burn's Ecc. Law, 88; Bac. Abr. Wills [D], II), or to the period when he was called to prove it, as Lord Mansfield held (*Windham v. Chetwynd*, 1 Burr. 414; *Lowe v. Jolliffe*, 1 W. Bl. 366; *Goodtitle v. Welford*, 1 Dougl. 141). This doubt our statute does not resolve. It is extremely probable that with us Lord Camden's opinion would prevail. It seems that it does in England. *Holdfast v. Dowsing*, 2 Stra. 1254, 1255; *Hatfield v. Thorp*, 5 B. & Ald. (7 E. C. L.) 589; 1 Jarm. Wills (5th Ed.) 70; 2 Min. Inst. (3d Ed.) 1024.

In *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481, the court, referring to the conflict between the great judges above mentioned, said: "Both opinions are respectively supported by other decisions, and it may be difficult perhaps to determine on which side the weight of authority preponderates. But it appears to me that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

opinion of Lord Camden is sustained by the more convincing and consistent reasoning, and is more conformable to the language and apparent intention of the statute."

In *Schouler on Wills* (3d Ed.) § 353, it is said: "The disqualification of interest is that which courts have chiefly to consider where the competency of a subscribing witness is drawn in question. One who has an immediate beneficial interest in a will is at the common law disqualified from becoming a subscribing witness thereto. He is neither 'competent' nor 'credible,' in the sense of the statute; and the test of competency is the state of facts when the will was made, and not when it comes into operation."

It is proper to observe that our statute, which has made so many and such radical changes with respect to the competency of witnesses, does not affect the competency of attesting witnesses to wills, deeds, and other instruments. Section 3346.

To hold that the tests as to competency were to be applied at the time when the will was presented for probate, and not at the date of its execution, would defeat one of the most important and salutary purposes contemplated by the statute, which requires that wills shall be attested by two competent witnesses.

"The object of the statute was to prevent frauds as well as perjuries. Wills are frequently made by a testator in extremis, or when he is greatly debilitated by age or infirmity, when frauds may be practiced upon him with facility by the crafty and designing; and it was the intention of the statute to guard against such practices, and to protect the testator by surrounding him with disinterested witnesses at the critical and important moment when he was about to execute his will. They are to be disinterested and credible, also, at the time of attestation, because in some sense they are made the judges of the testator's sanity. It is their duty to inquire into this matter, and, if they think the testator not capable, they should remonstrate and refuse their attestation.

"There is another important reason for referring the credibility of the witnesses to the time of attestation rather than to the time of the probate of the will; for, if the statute is to be understood as referring to the latter period, it would follow that a will attested by unexceptionable witnesses could not be proved, if the witnesses, after the attestation and before the probate, should become insane, infamous, or otherwise disqualified, which would be opposed to the current of the authorities; for I take it to be well settled that in such cases the handwriting of the witnesses may be proved, and the will thereupon allowed." *Hawes v. Humphrey*, supra; *Needham v. Borden*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434.

*Croft v. Croft*, 4 Grat. 108, is relied upon by plaintiff in error to sustain his conten-

tion. In that case Samuel Croft was one of two subscribing witnesses to the will of Lewis Croft, and was one of the devisees of a certain tract of land. The circuit court was of opinion that the statute concerning wills (1 Rev. Code 1819, c. 104, § 11, p. 377), which provides that "if any person shall subscribe his or her name as a witness to a will, wherein any bequest is given to him or her, if the will may not be otherwise proved, the bequest shall be void, and such witness shall be allowed and compellable to appear, and give testimony on the residue of the will, in like manner as if no such bequest had been made," governed the case of a devise or bequest, whether of real or personal estate, to an attesting witness to a will. The contention of appellants was that a bequest applied only to personal estate, and that the statute therefore did not apply to a devise of lands; but the Court of Appeals affirmed the judgment upon the ground that the statute applied as well to devises of real estate as to bequests of personalty, that it rendered the provision in favor of Samuel Croft null and void, and he became a competent witness to establish the will as though no such devise had been made to him.

In the case of *Davis v. Davis*, 43 W. Va. 300, 27 S. E. 323, decided by the Supreme Court of West Virginia, the contention of plaintiff in error is sustained. In that case the will of Charles W. Davis was attested by Mrs. Delilah Davis, to whom and whose husband devises and bequests were made. The other subscribing witness (two being required) took nothing under the will. The will was probated upon the testimony of the disinterested witness; and a bill to declare void the bequests and devises to Mrs. Delilah Davis and her husband was dismissed, the grounds upon which the decision was placed being (1) that there were two competent witnesses at the time of the attestation of the will; (2) that a will must be subscribed, but need not be proved, by two attesting witnesses, even though the other attesting witness be alive and within the jurisdiction of the court, and hence, as in this case, the will was otherwise proved, viz., by the other attesting witness, Mrs. Davis was not needed as a witness at the probate, and so her interest and that of her husband was not forfeited. Upon the first point it was conceded by the court that under the West Virginia statute, which is similar to section 2514 of our Code, there must be two witnesses competent at the time of the attestation; but said the court: "The only reasonable way to construe sections 3, 18, c. 77, Code 1887 (Code Va. 1904, §§ 2514, 2529), is that the word 'competent,' as used in each of them, refers to the separate time to which they relate—the first to the attestation, the second to the proof, of the will. Mrs. Davis was competent as an attesting witness. While she was interested in the will, the testator was alive, and, if the question of the attesta-



tion had arisen during his life, they were both competent to testify in relation thereto. Hence the word 'competency,' in so far as it relates to an attesting witness, excludes the question of interest, and has reference to age, sanity, and moral integrity. As used in the eighteenth section (Code Va. § 2529), in relation to the proof of the will, it has reference merely to the question of beneficial interest; its object being to remove all motive for false swearing or forgery, and also the incompetency of the witness occasioned by the death of the testator, thus throwing on the beneficiaries thereunder the burden of sustaining the will independently of their own testimony. If the will can be thus sustained, it is sustained as a whole, and not in parts, and none of the provisions are void, but all the beneficiaries take under it, even though the attesting witnesses were incompetent (i. e., to testify at the probate) on account of interest. \* \* \* The will is fully established by the other attesting witness."

We cannot concur in this reasoning. The will must be attested by two competent witnesses. They must be competent at the time of the attestation. Those who take under the will are not competent, were not competent at common law, and their incompetency is not relieved by statute. It is true that, while a will must be attested by two competent witnesses, its due execution can be proved by the testimony of one witness; but that witness must prove all the facts required by the statute to be proved as necessary to the due execution of a will, and among them that it was attested by two competent witnesses. The will in this case was attested by Sally Williams, who subscribed to it by making her mark in place of a signature, and by L. H. Bruce, the principal beneficiary under the will. Mr. Bruce stands aside, and puts forward Sally Williams as a witness to prove all that the statute makes necessary to the probate of the will. It became necessary for her to prove that it was signed by the testator, or acknowledged by him, in the presence of herself and of Bruce, who were present at the same time, and that they subscribed to the will in the presence of the testator. But that is not all. She should have been required to prove that both she and Bruce were competent witnesses. Now, the instant that it was made to appear that L. H. Bruce, who had subscribed to the will as one of the attesting witnesses, whose attestation was essential to the validity of the will, was the same Bruce who was named as a beneficiary under the will, he could only be considered as an attesting witness by virtue of section 2529, which renders the devise or bequest to him void. This will could not be otherwise proved than by proof of his attestation, whether that proof came from his own lips or from other witnesses.

In our judgment the true view of the statute is that the words, "if the will may not be otherwise proved," have reference to a case where the devisee or legatee is needed as an attesting witness to make up the number required by law, in which he is made a competent attesting witness by the avoidance of his interest, and he may also be called to testify at the probate of the will. And, conversely, a will may be otherwise proved when there is an extra or superfluous attesting witness beyond the number required by the statute. 4 Va. Law Reg. 327-329; 1 Tiedeman on Real Prop. § 878; 1 Redfield on Wills, \*258.

We are of opinion that there is no error in the judgment of the circuit court, which is affirmed.

Affirmed.

#### TUNE v. BEELAND.

(Supreme Court of Georgia. Nov. 14, 1908.)

##### 1. FRAUDULENT CONVEYANCES (§ 174\*) — RIGHTS OF FRAUDULENT GRANTEE.

In an action of complaint for land, where the plaintiff relies for a recovery on a deed from the defendant to T. and a deed from T. to the plaintiff, an amendment to the answer alleging that the conveyance of the defendant to T. was without other consideration than to place the title in T. until he should pay a certain creditor, and that his creditor was shortly afterwards paid, and that the plaintiff took his deed with knowledge of these facts, and praying a cancellation of the plaintiff's deed, was properly rejected. The allegations in the proffered amendment, under the rule that the allegations of the pleading should be taken most strongly against the pleader, charge in effect that the deed sought to be canceled was given to delay the maker's creditor, and courts will not set aside a conveyance made to hinder, delay, or defraud creditors, at the instance of the grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 533; Dec. Dig. § 174.\*]

##### 2. FRAUDULENT CONVEYANCES (§ 174\*) — RIGHTS OF GRANTEE.

Nor will a grantor in such a deed be allowed to set up such a defense, and support the same by evidence, to defeat the plaintiff's recovery.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 533; Dec. Dig. § 174.\*]

##### 3. ESTOPPEL (§§ 83, 119\*)—WHAT CONSTITUTES QUESTION FOR JURY.

If one induces another to buy land as the property of a third person, he will thereafter be estopped from asserting his title against such third person, who is ignorant of the true title and has no convenient means of acquiring such knowledge; but, where the facts relied on to establish the estoppel do not unequivocally show an estoppel in pais, the jury, and not the judge, should determine whether the facts constitute such an estoppel.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 232, 309; Dec. Dig. §§ 83, 119.\*]

(Syllabus by the Court.)

Error from Superior Court, Taylor County; J. H. Martin, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by W. N. Tune against Homer Beeland. Judgment for plaintiff. Defendant brings error. Reversed.

C. B. Marshall and Hardeman & Jones, for plaintiff in error. O. M. Colbert and R. S. Foy, for defendant in error.

EVANS, P. J. Homer Beeland brought suit against W. N. Tune to recover a small piece of land specifically described, and located within the east half of lot 171 of the Fourteenth district of Taylor county. From the abstract of title attached to the petition it appears that plaintiff claims that the defendant Tune, being the owner of an undivided half interest in the eastern half of lot 171 (which embraced the premises in dispute), on November 9, 1898, conveyed it to Cora Trapp, who on August 24, 1899, conveyed it to the plaintiff. The abstract of title to the other half interest of the eastern half of lot 171 recited a deed from Hattie E. Cooley, W. F. Williamson, and Edgar W. Williamson to E. S. Beeland and Homer Beeland, dated December 1, 1903, and a deed from E. S. Beeland to Homer Beeland, January 2, 1905. The defendant filed a plea, admitting his possession of the land, and denying that the plaintiff had title thereto. On the trial of the case the defendant offered the following amendment to his plea: "Now comes the defendant, and for further answer says: (1) The deed from defendant to Cora Trapp was executed and delivered under an express agreement that so soon as defendant should pay a debt which defendant was then and there owing to one C. C. Souder, amounting to \$16, that she would reconvey to this defendant the land so conveyed. That defendant in a few days paid said debt, and that thereupon said Cora Trapp agreed to reconvey, and attempted so to do, and thereupon instructed the clerk of Taylor superior court to cancel said deed. (2) That there was no other or further consideration of any kind whatever for the execution of said deed by this defendant, and that said Cora Trapp thereafter held said property under an implied trust to reconvey the same to this defendant. (3) That said Homer Beeland had full notice of said agreement between defendant and said Mrs. Cora Trapp, and himself carried the money to said Souder and paid the same. (4) That said deed from defendant to Cora Trapp and the deed from Cora Trapp to plaintiff should be decreed by the court to be surrendered up and canceled, and the title to the property sued for should be decreed to be in this defendant. Wherefore he prays that said deeds be decreed to be delivered up and canceled, and the title to the land above described be decreed to be in this defendant." The court refused to allow this amendment, and exception is taken to this ruling. The case proceeded to trial,

and upon conclusion of the evidence the court directed a verdict for the plaintiff, and this action of the court is assigned as error.

1, 2. The plaintiff in error contends that the facts pleaded in the proffered amendment do not authorize an inference that the conveyance from Tune to Mrs. Trapp was made for the purpose of delaying or defrauding Tune's creditor; but that, on the other hand, it was executed to secure a debt, and that the debt had been paid. If the deed was given to secure a debt, why should not the pleader so allege? There is no basis for the inference that Mrs. Trapp advanced any money to Tune, or to Tune's creditor for his benefit. What, then, could have been the object of Tune's conveyance to Mrs. Trapp? It was neither a deed of bargain and sale, nor a deed to secure a debt. This implication is irresistible that Tune desired to vest the title in Mrs. Trapp until he could pay Souder. Even if it be conceded that two conclusions as to the purpose and intent of Tune in giving the deed may be deduced—one that the deed was given to secure a debt, and the other that it was executed to defraud the maker's creditor—the latter conclusion must prevail. It is an elementary rule of pleading that the allegations are to be construed most strongly against the pleader; and, if two constructions can be put on the pleadings, that which is least favorable to the pleader must obtain. The construction, therefore, which should be placed on the facts pleaded is that Mrs. Trapp and the defendant entered into an agreement whereby Tune was to convey his land to her in order that he might put it out of the reach of his creditor, so as to gain time to raise the money with which to pay him. It is admitted that the recital in the deed that the land was sold for \$300 is untrue, and from the allegations no inference can be drawn that Mrs. Trapp either furnished or contracted to furnish the money to pay the debt of Souder upon the faith of the conveyance to her. The law brands as fraudulent every conveyance made with intention to delay or defraud creditors, where such intention is known to the party taking. Civ. Code 1895, § 1695 (2). The courts will not set aside a conveyance to hinder, delay, or defraud creditors, at the instance of the grantor. *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 280. When a suitor applies for equitable relief, he must come into court with clean hands with respect to the matters concerning which he asks such relief. The defendant was not entitled to have the deeds canceled as prayed.

The defendant contended on the trial that, although denied the affirmative relief of cancellation, he at least should be permitted to prove the allegations of the rejected amendment as a defense to the action. He offered to testify as follows: "That the war-

ranty deed from W. N. Tune to Mrs. Cora Trapp, dated November 9, 1898, the consideration expressed being \$300, and the property conveyed being one-half undivided interest in the east half of lot No. 171 in the Fourteenth district of Taylor county, was executed and delivered by him to M. J. Trapp, who was general agent for his wife, Mrs. Cora Trapp, the grantee, and who acted for her exclusively in the transaction, she being at no time present, without consideration; that he (Tune) was then and there indebted to one C. C. Souder, and the claim of said Souder against said Tune was in the hands of R. S. Foy as the attorney of said Souder for collection; that said M. J. Trapp proposed to said Tune that he convey said property to Mrs. Cora Trapp, and that as soon as Tune paid the \$16, which was the amount of his indebtedness to Souder, the said Mrs. Trapp would reconvey the land to Tune; that there was no other consideration for the execution and delivery of said deed; that a few days afterwards, Tune, having raised the money, \$16, carried it to Trapp, the plaintiff, Homer Beeland being present, and Homer Beeland took the money and undertook to carry it to R. S. Foy and pay it to him for Souder, and actually did so, and thus paid the debt; that Trapp at that time stated in the presence of Homer Beeland that his wife, Mrs. Cora Trapp, pursuant to the agreement, would reconvey to said Tune the land described in the deed from Tune to Mrs. Trapp; that shortly afterwards the said Trapp delivered to Tune a note addressed to O. T. Montford [directing Montford to cancel this deed] which was likewise offered in evidence, and that Tune carried said note to Montford, and was told by Montford that he could not legally comply with Trapp's request; that from that time for several years thereafter said Tune continued to occupy said land, as he had been doing before, and it was not until some time after the deed was made from Mrs. Cora Trapp to Homer Beeland that Tune ever heard of any claim being made by Mrs. Trapp under the deed which he made to her, and which M. J. Trapp, her agent, wrote the clerk to cancel, when Tune had paid the money to Souder, which he undertook to pay when the deed was made to Mrs. Trapp."

The court excluded this testimony, and properly so. Its effect was to establish a collusive arrangement between Tune and Mrs. Trapp, whereby Tune was to put the title of his land in Mrs. Trapp to delay Souder in the collection of his debt. As was said by Bleckley, C. J., in *Parrott v. Baker*, 82 Ga. 878, 9 S. E. 1071: "Both upon principle and authority, the fraudulent maker of such instruments is bound by them according to their terms, irrespective both of any actual payment of a consideration, or any contemporary or subsequent change of possession. \* \* \* The title passes as completely, so far as the parties to the conveyance are con-

cerned, where the possession is retained as where it is delivered." \* \* \* It is a mistake—a wide mistake—to regard an action of ejectment or complaint for land as a call upon the court to enforce the fraudulent deed as a contract. The law, taking the parties at their word and acting upon the deed as pure, has already executed it as a contract and transmuted it into title. The court is called upon to do nothing in behalf of the plaintiff to recover the land but that which it does for every plaintiff who comes armed with complete title to recover possession of his property." It is true that the debt which Tune owed to Souder was small, and that he afterwards paid it. But the payment of the debt did not purge the fraud from the conveyance. The law does not grant absolution to a party simply because no loss is occasioned by his fraudulent act. The defendant put the title in Mrs. Trapp, and the court will not relieve him from its consequences by allowing him to show that it was made in pursuance of a collusive and fraudulent design. Besides, the evidence which was repelled was but an effort to prove the facts alleged in the amendment which was disallowed.

3. The plaintiff claimed title to the premises in dispute under two chains of title, each purporting to convey an undivided half interest. One of these chains originated with a deed from the defendant to Mrs. Cora Trapp, and has already been discussed. The other consisted of deeds from Mrs. Hattie E. Cosey and W. F. and E. W. Williamson to E. S. Beeland and the plaintiff, dated December 1, 1903, and a deed from E. S. Beeland to plaintiff, dated January 2, 1905. No paper title was traced to these grantors, and it affirmatively appeared that they had never been in possession of the premises in dispute. The plaintiff testified that Mrs. Williamson, the mother of these grantors, died leaving three children, the grantors in the deed; that her husband predeceased her; that the defendant, while living on the land sued for, and long before plaintiff got the deed from Mrs. Cosey and W. F. and E. W. Williamson, told him that he, the defendant, and Mrs. Williamson each owned an undivided one-half interest in the eastern half of lot 171, and that Mrs. Williamson at the time was living on a part of the eastern half of lot 171. By directing a verdict the court adjudicated that the deeds introduced in evidence, aided by the parol testimony, established a prima facie title in the plaintiff. In order to reach this result the plaintiff's right to recover must be rested in part upon an estoppel of the defendant, and not entirely on legal title or possession, as the plaintiff showed neither paper title nor possession in the Williamson children. When a plaintiff in ejectment relies on the defendant's conduct in aid of his title, he must show that he acted on such conduct in procuring his title. The doctrine of estoppel as to title

to real estate is thus stated in our Civil Code of 1895:

"Sec. 5151. Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel.

"Sec. 5152. In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped; or such gross negligence as to amount to constructive fraud by which another has been misled to his injury."

While the plaintiff testified that, "long before" he bought from Mrs. Williamson's children, the defendant admitted that he and Mrs. Williamson owned the land in common, he does not say in express terms that he acted on this information when he bought, or that he was ignorant of the true title, and had no convenient means of acquiring such knowledge. Even if the jury could have drawn this inference from his testimony, certainly the court could not draw this inference, when it was not necessarily deducible from the testimony. For this reason, we think the court erred in directing a verdict.

Judgment reversed. All the Justices concur.

HOLDEN, J. (concurring specially). The defendant was resisting an action in ejectment, and the court refused to allow an amendment offered by him to his plea, which amendment set up that the deed from him upon which the plaintiff relied for a recovery was given without other consideration than to place the title in the grantee therein until the defendant could pay a debt of \$16 owing to a certain creditor, which debt he did pay a few days thereafter, and that the plaintiff took his deed from this grantee with knowledge of these facts. The court also refused to allow the defendant to introduce evidence for the purpose of defeating a recovery; the evidence offered being in substance the same as the allegations contained in the amendment which the court rejected. The writer cannot agree to these rulings, which are based upon the decision that it should be held, as a matter of law, from the existence of the facts alleged, that the intention of the maker of the deed was to hinder, delay, or defraud his creditor, but concurs in the other rulings in the case.

An assignment by a debtor of a part or all of his property, with an agreement with the assignee that the latter is to hold the property until the assignor pays his debts to one or all of his creditors, though the purpose of the assignment is not mentioned therein, does not necessarily mean that the intention of the debtor in making the assign-

ment was to hinder, delay, or defraud the creditor or creditors. His intention may have been the contrary. When a debtor makes a deed to one, with the agreement that the latter is to hold the title to the property conveyed until the debtor pays a certain creditor an obligation, it cannot be said, as a matter of law, what the intention of the debtor was. The fact that a transaction is unusual, or even illegal, does not necessarily mean that the intention of the parties thereto is fraudulent. Where a debtor, wealthy or poor, conveys a part or all of his property, it cannot be said, as a matter of law, that he does so with intention to defraud, hinder, or delay a creditor, simply because he had an agreement with the grantee that the latter was to hold the property conveyed until the creditor was paid. It does not appear from the proffered amendment or evidence that the grantee was related to the debtor, or that the debtor was insolvent, or that he did not have much other property with which to pay this small debt, nor that the agreement that the grantee was to hold the title to the land until the creditor was paid was to be kept a secret from the creditor, or any one else. The above-recited facts, the amount of the land conveyed, the improvement thereon consisting of a dwelling house, the small amount of the debt owing by the creditor, and the fact that he did actually pay the debt in a few days, and all the other facts and circumstances of the transaction, were to be considered in determining what was the intention of the debtor in making the deed. When a deed is made, and a state of facts or circumstances are given, it is a matter of inference from them whether or not it was the intention of the parties to the deed to defraud creditors of the maker. This inference is to be drawn by the jury, and not by the court. The rule is announced in 2 Moore on Fraudulent Conveyances, 570, in the following language: "The nature of the intent ordinarily will not be presumed as a matter of law, but must be inferred by the jury from the facts in evidence." The opinion of the court cannot be substituted for that of the jury. The intention of the debtor was locked in his own breast, and can only be judged of from facts and circumstances, and his intention is purely one of fact, to be determined by the jury from such facts and circumstances. The debtor nowhere in the amendment disallowed, or the evidence excluded, says his intention was to hinder, delay, or defraud his creditor. Even if it be conceded that the probable effect of his conduct was to delay, hinder, or defraud the creditor, it cannot be said as a matter of law that it was his intention to do so. This doctrine is clearly announced in Nicol v. Crittenden, 55 Ga. 497, the first three headnotes of which case are as follows:

"1. While it is true, in general, that a man is presumed to intend the natural and probable consequences of his own acts, it is not

true that he is presumed to intend all their necessary consequences. Consequences may be necessary, and yet quite remote and unexpected.

"2. That a given fact was followed necessarily by delay to creditors, in the particular case, however strong as a circumstance to be weighed by the jury, is not ground for presuming, as a matter of law, that it was intended to have that effect.

"3. It is impossible that a sale can defraud creditors, unless it was made with a fraudulent intent; and the nature of the intent will not be presumed as a matter of law, but must be inferred by the jury from the facts in evidence."

The deed in this case was not necessarily, or in fact, followed by delay or hindrance to, or fraud on, the creditor. The agreement that the grantee was to hold title to the property until a certain creditor was paid by the debtor, however strong as a circumstance to be weighed by the jury in determining whether the intent of the debtor was to hinder, delay, or defraud, to use the language of the decision in the Nicol Case, cited supra, "is not ground for presuming, as a matter of law, that it was intended to have that effect," and "the nature of the intent will not be presumed as matter of law, that it was intended to have that effect." The rule of law announced in the first headnote in the present case, that "the allegations of the pleading should be taken most strongly against the pleader," is not to be questioned, but in connection therewith should be considered the rule of law announced in 2 Moore on Fraudulent Conveyances, 571, as follows: "A fraudulent intent cannot be deduced from what the law pronounces honest; and, where the circumstances attending a conveyance are consistent either with a fraudulent intent or honesty of purpose, fraud will not be imputed." The facts alleged are consistent with an honesty of purpose on the part of the debtor.

In view of the rule of law above quoted and the decision in the Nicol Case, supra, and our own statute, which says, "Fraud may not be presumed," the writer is of opinion that the court should not say, as a matter of law, the intention of the debtor was to hinder, delay, or defraud his creditor, but the question as to whether or not such was his intention should be left to the jury. When a debtor says his only purpose in conveying a tract of land, or an article of personalty, to another, was that such other person should hold the title to the property until the debtor should pay a certain debt he owed another, it is not proper to say as a matter of law that this purpose was necessarily accompanied by a purpose to hinder, delay, or defraud the creditor. The latter purpose is not a necessary companion of the former. As a matter of law, to infer

the latter purpose from the former is to presume fraud from a fact which does not necessarily show it. To make such a presumption, as a matter of law, is in contravention of Civ. Code 1895, § 4029, which says, "Fraud may not be presumed," and of the rule of law announced in Willis v. Foster, 65 Ga. 82: "The existence or nonexistence of fraud is peculiarly a question for the jury."

#### EDENFIELD v. EDENFIELD.

(Supreme Court of Georgia. Nov. 19, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 196\*)—ALLOWANCE TO WIDOW.

Where the will of a testator was propounded for probate by his executor, and a caveat thereto was interposed by certain of the heirs at law of the deceased, not including the widow, and a year's support was set apart to her, and where, by reason of an appeal of the case by the caveators to the superior court, it was necessary for the estate to be kept together for longer than 12 months, under Civ. Code 1895, § 3466, the widow was entitled to have a second year's support assigned to her, she not having caused or been in any way responsible for the delay in distributing the estate, although there was no provision in the will directing the estate to be held together for more than 12 months.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 725; Dec. Dig. § 196.\*]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Application of Theresa Edenfield for an allowance as widow of John Edenfield, deceased. From an order granting the allowance John Edenfield, Jr., executor, brings error. Affirmed.

Mrs. Theresa Edenfield filed her application for a year's support, as the widow of John Edenfield, Sr., deceased, alleging that there were no minor children. A caveat was filed by the executor of the decedent on the following grounds: (1) That the applicant had been fully provided for, and had a sufficiency of property to cover this application. (2) That the original year's support set aside was sufficient for the support of the widow for succeeding years, especially for the second. (3) That the applicant was not entitled to have the support, for the reason that the estate was not an estate to be kept together; that only by special provision of the Civil Code of 1895 (section 3466) can a second year's support be set apart; and that this application does not fall within the provisions of that section. The case was appealed from the court of ordinary to the superior court, by consent. It was there submitted to the presiding judge upon the following agreed statement of facts: "John Edenfield Sr., of said county, died over a year ago, leaving a will, with John Edenfield, Jr., named as executor. There were no words in said will

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

stating that his estate was to be kept together for longer than 12 months, and John Edenfield, Jr., filed said will for probate in solemn form. Said application was caveated on several grounds. The case was tried in the court of ordinary, and judgment rendered for the propounder. The caveators, being dissatisfied, appealed the case to the superior court, where it is now pending, and where the same has been continued; it not being tried at the first term after said appeal. The widow, Mrs. Theresa Edenfield, is in no way responsible for said continuance or said pending litigation over the probate of the will of her husband. By the terms of said will she is one of his legatees, receiving a considerable amount of both real and personal property, equal to the other legatees in said will. Mrs. Theresa Edenfield filed her application for 12 months' support. The same was set aside in the sum of \$500, made the judgment of the court of ordinary, and was paid over to her by the executor. The pending litigation over the probate of said will has kept said estate together for more than 12 months, and Mrs. Theresa Edenfield files her application for a second 12 months' support. Caveators say that under the law she is not entitled to said 12 months' support, first, because the estate is one not to be kept together as provided by law, out of which a second 12 months' support is allowed; and, second, because the property willed to Mrs. Theresa Edenfield by her husband in his last will and testament was in lieu of dower, and therefore stands in the place of dower." The judge overruled the caveat and held that the widow was entitled to a second 12 months' support out of the estate of her deceased husband, and remanded the case to the court of ordinary in order that commissioners might be appointed for the purpose of determining the amount. The caveators excepted.

Saffold Larsen, for plaintiff in error. Williams & Bradley, for defendant in error.

LUMPKIN, J. (after stating the facts as above). Only one ground of the caveat was stressed before this court—that this was not an estate "to be kept together for a longer time than 12 months," within the meaning of the law, although it was in fact kept together for a longer time, without fault on the part of the widow or any act on her part causing that result, and that therefore she was not entitled to a second year's support under the provisions of section 3466 of the Civil Code of 1895. Section 3465 provides for the setting apart of a year's support. Section 3466 declares: "When an estate is to be kept together for a longer time than twelve months, and there are no debts to pay, and a widow and minor children to be supported out of said estate, they shall have a year's support for each year that such estate may be kept together, and the ap-

praisers aforesaid may act in the same capacity for the second and any subsequent year, or new appraisers may be appointed by the ordinary to assign such support after the first year." It was urged that the words, "When an estate is to be kept together for a longer time than twelve months," had reference only to cases where a testator by his will provided for keeping the estate together longer than a year. Doubtless this argument was derived from a remark made by Mr. Justice Cobb in the course of his opinion in *Smith v. Foster*, 119 Ga. 376, 46 S. E. 425, where he said that "it might with some force be asserted" that such was the legislative intent. This was not a decision of the point, but only a passing remark, which was immediately followed by a reference to the case of *Woodbridge v. Woodbridge*, 70 Ga. 733, and a statement that in that case an additional year's support was allowed where there was no will and the estate had been kept together for three years by a mere failure of the administrator to wind it up. It was said (page 378 of 119 Ga., and page 426 of 46 S. E.) that "the *Woodbridge Case* should not be extended."

The decision in that case, however, was concurred in by the entire bench, then consisting of three justices, and it has never been reviewed and overruled. It very nearly, if not completely, rules the question now involved. There a widow applied for a year's support, alleging that there were no minor children of her deceased husband, that the estate had been kept together by the administrator for longer than 12 months, and that she was entitled to a support for each year that it had been so kept together. Appraisers were appointed, who made a return setting apart a sum of money as a year's support for the first year, and also an amount for the second and third years, respectively, during which the estate had been kept together. A caveat was filed, one ground of which was "that the allowance for the second year is excessive, illegal, and without authority of law to support it;" and another ground made a similar objection to the allowance for the third year. The ordinary passed an order in accordance with the return. The case was carried by appeal to the superior court. There the caveator demurred, and moved to dismiss the application generally, and especially so much of it as sought to obtain a support for the second and subsequent years, "on the ground that said applicant does not show that there was any necessity for keeping the estate of Wiley Woodbridge together after 12 months from the grant of letters of administration." The presiding judge sustained the demurrer, except as to the first year, and struck that portion of the application which referred to an allowance for the second and third years. After verdict the applicant moved for a new trial, which was refused, and she excepted. These facts appear from the record of file.

in the office of the clerk of this court. The decision (70 Ga. 738) does not in terms construe the meaning of the words, "to be kept together for a longer time than twelve months," but the judgment was reversed on the ground that the court erred in sustaining the demurrer to the petition as to the second and third years, thus holding that the widow was entitled to a support for those years.

In *Hill & Co. v. Lewis*, 91 Ga. 796, 18 S. E. 63, it was held that a widow to whom the whole estate was devised and bequeathed for life, there being no minor children and no debts except the expenses of the last illness and funeral expenses, was not entitled to more than one year's support out of the estate as a statutory right, although she kept the estate together for a longer time; she having so done by her own choice, being both executrix and tenant for life, and the will of her husband not containing any requirement or direction as to keeping the estate together. It was said that, whatever the statute may mean by the phrase, "when an estate is to be kept together," the keeping of it together by the mere choice or the election of the widow herself cannot be recognized as a basis for allowing her continued support from year to year. Again, in *Smith v. Foster*, 119 Ga. 376, 46 S. E. 425, it was held that the mere fact that litigation was pending between a widow and the representative of her deceased husband's estate over the report of appraisers appointed to assign dower would not authorize the granting of a second year's support to her. In both of the cases last cited the delay in closing up the estate was caused by the widow herself—in the one as mere matter of choice, and in the other by reason of litigation over her dower.

A widow cannot cause a delay in winding up an estate, and then take advantage of the delay so brought about by her to absorb the estate for herself as a support for years later than the first. In each of the cases referred to the continued support was asked for her alone, there being no minor children. Here the delay has been brought about by litigation over the probate of a will, resulting from a caveat filed by heirs other than the widow. It was agreed that she was in no way responsible for the delay, and did not cause it. Construing the previous decisions of this court in harmony we hold that where an estate has been necessarily kept together for more than 12 months on account of litigation over the probate of the will of the deceased, and the widow has not brought about this litigation or been in any manner responsible for the delay in winding up the estate, if there are no debts, she is entitled to a support for each year that it is thus kept together after the first. Civ. Code 1895, § 3466. This construction is supported by a consideration of sections 3465 and 3466 of the Code together.

The former provides for the setting apart of a year's support, which is ranked with the expenses of administration and preferred to all other debts. It is provided that the amount shall in no event be less than the sum of \$100, and that, if it shall appear upon a just appraisal that the estate does not exceed in value the sum of \$500, the whole of it shall be set apart for the support and maintenance of the widow and children; and this is to be done, although it may deprive other heirs or legatees of any share therein. And it has been held that the fact that there are no minor children will not deprive the widow of a second year's support, if otherwise entitled thereto.

To construe the words, "when an estate is to be kept together for a longer time than twelve months," in section 3466, as applying solely to cases where a testator by his will directs the estate to be kept together, would be to restrict the language employed in the Code. That section does not declare that it is applicable solely in cases of testacy, or that the widow and children of the testator may have a second year's support, while those of an intestate shall not. Nor would the necessity for the support of a widow and minor children be any the less because the husband and father died intestate. In fact, where a will directs an estate to be kept together for a considerable length of time, it very often provides for the support of the widow and minor children of the testator during that time, while there is no such provision in case of intestacy. Again, section 3466 declares that, in such cases, the widow and minor children "shall have a year's support for each year that such estate may be kept together." Construing this language with the other words contained in the section, which are above quoted, it does not appear to have been the legislative intent to limit the support of the widow and minor children, if any, for the second year to cases where a will directs the estate to be kept together for longer than 12 months. Where it is rendered necessary that the estate be kept together on account of litigation instituted by other heirs over the validity of the will of the deceased, and without fault on her part, the provisions of section 3466 apply. It does not appear in this case that there were any debts of the deceased husband, or of his estate; and the only other persons whose distributive portion of the estate would be lessened would be the other heirs, some of whom caused the delay.

This case does not present any question as to the wife's right to support after the first year when there is a provision in the will of her husband in lieu of year's support and dower, or where the wife is not a legatee under the will at all, and the litigation as to it is entirely between others; and we decide nothing as to such possible cases. In determining the amount to be set aside for

a second or third year's support, in such a case as the present one, the amount of the first year's support, whether it had been consumed, or whether the widow still has a portion of it to be used in maintaining herself, the size of the estate, and other surrounding facts, would be proper for the consideration of the appraisers in determining the amount to be set apart.

Judgment affirmed. All the Justices concur.

### CARPENTER v. BOOKER.

(Supreme Court of Georgia. Nov. 18, 1908.)

#### 1. HUSBAND AND WIFE (§ 48\*)—SALE OF LAND BY WIFE.

A sale of land by a wife to her husband, without being allowed by order of the superior court of her domicile, is invalid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 242-248; Dec. Dig. § 48.\*]

#### 2. HUSBAND AND WIFE (§ 16\*)—ADVERSE POSSESSION—SALE OF LAND TO HUSBAND.

A husband cannot hold, adversely to his wife, premises of which they are in joint occupancy as a family, so as to prescribe against the wife under a deed of bargain and sale from her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 102; Dec. Dig. § 16.\*]

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by R. W. Carpenter against Bessie Booker, administratrix. Judgment for defendant, and plaintiff brings error. Affirmed.

Allen Fort & Son, for plaintiff in error.  
G. W. Warwick and Lane, Maynard & Hooper, for defendant in error.

EVANS, P. J. This is an equitable petition to cancel a deed as a cloud on the plaintiff's title, and for relief incidental thereto. The plaintiff and the defendant claimed the land under deeds from a common grantor, Mrs. Alma Carpenter. The plaintiff was the husband, and the defendant the mother, of Mrs. Carpenter. The deed from Mrs. Carpenter to the plaintiff was dated April 8, 1890, and recited a consideration of \$2,200, and was not approved by the superior court of the county of Mrs. Carpenter's domicile. The deed from Mrs. Carpenter to the defendant was dated February 11, 1895, and recited a consideration of \$3,200. The prayer of the petition was to cancel the deed from Mrs. Carpenter to the defendant, on the ground that the grantor was non compos mentis at the time of its execution. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial, which being refused, he brings error.

The first step in the plaintiff's case was to prove title to the land. The essence of

his suit was to remove a cloud on his title; and if he has no title to the land he cannot prevail. The plaintiff testified that he paid his wife the consideration recited in her deed to him, and it was admitted that the sale was without an order of the superior court of the county of the wife's domicile. A sale made by a married woman to her husband, without being allowed by the order of the superior court of the wife's domicile, is invalid. Civ. Code 1895, § 2490; Fulgham v. Pate, 77 Ga. 459. The plaintiff's deed was therefore void as title.

He contended, however, that he had been in adverse possession of the land under this void deed for more than seven years, and that he had a good prescriptive title. A defective or void deed will serve as color of title, and entry and possession thereunder in good faith will ordinarily be adverse. Fain v. Garthright, 5 Ga. 14; Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210; Gittens v. Lowry, 15 Ga. 336. But is the general rule applicable to the case as presented by this record? During the interval between the execution of the two deeds the plaintiff and his wife resided on the land. Shortly after his wife made the deed to her mother, the latter gave the plaintiff written notice that she had purchased the land and that he must quit the premises. He testified that he left the premises with the understanding that his wife was to rent the land in her own name, pay the taxes, and use the rents. Under the facts appearing in the record the plaintiff failed to show a prescriptive title, unless his possession of the land during the joint occupancy of himself and wife was adverse to the wife, so as to be the basis of a prescription predicated on the void deed from his wife. In recognition of the influence which a husband usually exerts over his wife, the married woman's emancipation act (Civ. Code 1895, § 2490) absolutely prohibited a wife from selling her land to her husband without the approval of the superior court of her domicile. The husband has the right to select the matrimonial domicile, and in the absence of sufficient cause the wife is under legal duty to occupy with the husband the place of domicile chosen by him for family residence. If a husband should induce his wife to sell her land to him, and both should continue to live on the land for seven years, in such a case it would circumvent the statute to hold that the husband's possession would ripen into a prescriptive title. Where the law condemns her deed of bargain and sale to him as void, his possession thereunder cannot be adverse to her so long as both live on the land. A husband cannot hold, adversely to his wife, premises of which they are in joint occupancy as a



family. *Hendricks v. Rasson*, 53 Mich. 575, 19 N. W. 192. It would be contrary to public policy and inconsistent with the matrimonial obligations to require that a wife should expel her husband from her land which had been selected as the family residence, in order to prevent him from acquiring a prescriptive title by adverse possession.

The plaintiff failed to make a case entitling him to the relief prayed, and it would be idle to inquire into the alleged erroneous charges concerning the law of prescription, and the admission of evidence offered by the defendant in support of her title.

Judgment affirmed. All the Justices concur.

**CLINE v. MILLEDGEVILLE BANKING CO.** (Supreme Court of Georgia. Nov. 24, 1908.)

1. **HUSBAND AND WIFE (§ 156\*)—LIABILITY OF WIFE—MONEY BORROWED.**

The principles of law announced in those portions of the court's instructions to the jury to which exception was taken are in accord with the law as enunciated in the cases of *Johnson v. Leffler*, 122 Ga. 670, 50 S. E. 488, and *Rood v. Wright*, 124 Ga. 849, 53 S. E. 390, on the subject of the wife's liability on a note for money borrowed by the wife for the purpose of paying the husband's creditors.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 616; Dec. Dig. § 156.\*]

2. **INSTRUCTIONS.**

A charge embracing an abstractly correct and pertinent principle of law is not rendered erroneous by a failure to charge some other legal principle applicable to the case. *Central Ry. Co. v. Grady*, 113 Ga. 1045, 39 S. E. 441.

3. **SUFFICIENCY OF EVIDENCE.**

The evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by the Milledgeville Banking Company against Ida Cline. Judgment for plaintiff, and defendant brings error. Affirmed.

Allen & Pottle, for plaintiff in error. D. B. & D. S. Sandford, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

**W. A. DOODY CO v. GREEN et al.** (Supreme Court of Georgia. Nov. 19, 1908.)

1. **INSURANCE (§ 767\*)—INSURABLE INTEREST.** The relationship of uncle and nephew will not support an insurable interest.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 767.\*]

2. **INSURANCE (§ 797\*)—MUTUAL BENEFIT INSURANCE—BENEFICIARIES—RIGHTS OF CREDITORS.**

Where an insurance company issued a policy at the instance of the insured, payable to a named person as nephew of the insured, who was

also his ward, and upon the death of the insured voluntarily paid the policy to the nominated beneficiary, neither the creditors nor the administrator of the insured can recover of the beneficiary the excess of the amount collected after discharging the guardian's debt to the beneficiary on the ground that at the time of the issuance of the policy the insured was indebted as guardian of the beneficiary and used the ward's money in paying all premiums subsequent to the initial payment.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 797.\*]

3. **EXECUTORS AND ADMINISTRATORS (§ 261\*)—DEBTS—PRIORITIES.**

In the administration of an estate, debts due by a deceased person as guardian for the estate committed to him as such rank in priority over debts due on judgments obtained during the lifetime of the deceased.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 261.\*]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Petition of Y. E. Barger, as administrator of Bird, to marshal the assets. W. A. Doody Company and Charles H. Green, guardian of Thomas H. Green, filed answers. From the judgment, the Doody Company brings error. Affirmed.

Hardeman, Jones & Johnson, for plaintiff in error. Williams & Bradley, for defendants in error.

EVANS, P. J. W. A. Bird applied for insurance in the American Guild, and his certificate was issued to him on April 28, 1903. Thereafter, on January 28, 1904, he surrendered his original certificate, with a request for a change of beneficiary, and a new certificate was issued to him on that date, with the benefits made payable to Thomas H. Green, his nephew. The premiums of this last contract of insurance were paid out of the funds belonging to Thomas H. Green, which the insured at that time had in his hands as guardian of Thomas H. Green. Upon the death of the insured the insurer paid to Chas. H. Green, who was the insured's successor as guardian of Thomas H. Green, \$1,000, the amount of the policy. Y. E. Barger, as administrator of Bird, filed a petition to marshal the assets of the estate and for direction. The W. A. Doody Company, a judgment creditor, and Chas. H. Green, guardian of Thomas H. Green, filed answers. The case was submitted to the judge upon an agreed statement of facts, to be decided by him without a jury. In addition to the foregoing recitals of facts, it was agreed that the debt due Thomas H. Green by W. A. Bird as guardian was the amount represented by his last return as such guardian, which was less than \$1,000; that W. A. Doody Company's debt was represented by a judgment against W. A. Bird; that the debts of the other creditors of W. A. Bird were upon open accounts; and that the assets in the hands of the administrator of Bird were

insufficient to pay off all the creditors. The court adjudged that the administrator, after paying the expenses of the administration, should first pay the amount due to Chas. H. Green, as guardian of Thomas Green; that next in order he should pay the judgment of the Doody Company; and that if any money remained it should be distributed among the account creditors. Doody Company excepts to this judgment, alleging it to be erroneous (1) because Thomas H. Green had no insurable interest by reason of relationship in the policy of life insurance in which he was named as beneficiary, but had an insurable interest as creditor of his guardian, and the law would presume that the insured named as beneficiary a person having an insurable interest, and that the policy was a security for debt, and when the debt was paid the security was released, and cannot be insisted on to the prejudice of the other creditors of the insured; (2) because the court should have decreed that Thomas H. Green, and Chas. H. Green, his guardian, must pay back into the estate of the insured the overplus after having paid the debt due Thomas H. Green; and (3) because the claim of Doody Company was a claim against the estate of W. A. Bird prior in dignity to the amount which W. A. Bird, as guardian of Thomas H. Green, was due his ward.

1. It is conceded that, according to the almost unbroken current of authority, the relationship of uncle and nephew will not support an insurable interest. 1 Cooley's Briefs on Ins. 290; 3 Am. & Eng. Enc. L. (2d Ed.) 941, and cases there collated.

2. But the proceeds of the policy of insurance were no part of the estate of W. A. Bird. When the second certificate of insurance was issued, the contract of the insurer was to pay to the nephew, and not the administrator, of the insured. No copy of the policy of insurance appears in the record, but it is stated in the agreed statement of facts that its benefits were payable to Thomas H. Green, the nephew of the insured. We may well assume from this admission that the insurable interest of the beneficiary as stated in the policy was the relationship of nephew. Although a nephew may have no insurable interest in the life of his uncle, the insurance company has seen fit to recognize the beneficiary as having an insurable interest in the life of the insured, and to pay the proceeds of the policy to the nominated beneficiary. The plaintiff in error argues that, while there was no understanding between the insured and the beneficiary, the policy should be held as security for debt, and that inasmuch as the beneficiary had no insurable interest on account of relationship, but did have an insurable interest as a creditor, the law will presume a legal, rather than an illegal, transaction, and the policy will be deemed to have been issued to the beneficiary as a creditor. We do not think any such presumption arises,

but rather that the policy was paid according to its terms. The insurance company recognized its liability to the beneficiary as the nephew of the insured, and voluntarily paid the amount of the policy to the beneficiary, and other parties have no interest in the matter. Hosmer v. Welsh, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; Johnson v. Van Epps, 110 Ill. 551; Meyers v. Schuman, 54 N. J. Eq. 414, 84 Atl. 1066; 1 Cooley's Briefs on Ins. 320. There is nothing ruled in the case of Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, which militates with this view. In that case Hudgins took out a policy of insurance on his life, payable to himself, and assigned the same to the bank to secure a debt. The policy was collected by the bank, and the court held that Hudgins' administrator was entitled to recover of the bank the surplus of the money collected after paying the indebtedness of Hudgins to the bank. That case turned on the point that the policy was payable to the administrator of the insured, and that, when the policy was assigned to the bank to secure a debt, the bank was not entitled to withhold from the administrator of the insured the surplus after getting the money for which the policy was hypothecated.

There is still another reason why the proceeds of the policy are no part of the estate of the insured. The policy was issued at the instance and by the procurement of the insured. The beneficiary took no part in the transaction. An applicant for life insurance, acting in good faith, may legally designate as the beneficiary in the certificate of insurance one who has no insurable interest in the life of the insured, provided that there be at the time the certificate is issued no restriction in the policy, or the charter or by-laws of the company, or in the statutes of the state, forbidding the right to appoint such a beneficiary. Ancient Order United Workmen v. Brown, 112 Ga. 545, 37 S. E. 890; Rylander v. Allen, 125 Ga. 206, 53 S. E. 1082, 6 L. R. A. (N. S.) 128. This subject is fully discussed and many authorities examined in these cases. The beneficiary here was a minor. He was closely related to the insured. There is nothing in the agreed statement of facts to indicate that the insured intended a wagering contract. The mere fact that the guardian used his ward's money to pay subsequent premiums does not show any participation of the ward in procuring or keeping up the insurance. In the Brown Case, supra, Lumpkin, P. J., in his dissenting opinion, regarded the payment of premiums by a beneficiary, who had no insurable interest, as determining the character of the policy as a wagering contract. The unauthorized use of a ward's funds by a guardian in paying the premiums upon a policy taken out by the guardian on his life for the benefit of his ward is not a payment of the premiums by the ward.

3. Civ. Code 1895, § 3424, in express terms

declares that debts due by a deceased person as guardian for the estate committed to him as such shall rank in priority over debts due on judgments obtained during the lifetime of the deceased.

Judgment affirmed. All the Justices concur.

#### STEWART v. MUNDY et al.

(Supreme Court of Georgia. Nov. 21, 1908.)

##### 1. EXCEPTIONS, BILL OF (§ 45\*)—ERASURES AND INTERLINEATIONS—PRACTICE.

Where, in correcting a bill of exceptions, or causing it to be corrected, before signing, there are considerable erasures or interlineations in it, or an exhibit thereto, the better practice is to require such portions of the bill of exceptions or exhibits to be rewritten, or to note the fact that the erasures or interlineations were made by the judge before signing. But where the certificate to the bill of exceptions shows that the presiding judge required counsel to make certain corrections, and in the evidence attached as an exhibit and duly identified appear certain erasures, the material ones being the striking of certain statements as to documentary evidence introduced, and where the same documents are more fully set out directly after such erasures, this will not cause a dismissal of the writ of error.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 45.\*]

##### 2. ABBREVIATION OF EVIDENCE IN BILL OF EXCEPTIONS.

There was not such a failure to abbreviate the evidence in this case as necessitates a dismissal of the writ of error, especially as some of the evidence consisted of pleadings in former cases, the allegations of which were claimed to amount to admissions affecting the present case.

##### 3. TRIAL (§ 69\*)—OPENING CASE AFTER CLOSE OF EVIDENCE—DISCRETION OF COURT.

After the plaintiff had closed his case, and the presiding judge had announced that he would direct a verdict for the claimants, there was no abuse of discretion in refusing to reopen the case and to allow counsel for the plaintiff to recall a witness who had already been examined; no reason appearing why he was not fully examined when on the stand. *Bridger v. Exchange Bank*, 128 Ga. 82 (1), 56 S. E. 97, 8 L. R. A. (N. S.) 463, 115 Am. St. Rep. 118.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165; Dec. Dig. § 69.\*]

##### 4. EXECUTION (§ 201\*)—CLAIMS BY THIRD PERSONS—JUDGMENT—FORM OF.

If, in a claim case, the plaintiff in *fi. fa.* falls to make out a *prima facie* case, and the claimant introduces no evidence, on motion the presiding judge should dismiss the levy, or dismiss the case made by it and equitable pleadings supporting it (in the nature of a nonsuit), rather than direct a verdict for the claimant.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 201.\*]

##### 5. CLAIMS BY THIRD PERSONS—EVIDENCE—SUFFICIENCY.

The evidence in this case was sufficient to have authorized the submission of the case to the jury under proper instructions, rather than the direction of a verdict for the claimants.

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

An execution in favor of J. D. Stewart against Lillie M. Camp, principal, and W. A. Camp, indorser, was levied on certain land, and a claim was interposed by W. W. Mundy and others. The plaintiff filed an equitable petition in aid of his levy, and from a judgment for claimants brings error. Reversed.

An execution in favor of J. D. Stewart against Mrs. Lillie M. Camp, principal, and W. A. Camp, indorser, was levied on certain land, and a claim was interposed by Mundy and others. The plaintiff filed equitable pleadings in aid of his levy, in which he alleged that the land had been held first by Camp and then by his wife under bond for title, with a part of the purchase money paid; that there were transfers of the bond and also conveyances of interests or equities in the land, made for the purpose of defrauding creditors, and that the claimants took with notice. He prayed that the land be sold, that out of the proceeds an amount which had been paid by the claimants to a third person to take up the outstanding legal title be paid to them, and that from the balance the judgment be paid; it being alleged that the value of the land was sufficient for that purpose. At the close of the plaintiff's evidence, on motion, the court directed a verdict for the claimants, and the plaintiff excepted.

W. H. Terrell and Gleaton & Gleaton, for plaintiff in error. John K. Davis and Mundy & Mundy, for defendants in error.

LUMPKIN, J. Where, in a claim case, the plaintiff in *fi. fa.* fails to make out any *prima facie* case, and the claimants introduce no evidence, if the presiding judge, on motion, gives direction as to the disposition to be made of the case because of such failure on the part of the plaintiff, he should dismiss the levy, not direct a verdict finding the property not subject. *Barnes v. Carter*, 120 Ga. 895, 48 S. E. 387; *Zipperer v. Mayor and Aldermen of Savannah*, 128 Ga. 135, 57 S. E. 311; *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262. If the evidence introduced by the plaintiff did not merely fail to make a *prima facie* case, but proved unquestionably that the property levied on was not subject, perhaps a direction of a verdict to that effect might not be erroneous. But we do not think that the case here made was one of such a character. The plaintiff filed an equitable petition in support of the issue made by the levy and claim. Without discussing the evidence, as the case is to be tried again, it is sufficient to say that it did not demand a finding for the claimants, certainly not as to one of them.

This is not a case depending entirely upon the question of whether the holder of a bond for title has a leviable interest in the land, but is rather a proceeding to subject prop-

erty, or an interest therein, which it is contended has been fraudulently conveyed, so as to conceal it from a creditor and prevent its subjection, and is held by persons taking with notice thereof. Not only has this subject been deemed of sufficient importance to be dealt with by legislation (Civ. Code 1895, §§ 2695, 2681, 2682), and not only has it been declared that every remedy and facility shall be afforded to creditors "to detect, defeat, and annul any effort to defraud them of their just rights" (Civ. Code 1895, § 2687), and that the courts of equity (or of law having equitable powers, and upon proper pleadings) should assist creditors in reaching equitable assets in every case where to refuse interference would jeopard the collection (Civ. Code 1895, § 2688), but the Constitution of the state itself declares that the General Assembly "shall provide, by law, for reaching property of the debtor concealed from the creditor" (Civ. Code 1895, § 5728).

In some cases direction might be given to set aside the verdict and enter an order to dismiss the levy; but the facts of this case are not such as to authorize that disposition.

Judgment reversed. All the Justices concur.

#### DODGE et al. v. COWART et al.

(Supreme Court of Georgia. Nov. 19, 1908.)

##### 1. EXECUTORS AND ADMINISTRATORS (§ 145\*)—MANAGEMENT OF ESTATE—REAL PROPERTY—CONVEYANCE—FORM.

A deed containing a recital that it was made by the maker as executor of a named person, and by virtue of the will of the testator, and which is duly attested and recorded, is admissible in evidence, although the maker signed his individual name thereto without adding to his signature his representative character.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 586, 587; Dec. Dig. § 145.\*]

##### 2. ADVERSE POSSESSION (§ 77\*)—COLOR OF TITLE — EXECUTORS AND ADMINISTRATORS — DEEDS.

An executor's deed is good as color of title, without producing any order of sale from the proper court, or the will of the testator conferring a power of sale.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 455-457; Dec. Dig. § 77.\*]

##### 3. ADVERSE POSSESSION (§§ 82, 100\*)—SUFFICIENCY OF TITLE—REGISTRATION OF CONVEYANCE—CONSTRUCTIVE POSSESSION.

Waiving all considerations as to the effect of the Code of 1895 on the subject of the essentiality of recordation of a deed as to constructive possession in the case of a deed executed prior thereto, record of it was not necessary in order for it to operate as color of title, so that possession of a part of the tract of land covered by it would extend to the limits of the tract described in it.

(a) The possession of a person having paper title to a designated lot of land laid out by official survey, which is traversed by a stream, and who is only in possession of the part of the lot

on one side of the stream, will be construed to extend to the boundaries of the lot.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471, 547; Dec. Dig. §§ 82, 100.\*]

##### 4. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

There was no error in refusing a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.\*]

##### 5. APPEAL AND ERROR (§ 728\*)—RECORD — MATTERS PRESENTED FOR REVIEW—ADMISSION OF EVIDENCE—SETTING OUT EVIDENCE.

An assignment of error complaining of the admission of evidence is not sufficient, where the evidence is not set out either literally or in substance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3012; Dec. Dig. § 728.\*]

##### 6. INSTRUCTIONS—EVIDENCE WARRANTING.

There was evidence to warrant the instruction complained of relative to the delivery of the deed upon which the defendants relied as color of title.

##### 7. APPEAL AND ERROR (§ 803\*)—REVIEW—QUESTIONS CONSIDERED.

Grounds of the motion which are not certified will not be considered. The evidence was sufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756; Dec. Dig. § 803.\*]

(Syllabus by the Court.)

Error from Superior Court, Telfair County; J. H. Martin, Judge.

Petition for injunction by Norman W. Dodge against B. R. Cowart and others. Judgment for defendants, and the executors of plaintiff, who died after trial, bring error. Affirmed.

N. E. & W. A. Harris, Pope S. Hill, and De Lacy & Bishop, for plaintiffs in error. Graham & Graham, for defendants in error.

EVANS, P. J. Norman W. Dodge brought his petition against B. R. Cowart, J. A. Cowart, and W. R. Silvers, to enjoin the defendants from boxing and cutting the trees on land lot No. 174 in the Seventh district of Telfair county, from removing the turpentine therefrom, and from interfering with or disposing of the land or timber in any manner. On the trial the plaintiff deraigned his title from the state through successive conveyances, and the defendants relied upon prescription based on seven years' adverse possession under color of title. A verdict was returned for the defendants, which the court refused to set aside on motion for a new trial, and this is the error complained of. Pending the motion for a new trial Dodge died, and his executors were made parties in his stead, and are prosecuting the writ of error.

1, 2. One of the deeds relied on by the defendant as color of title was that of Ann J. McKee to Charles Stewart, which recited that the maker was the executor of the will of Joseph McKee and was executing the deed as such by virtue of the will of her testator, but which was signed by the maker without

adding to her name any words indicating her representative character. Objection was made to this deed being received in evidence, because it was not signed by the maker as executrix, although describing her as such in the body of the deed, and because, in the absence of an order from the court of ordinary or the production of the power in the will, the executrix had no authority to make the deed, and it could not constitute even color of title. The objection was overruled. The first ground of objection was without merit, as was decided in the recent case of *Sapp v. Cline*, 131 Ga. 433, 62 S. E. 529. The other ground of objection was not well taken. An executor's deed, unaccompanied either by an order of sale from the court of ordinary or by the will conferring a power of sale, is good as color of title. *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *Shields v. Lamar*, 58 Ga. 592.

3. The deeds relied upon as color of title were executed prior to the present Code. The court refused a written request of the plaintiff to instruct the jury that, if these deeds were not recorded, prescription could ripen only as to the part in actual possession, and the prescriber's possession would not constructively extend to any part of the tract not in actual possession. The request was properly refused. Whether the present Code requires recordation as essential to constructive possession is not in this case. Certainly, before the Code, record of a deed was not necessary in order for it to operate as color of title, so that possession of a part of the tract of land conveyed by it would extend to the limits of the tract described in it. *Roberson v. Downing Co.*, 120 Ga. 833, 48 S. E. 429, 102 Am. St. Rep. 128; *O'Brien v. Fletcher*, 123 Ga. 427, 51 S. E. 405.

The plaintiff further contends that the rule laid down in Civ. Code 1895, § 3586, as to constructive possession, does not apply to a lot of land divided by a stream or swamp, where the actual possession is only of the portion of the lot on one side of the stream; that in such a case possession will not be extended beyond the stream—at least under an unrecorded deed. The lot of land in controversy contained 202½ acres. There was evidence that a stream or swamp extended through it, and that the defendants' possession was of about 50 acres—all of the lot on one side of the stream. We have been unable to find where the precise question has ever been adjudicated; but we do not think the physical condition of the lot excepts the case from the rule stated in the Code, which declares that "constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such a case the law construes the possession to extend to the boundary of the tract." The two portions of the lot, on either side of the stream, are not separate lots of land. They are parts of an integral lot, designated in

the government survey by a single number, and are not to be regarded as separate and contiguous lots or tracts of land.

4. The prescriptive title of the defendants was based upon two deeds—one from Ann J. McKee, executrix of Jos. McKee, to Chas. Stewart, dated February 16, 1880, and the other from Chas. Stewart to Jno. D. Stewart, dated February 23, 1880. On the trial of the case a certified copy of the record of the first deed was used, and the original deed from Chas. Stewart to Jno. D. Stewart was introduced in evidence. One ground of the motion was that the verdict should be set aside because of newly discovered evidence, to wit, that it appears from an inspection of the records of the clerk's office of Telfair county that the record of the deed purporting to be from Ann J. McKee to Chas. Stewart has apparently been altered, so far as the number of the lot is concerned; that the original number of the lot purporting to be conveyed by this deed was not 174, but the figures "174" appear to have been put into the record after the same had been recorded; and that the original deed, purporting to be from Chas. Stewart to Jno. D. Stewart, shows upon its face that it had been changed, and the lot number 174 written into it. On the hearing evidence was submitted to the judge by witnesses that in their opinion the record of the McKee deed appeared to have been changed and altered as to the number of the lot purporting to have been conveyed thereby. By consent of the parties the original record was inspected by the court. It appeared from the affidavit of the agent of the plaintiff, who was in charge of this suit, that the same had been pending since 1903; that he resided within a mile of the office of the clerk of the superior court; that when the deed from Chas. Stewart to Jno. D. Stewart was tendered in evidence it was examined by him, and the attention of counsel for the plaintiff was called to the apparent change, and he informed counsel that the deed had been changed, and he thought it was a forgery.

The trial occurred in 1907, in Telfair county, and in the same building where the clerk of the superior court kept his office. It would seem that, if the attention of counsel was called to the condition of the deed from Chas. Stewart to Jno. D. Stewart, and the agent of the plaintiff in charge of the litigation, from an inspection of the deed from Stewart to Stewart during the trial, pronounced it a forgery, and as Stewart derived his title from McKee, ordinary diligence would have demanded that some investigation should have been made as to the correctness of the suspicions of the agent of the plaintiff. He could have made an affidavit of forgery and placed the burden of proving the deed upon the defendant, or he could easily have procured the record book from the clerk of the court and investigated its condition. Defendants' case depended en-

tirely upon the bona fides of these two deeds, and when their genuineness was suspected it was the duty of the plaintiff's agent and his counsel to have availed themselves of the means at hand to determine the question. We are unable to say whether the court, in overruling the motion, entertained the opinion that proper diligence had not been shown, or from an inspection of the record there had been no change or alteration in it. The court could well have concluded that there was a lack of diligence on plaintiff's part in his failure either to raise the issue of forgery on the trial or to investigate the record.

5. A ground of the motion complains that: "After the plaintiff closed, the defendant introduced Jno. D. Stewart and proposed to show by him the reputation of Jos. McKee, husband of Ann J. McKee, who is alleged to have made the deed, which is a part of the chain in this case. This evidence was objected to as irrelevant and illegal, and could not be proven to effect any issue in the case." This assignment presents no question for adjudication. It has been repeatedly ruled that, when exception is taken to the admission of evidence, the evidence must be set out, either literally or in substance.

6. Complaint is made that, after giving the request invoked by the plaintiff that a deed which had never been delivered could not serve as color of title, the court charged the converse of the proposition; it being insisted that the evidence did not afford a basis for the additional instruction. There was evidence to support such instruction.

7. The first five grounds of the amended motion complain of the failure of the court to charge certain principles of law as to what would constitute adverse possession under color of title, so as to ripen into a prescriptive title. According to the note of the judge there was no request, either oral or written, to charge the various propositions in these several grounds. It would have been error for the court to give some of these propositions as stated by movant, for the reason that they contained an expression of opinion as to what had or had not been proved relative to the facts relied upon to constitute possession, and others were strongly argumentative. The court in his charge correctly and comprehensively instructed the jury as to the character of the possession necessary to be adverse and the length of time it should continue under color of title before such possession could ripen into title by prescription.

The court refused to instruct the jury, as requested in writing by plaintiff's counsel, that, if the jury believed from the evidence that possession of the land in controversy began before the execution and delivery of the deed under which the defendants seek to set up a prescriptive title, such possession

could not be the basis of prescription; that possession, to be the foundation of prescription, must have originated under the deed, and not prior thereto. The judge in his note states that there was no evidence that the possession antedated the deed. An inspection of the record confirms this statement of the judge, and there was no error in refusing so to charge.

There was sufficient evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

### SPARKS v. BLOODWORTH.

(Supreme Court of Georgia. Nov. 19, 1908.)  
GARNISHMENT (§ 52\*)—PERSONS AND PROPERTY SUBJECT TO.

Where all collections made on process from a justice's court by the constable thereof were, pursuant to an agreement between him and the justice of the peace, delivered, when made, to the latter, who on every Saturday distributed all amounts thus collected, and all amounts collected by the justice of the peace and his clerk during the week, to the parties entitled thereto, *held*, that the amount due the constable, embraced in the collections made by him which were held for him by the justice of the peace, could be subjected to the debts of the constable by serving garnishments on the justice of the peace.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 104; Dec. Dig. § 52.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. C. Sparks caused a summons of garnishment on a judgment against M. W. Barnes to be issued and served upon J. G. Bloodworth. Judgment against the garnishment, and Sparks brings error. Reversed.

Judgment was rendered in the superior court against Barnes, who was constable of a justice court. The judgment was transferred by the plaintiff therein to Sparks, who had summons of garnishment issued and served upon Bloodworth, who was justice of the peace of the court of which Barnes was constable. On the trial of the case the only oral testimony delivered was that of Bloodworth, which was as follows:

"I am ex officio justice of the peace for the 1,026th district, G. M., of Fulton county. Mr. Barnes is a constable, and works under me. I haven't got any money belonging to Mr. Barnes, or any property. I never did have any money or property, except money that I collected as justice of the peace, which money was paid to Barnes as L. C. This was all the money that I ever had, and it was collected as justice of the peace and paid over to Barnes as L. O. I never owed Barnes any money, except as I stated, that I collected as justice of the peace and turned over to him as constable. I have a cash

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

book, and whenever I collect any money, or Mr. Barnes collects any money and turns it over to me, or my clerk collects any money and he turns it over to me, I have a cash book which is run in this way:

Plaintiff J. G. Bloodworth | M. F. Barnes | R. F. Mauldin

"This is the way I kept my cash book. When I collect any money, I divide it up, and give the plaintiff his money, and my money that is coming to me, and what is going to Mr. Barnes and Mr. Mauldin. When my clerk receives any money, he turns it over to me. I do the same thing. I divide it up, and give the plaintiff his money, then I give myself credit for my part, and I give Barnes credit for his part, and Mauldin credit for his part; and when Barnes collects any money he brings it in to me, and he turns over to me all the money that's coming to the plaintiff, and what's coming to me, and what's coming to him, and I divide it all up, and then on Saturday evening I run up the column that belongs to Mr. Barnes, and to Mr. Mauldin, and see how much has been collected and turned over to me, and how much I have collected, and then I settle with Mr. Barnes every Saturday evening. Mr. Barnes collected and turned over to me from July 9, 1904, till September 5, 1904, from the time that I was served with the summons of garnishment and the time of making this answer, Mr. Barnes turned over to me, of money that he had collected as fees, more money than it would take to pay off said judgment now against him, which I paid to him every Saturday evening as above stated. Eight-tenths of this sum was paid in checks."

The court directed a verdict, and entered a judgment sustaining the answer of Bloodworth, and finding that the money received by Bloodworth from Barnes, and turned over to Barnes by Bloodworth, was not subject to the process of garnishment. To this judgment the plaintiff excepted.

S. D. Johnson and Robt. L. Rodgers, for plaintiff in error. C. B. Reynolds, for defendant in error.

HOLDEN, J. (after stating the facts as above). The defendant contends in this case that the judgment of the court below was correct, for two reasons: First, Bloodworth was not subject to garnishment, because he held the money due Barnes in his official capacity as justice of the peace, and as such officer was not subject to garnishment; and, second, that the amount due Barnes was his costs as constable, and was not subject to garnishment. We do not think that the money turned over to Bloodworth by Barnes was afterwards held by Bloodworth in his official capacity as justice of the peace; nor do we think that such money was due by Bloodworth to Barnes as costs

due to Barnes. It is the duty of the justice of the peace to collect claims turned over to him for collection, and also his duty to make collection of any judgments rendered in suits thereon; and if he makes such collections from the debtor himself, or by any one authorized to represent him, he would hold such collections in his official capacity. But can he be said to hold in his official capacity the costs due the constable, which have been collected by the constable and turned over to the justice of the peace, to be paid back by him to the constable? It is also the duty of the constable to collect judgments, where executions issued thereon have been placed in his hands; and when he makes collection thereof it is his duty, under Civ. Code 1895, § 4099, to pay over the same promptly to the persons entitled thereto, unless there are conflicting claims to the money collected. Civ. Code 1895, § 4162, provides that if any constable shall fail to account with and pay over to the person entitled thereto any money which he has received on an execution or other paper placed in his hands as such constable, within ten days after the money is received, the person injured by such failure may apply to the justice of the peace, whose duty it is to award judgment and execution against the constable for the amount collected and withheld, and the justice may also fine such constable for such default in a sum not exceeding 10 per cent. of the amount so collected. It will be seen from these two sections that when the constable makes a collection, and there are no conflicting claims to the money collected, it is his duty to distribute the fund and turn over to the parties entitled the amounts collected. It is no more the duty of the constable to turn over to the justice of the peace any collections which he makes (other than costs belonging to the justice) than it is the duty of the justice of the peace to turn over to the constable any collection he makes, except the costs that may be due such constable. The constable could not be ruled by the justice of the peace for contempt of court for failing to pay over to him the costs due the constable and collected by him. Certainly there is no law requiring the constable to turn over to the justice of the peace, to be paid back to the constable, the costs due the constable; but, on the contrary, it is his duty to disburse the fund, which includes his appropriating to himself such fees as he may be entitled to therefrom. The amount of the costs due the constable is fixed by law and is made certain; and when he receives his costs from the party entitled to pay the same there is a settlement of the costs due him. His costs have been paid to him, and he has the money in his possession. His dominion and control over it is complete, and there is no law requiring him, or authorizing him, to pay to some one else such costs, to be held as his costs and be paid back to him as such. When he makes

collection of the full amount due on a claim, including his costs, there is no particular part of the money paid as costs, and he can take the amount of his costs from any part of the collection and keep the same as his costs.

If the law protects officers from having their costs and fees and salaries due them subjected to garnishment, it is sufficient that they be protected from garnishment until they receive them. After they receive such costs, it is going too far to give further protection; but the officer should protect himself, if he wishes to save it from his creditors. If the state protects it from garnishment until he gets it, and he pays it to some one to be paid back to him, according to some private arrangement, even though such person happens to be an officer, it cannot be further protected by the law. The justice of the peace has no authority to pay over to him any costs due the constable and collected by him; and if he makes any such order the same is void, and can be ignored by the constable. It is no more protected from process of garnishment, after the constable turns it over to the justice of the peace to be paid back to the constable, than if the constable were to deposit it with some bank or any individual. This is true, whether the delivery by the constable of the collection made includes only his costs, or is an amount embracing his costs and amounts due others. The justice of the peace cannot be said to be making a collection in his official capacity when he receives from the constable an amount due the constable and collected by him on a process of the court. In the case of *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111, it was held that, where the plaintiff in a bill of interpleader deposited money or property with the clerk without any order of court permitting him to do so, the money and property were not in the custody of the law, and were subject to garnishment. And in *Marine Nat. Bank of Duluth v. Whitman Paper Mills*, 49 Minn. 133, 51 N. W. 665, the defendant made a tender of money to the plaintiff, which was refused, whereupon he placed the money in the hands of the clerk of the court, to be paid to the plaintiff if he would accept it. The court made no order relative to the receiving or holding of the money by the clerk. It was held that the action of the clerk in receiving and holding the money was not within the scope of his official duty, and that he was liable to garnishment. When a collection has been made by the constable, there is no collection to be made by the justice of the peace, as the collection has already been made by an officer required by law to make it. There is no duty on the constable, where there are no conflicting claims to the fund, except to distribute the money to the parties entitled to the same. He is entitled to his

costs in an amount fixed and made certain by law. He has possession of the money. He has absolute dominion and control over it; and if he delivers his costs, or an amount including his costs, to some one else, when no duty requires him to do so, the amount due him in the hands of the person to whom he voluntarily delivers it is subject to garnishment.

We think the court committed error in directing a verdict against the plaintiff, and the judgment is reversed. All the Justices concur.

#### MALOY v. MALOY et al.

(Supreme Court of Georgia. Nov. 21, 1908.)

#### 1. APPEAL AND ERROR (§ 384\*)—DECISIONS REVIEWABLE—DISCHARGE OF ADMINISTRATOR—BOND—SUFFICIENCY.

A decision of the court of ordinary, overruling objections to the application of an administrator or guardian for a discharge, and granting such discharge, is one from which an appeal will lie to the superior court, though no issue of fact be involved. Civ. Code 1895, §§ 4454, 5852; *Comer v. Ross*, 100 Ga. 652, 28 S. E. 387.

(a) A bond given to enter such appeal, reciting the names of the parties, the character of the case, the judgment of the court, and the term at which it was rendered, is not invalid because the appellants and their sureties in such bond acknowledge themselves bound generally, instead of to the appellee. *Smith v. Jackson*, 122 Ga. 856, 50 S. E. 930.

(b) Such bond is not void because the parties thereto acknowledge themselves bound for the "eventual condemnation money in said case," instead of "such further costs as may accrue by reason of such appeal."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2049; Dec. Dig. § 384.\*]

#### 2. GUARDIAN AND WARD (§ 8\*)—ACCOUNTING AND SETTLEMENT—JURISDICTION OF COURTS.

Where the domiciles of a guardian and his ward are in a county to the court of ordinary of which such guardian has been making his returns, and the portion of the county in which they are domiciled is carved therefrom and embraced in a new county formed under the act of the General Assembly approved August 21, 1905 (Acts 1905, pp. 46-52), the guardian has an option, under section 7 of such act, to change the jurisdiction over him as guardian to the court of ordinary of the new county; but if he does not exercise such option, and transfer the jurisdiction, it remains as it was before such new county was formed.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 15; Dec. Dig. § 8.\*]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action between R. T. Maloy, administrator, and E. N. Maloy and others. From the judgment, the administrator brings error. Reversed.

R. G. Hartsfield, for plaintiff in error. Ledford & Terrell, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur.



**JONES v. TAYLOR et al.** (No. 1,806.) —  
(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. EVIDENCE (§ 441\*)—PAROL EVIDENCE.**

The maturity of a promissory note cannot be extended by the terms of an alleged parol agreement, made contemporaneously therewith or antecedent thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2043, 2044; Dec. Dig. § 441.\*]

**2. BILLS AND NOTES (§ 484\*)—DEFENSES—PAYMENT—PLEA.**

A plea which alleges that a note sued on was merely evidence of an indebtedness, which was represented, also, by a series of similar notes, and that a definitely stated number of the smaller notes had been paid, is good as a partial plea of payment, when the dates, maturity, amount, and nature of the smaller notes are given, and it is alleged that they were paid to the holder according to their terms.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1535-1538; Dec. Dig. § 484.\*]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by R. J. Taylor and others, as receivers, etc., against A. D. Jones. Judgment for plaintiffs, and defendant brings error. Reversed.

Arthur L. Dasher, for plaintiff in error.  
Hardeman, Jones & Johnston, for defendants in error.

**POWELL, J.** The defendant was sued on a note executed by him to the bank, of which plaintiffs were the receivers, for \$4,817.60, executed January 4, 1907, due January 4, 1908. He pleaded that this note was made for memorandum purposes only; that it represented the balance due at its date of the total purchase price of a parcel of land sold on long-time credit; that, while it purported to mature January 4, 1908, it was thus executed under an agreement that the indebtedness was really to be paid off at the rate of \$65 per month; that on January 4th of each year, according to this agreement, a large note representing the entire unpaid balance of the total indebtedness was to be taken, and, as representing that part of the same debt which was to be paid during the 12 months between the date of the giving and the date of the maturity of the large notes, 12 notes, of \$65 each, were also taken; that on January 4, 1907, in pursuance to and in continuation of this arrangement, he gave the notes sued on and 12 notes, of \$65 each, maturing consecutively on the 4th of each month until January 4, 1908; that he complied with the terms of payment as to the small notes, paying to the bank until it failed, and to the receivers after that time, up to January 4, 1908; that he then went to the receivers and offered to pay the \$65 note due that day and to give the customary large note for the balance due, making it

mature January 4, 1909, and to execute the 12 smaller notes to represent the monthly payments for the ensuing year; and that the receivers declined to do this. In his plea he also offered to comply with his alleged oral contract to pay and to continue to pay the debt at the rate of \$65 per month. He also asked that the principal of the note sued on be reduced by the amount of the eleven \$65 notes which he had paid month by month during the year 1907. The court struck the entire plea.

So far as it attempted to set up the oral agreement by which the note sued on did not express its true maturity, the plea was subject to demurrer. So far as it set up that the twelve \$65 notes represented a part of the same indebtedness, and that 11 of these notes had been paid, it was pro tanto good. The plea, taken as a whole, shows with reasonable certainty that these notes were paid at maturity, and that the payments were made to the bank itself until it failed and then to the receivers. It is sufficiently definite as a plea of payment.

Judgment reversed.

**HOLT v. STATE.** (No. 1,417.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

**1. INDICTMENT AND INFORMATION (§ 110\*) — ACCUSATION—SUFFICIENCY.**

The accusation setting forth the offense in the language of the Code and so plainly that the nature of the offense could easily be understood by the jury, the demurrer was properly overruled.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 292; Dec. Dig. § 110.\*]

**2. CRIMINAL LAW (§§ 734, 772\*)—TRIAL—INSTRUCTIONS—DEFINITION OF CRIME—EXPLANATION.**

The factum of the allegations contained in the indictment is for the jury, but their materiality is to be determined by the court. Consequently to charge the jury, without explanation, that "the state is required to prove each and every material allegation in the accusation to the satisfaction of the minds of the jury beyond a reasonable doubt, and the jury is to decide as to the materiality of the allegations," is error. A crime is defined by the allegations in an accusation, but it is the duty of the court to legally explain the definition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1812; Dec. Dig. §§ 734, 772.\*]

**3. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—FACTS CONSISTENT WITH INNOCENCE.**

In a criminal case, in which the guilt of the defendant is dependent wholly upon circumstantial evidence, it is error not to instruct the jury that, if the proved facts are reasonably consistent with innocence, the defendant should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1887; Dec. Dig. § 784.\*]

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

Governor Holt was convicted of a crime, and he brings error. Reversed.

R. L. Tipton, M. Tison, and J. H. Tipton, for plaintiff in error. J. A. Comer, Sol., and W. E. Talley, for the State.

RUSSELL, J. Judgment reversed.

# STARLING v. STATE. (No. 1,381.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

1. CRIMINAL LAW (§§ 1091, 1092, 1088, 1059\*)—BILL OF EXCEPTIONS—ENTITLING—CERTIFICATE—SUFFICIENCY—MATTERS TO BE SHOWN BY—SENTENCE—EXCEPTIONS—SUFFICIENCY.

The motion to dismiss the writ of error is wholly without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2772; Dec. Dig. §§ 1091, 1092, 1088, 1059.\*]

2. CRIMINAL LAW (§ 400\*)—EVIDENCE—BEST AND SECONDARY.

Parol evidence of the contents of a written contract is inadmissible where it plainly appears that the writing itself is accessible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 879; Dec. Dig. § 400.\*]

3. CONTRACTS (§ 253\*)—ABROGATION—MUTUAL CONSENT.

A written contract cannot be abrogated by one of the parties without the assent of the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1146; Dec. Dig. § 253.\*]

4. MASTER AND SERVANT (§ 67\*)—FRAUDULENT CONTRACTS FOR SERVICES—CRIMINAL PROSECUTIONS.

The contract mentioned in the labor contract act of 1903 (Acts 1903, p. 90) must be definite and unambiguous as to the time when the laborer's term of service is to begin and end. A contract in which it is stipulated that the employé is to "work a month" with the employer, but without any agreement as to when the month is to begin or end, is too vague and indefinite to be the basis of a criminal prosecution, for the reason that the time may not have been reached for the contract to begin, and the employé may still have the right to repay the advances obtained by him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 67.\*]

(Syllabus by the Court.)

Error from City Court of Leesburg; H. L. Long, Judge.

Dolphus Starling was convicted of procuring money on a contract to perform services with intent to defraud in violation of Act Aug. 15, 1903 (Acts 1903, p. 90), and he brings error. Reversed.

Howell B. Simmons, for plaintiff in error. W. G. Martin, Sol., for the State.

RUSSELL, J. A motion is made to dismiss this writ of error. This motion is based upon four grounds, as follows: "(1) Because said writ of error is not entitled in the cause or court. (2) Because the certificate to the bill of exceptions of the trial

judge does not specify as material to a clear understanding of the errors complained of the whole or any part of the record of said case in the trial court. (3) Because there is nothing in the assignment of error or bill of exceptions to show that the trial court ever passed sentence upon the defendant, reference being merely made to a 'verdict of guilt and judgment,' and it does not disclose the nature of this judgment. (4) Because the assignments of error are too general to entitle them to the consideration of this court, in that none of them specify wherein the error consists."

An inspection of the bill of exceptions shows that it is sufficiently entitled in the cause, because it states that the trial had (of which it proceeds to give a history) was that of the State v. Dolphus Starling. It is not usual, nor is it ordinarily necessary, to otherwise entitle a bill of exceptions than to state in beginning the bill of exceptions the names of the parties to the cause. The certificate to this bill of exceptions is in the usual form prescribed by the Code. In the bill of exceptions in a criminal case reference is immaterial to the sentence, and it is not necessary that it should appear that the defendant had been sentenced where no error is assigned upon the sentence. An exception to the judgment overruling the motion for new trial is sufficient which assigns error upon that judgment. Upon every ground presented the motion to dismiss the writ of error is without merit.

Starling was convicted of a violation of the labor contract act of 1903 (Acts 1903, p. 90). Under the evidence the defendant procured money from the prosecutor upon a contract to work a month with him. The exact language of the prosecutor is as follows: "The last week in April I made a contract with Adolphus Starling to work a month with me, and I would pay him \$12 per month in rations, and I advanced him at the time \$3 and the supplies charged in the accusation." This is the only evidence as to the contents of the contract contained in the record. This contract was too indefinite to authorize a conviction under the act of 1903. When was the month's work to be done? Was it to be immediate, beginning the last week in April, or was it to commence on the first Monday in May, or upon the 1st day of May, or was it to be in the fall of the year in gathering the crops? Was it to be performed on a farm, in a manufactory, at a sawmill, or around a turpentine still, or was Adolphus Starling to be a mere domestic servant? The evidence does not disclose. Furthermore, it appears from the evidence upon the cross-examination of the prosecutor that there was already a contract in writing between the defendant and the prosecutor, which the prosecutor says he set aside; and it appears that the defendant had

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

been working for the prosecutor about 18 months at the time he left. In view of the fact that a contract must be set aside (just as it is made) by the consent, either express or implied, of both parties thereto, it cannot be established that the written contract was set aside by the mere statement of the prosecutor that "I set aside the first contract." There is no evidence that the defendant consented to the abrogation of the contract. It is clear, therefore, from the evidence that the written contract, whatever it contained, was of full force. It also appears that this contract was in the prosecutor's safe, and for this reason the objection of defendant's counsel to proof by parol of the contents of this writing was well taken, and should have been sustained.

We think the court erred in refusing a new trial. The contract referred to in the act of 1903, whether it be in writing or rests in parol, must be a definite and ambiguous agreement as to the kind of labor to be performed and when the term of service is to begin and end. In the absence of proof upon the point of the commencement of the labor, or of a definite agreement as to when service is to begin, a defendant would be precluded from showing that he had made a bona fide tender to repay the advance before the time specified in the contract as the time at which his term of service should begin. Under our ruling in *Harwell v. State*, 2 Ga. App. 613, 58 S. E. 1111, in order for him to avail himself of the provisions of the act of 1903, in reference to repaying advances, such payment must be made before the time set for the beginning of the work. Naturally, if one who had received an advance offered to repay it and the tender was declined, a legal tender thus made would be equivalent to payment. And in the present case it is possible that the month in which the defendant is to work has not yet been reached; and, if it has not, he still has the right to repay the advance, and be free from any criminal liability under the act of 1903. It is held in *Glenn v. State*, 123 Ga. 585, 51 S. E. 605, and *Presley v. State*, 124 Ga. 446, 52 S. E. 750, that there must be a distinct and definite contract for service. "An implied contract will not do. There must be an express contract, clear and definite in its terms." The facts in the present case are very similar to those in *McCoy v. State*, 124 Ga. 218, 52 S. E. 434. The expression in the evidence in that case that the defendant was to come back to work after Christmas (which the Supreme Court held was too indefinite) is certainly as clear and definite as that the defendant in this case was "to work a month" for the prosecutor at some time, not identified, which might occur between now and the day of judgment.

Judgment reversed.

## BARNES v. VANDIVER. (No. 1.313.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

### 1. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Whether a cause of action pending in a justice's court is for an amount greater than \$50 or not is to be determined by the summons and the cause of action attached thereto. It cannot be inferred with any certainty that the claim of one who sues upon a forthcoming bond is limited to an amount exactly one-half of the bond. Such a calculation would lose sight of both interest and costs.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 161; Dec. Dig. § 44.\*]

### 2. ESTOPPEL (§ 92\*)—ACCEPTANCE OF BENEFITS.

One who defers the prosecution of his remedy under a forthcoming bond until after he has claimed the fund arising from a sale, under judicial process, of the property, the production of which the forthcoming bond was given to secure, is confined to his election and estopped to assert the invalidity of the sale, the proceeds of which he has claimed.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 260; Dec. Dig. § 92.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County: W. D. Ellis, Judge.

Action by M. F. Barnes against M. C. Vandiver. Judgment for plaintiff in the justice court was reversed in the superior court, and he brings error. Affirmed.

C. B. Rosser, Jr., for plaintiff in error. Jas. L. Key, for defendant in error.

RUSSELL, J. This was a suit upon a forthcoming bond in which the judge of the superior court directed a verdict for the defendant. It appears that certain *fi. fas.* which were issued upon the foreclosure of laborer's liens were levied upon personal property, including a soda fountain and fixtures, and that a claim was interposed, which was tried in a justice's court, and that thereafter the claimant foreclosed a mortgage, and the mortgage *fi. fa.* was levied upon property included in the former levy, and, upon other property comprising a stock of goods, a 10-day order was obtained from the judge of the superior court, and the property described in the mortgage *fi. fa.* was sold thereunder. The claimant gave both a claim bond and a forthcoming bond; and, when the issue was found in favor of the plaintiff in *fi. fa.* and the property was not forthcoming, suit was instituted on the forthcoming bond. In the meantime, however, the plaintiff in *fi. fa.* had placed his *fi. fa.* in the hands of the sheriff, by whom the mortgage *fi. fa.* had been levied, claiming a priority as to the proceeds of the sale, and upon a rule brought against the sheriff had accepted the portion of the fund awarded by the court to his *fi. fa.* Upon the suit on the forthcoming bond in the justice's court, judgment was rendered in behalf of the plaintiff in *fi. fa.* for the balance after deducting the amount (received and credited up-

on his *fi. fa.*), which had been derived from the sale of the property under the mortgage *fi. fa.* From this judgment of the justice, the principal and his surety on the forthcoming bond appealed to the superior court.

1. In the superior court a motion was made to dismiss the appeal upon the ground that the amount involved being less than \$50, the appeal should have been to a jury in the justice's court, and the superior court was without jurisdiction. The motion to dismiss was overruled, and exception is taken to this ruling. We think the court properly refused to dismiss the appeal. The question as to whether the superior court did or did not have jurisdiction was to be determined by the pleadings; and, regardless of what may have been the truth as to the facts in the summons, the plaintiff sued for \$70 as the amount of his damages due upon the breach of the bond. If he had been endamaged a lesser sum he could have brought his action for a lesser amount. But upon appeal the case is an investigation *de novo*, and, disregarding what may have been the evidence or the finding in the justice's court, the action was one for an amount greater than \$50. The language of section 4142 of the Civil Code of 1895 is: "Where the sum claimed exceeds \$50.00," etc. And under the ruling in *Singer Manufacturing Co. v. Martin*, 75 Ga. 570: "Whether a case involves more than \$50," and thereafter can be appealed from a justice's court to a superior court, is to be determined from the summons and the cause of action thereto attached. In that case the amount claimed in the summons was for \$50, and not more, and the appeal was dismissed in the superior court, although the affidavit requiring bail alleged an additional sum of \$36; Judge Hall holding that: "The only pleading in a justice's court is the summons to which the justice is required to attach a copy of the cause of action sued on. To this we must look, not only for the character, but the amount of the claim." Counsel for the plaintiff in error insists that as under our ruling in *Smith v. Davis*, 3 Ga. App. 419, 60 S. E. 199, the levying officer is presumed to have done his duty and taken the bonds required by law, and as copies of the bonds are attached to the summons, it can be inferred that the amount of the plaintiff's claim was only \$35. The argument is that the law requiring a levying officer to take the forthcoming bond in double the value of the property levied on at the time of the levy, as estimated by him, and the claim bond being for double the amount of the execution levied, the plaintiff could not recover exceeding \$35 principal, and the interest which might have accrued. It may be that this would be all that the plaintiff could have recovered, but it does not follow that it is all that he could have claimed or did claim. He would be entitled to recover any costs that might have accrued and this amount was undetermined, and might as a matter of fact

have carried plaintiff's claim for damages, due to the breach of the forthcoming bond, above \$50. What was said by this court in *Southern Express Company v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066, with reference to a consideration of the evidence, as well as the summons, in determining the question of jurisdiction, had reference only to the duty devolving upon a court of review, and has no application to the provision of section 4142, *supra*.

2. Upon the trial in the superior court, the defendants relied upon a plea of estoppel, and, upon the undisputed evidence in the case, the judge directed a verdict sustaining that plea. The evidence showed that after M. C. Vandiver had foreclosed his mortgage in the superior court, and the mortgage *fi. fa.* had been levied on the property upon which the plaintiff's *fi. fa.* had been levied, and for production of which the forthcoming bond was given, the judge of the superior court ordered that the property be sold on the premises after advertising the same for ten days, and that the fund derived from the sale be held for distribution. The plaintiff, Duffell, was notified of the sale, and participated in the distribution. But the amount paid upon his execution did not satisfy his claim. In view of this uncontradicted evidence, we think that the plaintiff was estopped from proceeding upon the forthcoming bond, and that the judge did not err in directing the verdict in favor of the defendant. It may be, as contended that the sale under the mortgage foreclosure was illegal. It may be that the mortgage given by the original defendant in *fi. fa.* to his father was fraudulent. It may be that the counsel for the plaintiff relied upon the agreement with counsel for the defendant in which it was stipulated that if any objection was made to the sale under the mortgage *fi. fa.* the whole of plaintiff's laborer's lien would be satisfied, and that, by such agreement, he was kept away from the sale and allowed an entire valuable stock of goods to be sold for the nominal sum of \$100. All of this may be true, and yet it can have no bearing on the issue presented in the court below. The plaintiff had a forthcoming bond, and he had a right to rely upon it to the exclusion of any other remedy or agreement, but, having placed his liens in the hands of the sheriff and demanded the proceeds of a sale, he will not be heard to say that that sale was illegal; and, if it was a legal and valid sale, under the judgment of a court of competent jurisdiction which prevented the production of the property according to the terms of the forthcoming bond, the nonproduction of the property under these circumstances was excused. In the argument much stress was laid on the agreement between the parties by which the plaintiff was kept away from the sale. With regard to this it is only necessary to say that the result of any breach of that agreement would

afford the subject-matter of an entirely distinct cause of action. It cannot be considered here and it could not be considered in the court below in an elucidation of issues presented by this record. Regardless of the antecedent motive or cause which may have induced the plaintiff's election (and which might support another action), he elected to pursue the property in the hands of the sheriff under the mortgage *fi. fa.* rather than the remedy afforded by suit on the forthcoming bond; and he is bound by his election. Judgment affirmed.

**AUGUSTA BROKERAGE CO. v. CENTRAL OF GEORGIA RY. CO. (No. 1,262.)**

(Court of Appeals of Georgia. Nov. 11, 1908.)

**1. COMMERCE (§ 33\*)—CARRIAGE OF GOODS—DISCRIMINATION.**

The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same state intends to have it further transported by a second carrier into another state does not make such first transportation interstate commerce, even though such first carrier may be informed of the ultimate destination of the merchandise.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.\*]

**2. COMMERCE (§ 33\*)—CARRIAGE OF GOODS—DISCRIMINATION.**

The intention of the consignee as to the future disposition of his property by shipping it over another line under a new bill of lading into another state cannot change an intrastate shipment to an interstate shipment; the law is not dealing with the intention of the consignee, but deals solely with the relation of the carrier to the freight transported.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.\*]

**3. CARRIERS (§ 32\*)—CARRIAGE OF GOODS—DISCRIMINATION—"EQUAL FACILITIES IN THE TRANSPORTATION AND DELIVERY OF FREIGHT"—"UNJUST DISCRIMINATION."**

In so far as the plaintiffs' case rested upon the alleged violation of rule 36 of the Railroad Commission of Georgia with respect to the defendant's refusal to issue to the plaintiffs through bills of lading, or to furnish its cars to connecting carriers that shipments might be carried to ultimate destination without reloading at terminal points, there has been a definite and positive adjudication against their right of recovery in the decision of the Supreme Court in the case of Central of Georgia Ry. Co. v. Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119, which, as to these features, is the final law of the case. Not so, however, with respect to that portion of the plaintiffs' case complaining of a failure of the defendant to place cars upon the plaintiffs' warehouse side track. That much of the plaintiffs' case remains intact, and the evidence upon that point should have been submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.\*]

Russell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Richmond; Wm. F. Eve, Judge.

Action by the Augusta Brokerage Company

against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Fleming, for plaintiff in error.  
Lawton & Cunningham and Jas. C. C. Black, for defendant in error.

SEABROOK, J. In the court below a verdict was directed against the plaintiffs. They filed their motion for a new trial, and it was overruled. To the judgment overruling this motion the plaintiffs except.

To determine whether the judgment overruling the motion for a new trial was proper, we must consider whether the direction of the verdict by the court was proper; for, if the ruling in the latter instance was right, necessarily the former ruling was right. It is necessary, therefore, that we review somewhat at length the history of this case. It seems from the record that the Augusta Brokerage Company was engaged in buying cotton seed in car load lots along the line of the defendant's railway in this state, in competition with the oil mills in Augusta, and shipping them to parties in South Carolina over the Southern Railway. The real controversy has been succinctly summarized in the body of the opinion in the case of Central of Ga. Ry. Co. v. Augusta Brokerage Co., 122 Ga. 649, 50 S. E. 474, 69 L. R. A. 119, as follows: "The oil mills at Augusta depended largely for a supply of cotton seed upon the territory through which ran the defendant railway company's line. They delivered to it their manufactured products for shipment, so the railway company got a short haul on the raw cotton seed, and also a long haul on the reshipments made over its line of the manufactured products. It was not to the business interests of the railway company that cotton seed grown at local stations on its Augusta and Savannah branch should be shipped to oil mills located in South Carolina; for none of the manufactured products could then be secured for reshipment at a high rate over its road. Its interests dictated that the cotton seed should stop at Augusta and be manufactured into oil and by-products by the mills located at that point. The railway company, therefore, determined that it would not, by voluntarily granting facilities to shippers which it was under no legal duty to afford, supply the means of diverting from its road profitable shipments which it otherwise would receive. On the other hand, the material business interests of the brokerage company demanded that it should be granted such facilities. It was a free lance, in open competition with the oil mills at Augusta in the buying of cotton seed at the lowest price possible, and all the seed purchased by it was shipped from Augusta over the Southern Railway to South Carolina mills. To reload shipments at Augusta for the South Carolina trip was ex-

pensive; to get through bills of lading, or to secure the consent of the defendant company that its loaded cars be delivered to the Southern Railway at Augusta so that the seed might be carried to its ultimate destination without reloading, would render the business of the brokerage company profitable, the business of the Augusta oil mills less remunerative. Their interests and those of the defendant railway company were coincident. Its interests and those of the brokerage company conflicted." Upon this state of facts the Supreme Court held: "As to issuing through bills of lading or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike. That such discrimination is dictated by the business interests of the carrier and really affects but a single shipper, because he is the only person at a terminal point who is engaged in shipping cotton seed out of the state, cannot alter the matter." In the body of the decision, referring to the refusal to issue through bills of lading, or to consent that its loaded cars be delivered to the Southern Railway at Augusta, that court further says (page 650 of 122 Ga., page 474 of 50 S. E. [89 L. R. A. 119]): "The railway company acted as the average business man would have done;" and, "in declining to grant the privileges which the brokerage company wished to enjoy, the railway company merely adopted a policy which was within its legal right as a carrier. *State v. Railroad Company*, 104 Ga. 437, 30 S. E. 891. \* \* \* The railway company had the undoubted right to refuse to make through shipment of any freight or to permit its cars to leave its line of road, however they might be loaded."

Hence it will be seen that, in so far as the plaintiffs' case rested upon the alleged violation of rule 36 in the two respects referred to, there has been a definite and positive adjudication against them, and this court is bound by such adjudication. But this is by no means all of the plaintiffs' case. In their declaration they allege that rule 36 was violated by the defendant in another respect, and that such violation resulted in damage to them. They say that it is a common practice of the defendant railway company to make delivery of car load lots of cotton seed to the warehouses of the cotton seed oil mills at Augusta having tracks connected with the tracks of the defendant; that in September, 1903, the plaintiffs shipped to Augusta from Greens Cut, Ga., a station on the line of the defendant's road, car No. 4769, loaded with cotton seed, and, when said car arrived at Augusta, a member of the plaintiffs' firm presented to the proper officer of the defendant the bill of lading, and requested that the car be delivered on the side track of the plaintiffs' warehouse. This

request was refused, and it is claimed that such refusal was a denial to the plaintiffs of "equal facilities in the transportation and delivery of freight," and was "an unjust discrimination" against them in violation of rule 36 of the Railroad Commission of Georgia, and that, in consequence of the defendant's failure to deliver the car load of cotton seed, the plaintiffs were put to the expense of \$5, which sum is claimed as actual damages. It is further claimed that this refusal was a part of a premeditated plan to drive the plaintiffs out of the business of buying cotton seed, and it is characterized as a willful violation of law which renders the defendant liable for exemplary damages. By reference to the thirty-first annual report of the Railroad Commission of Georgia, it is discovered that the rules have been amended and rearranged, and that rule 36 is now rule 2, and that the language of this rule has been changed (see page 20). It appears, however, that rule 36 was in force when this controversy arose. The material portion of this rule reads as follows: "The several railroad companies in this state in the conduct of their intrastate business shall afford to all persons equal facilities in the transportation and delivery of freight without unjust discrimination in favor of or against any; and, wherever special facilities are afforded to one shipper in the transportation or delivery of freight in car load lots or less, whether upon a special rate authorized by this commission, or otherwise, such company shall be bound to afford to any other shipper or shippers, under substantially similar circumstances, like facilities upon like rates." It will be observed that this rule applies not to interstate, but to intrastate, business only. It is necessary, therefore, in determining whether plaintiffs' complaint is properly laid, to ascertain the character of the shipment in car No. 4769 in this respect, and see if it falls within the operation of rule No. 36 of the Railroad Commission of Georgia.

The plaintiffs were avowedly buyers of cotton seed for South Carolina parties. It is admitted that the cotton seed they bought was intended ultimately to be shipped to South Carolina, and presumably their request that this car be placed on the side track at their warehouse was intended in some way to facilitate shipment to its ultimate destination in South Carolina. But the intention of the consignee as to the future disposition of his property by shipping it over another line under a new bill of lading into another state cannot change an intrastate shipment into an interstate shipment. The law is not dealing with the intention of the consignee, but solely with the relation of the railroad to the freight transported. A seller in Georgia might conduct with a buyer in South Carolina an interstate business as between themselves, but, if the railroad refuses to carry beyond its own line and compels unloading at its terminus in Georgia, such

business in its relation to the railroad is wholly intrastate. "Business done within this state cannot be made to mean business done between this state and another state." *Pacific Express Company v. Seibert*, 142 U. S. 350, 12 Sup. Ct. 253, 35 L. Ed. 1035. "The fact that the owner of merchandise offered to a carrier for transportation from one point to another in the same state intends to have it further transported by a second carrier into another state does not make such first transportation interstate commerce, or render the carrier subject to the control of the commission in respect to it, even though such first carrier *may be informed* [italics ours] of the ultimate destination of the merchandise." *Mo. & Ill. R. Co. v. Cape Girardeau R. Co.*, 1 Interst. Com. R. 30. We think the expression used by the Supreme Court in the case of *Central of Georgia Ry. Co. v. Augusta Brokerage Company*, 122 Ga. 652, 50 S. E. 476, 69 L. R. A. 119, that "the plaintiffs appear to have been engaged altogether in making interstate shipment of cottonseed," etc., can only be true in the sense that the owner was in Georgia and the buyer in South Carolina, and cannot be true in respect to the defendant railroad's relation to the contract. It appears that, when using this expression, the court had in mind the refusal of the defendant railroad company to deliver its cars to the Southern Railway, and not the refusal of the defendant railroad company to place its loaded cars on the side track at the plaintiffs' warehouse. Briefly stated, the Supreme Court did not decide that the shipment of cotton seed from Greens Cut or elsewhere in Georgia to Augusta was interstate business, even though, after being unloaded into the plaintiffs' warehouse, it was intended to be reloaded into other cars for shipment to points in South Carolina. Hence what we here rule is not in conflict with the decision of that court.

There being some evidence tending to show that it now is, and for years past has been, the common practice of the defendant railroad company to deliver cars of cotton seed upon the side track of the oil mills at Augusta, and to other parties; and, further, that notwithstanding plaintiffs had a side track of standard gauge alongside their warehouse connected with the defendant's line of railway at Augusta, upon which delivery of a car load of cotton seed consigned to them was requested by the plaintiffs and refused by the defendant, it follows that such a refusal was a denial to the plaintiffs of "equal facilities in the transportation and delivery of freight," and was "an unjust discrimination" against the plaintiffs, in violation of rule 36 of the Railroad Commission of Georgia. The evidence on this branch of the case should have been submitted to the jury for their determination under appropriate instructions by the court. It follows,

therefore, that the direction of the verdict was error.

Judgment reversed.

RUSSELL, J. (dissenting). Personally I am glad that the judgment of the majority of the court affords a means by which the plaintiff in error can sustain a verdict against the defendant. Judicially I cannot concur in that judgment. I expressed our personal view in the opinion when the same case was heretofore before this court (*Central of Georgia Railroad Company v. Augusta Brokerage Company*, 2 Ga. App. 511, 58 S. E. 904); but, after a very mature consideration of the evidence, then we could not, in the light of the decision of the Supreme Court (122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119), see how to escape the effect of that decision. We were bound to declare the law, not according to our views, but according to the prior adjudication. There has been no change in the evidence since the case was here before. By agreement of counsel on the trial now under review, the approved brief of evidence on the former trial was read to the jury in lieu of the testimony being again delivered by the witnesses. To my mind nothing is more obnoxious legally than a monopoly. In my view nothing should be less encouraged than a policy which, by the destruction of competition, must necessarily create a monopoly, either in trade or transportation. In my opinion the facility with which monopoly can under existing conditions be created is so much greater than ever that neither the law as to the offenses defined by Blackstone in volume 4, c. 12, of his Commentaries, nor the Roman law upon similar subjects, is adequate to deal with the existing situation.

It is not material to this discussion to say whether the effect of the line of conduct would be to create a monopoly in cotton seed in the hands of the oil mills at Augusta or not. As said by Justice Bradley in the case of *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 761, 4 Sup. Ct. 656, 28 L. Ed. 585: "I hold it to be an incontrovertible proposition of both English and American public law that all mere monopolies are odious and against common right. \* \* \* Monopolies are the bane of our body politic at the present day." And, as said by Justice Brown in the case of *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 676, 16 Sup. Ct. 714, 40 L. Ed. 838: "The logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation."

However, if the decision of the Supreme Court in *Central of Ga. Ry. Co. v. Augusta Brokerage Co.*, supra, means anything, it means that the Central of Georgia Railway Company, as a common carrier, had the right to establish and maintain a policy as to cotton seed at Augusta by which it would receive the benefit of the profit accruing from their transportation away from Augusta, and

that it was not required to afford any facility to those who would contravene its policy or render it less effective. This was held not to be discrimination against a shipper, but against a commodity, and was distinctly ruled to be permissible by this unequivocal declaration of the law. There is no evidence in the record that the plaintiffs were discriminated against, even if their cotton seed were. The evidence is uncontradicted that the railway company placed cars at the plaintiffs' warehouse for grain, hay, lumber, or any other product except cotton seed. We are all agreed that the plaintiffs cannot recover for the refusal of the carrier to issue through bills of lading beyond its terminus. Indeed, the Supreme Court was not by any means announcing this principle for the first time in this case, and it is only incidental. The point on which we differ in my opinion is the axis around which this whole case revolves. The crux of the whole matter is the refusal of the railway company to place a car, No. 4769, loaded with cotton seed, at the plaintiffs' warehouse, so as to make it easier for the plaintiffs to defeat the policy which the railroad had established, and which the Supreme Court has expressly sanctioned in *Central Ry. Co. v. Augusta Brokerage Co.* as not being discriminatory. In other words, under the decision of the majority of this court, the plaintiffs are permitted to recover damages for the refusal of the railroad company to afford them a facility for defeating a policy which the Supreme Court says the defendant has the right to maintain. I grant that there is evidence in the record that the defendant company placed cars of cotton seed at the warehouses of the cotton seed oil mills, but I reiterate the statement contained on page 514 of the opinion in 2 Ga. App., page 905 of 58 S. E., that "the plaintiff proved the discrimination, but did not prove that any commodity was discriminated against except cotton seed." There is, so far as I can discover, no rule of the railroad commission which requires a carrier to deliver a loaded car at a private side track of a consignee. The evidence is undisputed that such placing of a car of cotton seed involved expense to the railway company and effected a saving of at least \$2.50 to the dealer in cotton seed; that without this the Augusta Brokerage Company could not prevail in the effort to ship seed away from Augusta, and, unless the railroad company was forced to render this gratuitous assistance to its adversary, it could successfully carry out the policy it had adopted to increase its legitimate business at Augusta by securing freight on the shipments of the manufactured products of cotton seed from Augusta. The Supreme Court recognizes a state of war between the parties for such profits as may accrue from handling cotton seed at Augusta (the brokerage company's profits to arise

from sales, and the railway company's profits to arise from freights), and calls for a fair fight. The decision of this court says, in effect: "You can fight if you wish, but we will first take away from one of the combatants his only weapon of defense or offense." I would have been willing, as an original proposition, to outlaw one of the combatants as being engaged in practices not sanctioned by the rules of war, but forced, as I am, by the precedent in *Central of Georgia Ry. Co. v. Augusta Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119, to hold the cause of quarrel just, I am unwilling by my silence to consign one of the combatants after stripping him of his arms, to the mercy of his antagonist.

# YOUNG v. GERMANIA SAVINGS BANK. (No. 1,181.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

## 1. COURTS (§ 188\*)—CITY COURT OF ATLANTA—JURISDICTION.

The city court of Atlanta is a court of general common-law jurisdiction. Those exceptions which exist to its jurisdiction on account of the exclusive jurisdiction of the superior court and of the court of ordinary as to certain causes render it no less a court of general jurisdiction, as contradistinguished from courts of special jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 188.\*]

## 2. APPEARANCE (§ 24\*)—EFFECT.

A general appearance and pleading waives all defects in process or service of process. Civ. Code 1895, § 4981.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 118; Dec. Dig. § 24; Divorce, Cent. Dig. § 267; Equity, Cent. Dig. § 306.]

## 3. COURTS (§ 188\*)—CITY COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

A suit which states that defendant is indebted to the plaintiff on 77 promissory notes for \$10 each, and prays judgment for the principal and interest "of said notes," is within the jurisdiction of the city court of Atlanta, although only 1 of the notes is attached as an exhibit, especially when it is alleged that the other 76 notes are substantially in the same form.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 188.\*]

## 4. COURTS (§ 188\*)—CITY COURT—JURISDICTION.

The city court of Atlanta has jurisdiction of a suit based upon notes given for the purchase money of land and praying a general judgment, with a special lien upon the land. *Wheatley v. Blalock*, 82 Ga. 406, 9 S. E. 168.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 188.\*]

5. There was no error in overruling the motion to set aside the judgment for any of the reasons stated.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Germania Savings Bank

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



against Oscar Young. Judgment for plaintiff. Defendant brings error. Affirmed.

Robt. L. Rodgers, for plaintiff in error.  
Westmoreland Bros., for defendant in error.

POWELL, J. Judgment affirmed.

HOWELL v. STATE. (No. 1,419.)  
(Court of Appeals of Georgia. Nov. 10, 1908.)

1. INDICTMENT AND INFORMATION (§ 122\*) —  
ACCUSATION—SUFFICIENCY OF AFFIDAVIT.

An affidavit charging the defendant with "the offense of resisting an officer in the discharge of his duty" is broad enough to support an accusation in the city court of Dalton charging the defendant with resisting an officer by assaulting him and beating him.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 122.\*]

2. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT.

The motion in arrest of judgment was properly overruled. At least one of the counts of the accusation was good.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2445; Dec. Dig. § 970.\*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Don Howell was convicted of resisting an officer, and brings error. Affirmed.

W. E. Mann, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

HOWELL v. STATE. (No. 1,420.)  
(Court of Appeals of Georgia. Nov. 10, 1908.)

1. CRIMINAL LAW (§ 211\*)—JURISDICTION—AC-  
CUSATION.

An affidavit charging the defendant with the "offense of assault with a knife [upon a named person] to murder" may legally furnish the basis for an accusation in a city court charging the defendant with the offense of stabbing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 425; Dec. Dig. § 211.\*]

2. CRIMINAL LAW (§ 594\*)—CONTINUANCE—  
ABSENCE OF WITNESS.

The defendant was arrested and brought before a magistrate on a warrant for assault with intent to murder. On June 8th the magistrate, on that charge, committed him in default of bail for his appearance at the next term of the superior court, to be held on the second Monday in October. On August 18th the solicitor general of the circuit, who by law was also solicitor of the city court, filed in the city court an accusation, based upon the same affidavit upon which the warrant was issued, charging the defendant with stabbing. The defendant was in jail, and neither he nor his counsel knew of the accusation until August 20th or 21st. On August 22d, when the case was called in the city court, the defendant moved for a continuance on the ground that he had a material witness, who was then in another county, about 50 miles away, whom he had not subpoenaed, because he did not expect the case to be tried until the superior court convened; and the court

overruled the motion. Held, that the defendant was entitled to a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1821; Dec. Dig. § 594.\*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Don Howell was convicted of stabbing, and brings error. Reversed.

W. E. Mann, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

POWELL, J. Judgment reversed.

CONSIGNEES' FAVORITE BOX CO. v.  
MEERS. (No. 1,288.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

VENDOR AND PURCHASER (§ 213\*) — RIGHTS  
AND LIABILITIES OF PARTIES — CLAIMS BY  
THIRD PERSONS.

It appearing that the plaintiff bought the property in dispute in settlement of a bona fide indebtedness from the defendant in attachment, and had taken possession of it prior to the issuance and levy of the attachment, there being nothing in the record to impeach the good faith of the transaction, the verdict finding the property subject to attachment was contrary to law. See Ga., Fla. & Ala. Ry. Co. v. Sasser, 4 Ga. App. 278, 61 S. E. 505.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 440; Dec. Dig. § 213.\* Attachment, Cent. Dig. § 151.]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action between A. L. Meers and the Consignees' Favorite Box Company. From the judgment, the box company brings error. Reversed.

M. C. Tarver and Geo. G. Glenn, for plaintiff in error. W. E. Mann, for defendant in error.

POWELL, J. Judgment reversed.

CONSIGNEES' FAVORITE BOX CO. v.  
SPEER. (No. 1,289.)

(Court of Appeals of Georgia. Nov. 10, 1908.)

LOGS AND LOGGING (§ 25\*) — LIENS — PRIORI-  
TIES—DELIVERY—WHAT CONSTITUTES—ELEC-  
TION BETWEEN LIEN AND ATTACHMENT.

This was a claim case, involving the title to a number of articles levied on under an attachment and under a lien foreclosure in favor of the same plaintiff. The jury found all the property subject. Some of the property was clearly not subject. As to the other articles the charge of the court did not fairly present the issues.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 58; Dec. Dig. § 25.\*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action between the Consignees' Favorite Box Company and J. A. Speer. From the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment, the box company brings error. Reversed.

M. C. Tarver and Geo. G. Glenn, for plaintiff in error. W. E. Mann, for defendant in error.

POWELL, J. As to the property contained in the bill of sale the claimant's title accrued prior to the foreclosure of the lien. So far as the evidence shows, the claimant purchased in good faith and without notice. We find nothing in the record suggesting fraud, no single suspicious circumstance or badge of fraud is pointed out in the brief of counsel, and the submission of that issue to the jury seems to have been error. The verdict finding so much of the property as was included in the bill of sale subject is therefore clearly without evidence to support it.

The fact that the defendant in *fi. fa.* had bought timber from a third person, who retained the title until it was paid for, and that the claimant had paid the purchase price, did not put the title either of the timber or of the lumber sawed therefrom into the claimant. If there was an additional agreement that the defendant should cut the lumber and stack it, and that it should be the property of the claimant when stacked, and that the value thereof should be credited on the amount of advances of the claimant to the defendant, the cutting and the stacking of the lumber would amount to delivery to the claimant, so as to put title in him, if it was the intention of the parties that actual delivery should be dispensed with and this constructive delivery substituted. The claimant's testimony as to this feature of the case was not as clear and definite as it was in the Meers Case (No. 1,288) 62 S. E. 1000; but the issue as to this should have been submitted to the jury.

There was no error in refusing to compel the plaintiff to elect between his attachment and his lien. These are not inconsistent remedies. Especially is this true as it appears from an inspection of the account attached to the plaintiff's pleading that but few of the items are such as to constitute a lawful basis for a lien under section 2809 of the Civil Code of 1895, but are such as to be the basis for an attachment.

Judgment reversed.

HOWELL v. STATE. (No. 1,418.)  
(Court of Appeals of Georgia. Nov. 10, 1908.  
Rehearing Denied Nov. 24, 1908.)

CRIMINAL LAW (§ 878\*)—EVIDENCE—VERDICT.  
There being sufficient evidence to authorize the verdict upon either or both of the two counts of the accusation, the general verdict of guilty is not contrary to law. *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. § 878.\*]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Don Howell was convicted of crime, and he brings error. Affirmed.

W. E. Mann, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

MCADAMS v. ELLIS. (No. 1,356.)  
(Court of Appeals of Georgia. Nov. 23, 1908.)  
EXEMPTIONS (§ 48\*)—PERSONS ENTITLED—LABORER.

It appeared that the defendant, whose wages were sought to be subjected to garnishment, was employed by the garnishee as a night watchman at a factory, but that he was without the police power and discretion possessed by the employee referred to in the case of *Tabb v. Mallette*, 120 Ga. 97, 47 S. E. 587, 102 Am. St. Rep. 78; that his duties consisted mainly in walking around the premises of the garnishee, and keeping tramps away from the premises, and seeing that fire did not break out; that he had no authority to arrest any one, but only ran them off of the premises when he found them loitering; that he worked 12 hours each day; that he had license to run an engine; that he had to make a round over the premises once each hour, and about 20 minutes of his time was occupied each hour in making this round; that he had to register 16 times during this round, and in registering he had to use an instrument in the nature of a key, which, when he turned it, registered in the Western Union office and showed that he was doing his duty; that each morning before he left, after making his eleventh round, he fired the boiler, which took him about 30 minutes. He had to remain in the boiler room in all about 1 hour and 40 minutes. Held, that the jury was authorized to find that he was a laborer, and that his wages were exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 70; Dec. Dig. § 48.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between E. P. McAdams and R. Z. Ellis. From the judgment, McAdams brings error. Affirmed.

Horton Bros. & Burress, for plaintiff in error. Wm. M. Smith, for defendant in error.

POWELL, J. Judgment affirmed.

DUB v. BRYSON. (No. 1,151.)  
(Court of Appeals of Georgia. Nov. 23, 1908.)  
REVIEW ON APPEAL.

The evidence fully supports the verdict, and there appears no sufficient reason for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action between Dollye Dub and T. A.

Bryson. From the judgment, Dub brings error. Affirmed.

Robt. L. Colding, for plaintiff in error.  
Osborne & Lawrence, for defendant in error.

HILL, C. J. Judgment affirmed.

**BROOKE v. NASHVILLE, C. & ST. L. RY. CO.** (No. 1,314.)

(Court of Appeals of Georgia. Nov. 25, 1908.)  
**CARRIERS (§ 187\*)—INJURY TO FREIGHT—EVIDENCE.**

The plaintiff having failed to prove one of the material allegations of his petition as laid, the court properly awarded a nonsuit.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 187.\*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. W. Brooke against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. P. Jones, for plaintiff in error. Tye, Peeples, Bryan & Jordan, for defendant in error.

**POWELL, J.** The plaintiff alleged delivery of a shipment of corn to the defendant railway company, to be transported from Nashville, Tenn., to a point in South Carolina on the line of another railroad. It also alleged that the defendant furnished for the shipment a leaky car, by reason of which the corn was damaged. The corn was received from another carrier at destination in bad order. The defendant denied the paragraphs of the plaintiff's petition *seriatim*, and then set up additionally that, "at the time it received the shipment from plaintiff, plaintiff made an express contract with this defendant that no carrier engaged in the transportation of said shipment should be liable for loss or damage not occurring on its portion of the route." The plaintiff did not show the original bill of lading, and offered no evidence (except certain testimony of no probative value, as it was hearsay) of the delivery of the shipment to the defendant. His case, so far as the contract of carriage is concerned rests upon the indirect admission quoted above from the defendant's plea. There was no evidence as to who furnished the car in which the shipment was made. The court granted an order which was in effect a nonsuit.

We affirm this judgment. If the plaintiff had shown or the defendant had admitted a through contract of carriage, such as is evidenced by the ordinary bill of lading (see *Atlantic Coast Line R. Co. v. Hend-*

*erson*, 131 Ga. —, 61 S. E. 1111), the plaintiff might have recovered, either *ex contractu* or *ex delicto*. The suit would then have been maintainable both as to local jurisdiction in the city court of Atlanta and as to the general right to recover on the theory that the carrier broke its contract of carriage and also committed a tort growing out of a failure to perform a public duty by not making a delivery in good order at the point of destination, which in the present instance was beyond the limits of the state. *L. & N. R. Co. v. Warfield & Lee*, 129 Ga. 473, 59 S. E. 234; *Lytie v. So. Ry. Co.*, 3 Ga. App. 219, 59 S. E. 595; *So. Ry. Co. v. Montag*, 1 Ga. App. 649, 57 S. E. 933. The case of *Brooke v. L. & N. R. Co.*, 3 Ga. App. 492, 60 S. E. 218, instead of being authority to the contrary of this proposition, not only impliedly asserts it, but also expressly declares it in the concluding portion of the second division of the opinion.

The defendant's admission in the answer, while it is evidence of the fact that the defendant received the shipment from the plaintiff, is not evidence that it received it for carriage to destination. Those indicia from which an inference of through contract of carriage arises were neither proved nor admitted. The defendant had expressly denied the paragraph of the petition in which the delivery for purpose of transportation to destination was alleged. On account of this lack of proof as to the initial proposition in the plaintiff's case, nonsuit followed as a matter of juristic necessity.

Judgment affirmed.

**SOUTHWESTERN SHEEP CO. v. THOMPSON.** (No. 1,148.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

**MUNICIPAL CORPORATIONS (§ 604\*)—POLICE POWER—ANIMALS RUNNING AT LARGE.**

This case is controlled by the decision of this court in *Geer v. Thompson*, 4 Ga. App. 756, 62 S. E. 500, and the decision of the Supreme Court in *Stone v. Town of Tallulah Falls et al.*, 131 Ga. —, 62 S. E. 592.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1336; Dec. Dig. § 604.\*]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by the Southwestern Sheep Company against J. S. Thompson. Judgment for defendant. Plaintiff brings error. Affirmed.

W. I. Geer, for plaintiff in error. P. D. Rich, for defendant in error.

HILL, C. J. Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**WILSON v. STATE.** (No. 1,430.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

**CRIMINAL LAW (§ 935\*) — NEW TRIAL — GROUNDS—INSUFFICIENCY OF EVIDENCE.**

The circumstantial evidence, which is consistent with the guilt of the accused, not being inconsistent with a reasonable hypothesis of his innocence, and being quite insufficient to establish beyond a reasonable doubt an intent to steal, a new trial should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 2298; Dec. Dig. § 935.\*]

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

John Wilson was convicted of a crime, and he brings error. Reversed.

Thos. W. Thurman, for plaintiff in error.  
O. H. B. Bloodworth, Sol. Gen., for the State.

**RUSSELL, J.** Judgment reversed.

**BOSWELL v. JOHNSON.** (No. 1,285.)

(Court of Appeals of Georgia. Nov. 25, 1908.)

**1. EVIDENCE (§ 434\*) — PAROL EVIDENCE — WRITTEN CONTRACT.**

One who, though he can read and write, signs a written contract without reading it, is bound by its stipulations, and cannot set up that representations were made to him directly contradictory to the express language of the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.\*]

**2. BILLS AND NOTES (§ 489\*)—ACTION ON NOTE — VARIANCE.**

None of the rulings complained of were legally prejudicial to the plaintiff in error.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1618; Dec. Dig. § 489.\*]

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by J. M. Johnson against J. F. B. Boswell. Judgment for plaintiff, and defendant brings error. Affirmed.

R. D. Jackson, for plaintiff in error. J. O. Newell and S. Holderness, for defendant in error.

**POWELL, J.** This is not, as the title of the case might suggest, an action by Dr. Johnson against his friend Boswell for any failure of the latter to include all the sayings and doings, witticisms (good, bad, and indifferent, real or imaginary), and divers eccentricities of the former in the famous biography, nor yet an action by the faithful Boswell against the learned doctor for services in his behalf, but is a prosaic affair between Horsedealer Johnson and Mechanic Boswell as to the purchase price of two mules. Boswell gave a note for the mules, in which were the following statements: "It

is agreed between the parties to this contract that the vendors do not warrant the above-described property, further than their right to sell; that the death of the same is at the vendee's risk; also any injury or sickness now existing or may hereafter arise at the vendee's risk; said vendee assuming said risk in consideration of the credit extended; he purchasing said property on his own judgment." He sought to set up that he was inexperienced in purchasing mules, and that he so informed the seller; that he told the seller that he must and would rely solely upon his representations; that the seller told him that the mules were sound; that the mules at the time were affected with glanders, from which they soon died; that by the false representations of the seller the note was procured; that the consideration wholly failed. This contention, being directly contrary to the express terms of the written contract, could not be set up as a defense to it. The defendant, though he could read and write, signed the contract without reading it. He must suffer for his own negligence. It seems hard to hold him to his contract under the circumstances; but plain law must not be dispensed with to prevent injustice in a particular case. The case is very similar as to its general features to the case of *Branan v. Warfield*, 3 Ga. App. 586, 60 S. E. 325. If it had been shown that the seller knew the horse had the glanders at the time of the sale, the case might be different. *Harris v. Mullins*, 32 Ga. 704, 79 Am. Dec. 320. But see *Floyd v. Woods*, 110 Ga. 850, 36 S. E. 225.

2. The court worked no legal prejudice upon the defendant by first allowing his amended plea upon payment of costs and then disregarding and rejecting it later during the same term of the court. There is nothing in the point that the note produced by the plaintiff at the trial was differently attested from the copy of the note attached to the petition. There was no plea of non est factum, and the simple denial of the original plea did not put the plaintiffs to proof of his contract. *Crockett v. Garrard*, 4 Ga. App. 360, 61 S. E. 552 (2, b.)

Judgment affirmed.

**ALLEN v. STATE.** (No. 1,448.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

**1. OBSTRUCTING JUSTICE (§ 3\*)—WHAT CONSTITUTES—THREATS.**

Threats alone, unaccompanied by any effort or apparent intention to execute them, are not sufficient to constitute the offense of obstructing, resisting, or opposing an officer in the execution of lawful process, under section 306 of the Penal Code of 1895. *Statham v. State*, 41 Ga. 507 (4); *Davis v. State*, 76 Ga. 721, 29 Cyc. 1329.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 4; Dec. Dig. § 3.\*]

**2. REVIEW ON APPEAL.**

The verdict is without evidence to support it, and a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Elberton, P. P. Proffitt, Judge.

Peter Allen was convicted of obstructing an officer, and brings error. Reversed.

Sam. L. Olive, for plaintiff in error. Thos. J. Brown, Sol., for defendant in error.

HILL, C. J. Judgment reversed.

**BASS v. WEST POINT WHOLESALE GROCERY CO. (No. 1,092.)**

(Court of Appeals of Georgia. Nov. 23, 1908.)

**1. MONEY RECEIVED (§ 17\*)—DECLARATION—SUFFICIENCY.**

A suit for \$400 "cash" may afford sufficient basis for a suit for money had and received, which may be properly amplified by amendment setting forth in detail the circumstances of the transaction.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 17.\*]

**2. MONEY RECEIVED (§ 4\*)—DEFENSES.**

Where a single mortgage is taken for two separate amounts due to two distinct parties, in legal effect it is equivalent to two mortgages taken contemporaneously upon the same property; and upon a suit by one of the parties secured thereunder against the other for money had and received it is permissible to show that the mortgage was collected as to only one of the amounts secured, and not as to the other.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 7; Dec. Dig. § 4.\*]

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Attachment by the West Point Wholesale Grocery Company against B. A. Bass. Judgment for plaintiff, and defendant brings error. Reversed.

Hatton Lovejoy, for plaintiff in error. R. A. S. Freeman and A. H. Thompson, for defendant in error.

**RUSSELL, J.** The West Point Wholesale Grocery Company sued out an attachment against B. A. Bass, and in the declaration filed upon the attachment stated that the defendant was indebted to it \$400 "cash," with interest. The petition alleged that this sum was past due and unpaid, and that the defendant refused, upon demand, to pay the same. An account was attached to the declaration as an exhibit which fixed the date of the indebtedness of the defendant as June 22, 1903. By amendment the plaintiff alleged that on June 22, 1903, B. A. Bass was its president, and that as such he sold a stock of goods to W. C. Moore and T. P. Booker; that the consideration of said sale was \$400; that Bass took a note and mortgage for \$1,300 from said Booker, payable to himself, and

that \$400 of this amount was the amount due for the said stock of goods. It was further alleged by the amendment that the defendant foreclosed the mortgage and collected the said \$400, and has not paid any part thereof to the plaintiff; that the verdict and judgment under the mortgage foreclosure were obtained in the city court of La Grange on July 15, 1905; that the judgment was fully paid; and therefore the defendant is indebted to the plaintiff in the amount sued for. Upon the trial only one witness was introduced, and certain facts were agreed between the parties to be true; and, there being no controversy as to the facts, the court directed a verdict for the plaintiff for \$348.06 and interest.

The evidence shows, without contradiction, that the defendant Bass, as president of the grocery company, sold Moore & Booker \$400 worth of goods. Booker was also indebted to Bass individually \$900. The account of the grocery company for \$400 was included with the \$900 due to Bass in a note secured by a mortgage for \$1,300. About two years later Bass foreclosed this mortgage for \$1,300. A claim was interposed to the levy of the mortgage *fi. fa.*, and upon the trial the *fi. fa.* was ordered to proceed for \$900, with interest thereon at 8 per cent.; the amount, with interest, being \$1,120. This amount was collected by Bass. There was no evidence, however, that Bass collected more than \$900 and interest, nor was there any evidence that the plaintiff had made any demand upon Bass. The defendant objected to the allowance of the amendment offered by the plaintiff; but his objections were overruled, and he excepts *pendente lite*. The defendant also offered to prove that in the proceeding to foreclose the mortgage against Booker the amount due to himself individually was conceded, while the \$400 due to the plaintiff, which had been included in the mortgage, was contested, and that the verdict was only for the amount loaned to Booker by himself with interest thereon; the purpose of this testimony being to show that the defendant had not, as a matter of fact, collected any part of its debt included in the mortgage taken in the name of Bass. We think that the plaintiff's petition sufficiently set out a case for money had and received, and that the amendments were properly allowed as merely amplifying the cause of action originally imperfectly indicated by the plaintiff's petition. There is, therefore, no merit in the exceptions taken *pendente lite*, and in view of the amendment the court did not err in overruling the demurrer.

2. We think, however, that the court erred in declining to allow the defendant to show that all that he had ever collected was the \$900 due to himself. Construing the action, as we have, as properly brought for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

money had and received, the plaintiff made a prima facie case, by the evidence adduced in its behalf to show that the defendant had collected a mortgage in which its claim was included or a portion thereof. In this state of the case, however, it was clearly the right of the defendant to show, if he could, that the money collected upon the mortgage was his own, instead of the money of the plaintiff. Such testimony as was offered by the defendant is not irrelevant. The plaintiff alleged and necessarily had to prove, that Bass had collected its \$400 and held it for its use and benefit. If the defendant showed that he had not, in fact, collected the plaintiff's money, the plaintiff could not recover as for money had and received, though Bass might be liable to it under some other cause of action. It is true, as insisted by counsel for the defendant in error, that where one commingles his goods with those of another he is liable to account therefor. It may be that Bass, by taking the mortgage in his own name for the account due the West Point Grocery Company by Moore and Booker, became individually liable to pay this account; but recovery upon this cause of action could not be had by a suit for money had and received. The mortgage was to secure \$900 due the defendant, loaned Booker by Bass individually, together with the \$400 due the plaintiff. The defendant offered to prove that he foreclosed the mortgage for the full \$1,300 and endeavored to collect the \$400 for the plaintiff, as well as the \$900 due himself. It was admitted that the amount for which the mortgage was adjudged to proceed was limited to \$900 principal. Defendant offered to prove that on the trial of this mortgage case it was conceded by the party contesting the mortgage, and by the mortgagor, that the \$900 was just, due to Bass, and unpaid. The \$400 was hotly contested. There was no issue and no contest as to the \$900. There was a denial and contest as to the \$400. The jury found \$900 due under the mortgage. No logical or sensible conclusion can be reached but that this verdict granted this \$900 which was conceded, and found against the \$400 which was contested. Any other conclusion would mean that the jury cut off part of the \$900 which was conceded. The verdict being only for \$900, if the jury allowed anything on the \$400 claim, they cut that much off of the \$900 admittedly due. This would be absurd. Defendant offered to prove these facts, so as to show that in collecting the amount of the verdict and judgment, \$900, he was only collecting the amount due himself individually, the amount which all parties had conceded was his, and had collected nothing due the plaintiff because the jury had decided against the plaintiff's claim. As insisted by counsel, it would be unjust to require the defendant to take a part of the money admittedly

his and pay it to the plaintiff on a claim which the jury had repudiated.

To construe a verdict in the light of evidence is not to attack it directly or collaterally. It is possible, as we see it, to show of what the items for which the judgment was rendered consisted, and at the same time maintain the judgment as valid and binding. The case in which the verdict for \$900 was rendered was a claim case. No pleadings being required in such cases, there is no other way of ascertaining the issues, except by the evidence submitted or admissions made during the trial. Viewing this case as one for money had and received, the plaintiff should recover whatever amount the defendant actually received in its behalf and for its benefit; but it should not have judgment for more than this. To rebut the plaintiff's prima facie case the defendant should be permitted to prove that he had received none of the money which was due to the plaintiff by Moore and Booker. Upon this subject, see *McLendon Bros. v. Finch*, 2 Ga. App. 421, 58 S. E. 690, and citations. The inquiry into the basis of the judgment in the claim case is not for the purpose of attacking the judgment, but for the purpose of showing of what that basis consists.

Judgment reversed.

HILL, C. J., disqualified.

#### CRUMLEY v. STATE. (No. 1,442.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

##### 1. HOMICIDE (§ 230\*)—THREATS—EVIDENCE.

If a long period intervenes between the threat and the act, and there are opportunities of doing the threatened injury and no attempt to do it, the probative force of the threat would be greatly weakened. If between the threat and the act a feeling of ill will which inspired the threat has changed to a feeling of good will and friendly relations, the probative value of the threat would be negligible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 478; Dec. Dig. § 230.\*]

##### 2. HOMICIDE (§ 230\*)—EVIDENCE—THREATS.

The *res gestæ*, which show a shooting to have been accidental, are sufficient to overcome any inference of intentional shooting, arising from proof of threats.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 478; Dec. Dig. § 230.\*]

##### 3. HOMICIDE (§ 87\*)—ASSAULT WITH INTENT TO KILL—MALICE.

To constitute an assault with intent to murder, malice and intent to kill must appear. The evidence in this case shows neither malice nor the intent to kill, and the verdict must be set aside as contrary to law.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 112, 113; Dec. Dig. § 87.\*]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Miles Crumley was convicted of assault with intent to kill, and brings error. Reversed.

W. L. & Warren Grice, for plaintiff in error.  
E. D. Graham, Sol. Gen., for the State.

HILL, C. J. Miles Crumley was indicted for the offense of assault with intent to commit murder, and on his trial was convicted and sentenced to a term of two years in the penitentiary. He made a motion for a new trial, based on the general grounds and on one special ground. This motion was overruled. The view that this court takes of the evidence makes it unnecessary to consider the special exception.

The facts may be substantially stated as follows: Miles Crumley, a white boy about 17 years of age, with his brother Lee, on the night of the alleged offense, was on a visit to their brother Tom and his wife. Tom and his wife intended to move on the following day, and Miles and Lee went to the house for the purpose of assisting in the work of moving, and were invited to remain all night, so as to be present the next morning for that purpose. Tom and his wife were lying on a bed, and Miles was sitting in the room. Lee had not accepted the invitation to remain all night, and had gone home. Tom got up from the bed for the purpose of replenishing the kerosene lamp, which was burning low, and asked Miles to help him fill the lamp with oil. Miles saw a pistol lying on his brother's pants on the floor. He took up the pistol, and according to both Tom and his wife was "pranking" with it, and the pistol went off and the ball hit the woman (who was still lying on the bed) in the breast. Miles, seeing what he had done, immediately dropped the pistol, began crying, exclaiming that he did not intend to shoot his sister-in-law, and went immediately for the doctor and brought him to the house. Only the three were in the house at the time of the shooting, and both Tom and his wife testified that Miles was "pranking" or fooling with the pistol, when it went off accidentally, and the defendant declared that the shot was accidental.

There is no circumstance or inference fairly and reasonably deducible from any fact in connection with the actual shooting, either before or at the exact moment of the shooting, or immediately afterwards, that tends to show any criminal intent either to shoot or to kill; and if a consideration of the evidence is confined to the *res gestæ* of the transaction, accidental shooting is the only reasonable hypothesis. But it is claimed by the state that the defendant had several months previous to the act of shooting made threats to shoot or to kill his sister-in-law, and it is insisted by the state that the act of shooting was the carrying out of a previously formed intention to shoot or to kill, as proved by the threat. This threat was shown by the testimony of four witnesses; the four witnesses swearing to one threat, and not to four different threats made at different times. The time when this

threat was made by the defendant to kill his sister-in-law is not definitely fixed by the testimony. "It was some time before the shooting occurred," and was made at the house of the witnesses, while the defendant was talking about the marriage of his brother, and the exact language of his threat, as remembered by the witnesses, was as follows: Alluding to the marriage of his brother Tom with Georgia Wiggins, the defendant said, "Before Tom should live with Georgia Wiggins he would kill her before the year was out." When his brother first married this woman, there was opposition in the family to the marriage on account of her character, and there was some feeling in reference to the marriage; and it is reasonable to presume that it was during the existence of this state of feeling that Miles gave utterance to the threat. The time intervening between the expression of the threat and the act of shooting had removed all feeling of antagonism or dissatisfaction to Tom's marriage, and the relation between Tom's wife and his brother and his family was entirely pleasant.

The probative value of this threat must be considered in connection with this change in the sentiment of the defendant and his family towards the marriage. A threat made during the existence of ill feeling should have little weight as proof of malice, which is not carried into execution until after the ill feeling has disappeared and kindly feeling and pleasant relations exist between the one who threatened and the one who is threatened. *Starke v. State*, 81 Ga. 596 (2), 7 S. E. 807. Can it be doubted, under the facts of this case, that the threat uttered by this boy, if in fact he did utter it, was the mere careless, thoughtless utterance or ebullition of temporary passion, resulting from the family opposition to his brother's marriage? The time intervening between the threat and the act should greatly impair its probative force, and the additional change of ill will to sentiments of good will should still further diminish its probative value. If the boy had intended to do what he is said to have threatened, why did he not carry out his intention? There were doubtless many opportunities for him to have done so. Instead of any effort to carry out his threat, the evidence shows that the cause for his ill will had entirely disappeared, and that at the time of the shooting, not only were his relations pleasant towards his brother and his sister-in-law, but on that night he was in his brother's house as his guest for the night on the invitation of his sister-in-law, for the friendly purpose of assisting the two on the next day in moving to another home. Is it conceivable that a boy of 17 could have been such an adept in hypocrisy as to have been able to conceal a malignant spirit and to have executed a malignant design while engaged in friendly and brotherly intercourse and association, tendering services of good

will, and accepting the hospitality of a relative whom he was but waiting a favorable opportunity to murder?

To constitute an assault with intent to murder there must exist the element of malice. The undisputed evidence which proves the friendly and pleasant relations between the parties, the express declaration of the woman assaulted and her husband that the shooting was accidental, the evidence that the boy did not bring any pistol to the house with him, but that, seeing the pistol of his brother lying on the floor, he picked it up and in the language of the witnesses was "pranking" with it, and the conduct of the boy when he realized what he had done, prove, it seems to us, beyond all controversy that the unfortunate act was wholly unintentional, and that the verdict of guilty is not only without evidential support, but is in direct antagonism to the truth as shown by the evidence.

Judgment reversed.

#### O'CONNELL v. STATE (three cases). (Nos. 1,444-1,446.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

##### 1. OFFENSES AGAINST LIQUOR LAW.

As to main features these cases are controlled by *Jenkins, alias Jinks, v. State*, 5 Ga. App. —, 62 S. E. 574, and *Bashinski v. State*, 5 Ga. App. —, 62 S. E. 577 (1-3).

##### 2. CRIMINAL LAW (§ 304\*)—JUDICIAL NOTICE—INTOXICATING LIQUOR—WHISKY.

The courts may take judicial cognizance that whisky is a spirituous, alcoholic, and intoxicating liquor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 716; Dec. Dig. § 304.\*]

##### 3. CRIMINAL LAW (§ 304\*)—JUDICIAL NOTICE—INTOXICATING LIQUOR—BEER.

The courts may take judicial cognizance that an ordinary beer, containing such a percentage of alcohol as by common knowledge may produce intoxication when the beer is drunk in such quantities as it may ordinarily be drunk, is an intoxicating liquor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 716; Dec. Dig. § 304.\*]

##### 4. INSTRUCTIONS—INSANITY.

The charge of the court upon the subject of insanity was full and fair, and was not for any reason assigned erroneous.

##### 5. CRIMINAL LAW (§ 918\*)—NEW TRIAL—GROUNDS—CONDUCT OF JUDGE—ASKING QUESTIONS.

The fact that the trial judge asked questions of witnesses is not cause for new trial unless the complaining party suffered prejudice thereby. No prejudice, actual or constructive, appears in the present case. *Ray v. State*, 4 Ga. App. 72, 60 S. E. 818.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2187; Dec. Dig. § 918.\*]

##### 6. EXCEPTIONS.

None of the exceptions are meritorious.

(Syllabus by the Court.)

##### 7. WORDS AND PHRASES—"INTOXICATION"—"INEBRIETY"—"DRUNKENNESS."

"Intoxication" is a synonym of "inebriety" or "drunkenness," implying or evidenced by

undue and abnormal excitation of the passions or the impairment of feelings, or an impairment of the capacity to think and act correctly and effectually. A man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquor that it so affects his acts or conduct or movement that the public or parties coming in contact with him can readily see and know that it is affecting him in that respect (citing *Words and Phrases* vol. 4, pp. 8734-8736).

Error from City Court of Macon; Robt. Hodges, Judge.

Cornelius O'Connell was convicted of a violation of the liquor law, and he brings error. Affirmed.

W. D. McNeil, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

POWELL, J. We deem it unnecessary to elaborate or explain any of the propositions announced in the headnotes other than that stated in the third. This point is especially relevant to one of the cases. The evidence showed, among other things, that the defendant kept on hand at his place of business and sold a beer containing, according to analysis, over 4 per cent. of alcohol. It was not stated in direct words that it was lager beer, or even that it was a malt liquor. We held in *Cripe's Case*, 5 Ga. App. —, 62 S. E. 567, that the courts may take judicial cognizance of the fact that lager beer is an intoxicating liquor, for the beverage ordinarily referred to by that name is according to common knowledge capable of producing intoxication if drunk to excess. Beer, however, as we stated there, varies so much in kind that, in the absence of other words of description, it is not to be assumed that a beverage referred to by that name is or is not intoxicating. In determining whether a liquor or liquid is intoxicating, within the purview of prohibition statutes, courts keep in mind two things—its potableness (the quality of being a beverage), and its intoxicating power. All beers are beverages; hence the courts may without difficulty assume that they possess the quality of potableness; so the only element really open to inquiry is their power of intoxication when drunk to excess. It is a matter of common knowledge that alcohol, when contained in a potable liquid, has intoxicating power unless the percentage thereof is so small as to be negligible. We are not called upon to define the minimum under which the percentage of alcohol in a beverage would be so small that the court could not take judicial cognizance of the intoxicating quality of the liquor. In *State v. McKenna*, 16 R. I. 400, 17 Atl. 51, where the Legislature had taken cognizance in an enactment that a liquor containing 2 per cent. or more of alcohol was per se intoxicating, the court intimates that this was on the verge of the limit, but not over it. See, also, *State v. Guinness*, 16 R. I. 401, 16 Atl. 910. We feel no hesitancy in taking cognizance as a mat-



ter of common knowledge that any beer or other liquor of similar potableness which contains as much as 4 per cent. of alcohol is intoxicating. Indeed, lager beer (and we are not employing the words in a trade or technical sense, but in the ordinary sense in which they are popularly employed), of the intoxicating quality of which judicial notice is taken, is merely a malt beer containing approximately 4 per cent. of alcohol.

Power to intoxicate does not mean power to make a person dead drunk (*Laffer v. Fisher*, 121 Mich. 60, 79 N. W. 934), or stupidly, staggeringly or foolishly drunk (*Elkins v. Buschner* [Pa.] 16 Atl. 102, 104). "Intoxication" is a synonym of 'inebriety' or 'drunkenness,' implying or evidenced by undue and abnormal excitation of the passions, or the impairment of feelings, or an impairment of the capacity to think and act correctly and effectually." *Standard Life Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530. "A man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so operates upon him that it so affects his acts or conduct or movement that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect." *Sapp v. State*, 116 Ga. 184, 42 S. E. 410. See, also, 4 Words & Phrases, p. 3734 et seq. In light of common knowledge as to the amount of beer that may be drunk, it would be absurd to refuse to recognize that a beer containing as much as 4 per cent. of alcohol is capable of being drunk in such quantities as to produce "intoxication" as defined above. A pint of such beer would contain nearly as much alcohol as an ounce and a half of hundred proof whisky. For the basis of this calculation, see *Mason v. State*, 1 Ga. App. 538, 58 S. E. 139.

We are aware that in *State v. Piche*, 98 Me. 348, 56 Atl. 1052, the court following the Massachusetts case of *Commonwealth v. Bloss*, 116 Mass. 56, denied the right to take judicial cognizance that a beer containing 3 per cent. or more of alcohol is intoxicating; but we are satisfied that if the learned judges there had stopped to consider the fact that they judicially knew how much alcohol "hundred proof" whisky contains (for this is a matter of lexicographical definition, as well as of federal law, and both of these, as well as common knowledge, are legitimate sources of juridic information), and had made the calculation that two pint bottles of beer (certainly not beyond the limit of excessiveness as to potableness) is the alcoholic equivalent of "two highballs" (a thing as to which it would be mawkish for them to deny some familiarity), containing each something over an ounce of hundred proof whisky and a quantum sufficit of mineral water, they might have reached the same conclusion we are announcing.

The evidence demanded the verdict of guilty

rendered in the case, except as to the question of the defendant's sanity, and that, being issuable, was settled by the verdict of the jury.

Judgment affirmed.

McDUFFIE v. OCEAN S. S. CO. (No. 1,162.)  
(Court of Appeals of Georgia. Nov. 10, 1908.  
Rehearing Denied Nov. 27, 1908.)

1. MASTER AND SERVANT (§ 134\*) — DUTY OF MASTER—METHODS OF WORK.

If the nature of the master's work is complex, and involves the presence and co-operation of a number of laborers so situated that independent individual action on their respective parts would render the doing of the work unsafe, the law imposes on the master the duty of organizing and maintaining a system by which the work can be done with reasonable safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 269; Dec. Dig. § 134.\*]

2. MASTER AND SERVANT (§ 185\*) — "FELLOW SERVANTS"—WHO ARE.

If the master chooses to leave to an employé the regulation of matters which he ought to have provided for by specific rules, such employé will be regarded as his representative, and not as a "fellow servant" of the laborers who do his work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385, 419; Dec. Dig. § 185.\*]

3. MASTER AND SERVANT (§ 185\*) — "FELLOW SERVANTS"—WHO ARE.

The courts of this state are now thoroughly committed to the proposition that any employé, regardless of rank or title, who performs with the master's consent a nondelegable duty, is not a "fellow servant" with the laborers who do the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-419; Dec. Dig. § 185.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

4. MASTER AND SERVANT (§ 185\*) — NONDELEGABLE DUTY — ORDERS AS TO SYSTEM OF WORK.

The giving of orders as to the system of work, even though they affect but a single particular piece of work, is a duty of the master, and is to be distinguished from the giving of work signals, which merely aid the successful and satisfactory execution of the labor at hand.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-419; Dec. Dig. § 185.\*]

5. NONSUIT.

The court erred in granting the nonsuit.  
(Syllabus by the Court.)

Error from City Court of Savannah; *Davis Freeman, Judge*.

Action for personal injuries by James McDuffie against the Ocean Steamship Company. Plaintiff was nonsuited, and brings error. Reversed.

McDuffie was employed by the Ocean Steamship Company as one of a gang of laborers engaged in trucking and loading bridge iron from the wharf of the company to certain freight cars. There were a number of similar gangs working at the same

time and place. Piled upon the wharf were eight or nine pieces of the bridge iron, each about 25 feet long and weighing about 2,000 pounds. One piece had been rolled down from the pile and placed on a truck. The plaintiff and a collaborer were in the act of pushing the truck. He had his back to the pile of iron, with his legs spread somewhat apart and braced back. The remaining men of the particular gang, 10 in number, were waiting to load another piece on another truck. George Knox, an employ  of the company, who had general superintendence of the men and of the loading so far as this particular gang was concerned, gave the men in waiting orders to turn the second piece of iron off the pile. On account of the noise on the wharf the plaintiff did not hear this command, but the "header" of the gang, a fellow laborer occupying somewhat the same relationship as is usually denoted by the word "boss," repeating the command, said "Turn," and the iron was thrown down upon the heels and legs of the plaintiff, severely injuring him. Knox's designation in the employment was "shipping clerk." He and the other shipping clerks were under the authority of a chief shipping clerk; and then there was Capt. Savage, who, to adopt the language of one of the witnesses, was "the general boss over the whole business." The petition set out these facts, including the nature of Knox's duties, but not including the statement as to the existence of the chief shipping clerk and the "general boss over the whole business," and alleged that the plaintiff was injured by the negligence of the company through its alter ego, Knox, in that he negligently ordered the second piece of bridge iron to be turned off the pile under the circumstances and while the plaintiff in the conduct of his particular duty was still in range of it. The defendant filed a general demurrer to the petition. It was overruled, and no exceptions were taken. The case proceeded to trial, and, the plaintiff having proved the facts stated above, the court granted a nonsuit, on the ground that Knox was only an ordinary foreman, and not an alter ego or vice principal; that the particular order given by Knox related merely to one of the details of the work, and that it was not given by him in the performance of one of the nondelegable duties of the master; and that the plaintiff's injuries were therefore the result of the negligence of fellow servants alone. The plaintiff excepts to the grant of the nonsuit.

Shelby Myrick and Osborne & Lawrence, for plaintiff in error. Lawton & Cunningham, for defendant in error.

POWELL, J. (after stating the facts as above). 1. In the case of *Brown v. Rome Machine Company* (this day decided) 62 S. E. 720, we have gone at some length into the 62 S.E.—64

rationale of why the law imputes certain assumption and imposes certain duties upon each of the parties to the relationship created by a contract of employment, and it will not be necessary now to elaborate these propositions again. It is sufficient to say that if the nature of the master's work is complex, and involves the presence and co-operation of a large number of men so situated that individual independent action on their respective parts would render the doing of the work unsafe, the law imposes on the master the duty of organizing and maintaining a system of work by which reasonable safety can be secured. Frequently this is accomplished largely through rules and regulations promulgated and enforced by the master. In that event the doing of the work according to the rules and regulations is regarded as mere detail, and those doing it are considered as fellow servants, though some of them are superior servants and others inferior, though some are bosses and others common laborers. Since transitory increases of risk and exposure to danger are reasonably to be anticipated, even under a prudently organized system of work, the servant is usually held to have assumed the risk as to such dangers when they have not occurred through some special negligence of the master.

2. The master may not see fit to promulgate rules and regulations, or the work may present so many and various phases as to make it practically impossible for him to prepare any set of rules and regulations that would be sufficiently adequate and comprehensive to fulfill his duty in respect to creating and maintaining a safe system of work; and in this event he is required, either through himself or some person deputized by him, to give supervision to the work as it is done and to provide by special orders or directions against the exigencies as they arise. "If, therefore, he chooses to leave to an employ  the regulation of matters which he ought to have provided for by special rules, such employ  will be regarded as his representative." *Labatt's Master & Servant*, § 574. If this representative handles an exigency negligently, the negligence is the master's.

3. The courts of this state are now thoroughly committed to the proposition that an employ , in performing one of the nondelegable duties of the master, is not a fellow servant with the other laborers, who are merely doing the work. *Moore v. Dublin Cotton Mills*, 127 Ga. 614, 56 S. E. 839; *Dennis v. Schofield*, 1 Ga. App. 489, 57 S. E. 925; *Van Dyke v. Menlo Fruit Co.*, 129 Ga. 532, 59 S. E. 215. The rank or title of the employ  is immaterial in the ultimate consideration of the question. It is a negligent act chargeable against the master if he, or the agent to whom he has deputed the duty of giving orders relating to the manner in which the work shall be done, gives an order by

which a servant's safety is imperilled. *Labatt's Master & Servant*, § 114; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 263, 58 S. E. 249; *Moore v. Dublin Mills*, supra; *Taylor v. Georgia Marble Co.*, 99 Ga. 517, 27 S. E. 768, 59 Am. St. Rep. 238; *City Council of Augusta v. Owens*, 111 Ga. 464, 36 S. E. 830.

4. Orders as to how the work shall be done, even though it be a particular piece of work, stand upon a different footing from mere work signals, and must be distinguished from them. Orders are generally the act of the master, and the work signals the act of fellow servants. Certain features of the case at bar illustrate this difference. The steamship company, through Knox, gave such an order when he directed that the laborers should proceed with the work of turning the bridge iron without waiting for the plaintiff and his collaborer at the truck to get out of the way; for that was a command relating to the manner in which the work should be done, determining, as a part of the system, the speed, the haste, or lack of haste, in which the work should be carried on. When the "header" or gang boss said "Turn," he gave a work signal, a mere detail in the execution of the work, enabling the men thereby to act in concert.

5. There was enough in the evidence to have warranted the jury in finding that the work was complex and of such a nature that it could not be carried on in reasonable safety without the establishment and maintenance of a system; that, instead of creating a general and comprehensive system based on rules and regulations, the master undertook to secure this safety by the giving of special instructions throughout the progress of the work, and that Knox was delegated with this authority; that in attempting to regulate the speed of the work he gave a negligent order; and that as a result of this order the plaintiff was hurt. This being so, the court erred in granting a nonsuit.

The plaintiff in error also makes the point that the defendant filed a general demurrer to his petition, and that the court overruled it, thereby creating a *res adjudicata* as to the fact that a cause of action is set out, and that as he proved his case as laid the court could not have granted a nonsuit. The overruling of a demurrer is a judgment binding on the parties, concluding the points of law necessarily involved. That does not mean that the plaintiff is absolutely entitled to recover if he proves his case as laid; for a general demurrer should be overruled, in an action based on negligence, when the jury from the facts alleged would be authorized to infer negligence, though they would not be bound to do so. In the light of the principal ruling already made in the foregoing opinion, it will not be necessary for us to discuss the question as to what particular points of

law have been settled by the judgment on the demurrer.

Judgment reversed.

**McDANIEL v. AKRIDGE et al. (two cases).**  
(Nos. 1145, 1152.)

(Court of Appeals of Georgia. Nov. 23, 1908.)  
**HUSBAND AND WIFE (§ 87\*)—WIFE AS SURETY—LIABILITY.**

A married woman cannot make any contract of suretyship binding her separate estate, and therefore, where a married woman is sued as one of the joint makers of a promissory note, and pleads her marriage and suretyship as a defense, and the only conclusion legally deducible from the evidence is that she signed the note as surety, a verdict against her is contrary to law.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 352; Dec. Dig. § 87.\*]

(Syllabus by the Court.)

Error from City Court of Camilla; J. H. Scaife, Judge.

Two separate actions by Albert Akridge against M. S. McDaniel and others. Judgment against all defendants, and defendant M. S. McDaniel brings error. Reversed.

Davis & Merry, for plaintiff in error. Ben-net & Cox, for defendants in error.

HILL, C. J. Albert Akridge brought two suits in the city court of Camilla; one suit being on a promissory note for \$70 made by Jule Bonds, L. E. McDaniel, and M. S. McDaniel, and the other against John Hudson, L. E. McDaniel, and M. S. McDaniel on a promissory note for \$138.45. The two cases were consolidated in the trial court, and the jury found a verdict against all the defendants in both suits for the full amount of each note, principal and interest. Separate motions for a new trial were made by the defendants L. E. McDaniel and M. S. McDaniel, and, being overruled, M. S. McDaniel sued out two separate writs of error to this court.

The questions made in both cases are identical, and the decision of this court thereon will apply to both. Several assignments of error are contained in the motion for a new trial; but the principal defense relied upon by the plaintiff in error, in the court below and in the argument here, is that she signed both notes as surety, and that, as she was a married woman at the time, the notes could not be enforced against her. If her contention in this respect is the only legal conclusion that can be drawn from the evidence, the other questions made by the record are immaterial.

In reference to the making of the notes the plaintiff in the court below testified as follows: "Jule Bonds and John Hudson worked with me during the year 1906, and at the end of the year they owed me the amount

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

represented by these notes. They wanted to leave me; said they could get some one to take up their accounts. I went with them to see Mrs. M. S. McDaniel and L. E. McDaniel, the defendants in this case, and they agreed to give me their notes in settlement of the accounts, and this I agreed to accept; but I understood that Mrs. M. S. McDaniel was one of the principals in the case. She was the party who owned the land and other property, and I understood that the negroes were to work on her place, and she was the only one I was considering in the transaction. L. E. McDaniel, her husband, owned no property, and I did not consider his name worth anything; neither that of Jule Bonds and John Hudson, as they were all insolvent. Mrs. M. S. McDaniel and L. E. McDaniel gave me their notes in settlement of the accounts; the same being the notes sued on. Mrs. M. S. McDaniel was the principal, and not L. E. McDaniel, and there was no understanding that she would sign the notes as security, or anything like that." L. E. McDaniel testified that both he and his wife signed the notes as security for the principal makers, Jule Bonds and John Hudson, and that this fact was known to the holder of the notes at the time that she signed them; that she did not receive any consideration for signing the notes.

The testimony of the plaintiff in the court below clearly and conclusively shows that Mrs. M. S. McDaniel was surety on the notes; and, this being true, the verdict against her is contrary to law. Civ. Code 1895, § 2488. The nature of the instruments sued on and which were signed by the married woman, is not to be determined by the statement of the payee that she did sign the same as principal, and not as surety, nor by the statement that he understood that she signed as principal and not as surety. The real character of the instrument must be determined by the facts. Applying to these facts the definition of Civ. Code 1895, § 2966, of a contract of suretyship, we are clear that the conclusion is inevitable that the notes, in so far as the same apply to the obligation of the plaintiff in error, were contracts of suretyship. The debts for which the notes were given were the debts of Jule Bond and John Hudson, which they owed the holder of the notes. The consideration for the notes was the credit or indulgence granted by the payee therein to the debtors.

But it is insisted that there was a consideration to Mrs. McDaniel, and that this consideration induced her to sign the notes, not as surety, but as principal. The only support for this position is the statement in the evidence of the plaintiff that he understood that the negroes were to work on her place. In her sworn plea she states that it was understood and agreed between her and the plaintiff, at the time of the execu-

tion of the notes and subsequently thereto, that she was not to be liable for the payment of the notes unless the two negroes remained in the employ of her son, R. P. McDaniel, and worked and gathered a crop of corn and cotton, etc., for the year 1906, and that she would not be liable on the notes if the negroes failed to make a sufficient amount out of said crop, over and above making the expenses of the same, to pay the notes. She sets up in her plea that the two negroes utterly failed and refused to carry out the contract and work for her son, and that therefore the consideration inducing her to sign the notes had utterly failed. This question is fully covered by the decision of this court in Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 S. E. 138. Therefore, in any view of the evidence, her relation to the notes, in so far as any present consideration was concerned, was that of a surety, and for this reason the verdict against her is contrary to law, and the court should have granted her a new trial.

Judgment reversed.

#### HUDSON v. WILLIAMS. (No. 1,158.)

(Court of Appeals of Georgia. Nov. 25, 1908.)

##### 1. OFFICERS (§ 110\*)—OFFICIAL ACT—LIMITATION AS TO TIME—"DIRECTORY STATUTE."

"Where a statute specifies a time within which a public officer is to perform an official act regarding the rights of others, it is merely directory as to the time within which the act is to be done, unless from the nature of the act or the phraseology of the statute the designation of the time must be considered a limitation on the power of the officer." (Citing Words and Phrases, vol. 3, pp. 2078, 2079.)

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 178; Dec. Dig. § 110.\*]

##### 2. NEW TRIAL (§ 116\*)—MOTION—TIME OF FILING.

That part of section 7 of the act of 1903 (Acts 1903, p. 176) establishing the city court of Waynesboro, relating to the time when a motion for a new trial must be filed by the defendant and passed upon by the judge of the court, is directory merely in so far as said prescription applies to the act of the judge. It is mandatory as applied to the movant, unless further time for filing the motion for new trial is, for good cause and in his discretion, given by the judge.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 116.\*]

##### 3. NEW TRIAL (§§ 132, 156\*)—DISMISSAL OF MOTION.

There is no merit in the other grounds of the motion to dismiss the motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 316; Dec. Dig. §§ 132, 156.\*]

(Syllabus by the Court.)

Error from City Court of Waynesboro; Phil. P. Johnston, Judge.

Action by Mollie Williams against W. B. Hudson. Judgment for plaintiff, and defendant brings error. Reversed.

Mollie Williams brought suit to foreclose a laborer's lien against W. B. Hudson in the city court of Waynesboro, and obtained a verdict against him in the sum of \$125, and judgment was entered accordingly. The defendant, during the term in which the case was tried, presented his motion for a new trial. The court approved the grounds of the motion when it was presented, and on December 13, 1907, during the term in which it was presented and filed, passed an order reciting the making and filing of the motion and the approval of the grounds therein contained, and ordered that it be heard and determined on the 8th day of January, 1908, in vacation, at Waynesboro, giving the movant the right to amend the motion and to prepare and present for approval a brief of the evidence in the case at any time before the final hearing, whenever the same might be, and providing that, if for any reason the motion was not heard and determined before the beginning of the next term of the court, it should stand on the docket until heard and determined at said term or thereafter, and further providing that the judge might make his approval of the brief of evidence in term or vacation, and "if the hearing of the motion shall be in vacation, and the brief of the evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined." The motion was not heard on the original date fixed for the hearing, to wit, January 8, 1908, and no further action was taken thereon by the judge until February 15, 1908. On this latter date the attorneys for both parties agreed to continue the hearing on the motion until February 19, 1908, and consented to the following order: "Motion for new trial in the above-stated case having been by agreement of counsel assigned for hearing on the 15th day of February, 1908, with the rights of all parties preserved, by consent of counsel for both the plaintiff and defendant, which is approved by the court, it is hereby ordered, considered, and adjudged that said motion for new trial be and the same is hereby continued until the 19th day of February, 1908, with all the rights of the parties preserved."

On February 19, 1908, to which date the hearing of the motion had been continued, as above stated, an agreed brief of the evidence was presented to the court for approval. On this date the motion was sounded for a hearing, and the plaintiff moved to dismiss the same: "(1) Because under the act establishing the city court of Waynesboro (Acts 1903, p. 176, § 7) the judge of said court has no jurisdiction to hear such a motion after the expiration of 10 days from the making of the same, unless the judge, for good cause, shall by order grant further time, and because no such order was made in this case. (2) Be-

cause under the provisions of the city court act the judge of said court has no jurisdiction, on the date of the making of the original motion for new trial in said case, to wit, on December 13, 1907, to pass the order attached to said motion, assigning the same to be heard on the 8th day of January, 1908, being more than 10 days from the making of said motion. No order is necessary under the statute to authorize the court to hear such motion within the 10 days in which the statute requires it to be heard, and if not heard within the time it cannot be heard afterwards without an order granting further time for good cause. That said order of December 13, 1907, was granted without the knowledge or consent of plaintiff or her attorney, and without any good cause. (3) Because under the provisions of said city court act the judge of said court has no authority at all, at any time, to provide by the order of December 13, 1907, attached to said motion, that in the event said motion was not heard on January 8, 1908, the same might be heard and determined 'in vacation as counsel may agree,' and, upon failure to agree, 'then at such time and place as the presiding judge may fix,' etc., and 'if not heard and determined before the beginning of the next term, then the same shall stand on the docket until heard at that term or thereafter.' (4) Because said motion was not heard on January 8, 1908, and no order was then taken granting further time. (5) Because no brief of evidence was filed or approved by the court during the term at which the case was tried, nor within 10 days thereafter, nor on January 8, 1908, and none has yet been filed or approved, and the court has no authority to approve one now." The court refused to approve the brief of evidence presented for approval on February 19, 1908, because of the motion to dismiss, and on March 21, 1908, passed the following order: "It is ordered and adjudged by the court that said motion to dismiss be sustained, and said motion for new trial is hereby dismissed."

The defendant excepted to the judgment of dismissal, and makes the following specific assignments of error: "(a) That said court erred in dismissing the motion for new trial and refusing to approve the brief of evidence tendered at the hearing, under the various orders and consent of counsel as above set forth. (b) That the original order passed by the court on the 18th of December, 1907, was sufficient in law, and authorized the court to hear and determine said motion according to the terms of said order. (c) That, if the court committed error in the original order designating the date of the hearing of said motion, said order was not void, and, if erroneous, should have been taken advantage of by exceptions. The order was signed by the court as presented by counsel for movant, without his attention being called to date fixed in the order."

Lawson & Scales, for plaintiff in error. C. B. Garlick and Brinson & Davis, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. The only material question to be decided is as to the validity of the original order granted on the motion for a new trial during the term at which the case was tried, dated December 13, 1907. It is insisted that this order was invalid, because it does not comply with the provisions of the act creating the city court of Waynesboro, relating to motions for new trials. This act provides that, "whenever a case is heard at either a regular or special session of said court and defendant desires to move for a new trial, such motion must be made within two days after the adjournment of the session and passed upon by the judge of the city court within ten days after the motion is filed, and not afterwards, unless for good cause further time may, by order, be granted in the discretion of the judge of the city court." Acts 1903, p. 176, § 7. The phraseology of this act is peculiar and somewhat involved. The provision quoted applies by its terms only where "defendant desires to move for a new trial." A plaintiff who loses in the trial court and desires to move for a new trial must do so under the general law on the subject. The words of positive prohibition used in the statute have reference to the act of the movant. He must make the motion for a new trial "within two days after the adjournment of the session, \* \* \* and not afterwards, unless for good cause further time may, by order, be granted in the discretion of the judge." The statute is mandatory, as applicable to the movant, and he must file his motion within the prescribed two days after the adjournment of the session, unless, in the discretion of the court, further time be allowed him for that purpose.

We do not think these words of absolute prohibition apply to the judicial act of the judge. The language of the act, which requires the judge to pass upon the motion for new trial "within ten days after the motion is filed," is directory, and not imperative. It would be a great injustice to hold that, notwithstanding the movant had fully complied with the act in making and filing his motion, he should nevertheless be deprived of his right by the failure of the judge to perform his duty in passing upon the motion within the 10 days. Suppose the judge does not pass upon the motion within the 10 days; what then? Shall the movant be put to the expense of compelling him by mandamus to do so, or would the failure of the judge to discharge the duty required of him be cause for impeachment? Either remedy would be inadequate so far as the movant is concerned. The statute relating to the duty of the judge, construed with reference to the rights of the parties, must be directory, to avoid serious and remediless injustice. The prin-

ciple is well settled that, when a statute specifies a time within which a public officer is to perform an official act regarding the rights of others, it is merely directory as to the time within which the act is to be done, unless from the nature of the act to be performed, or from the phraseology of the statute, the designation of the time must be considered a limitation on the power of the officer. *People v. Allen*, 6 Wend. (N. Y.) 486; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131; *Walker v. Chapman*, 22 Ala. 116. "Where the words of a statute relate to the manner in which power or jurisdiction vested in an officer is to be exercised, they must be construed to be directory." *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. 704; *State v. Connor*, 86 Tex. 183, 23 S. W. 1103; *People v. Cook*, 8 N. Y. 87, 59 Am. Dec. 451; 3 Words and Phrases Judicially Defined, 2078.

Statutory prescriptions in regard to the time, form, and mode of proceedings by public functionaries are generally directory, as they are not of the essence of the thing to be done. 28 Amer. & Eng. Enc. of Law (2d Ed.) 689; *Justices v. House*, 20 Ga. 328; *Wise v. State*, 34 Ga. 348; *Central Bank v. Kendrick*, *Dudley* (Ga.) 166. The statute does not impose any penalty upon the judge for a non-compliance with its terms, nor does it declare that the proceedings for new trial shall be null and void unless passed upon within the 10 days from the filing of the motion. We conclude, not only from the phraseology of the statute, but from authority, that that part of section 7 of the act of 1903 (Acts 1903, p. 176), establishing the city court of Waynesboro, which requires a motion for a new trial to be passed upon by the judge within 10 days from the filing of the motion, is directory, and a failure on the part of the judge to comply with it would at most be an irregularity, and would not deprive the court of jurisdiction to subsequently pass upon the motion. We are satisfied with the correctness of the above opinion; but if the words of the statute, "unless for good cause further time may, by order, be granted in the discretion of the judge," should be held to apply to the judicial act of passing upon the motion, as well as to the act of the movant in filing the motion, then the time when the judge shall pass upon the motion is clearly left to his discretion, and, if he fixes the time for passing upon the motion beyond the prescribed ten days, he will be deemed to have had "good cause" for so doing. If a public officer has any discretion at all in connection with the time when he is to perform a public act, the element of imperativeness is excluded.

2. There is no merit in the motion to dismiss because the motion was not heard on January 8, 1908, and no order was then taken granting further time. The order of December 13, 1907, provided that if the motion was not heard on January 8, 1908, it could be heard later by consent of counsel, and the or-

der of February 15, 1908, recited that it was assigned to that date by agreement of counsel, and on February 15th the court, by agreement of counsel, again postponed the hearing of the motion to February 19, 1908.

3. Nor do we think the motion to dismiss because there was no brief of evidence filed and approved by the court during the term at which the case was tried, nor within 10 days thereafter, nor on January 8, 1908, or since, is meritorious. The order of December 13, 1907, gave the movant until the final hearing to file an approved brief of the evidence. On February 19th an agreed brief of the evidence was presented to the judge, and he refused to approve it because he declined to pass upon the motion, and dismissed it. Refusal of the judge to approve the brief when thus presented was no ground for dismissing the motion. The movant had, under the original order, until the final hearing of the motion to present a brief of the evidence and have the same approved and filed. The erroneous ruling of the judge in dismissing the motion made it unnecessary to approve the brief. Indeed, if the judge had no jurisdiction to hear the motion, he had no jurisdiction to approve the brief of evidence. Civ. Code 1895, § 5484; Gould v. Johnston, 123 Ga. 768, 51 S. E. 608, and citations.

Judgment reversed.

#### REAMS v. THOMPSON. (No. 1345.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

##### 1. EVIDENCE (§ 441\*) — PAROL EVIDENCE — WRITTEN CONTRACT.

The express terms of a written instrument are not to be varied by any alleged parol contemporaneous agreement, whether that agreement be based on a consideration or not.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

##### 2. EVIDENCE (§ 445\*)—PAROL EVIDENCE—SUBSEQUENT AGREEMENT.

While in some cases the terms of a written contract may be varied by a subsequent parol contract between the same parties; yet before an alleged subsequent agreement can be given the effect of changing or abrogating a previous written contract it must possess the elements and formalities essential to the creation of a valid contract as to the particular subject-matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2062-2065; Dec. Dig. § 445.\*]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. A. Thompson against L. D. Reams. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Thompson sued Mrs. Reams on a series of notes, which on their faces were negotiable and which according to their terms were past due. In the notes it is expressly stipulated that as to the maturity of the notes time is of the essence, and that if as

many as three of the notes should be due and remain unpaid for as much as 30 days the entire series should therefrom become due at once. Mrs. Reams filed a plea in which she recited a parol contemporaneous agreement, made on an alleged consideration of \$150, in substance that the notes should not be negotiable, that time should not be of the essence as to the maturity of the notes, and that the plaintiff would give her full and ample time in which to resell or otherwise dispose of the real estate for the purchase price of which the notes were given. She further pleaded that subsequently by parol agreement the plaintiff agreed with her to accept in substitution for her in the land trade another purchaser for the property and to allow him to assume the indebtedness, he executing his notes in the place of her notes, but that when the time came to close the trade the plaintiff refused to complete the arrangement and to abide by her agreement in this respect.

I. Roland Alston, for plaintiff in error.  
Owens Johnson and H. L. Culberson, for defendant in error.

POWELL, J. (after stating the facts as above). 1. The plea, so far as it related to the alleged agreement made at the time the notes were executed, was a direct, unmasked attempt to vary the express terms of a written contract by a parol contemporaneous agreement. The fact that there was consideration for this parol agreement does not render the rule forbidding such contradiction of a written contract any the less applicable. The express terms of a written instrument are not to be varied by proof of a parol contemporaneous contract, any more than they are to be varied by proof of a parol contemporaneous nudum pactum. Jones v. Taylor, 5 Ga. App. —, 62 S. E. 992. The cases cited by counsel for plaintiff in error are easily distinguishable. Denham v. Walker, 93 Ga. 501, 21 S. E. 102, related to an executed parol subsequent agreement by which the terms of the original contract had been changed. Dooley v. Gorman, 104 Ga. 767, 31 S. E. 203, was based on the proposition that the plaintiff procured the contract by fraud, and did not involve the question here decided.

2. The plea, so far as it attempted to set up that subsequently to the execution of the written contract the plaintiff agreed to accept another as a purchaser of the land in substitution for the defendant, is bad, if for no other reason, in that the alleged agreement related to lands and an interest therein and was within the statute of frauds. No such performance was shown as to fulfill the requirements of any of the exceptions to that statute. See, also, Patterson v. Ramspeck, 81 Ga. 808 (4), 10 S. E. 390.

Judgment affirmed.

## COHEN v. ALDRICH. (No. 1,347.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

## EXEMPTIONS (§ 48\*) — PERSONS ENTITLED — LABORER—STENOGRAPHER.

The wages of a person whose duty under his employment is to act as a stenographer to the assistant manager of a manufacturing corporation, to receive by dictation and transcribe his letters, to take care of letters pertaining to his office, and to see that the same are properly addressed and mailed, and generally to perform the duties of amanuensis and stenographer in the office, whose salary is payable semimonthly, there being no time fixed for the termination of his contract of service, are not subject to process of garnishment.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 69; Dec. Dig. § 48.\*]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by C. D. Cohen in a justice's court against R. M. Aldrich on a note; garnishment issuing against the Southern Cotton Oil Company. The justice found in favor of the garnishment, but a superior court, on certiorari, found against it, and Cohen brings error. Affirmed.

Alexander & Edwards, for plaintiff in error. Cann, Barrow & McIntire, for defendant in error.

POWELL, J. According to the record, Aldrich, the exemption of whose wages from garnishment is the subject-matter of the present controversy, "at the time of suing out such summons of garnishment was employed by the Southern Cotton Oil Company at a salary of \$75 per month, said salary being paid semimonthly, there being no time fixed for the termination of the contract of service, as stenographer for C. D. Jordan, assistant manager for said company, his duties being to receive by dictation and transcribe for said manager his letters, to take care of the letters pertaining to said office, and see that the same were properly addressed and mailed, and generally to perform the duties of amanuensis or stenographer for said assistant manager." In *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778, 12 Am. St. Rep. 274, to which reference is hereinafter made, the agreed statement of facts was as follows: "Andrew Anderson, Jr., was at the time of the suing out of the garnishment process and is now employed at a salary of \$125 a month, there being no time fixed for the termination of the contract of service, as private secretary and stenographer to the president of the Central Railroad & Banking Company of Georgia; \* \* \* his duties being to receive by dictation and transcribe for the president his letters, and such other papers and documents as he may desire, to take care of the papers and records in his office, travel with him as secretary when required, to receive and forward the president's mail

when left in the office in the absence of the president, and generally to perform the duties of an amanuensis, stenographer, and private secretary, including the keeping of such books and statements as would generally be kept in the office of the president of a railroad company." If we were authorized to exercise a free intellectual judgment as to the matter, instead of being bound by the precedents, we would not hesitate to hold that Aldrich was not a manual laborer. It is our personal view that *Abrahams v. Anderson* was incorrectly decided. We are bound by the precedents, and the *Abrahams Case* clearly controls this one.

Judge Charlton, whose decision is under review, has prepared a charming opinion which appears in the record. It is worth reproduction, and will be quoted in lieu of any further discussion of the question on our part. It is as follows:

"C. D. Cohen brought his action in the justice court for the Third district, G. M., against R. M. Aldrich to recover \$35, with interest, alleged to be due on a promissory note, garnishment issuing against the Southern Cotton Oil Company. On the return day the defendant claimed exemption from garnishment on the ground that he was a stenographer, and therefore a laborer. It appears from an agreed statement of facts that Aldrich was employed by the Cotton Oil Company at a salary of \$75 a month, payable semimonthly, no time being fixed for the termination of the contract of service; that he was a stenographer to the assistant manager of the company, taking letters from dictation of that official and transcribing them, taking care of letters pertaining to the office, and seeing that the same were properly addressed and mailed, and generally performing the duties of amanuensis and stenographer to that person. In his answer the justice says he understood from the plaintiff's attorney that, 'in addition to the agreement of facts set out in the fifth paragraph of said petition for certiorari [which are those just recited], it was agreed that stenography is a skillful employment, and the art of shorthand writing is acquired as the result of special study and training, and proficiency in it is the result of steady practice and experience. These facts were used by plaintiff's attorney in argument without objection that they were not agreed to.' A traverse was filed to this return, and the jury trying the same found generally in favor of the traverse, apparently covering this point, and on this subject the argument is now addressed to the judicial cognizance of the court. It appears that at the appropriate time Aldrich made the point 'that he has been employed by the garnishee above named as a stenographer, that he is a day laborer, and that as such his wages are exempt from the process of garnishment.' The justice was not impressed by



this contention as a sound proposition of law under the facts, and found the wages subject. The certiorari results, impressively reinforced by an affidavit in forma pauperis.

"Is a stenographer—one who receives letters and transcribes the same, preserves office records, addresses and mails letters, and performs generally the duties of an amanuensis to the assistant manager of a corporation—the kind of laborer whose wages are exempt under the statute? Or are the duties and the occupation so distinctively mental as to exclude the fair inference of manual work? In time our Supreme Court has held that locomotive engineers, street railroad conductors and motormen, clerks in retail stores, railroad clerks, bookkeepers, public school teachers, farm hands, painters, bartenders, are laborers. In the case of *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778, 12 Am. St. Rep. 274, practically the identical question now before the court came up for determination. *Anderson*, whose wages were sought to be subjected, received \$125 a month; no time being fixed for the termination of the contract. He was private secretary and stenographer to the president of a railroad company. It was his duty to receive and transcribe letters and other papers, to take care of the papers and documents as secretary, to receive and forward mail, and generally to perform the duties of an amanuensis, secretary, and stenographer, including the keeping of such books as are ordinarily kept in a railroad president's office. The similarity in kind and scope of the duties of *Anderson* and those of the plaintiff in certiorari are manifest; those of *Anderson*, if there be any substantial difference, suggesting more individual latitude and discretion. Manifestly I might stop at this point, since the *Anderson* Case, being directly in point and un-reversed, justifies me in concluding that the plaintiff in certiorari is such a laborer as the law contemplates when garnishment exemption is invoked.

"But it is urged that stenography is an 'art,' a skillful employment, the result of special study and training, and that proficiency in it is the result of steady practice and experience. This is true of everything the result of which, when done, commends itself. Proficiency comes to the bricklayer and carpenter and blacksmith from steady practice and experience, and, unless they specially study and train, the work they do is not apt to appeal to the unfortunate who has to pay for it. Special study and training and steady practice and experience do not of themselves make arts. Under our garnishment statute the true distinction is: Does mental labor or manual labor predominate? In the case of *Prather v. Pantone*, 125 Ga. 808, 54 S. E. 663, the defendant was a builder of cabs and pilots for locomotives, but he boldly proclaimed himself 'a skilled mechanic

and an expert,' and said that 'holding his job was as much dependent upon his mental ability as upon his ability to perform manual labor, the one being about as important as the other.' While it is true that stenography tends to cultivate the memory, the memory is not an intellectual faculty. Fine memories usually attend upon great minds, but the converse is not necessarily true. There have been marvelous memories unilluminated by intelligence. Blind Tom's ears received in perfect integrity musical sounds which his fingers reproduced upon the piano, but he was practically an idiot, and no one ever confounded him with a true musician. The incidencies of mathematical prodigies without minds are numerous. For the purposes of the statute in question, the real test, after all, to be ascertained from the decisions, is independence of thought, discretion, the exercise of choice, initiative, decision, mental responsibility. The motorman is much given to manual exertion—one hand on the controller, the other on the brake, his foot on the gong—and yet he is frequently called upon to exercise his mind in careful thought, the judiciousness of which may involve life and death; but because the dominancy of his work is physical he is classed as a laborer under our garnishment statute. This is eminently true of most of the callings which the Supreme Court has exempted from the operation of the garnishment law. Wherein does the stenographer differ?

"If we are to take the *Prather* Case, *supra*, as a guide, skillfulness does not render the salary subject. One may be an expert—the highest expression of that particular line of occupation—and still be within the protection of the statute. The law encourages proficiency and skill. It does not fine a man for cultivating them. That a stenographer is skilled and trained cannot affect the nature of the work he does, although it does affect its character. After acquiring the trade, the test is the method of carrying it on. It is difficult to conceive of anything more thoroughly manual than the work of a stenographer. Receiving the sounds from the lips of another, he registers what he hears and reproduces what he receives. He exercises no independence of thought, no initiative, no discretion. The test of his efficiency is his absolute acceptance of what is given him and its return unchanged. If his employer indulges in the pastime of murdering the king's English, he must become a 'particeps criminis,' and join in the assassination. So pronouncedly are the physical faculties involved in stenography that there comes a time when the hand refuses to work, although the mental faculties may be entirely clear. It is pre-eminently manual labor, work of the hand. I have heard it said that in the efficient corps which records the proceedings of Congress individuals are not permitted to take down what is said be-

yond a limited number of minutes, the hand becoming unreliable, although the mind may be in definite working order. I am not without corroborating experience in this direction, having enjoyed the privilege of being in my youth the reporter of this circuit. If to the plaintiff's duties were added that of transcribing on the typewriter, surely no one who has gone through with that back-breaking experience will hesitate to range it in the category of hard physical labor. Whilst the tendency on the part of the Supreme Court has been to treat each case upon its individual merit, and whilst the *Oliver Case* in 98 Georgia [Oliver v. Macon Hardware Company, 98 Ga. 249, 25 S. E. 406, 58 Am. St. Rep. 300] would seem designed to curb the effect of previous liberal construction, the fact remains that in this extensive and useful calling, pursued by many breadwinners under hard conditions and upon scant remuneration, the dominant part of the work is physical. Just when a person ceases to be a laborer and crosses the shadowy line of mental vocation within our garnishment statute will always be difficult of determination. But Aldrich comes within the ruling of the *Anderson Case*, and his wages should be exempt. His calling, which has been adorned by the delightful meanderings of the ubiquitous Pepys, has in time attracted many minds. Those who love the good things of literature will not fail to recall those strenuous times when Mr. Tommy Traddles, with the assistance of Enfield's Speaker or a volume of parliamentary debates, standing by the table, with his finger on the page to keep the place, and his right arm flourishing above his head, like Mr. Pitt, Mr. Fox, Mr. Sheridan, Mr. Burke, Lord Castlereagh, Viscount Sidmouth, or Mr. Caning, worked himself into the most violent heats and delivered the most withering denunciations on the profligacy and corruption of the opposition, as represented by Aunt Betsy and Mr. Dick, until the latter began to be afraid that he had really done something tending to the annihilation of the British Constitution and the ruin of the country; whilst David Copperfield followed him on paper with what might as well have been 'Chinese inscriptions on an immense collection of tea chests, or the golden characters on all the great red and green bottles in the chemists' shops.' David summed up: 'I really did work, as the common expression, is like a "cart horse."'

"Between the conflicting view of the Supreme Court and the justice of the third militia district, with some illumination from my own cognizance, judicial and otherwise, I am constrained to follow the *Anderson Case* and sustain the certiorari. Let an order be taken to that effect."

Judgment affirmed.

DUGGAN et al. v. MONK. (No. 1,129.)  
(Court of Appeals of Georgia. Nov. 23, 1908.)

1. EXCEPTIONS, BILL OF (§ 8\*)—SUFFICIENCY OF RECITALS.

There is no merit in the motion to dismiss the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 8.\*]

2. PRINCIPAL AND SURETY (§ 143\*)—DEFENSES—RIGHTS OF SURETIES.

In a suit on a promissory note against three defendants, a plea by two of the defendants that they were sureties on the note, and setting up as a defense a total failure of the consideration of the note as to the principal, was improperly stricken by the court.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 392; Dec. Dig. § 143.\*]

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Action by S. S. Monk against W. A. Keel and others. Judgment for plaintiff, and defendants bring error. Reversed.

S. S. Monk brought suit against W. A. Keel, B. J. Duggan, and R. L. Gay on a promissory note, a copy of which is attached to the petition, as follows: "Georgia, Tift County. On or by the first day of October, 1906, we promise to pay to Monk & Mathis, or order, the sum of ninety dollars, with interest from date at the rate of eight per cent. per annum, payable at the Bank of Tifton, for the purchase money of the following described property, to wit, one sorrel horse with blaze in face, about twelve years old. And to secure the payment of the aforesaid note, we hereby mortgage to and create a lien in favor of Monk & Mathis upon the following described property, to wit: [No property is described.] We further covenant and agree that, if this debt is not paid promptly at the maturity of this note, to pay in addition to principal and interest the further sum of ten per cent. on principal and interest as attorneys' fees," etc., dated November 15, 1905, and executed by all three of the defendants under seal. The defendant Keel filed no defense. The other two defendants filed an answer in which they alleged that they were sureties only on the note, Keel being the principal; that the consideration of the note was the purchase by Keel from the payee of "one small horse with blaze face, about twelve years old," that there was a total failure of consideration, in that the horse was purchased by Keel for a farm horse to be used on his farm; and that the horse at the time the note was executed "had been stimulated and was bloated on some kind of chemical unknown to the defendants," and, when the horse was put to work soon after it was bought, "it began to perish away" and became so weak that it could do no work on the farm for which it was purchased, and was of no value. They alleged,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

further, that the note in question created a mortgage or lien on the horse, and should have been recorded, and that the failure to record it increased their risk as sureties, and therefore they were discharged from all liability on the note. The plaintiff moved to strike the pleas, on the ground that no valid defense was set up. The court sustained the motion and struck the pleas, and to this ruling exception was taken. The bill of exceptions recites that it was admitted by both the plaintiff and the defendants that Keel was principal and Duggan and Gay were sureties, and that the principal filed no defense. The note not being indorsed, the court allowed an amendment to the petition that the suit proceed in the name of "Monk & Mathis, for the use of S. S. Monk," and thereupon directed a verdict for the plaintiff for the full amount of the note with interest and attorney's fees, and judgment was entered accordingly. The direction of a verdict for the plaintiff is excepted to in the following language: "The court directed a verdict for the plaintiff, to which ruling the defendants B. J. Duggan and R. L. Gay then and there excepted and now excepts, and assigns the same as error." When the case was called in this court, a motion was made to dismiss the bill of exceptions on the following ground: "That plaintiff in error does not in said bill of exceptions assign error on the verdict and judgment rendered in said case, though it appeared in said bill of exceptions that final verdict and judgment were rendered.

J. B. Murrow and J. J. Murray, for plaintiffs in error. Smith & Foy, for defendant in error.

HILL, C. J. (after stating the facts as above). 1. There is no merit in the motion to dismiss the bill of exceptions. It appears from the recitals in the bill of exceptions that there is a direct and specific exception and assignment of error to the ruling of the court in directing a verdict for the plaintiff, as well as an exception and an assignment of error to the ruling of the court in striking the answers. This is sufficient. *Lyndon v. Georgia Ry. & Electric Co.*, 129 Ga. 353, 58 S. E. 1047.

2. Plaintiffs in error in the brief rely only upon the assignment of error in the judgment striking their plea of suretyship and the defense set up by them as sureties that the consideration given for the note had totally failed. We think the court erred in striking this plea. While the fact of suretyship did not appear on the face of the note, yet the defendants were clearly entitled to show that they were only sureties. *Civ. Code 1895, § 2969; Whitley v. Hudson*, 114 Ga. 668 (3), 40 S. E. 838. We also think that the plea filed by the sureties setting up a total failure of consideration to the principal

was, if established by proof, a good defense to a suit on the note. The plea setting up a total failure of consideration is not a personal plea which can only be made by the principal in a contract, but is a defense that the surety as well as the principal can set up, and, where the contract between the principal and creditor fails by reason of the want of consideration, the collateral suretyship contract also fails. 1 *Brandt on Suretyship*, § 465; *Stearns on Suretyship*, 148.

The judgment of the court in striking the plea of the defendants that they were sureties, and that there was a total failure of consideration of the note as to the principal and in directing a verdict for the plaintiff on the note, was erroneous.

Judgment reversed.

#### HUBBARD v. MACON RY. & LIGHT CO. (No. 1,322.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

##### 1. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—PRESUMPTION OF NEGLIGENCE.

In a case where an employé is hurt by steam from a stationary engine in the power plant of an electric street railway company blowing through a leaky valve in the lubricator of a pump connected with the engine, while he was attempting to oil the pump, section 2321. *Civ. Code 1895*, so far as it relates to the presumption of negligence, is not applicable.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 265.\*]

##### 2. MASTER AND SERVANT (§ 217\*)—LATENT DEFECTS—KNOWLEDGE OF MASTER.

Except where the injured employé is an inspector, the master's means of knowledge of latent defects in the machinery furnished are primarily to be considered as greater than those of the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 217.\*]

##### 3. MASTER AND SERVANT (§ 217\*)—LATENT DEFECTS—INSPECTION BY SERVANT.

The duty of inspecting for defects which would not be disclosed by superficial observation is not primarily imposed upon a servant employed to operate a machine, or to see that it is operated.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 217.\*]

##### 4. MASTER AND SERVANT (§ 236\*)—ACTION FOR INJURIES—NONSUIT.

The plaintiff clearly proved by circumstantial evidence that he was injured by a latent defect in the machine he was operating. The master's negligence and his own diligence were issuable; and the court erred in granting a nonsuit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1017; Dec. Dig. § 236.\*]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by W. J. Hubbard against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hubbard was employed by the street railway company as assistant engineer, and at the time his cause of action arose he was acting as engineer. His duties related to the operation of a stationary engine in the power plant of the defendant company. A part of the machinery was a pump to which was attached a lubricator. It became Hubbard's duty to oil it. In his petition he alleges that, as he opened the cap in the ordinary manner to pour in the oil, steam, water and hot oil spurted forth, scalding his face and burning out one of his ear drums; that this was occasioned by the fact that the valve in the lubricator which should have held the steam back was defective and leaked. The trial resulted in a nonsuit, to which Hubbard excepts.

Napier & Maynard, for plaintiff in error.  
Roland Ellis, for defendant in error.

POWELL, J. (after stating the facts as above). 1. The plaintiff contends that this is a case to which section 2321 of the Civil Code of 1895, which raises a presumption of negligence against railroad companies when damage is done "by the running of the locomotive or cars or other machinery," is applicable. Considering the origin of the rule, we do not think so. *Atlanta Ry. Co. v. Johnson*, 120 Ga. 908, 48 S. E. 389; *Ga. R. Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; *Savh. Ry. Co. v. Flaherty*, 110 Ga. 335, 35 S. E. 677. Compare and examine on the common-law rule of which the Georgia rule is a declaration and an extension the following cases and notes thereto: *Farish v. Reigle*, 11 Grat. (Va.) 697, 62 Am. Dec. 666; *Smith v. St. Paul Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Memphis Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71.

2. We think, however, the court erred in awarding a nonsuit. The master in employing this servant and in putting him to work at this machine by implication of law warranted to him that the machine contained no latent defect undisclosed, so far as the master knew or by reasonable care could discover, and that he would use reasonable care to keep it in that condition; hence it became the master's nondelegable duty to use ordinary care to see that the machine remained free from such defects, and to have reasonable inspections made to prevent them from arising. *Brown v. Rome Machine Works*, 5 Ga. App. —, 62 S. E. 720. It is likewise elementary that, if the servant knew, or by reasonable diligence could have known, of the defect, he is conclusively presumed to have assumed the risk of injury from it. The defect in the present case was latent. It was not discoverable by superficial observation. The servant did not know of the defect in the valve; and, since he also made it appear from the proof that the pump was not usually run while he was on duty, he gave a reasonable explanation as to why he had not discovered the defect. "As a gen-

eral rule, a servant is under no obligation to inspect the appliances about which he works, or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation." *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787 (2), 49 S. E. 788; *Duke v. Bibb Mfg. Co.*, 120 Ga. 1074, 48 S. E. 408; *Southern Cotton Oil Co. v. Gladman*, 1 Ga. App. 262, 58 S. E. 249. The duty of inspecting for defects, however, is one of the absolute duties of the master. Therefore primarily the servant's means of knowledge of latent defects are not to be considered as equal to those of the master.

3. The exception to this rule arises when the injured servant himself is employed as an inspector. *Lucas v. Southern Ry. Co.*, 1 Ga. App. 810, 57 S. E. 1041; *Green v. Babcock Co.*, 130 Ga. 469, 60 S. E. 1062. The duty of general inspection is not primarily included in the duty of operating or directing the operation of a machine or even in the duty of repairing such defects as might from time to time be disclosed. *Green v. Babcock Co.*, supra. The plaintiff directly and unequivocally testified that it had not been made his duty to inspect the machine for defects. The court erroneously excluded testimony that this duty had been imposed upon another named employé; but, even with the record silent as to whom the master had placed this duty upon, the law still left it resting upon the master, for this duty is nondelegable in the sense that the master cannot relieve himself of responsibility for its nonperformance by imposing it upon an employé.

4. It is contended by the defendant that the plaintiff did not show the existence of the defect. We think he made a prima facie case as to this. It is true that he never saw the valve before or after the time of his injury. He knew, however, the general construction of the machinery. He exhibited a diagram of it to the jury showing the relation of the valve and of the other parts. From an examination of the diagram it seems impossible that the steam could have come through the valve, when it was closed, as the plaintiff testified it was, so as to blow the contents of the lubricator into the plaintiff's face if it had not contained the defect of being leaky. Without frightening any of the Brethren of the profession by saying that it was a case of *res ipsa loquitur*, for this phrase seems to be a bug-a-boo to some members of the bar, we will say that the circumstances were such as clearly to prove, according to all the rules of circumstantial evidence, that the valve contained a leak. As the plaintiff directly testified, "there was no other way for it [the steam] to get in there." Even in pleading it is not necessary that the negligent deficiency be described in structural terms. A deficiency may be sufficiently alleged by stating that the particular contrivance was so constructed or maintained that it gave forth a result which

it was designed to prevent, and which such contrivances, as they are usually constructed and maintained, do prevent. *Atlantic Coast Line R. Co. v. Davis & Brandon* (this day decided), 62 S. E. 1022; *Ga. Ry. & E. Co. v. Reeves*, 123 Ga. 702 (3), 51 S. E. 610.

The plaintiff proved a prima facie case, and the grant of a nonsuit was erroneous. Judgment reversed.

**SMITH v. ATLANTIC COAST LINE R. CO.**  
(No. 1,310.)

(Court of Appeals of Georgia. Nov. 23, 1906.)

**1. CARRIERS (§ 316\*) — OPERATION OF RAILROAD — DAMAGES — PRESUMPTIONS AND BURDEN OF PROOF.**

The presumption of negligence does not arise against a railway company for damages done to person or property until it appears that the proximate cause of the injury was occasioned through the operation of its "locomotives, cars, or other machinery," or by the act or misfeasance of some person in its employment and service.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.\*]

**2. CARRIERS (§ 320\*)—INJURY TO INTENDING PASSENGER — EVIDENCE — QUESTION FOR JURY.**

Independently of the presumption of negligence, the plaintiff in the present action made sufficient proof of his case to require a submission of it to the jury, and it was erroneous for the court to grant a nonsuit.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.\*]

(Syllabus by the Court.)

Error from City Court of Waycross; Jno. T. Myers, Judge.

Action by James M. Smith for personal injuries against the Atlantic Coast Line Railroad Company. Plaintiff was nonsuited, and brings error. Reversed.

On November 21, 1905, the plaintiff, while standing in front of the defendant's passenger station at Waycross, was severely injured by the explosion of two railway torpedoes run over by a passing locomotive. He was intending to take a train for Jacksonville, Fla., which according to the published schedule left Waycross at 6:20 a. m., but which he thought left at 6 o'clock. He had spent the night sitting up with a sick friend near the station. At about 4:30 o'clock he left the friend's house, and walked across to the ticket office, and, finding that closed, he went into the restaurant connected with the station, ate a sandwich and drank a cup of coffee; this taking about 15 minutes. He went out to the front of the building, upon a gravel walkway, over which passengers walked from the waiting rooms to the ticket office, restaurant, etc. He had started to the white waiting room, but stopped on the walkway and engaged in conversation with another

gentleman. While they were thus standing talking, in front of the waiting room, about seven or eight feet from the tracks, an engine passed and exploded two torpedoes immediately in front of them. The explosion made considerable noise, and a piece of the metal covering in which the explosive substance was contained struck the plaintiff, one piece piercing his eye, another making a wound upon his stomach, and still another going into his leg. The torpedoes are made of dynamite or other explosive substance contained in a metal covering about 1½ inches wide and about 2 inches long, with tin projections on either side, so that the torpedoes may be fastened to the top of the rail by clamping the tin projections under the sides of the rail. They are used as danger signals in train service. Under railway rules two torpedoes indicate one thing, while one torpedo indicates another in stopping and flagging trains. They were furnished to engineers and firemen at supply stations located at different points; one of these supply stations being located at Waycross. It was against the rules of the company to put them out in the yards around stations, though they were occasionally exploded there. The yards of the defendant company at Waycross are extensive and contain a large number of tracks around and adjacent to its passenger station. It has lines of railroad coming into this station from five different directions—from Savannah, Brunswick, Jacksonville, Montgomery, and Albany—and it also handles trains from a branch of the Atlanta, Birmingham & Atlantic Railroad through the same yards. The restaurant and usually the waiting rooms are kept open all night. The defendant's yardmaster, who testified as a witness for the plaintiff, stated that he was on duty that night handling trains in the yards; that there was no necessity for putting down torpedoes in the yards as other means of signaling were arranged for there; that, if one of the employes had desired to put torpedoes down, it might have been done without asking him, but that he did not know of any being placed in the yard by any of the employes that night; that, so far as he knew, torpedoes might be obtained by other than railway companies by purchase or otherwise; that sometimes in transporting torpedoes from the supply rooms to the trains employes carried them in their pockets, and they might be dropped occasionally, though he did not know of any being lost thus; that it would be improbable that a locomotive could explode torpedoes unless they were on top of the rail. The flange of the engine wheel would hardly explode one lying on the ground near the rail. These facts appearing in the testimony, the court granted a nonsuit on motion of the defendant.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wilson, Bennet & Lambdin and Crawley & Crawley, for plaintiff in error. Bennet & Conyers and S. W. Hitch, for defendant in error.

POWELL, J. (after stating the facts as above). 1. Much of the discussion of the case by counsel has been upon the point as to whether the presumption of negligence attached to the defendant upon proof that the plaintiff was injured by the explosion of a torpedo run over by the engine. Civ. Code 1895, § 2321, provides for a presumption of negligence against railway companies where the damage is done "by the running of the locomotives or cars or other machinery or \* \* \* by any person in the employment and service of such companies." The presumption relates only to the particular acts of negligence set out in the petition. In this case the proximate cause of the injury is not alleged to have been any negligence in the operation of the locomotives. The word "running," as used in this code section, does not refer so much to actual motion, as it does to the general operation of the things named in the statute. *Ga. Ry. & Elec. Co. v. Reeves*, 123 Ga. 705, 51 S. E. 610; *S. F. & W. Ry. Co. v. Slater*, 92 Ga. 391, 17 S. E. 750. See *Hubbard v. Macon Ry. Co.* (this day decided) 62 S. E. 1018, and cases cited. The negligent presence of the explosives in the front of the passenger station where the presence of persons might be expected is the gist of the present action. If the torpedoes were placed there by outsiders, it was not a case for the operation of the statutory presumption. If they were placed or dropped there by employes, it was such a case. The burden of proving that they were placed there by an employe was therefore upon the plaintiff; and we suppose that the trial judge granted the nonsuit on the theory that the plaintiff had not shown that they were placed or dropped there by an employe of the defendant company.

2. Under all the circumstances shown, we think that the plaintiff proved enough to make a *prima facie* case, such a case as to raise an issue for submission to the jury. The torpedoes were there as a result of an act deliberate or negligent either of the company's employes or of some outsider. They were upon premises controlled by the defendant. This is of some evidentiary value, though slight. These torpedoes were a special contrivance designed for and used peculiarly in railway service. Nobody else had any business with them, and especially had no right to place them on the company's tracks. An outsider, however, might have bought, found, or stolen them, and might have put them on the track. Let us examine the time, place, and other circumstances to see if this is reasonable. The time was 4 o'clock, before dawn, on a winter morning. The place was in the yards of the defendant, where its employes were on duty making up

and shifting trains of cars, and was in front of the passenger station, some of the rooms of which were lighted and open. Say that the object of the outsider was sport or mischievous prank. Is it probable that any one would previously furnish himself with two torpedoes, and then go to this open place on the premises of the railway company in the late hours of a winter night to hear them explode, or to witness the results of their explosion? Such things are not usually done that way. If the outsider's purpose was sinister, he would hardly have chosen so open a location for the place of his offense, and would hardly have used a caution signal as a means of committing it. This theory seems unreasonable. The deliberate act of an outsider seems improbable. An unintentional dropping of two torpedoes in such a manner that both of them should fall on the top of the rail and balance themselves and remain there would be even more unlikely. On the other hand, if the employes for some purpose in hand connected with the moving of the trains in the yard had found it more convenient to use torpedoes for a signal instead of the ordinary means of signaling, the very fact that there was a rule against using them in the yards would be a reason why they would choose to use them there only in the dark hours of the morning, when the violation of the rule would be least likely of detection. The presence of a single torpedo would not make so strong a case against the employes as does the fact that there were two of them. In the first place, one would serve any probable purpose of an outsider as well as two; on the other hand, the arrangement of two torpedoes is a regular train signal, such as an employe would give and an engineer would recognize. While a plaintiff, who relies upon circumstantial evidence for the establishment of the case, must raise more than a mere suspicion, and must reasonably establish the theory relied upon, yet in the present case there was more than "a mere scintilla of inconclusive circumstances"—there was "scope for legitimate reasoning by the jury." *Georgia Railway & Electric Co. v. Harris*, 1 Ga. App. 714, 57 S. E. 1076. "In arriving at a verdict the jury, from facts proven, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved." Civ. Code 1895, § 5157. By comparing the present circumstances with those relied on by the plaintiffs in many of the suits in this state in which recoveries have been sustained for fires alleged to have been set out by locomotives (e. g., *Greene v. Central Ry. Co.*, 130 Ga. 375, 60 S. E. 861 and citations), it will be seen that we are making no exception to any general rule in holding that nonsuit was improper. "A nonsuit is not granted merely because the court would not allow a verdict for the plaintiff to stand." It is only when, admitting all

the facts proved and all reasonable deductions therefrom, the plaintiff has not made out a prima facie case, that this is the legal result of a trial. Civ. Code, § 5347.

As the case is to go to trial again, we may add that, under the facts appearing in the proof, the degree of diligence owing by the defendant to the plaintiff was ordinary, and not extraordinary, care. Cf. *Southern Ry. Co. v. Rosenheim*, 1 Ga. App. 768, 769, 58 S. E. 81.

Judgment reversed.

# ATLANTIC COAST LINE R. CO. v. DAVIS & BRANDON. (No. 1,267.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

## 1. PLEADING (§ 18\*)—SPECIAL DEMURRER.

Reasonable certainty is all that is necessary to render pleadings exempt from attack by special demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.\*]

## 2. RAILROADS (§ 456\*)—FIRES SET BY LOCOMOTIVES.

It is the duty of a steam railway company to exercise ordinary care to keep its tracks and right of way free from combustible materials, whereby fire from its locomotives may be communicated to adjacent property. An action will lie for negligence in this respect, though the engine from which the fire escaped was properly equipped, and prudently handled.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1673; Dec. Dig. § 456.\*]

## 3. RAILROADS (§ 465\*)—FIRES—COMBUSTIBLES ON RIGHT OF WAY.

The liability of a steam railway company for damages resulting from its failure to keep its right of way reasonably clear of combustible materials likely to be ignited by passing locomotives is not defeated by the fact that the lands of the adjacent owner are in a similar condition.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1690; Dec. Dig. § 465.\*]

## 4. RAILROADS (§ 483\*)—INJURY BY FIRES—DAMAGES.

Where a plaintiff shows that he was in possession of turpentine and resin produced but still remaining on the pine trees, but does not show title to the land, the measure of damage for a destruction of the turpentine and resin is its market value.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1737; Dec. Dig. § 483.\*]

## 5. REVIEW ON APPEAL.

No error appears.

(Syllabus by the Court.)

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by Davis & Brandon against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Bennet & Conyers, for plaintiff in error.  
R. D. Meader, for defendants in error.

POWELL, J. The plaintiffs sued the railway company for negligently setting fire to and burning the crude turpentine and resin in certain turpentine boxes which they owned

on the trees on a definitely designated tract of land adjacent to the defendant's right of way near Bladen, Ga. The allegations of negligence in the original petition are as follows: "That said fire as set out in the previous paragraph was occasioned by the negligent, careless, insufficient, deficient, and unskillful construction of the smokestacks of said defendant's locomotives, by the negligent, careless, unskillful, and insufficient operation and management of said locomotives by said defendant's servants, agents, and employes on said occasion, and by the negligence and carelessness of defendant in not keeping its right of way along its tracks cleared and free from grass and trash, as in duty bound it should have done." The defendant demurred to this on the following grounds: "Because the plaintiff fails to allege in the fifth paragraph or elsewhere wherein the smokestacks of defendant's locomotives were negligently, carelessly, insufficiently, or unskillfully constructed, because he fails to state in said fifth paragraph or elsewhere wherein the said operation and management of said locomotives by said defendant's servants was negligent, careless, unskillful and insufficient, because he fails to allege wherein the defendant was guilty of negligence or carelessness in not keeping its right of way cleared and free from grass and trash." The plaintiffs amended and amplified these allegations as follows: "Said engine's spark arrester was insufficiently and improperly constructed to prevent live sparks of fire from issuing from said smokestack, and the engineer in charge of said locomotive was negligent in operating said locomotive, in that he caused said engine to exhaust at that point, and not at some other point where there was less danger of fire being caused by such emission of sparks, as in a swamp or while crossing a stream, which he had an opportunity of doing; there being no necessity for causing such emission of sparks at that point. Defendant was further negligent in permitting dry grass and trash, which were then and there in a very inflammable and combustible condition, to remain and be on its said right of way at that point." The court overruled the demurrer as to these as well as to other points presented therein, but not here mentioned, as we do not deem them of sufficient general importance. On the trial the plaintiff showed no paper title to the lands on which the turpentine trees and boxes were located, but proved that they were in actual possession of the turpentine boxes, and of a still and certain houses located thereon. There was sufficient evidence to justify the jury in inferring that the fire was started through the emission from the locomotive of the defendant of a spark or sparks which fell into dry grass on its right of way, igniting it so that the fire spread therefrom into the plaintiff's turpentine

woods. Though this was sufficient to cast upon the defendant the presumption of negligence, the defendant met and fully overcame this presumption so far as the construction and operation of the locomotive were concerned, and the only allegation left issuable was as to its allowing dry combustible grass to accumulate and remain upon its right of way. The grass in question was a full natural growth of dry dead wire grass such as is to be found throughout large portions of the country in that section of the state at that time of the year, December. The jury found a verdict for the plaintiff, and the defendant brings a number of exceptions. Some of them will be discussed in the opinion. Others we dispose of by the general statement that, after careful examination of them, we do not find them to be meritorious.

1. The special demurrers to the plaintiff's allegations of negligence were originally well taken; but the amendment cured the deficiencies. Reasonable certainty is all that is required in pleadings. Mere conclusions will not suffice as allegations of negligence. However, structural descriptions of defects alleged in machinery are not required in order to give the necessary certainty. To state specific concrete improper results which a machine in question produced is often sufficient to describe a defect definitely. In other words, to say that a locomotive smokestack was so insufficiently constructed that it allowed live sparks of fire to come through describes a lack in its construction with legal definiteness. An examination of the record upon which the fifth headnote in the case of *Green v. Babcock Co.*, 130 Ga. 470, 60 S. E. 1062, is based, shows that the Supreme Court recognizes and applies this principle. See, also, *Ga. Ry. & E. Co. v. Reeves*, 123 Ga. 697 (3), 51 S. E. 610.

2. It is a rule flowing from the common law and recognized in this state, as well as in most of the other American states, that it is a duty of a steam railroad company to exercise ordinary care and diligence in keeping its track and right of way free from combustible matter whereby fire from its locomotives may be carried to adjacent property, and that an action will lie for negligence in this respect, although it may be shown that the engine from which the fire escaped was properly equipped and prudently handled. *Georgia R. Co. v. Lawrence*, 74 Ga. 534; *Southern Ry. Co. v. Thompson*, 129 Ga. 367 (8), 58 S. E. 1044; *Western & Atlantic R. Co. v. Tate*, 129 Ga. 528 (2), 59 S. E. 266. The very fact that fire will sometimes escape from locomotives, though most carefully equipped and handled, makes it the dictate of prudence that the adjacent right of way should also be taken into consideration by the railway company in the discharge of its duty of so using its own property as not to injure the property of others. See 13 Am. & Eng. Enc. of Law (2d Ed.) 466 et seq.

3. Though it was ruled to the contrary in

an early Illinois case, it is now well settled by a strong current of American authority that the liability of a railway company for damages resulting from a failure to keep its right of way reasonably clear of combustible materials likely to be ignited by passing locomotives is not defeated by the fact that the lands of the adjacent owner are in similar condition. *Salmon v. Delaware R. Co.*, 38 N. J. Law (9 Vroom) 5, 20 Am. Rep. 356, and note; *Walker v. Chicago Ry. Co.*, 78 Kan. 32, 90 Pac. 772, 12 L. R. A. (N. S.) 624, and cases cited in the footnote. The differences in the uses to which the owners have put their property fairly permits of a difference in the quantum of diligence to be required of them respectively.

4. The plaintiffs did not sue for damage to the freehold, but for injury to the turpentine and resin contained in the boxes and adhering to the faces of the trees and ready to be gathered. The plaintiff showed no paper title or color of title as to the land. Testimony that they were engaged in taking turpentine from the trees, or that they had houses thereon, did not show possession of the entire tract of land. There being no basis for the application of the principle of constructive possession, the *possessio pedis* was presumptive evidence of title at most only to the trees which were worked for turpentine, and as to the particular ground on which the houses stood. Compare *Knight v. Isom*, 113 Ga. 613, 39 S. E. 103. In the pleadings the plaintiffs did not assert title to the land, but only to the turpentine and resin, and incidentally to the turpentine boxes. In the proof they showed no title to the land, but only to the turpentine and resin and perhaps to the boxes in the trees. Turpentine and the right to work the pine trees for it are appurtenances of the timber, and not of the land, where the land and timber are separately owned. *Red Cypress Lumber Co. v. Beall* (this day decided) 62 S. E. 1056. The suit was not for damages to the freehold. The proper measure of damages was that stated by the trial court the market value of the turpentine and resin destroyed. Compare *Western R. Co. v. Tate*, 129 Ga. 528, 59 S. E. 266; *So. Ry. Co. v. Thompson*, 129 Ga. 367, 58 S. E. 1044. It is hardly necessary to add that the testimony that the plaintiffs produced the turpentine and resin by boxing and working the trees for it, and that they had an employé in the woods engaged in gathering it on the day it caught fire, is evidence of such possession as to raise the legal presumption that they were the owners of it.

5. The excerpts from the charge to which exceptions are taken are not, when considered in connection with the context, erroneous. The charge as a whole was a terse, fair and accurate presentation of the points involved in the case and gave the defendant the benefit of all its contentions at least as fully as they were presented by the pleadings.

Judgment affirmed.



**JORDAN v. FARMERS' & MERCHANTS' BANK.** (No. 1,155.)

(Court of Appeals of Georgia. Nov. 25, 1908.)

**1. PRINCIPAL AND SURETY (§ 125\*)—DISCHARGE OF SURETY—NONACTION BY CREDITOR.**

"Mere nonaction by the creditor will not release the surety, unless such nonaction makes unproductive some collateral security, \* \* \* or is based upon a consideration paid by the principal debtor to the creditor, or he is notified under the statute to collect the debt." Civ. Code 1895, § 2972; *Lumsden v. Leonard*, 55 Ga. 374.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 312-328; Dec. Dig. § 125.\*]

**2. PRINCIPAL AND SURETY (§ 126\*)—NOTICE TO COLLECT DEBT—SUFFICIENCY.**

Verbal requests, however urgent and frequent, by a surety to the creditor, to take action to collect the debt from the principal debtor, will not relieve the surety. To avail the surety, the request or notice to the creditor to collect the debt out of the principal debtor must be in writing and in conformity to the statute on that subject. Civ. Code, § 2974; *Souter v. Bank*, 94 Ga. 713, 20 S. E. 111.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 344; Dec. Dig. § 126.\*]

**3. PRINCIPAL AND SURETY (§ 164\*)—EXECUTION—PERSONS LIABLE—ELECTION.**

A creditor, who holds an execution against both principal and surety, may, at his election, proceed against the property of either. *Manry v. Shepperd*, 57 Ga. 68.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 456-465; Dec. Dig. § 164.\*]

**4. PRINCIPAL AND SURETY (§ 125\*)—DISCHARGE OF SURETY—FAILURE TO PROVE DEBT IN BANKRUPTCY.**

The failure or refusal of the creditor to prove the debt in bankruptcy against the principal

debtor will not discharge the surety. *Bankr. Act* July 1, 1898, c. 541, § 18, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428).

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 327; Dec. Dig. § 125.\*]

**5. APPEAL AND ERROR (§ 1004\*)—REVIEW—QUESTIONS OF FACT—ISSUE OF ILLEGALITY—DAMAGES FOR DELAY.**

Where an affidavit of illegality has been dismissed on demurrer for insufficiency, the jury may be authorized to infer therefrom that it was filed for delay only, and a verdict assessing damages at less than 25 per cent. of the principal debt in favor of the plaintiff in execution and against the defendant in execution for delay will not be disturbed, where there is any evidence to support it, unless for some material error of law. Civ. Code 1895, § 4739.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

**6. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—ABANDONMENT.**

Assignments of error, not insisted on or alluded to in the argument or brief, will be considered as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

7. No error appears, and the verdict was fully authorized.

(Syllabus by the Court.)

Error from City Court of Sandersville; *J. F. Brannen*, Judge.

Action between C. O. Jordan and the Farmers' & Merchants' Bank. From the judgment, Jordan brings error. Affirmed.

E. L. Stephens, for plaintiff in error. G. H. Howard and Hines & Jordan, for defendant in error.

HILL, C. J. Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**BRAY et al. v. PEACE.**

(Supreme Court of Georgia. Dec. 1, 1908.)

**1. PARTNERSHIP (§ 202\*)—ACTION AGAINST PARTNER—INTERVENTION.**

In a suit against an individual, it was not erroneous for the judge to refuse to entertain a plea offered by a firm of which the individual was a member, where neither the firm nor the other member thereof was declared against or otherwise appropriately made a party to the suit.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 202.\*]

**2. PARTIES (§ 84\*)—DEFECTS—MODE OF OBJECTION—DEMURRER.**

If it appears on the face of the petition that the suit is brought against an individual for the debt of a partnership of which he is a member, objection may be raised by demurrer. If it does not so appear, but the defendant claims that the suit against him as an individual is based upon a partnership liability, and that the other partner is a necessary party, the point should be raised by a plea in abatement.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-138; Dec. Dig. § 84;\* Pleading, Cent. Dig. § 494.]

**3. ABATEMENT AND REVIVAL (§ 81\*)—DILATORY PLEA—OATH AND TIME OF FILING.**

Such a plea is a dilatory plea, and must be filed under oath at the first term of court. Civ. Code 1895, § 5058; *Merritt v. Bagwell*, 70 Ga. 578, 585.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 500; Dec. Dig. § 81.\*]

**4. PARTNERSHIP (§ 216\*)—ACTIONS—DEFENSES.**

Partners are each liable for the debts of the partnership; and if one be sued upon such a debt, and no objection for nonjoinder is duly raised by demurrer or plea, it furnishes to the defendant sued no defense to prove that he contradicted the indebtedness on behalf of a firm of which he was a member, and that he has a partner who is not before the court. *Hirsch v. Oliver*, 91 Ga. 554 (4), 18 S. E. 354; 15 Enc. Pl. & Fr. 928.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 417; Dec. Dig. § 216.\*]

**5. PLEADING (§ 106\*)—PLEA IN ABATEMENT—SUFFICIENCY.**

In a suit for the price of personal property, where the petition alleged that the defendant had been the highest and best bidder at an administrator's sale, and had bought the property from the plaintiff at a certain price, and that it had been delivered to him, mere vague statements in the unsworn answer, to the effect that the defendant denied such allegations, but admitted that a partnership composed of himself and another had bought the property, and it had been delivered to them, were not sufficient to meet the requirements of the law as to a plea in abatement.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 106.\*]

**6. PLEA IN ABATEMENT—SUFFICIENCY.**

Under the rulings contained in the previous headnotes, a verdict against the defendant was inevitable, and, in the absence of a proper plea in abatement, there was no error in rejecting evidence offered by the defendant that the purchase was made by the defendant for his firm, or in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; W. C. Worrill, Judge.

Action by J. F. Peace, administrator, against J. J. Bray. Judgment for plaintiff, and defendant brings error. Affirmed.

Peace, administrator, brought suit against J. J. Bray, to which an answer was filed by the defendant. The firm of J. J. Bray & Son, a firm composed of the defendant and another, also filed a plea, but the other partner did not become a party, nor ask to be made such. In this plea, by way of cross-action, the firm sought to recover a judgment against the plaintiff. On motion such plea was stricken. After the plaintiff had made out his case, the defendant offered to testify that he bought the property for his firm, composed of himself and his son, and that this was known to the plaintiff. On objection this evidence was rejected, and a verdict was directed for the plaintiff. The defendant excepted.

J. F. Gollightly, for plaintiff in error. W. L. Watterson and Jos. W. & John D. Humphries, for defendant in error.

ATKINSON, J. The headnotes sufficiently deal with the case; but it will not be out of place to consider the pleadings for the purpose of showing that the plea of the defendant to which reference was made in the fifth headnote was not a plea in abatement on account of nonjoinder of parties. The suit was for the purchase price of personal property sold at administrator's sale, which was alleged to have been bid in by the defendant, and for which he refused to pay. The fourth paragraph of the petition was as follows: "Petitioner further says that at said sale one J. J. Bray, of this county, was the highest and best bidder for 186½ bushels of corn at the price of 67 cents per bushel; also of 635 pounds of hay at the price of 51 cents per 100; and that the same was knocked off to him at said price, which said corn and hay at the price of his bid amounted to the sum of \$128.26." The fifth paragraph of the petition was as follows: "That a few days after said sale he, petitioner, delivered the said corn and hay to the said J. J. Bray, and, after the same was so delivered to him, petitioner demanded the money for the same, and the said J. J. Bray refused to pay for same; that the corn and hay were worth the price that he bid and was to pay, and he still fails and refuses to pay for the same." The answer to the fourth paragraph of the petition was as follows: "Defendant denies paragraph No. 4 of the petition, except he admits that J. J. Bray & Son, a partnership composed of J. J. Bray and W. C. Bray, bought the property therein set out, but says he is not liable individually." The answer to the fifth paragraph was as follows: "Defendant denies paragraph No. 5 of the petition, except he admits that the property was delivered to J. J. Bray & Son, and he admits that the property was worth the price bid for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same." The answer was not verified. This comprises all the different parts of the answer which could possibly be construed as a plea of nonjoinder.

Under our present system of pleading, the plaintiff is required to plainly, fully, and distinctly set out his cause of action in distinct and orderly paragraphs. Civ. Code 1895, § 4961. The defendant is required to distinctly answer each paragraph of plaintiff's petition, and is not allowed to file a mere general denial. Civ. Code 1895, § 5051. He may include in his answer different grounds of defense against the action, as, for instance, a denial that he owes the debt alleged by the plaintiff, and that it is barred by the statute of limitations, and that it has been paid; but each of such defenses must be distinctly made. Civ. Code 1895, § 5052. Under the denial of the allegations of the plaintiff's petition, no other defense is admissible except such as disproves the plaintiff's action. All other matters in satisfaction or avoidance must be specially pleaded. Civ. Code 1895, § 5053. The distinction between dilatory pleas and pleas to the merits has not been abolished by our pleading act of 1896, or by the uniform procedure act of 1887. Civ. Code 1895, § 5049. An answer to the plaintiff's petition, admitting or denying the paragraphs thereof, is pleading to the merits; nor is it otherwise because such an admission or denial may be qualified by some explanation or partial admission. It is still declared by our Code that the defendant may either demur, plead, or answer to the petition, or may file one or more, or all, these defenses at once, without waiving the benefit of either; and that he may file two or more pleas to the same action. But it is declared that "in all cases demurrer, pleas, and answer shall be disposed of in the order named; and all demurrers and pleas shall be filed and determined at the first term, unless continued by the court, or by consent of parties." Civ. Code 1895, § 5047. And also that "no dilatory answer shall be received or admitted unless an affidavit shall be made to the truth thereof, and must be filed at the first term." Civ. Code 1895, § 5058. With the exception of pleas specially required to be sworn to, such as dilatory pleas of non est factum, generally pleas and answers are not required to be verified, except where the petition is verified by affidavit. Civ. Code 1895, § 5055. Construing these sections together, it is evident in our opinion that it is the intention of the law that dilatory pleas shall be expressly filed as such, at the first term of the court, under oath, and that they are to be tried and disposed of before the trial on the merits. To pick out from an unsworn answer clauses or fractions of a sentence, which taken alone are unintelligible, fragmentary, and incomplete, and which are inextricably mixed with admissions or denials of paragraphs of the plaintiff's petition, and to construe them as constituting a plea of nonjoinder, would breed

confusion, and we think is not proper. If it would be competent for the defendant to include a dilatory plea in his answer at all, certainly it should be distinctly and separately set up, so as to make an issue which could be separately submitted to the jury, and not merely incidentally be drawn from qualifications of an admission or denial of distinct allegations of facts in paragraphs of the plaintiff's petition.

In the case before us the plaintiff alleged, in the fourth paragraph of his petition above quoted, that J. J. Bray was the highest and best bidder for 186% bushels of corn at the price of 67 cents per bushel, and also of 635 pounds of hay at the price of 51 cents per hundred, and that it was knocked off to him at that price, amounting in the aggregate to \$128.26. The fourth paragraph of the answer of defendant Bray, which responds to this paragraph in the plaintiff's petition, says that the defendant denies paragraph 4 of the petition, except that he admits that J. J. Bray & Son, a partnership composed of J. J. Bray and W. C. Bray, bought the property therein set out, but says that he is not liable individually. This denial traverses the allegation that Bray was the highest and best bidder. It also denies the allegation as to the price at which the property was bid off, as alleged in the petition. This is clearly pleading to the merits, and not merely setting up a dilatory plea. The denial is not confined to the fact that Bray was the purchaser, but includes the other allegations mentioned. The denial of these allegations of the plaintiff, distinctly made, cannot by any sustainable construction be called a plea in abatement, or any part of a plea in abatement. What then is left of the fourth paragraph of the defendant's answer as constituting such a dilatory plea? Not any distinct allegation of nonjoinder, or even any separate paragraph, or complete assertion, which could be submitted as a separate issue to the jury; but a mere clause, forming part of a sentence and qualifying the denial contained in the first clause thereof.

Certainly the court could not segregate the fragmentary expression, "except he admits that J. J. Bray & Son, a partnership composed of J. J. Bray and W. C. Bray, bought the property therein set out, but says that he is not liable individually," wrest it from its connection as a part of a sentence in an answer, and submit it to the jury as a separate plea. And with equal certainty it may be asserted that he could not take out of the answer an entire paragraph, which was responsive to allegations of a paragraph in the plaintiff's petition going directly to the merits of the case, and say that such paragraph as a whole was not a plea to the merits, but only a plea in abatement. What has been said in relation to paragraph 4 of the answer also applies to paragraph 5. That paragraph denies, not only the delivery of the corn and hay to J. J. Bray, but also the

demand upon him for payment, and the refusal thereof, which the plaintiff alleged. The defendant distinctly says that he denies paragraph 5 of the petition, "except that he admits that the property was delivered to J. J. Bray & Son, and he admits that the property was worth the price bid for the same." As has been stated in regard to paragraph 4 of the answer, this clearly does not constitute a plea in abatement. To require a judge to search through an unsworn answer to discover words, not setting up any distinct dilatory plea, but forming parts of sentences and qualifications of admissions or denials of allegations in the plaintiff's petition touching the merits of the case, and out of them to construct and submit to the jury a distinct plea in abatement, would not, we think, be authorized by law.

Paragraph 3 of the plaintiff's petition alleged that an order was granted to him as administrator, by the ordinary of the county, to sell the perishable and personal property belonging to the estate, and that as such administrator he did dispose of and sell such property to the highest bidder as the law directs; such sale being for cash on delivery of the goods. In response to this paragraph, the defendant answered that for want of sufficient information he neither admitted nor denied it. This, under our law, placed upon the plaintiff the onus of proving such allegations. Civ. Code 1895, § 4961. It could hardly be claimed that this could be called only a part of a plea in abatement. It has already been shown that paragraphs 4 and 5 of the answer denied material allegations of the petition. Thus, whether the allegations in the defendant's answer be taken as a whole, or disjointed excerpts be taken from the 4th and 5th paragraphs thereof, it cannot be construed into a plea in abatement. The truth is, it is evident that counsel did not intend it as such, and the court did not so construe it. No request was made to submit any issue raised by a dilatory plea as such to the jury, either separately or in connection with the general trial. The case went to trial on its merits. It was not sought to have a mere judgment of abatement, which would permit the action to be again brought, but to have the claim of the plaintiff defeated altogether. It is quite apparent that the real contention of counsel for the defendant was, not that the suit should be abated for nonjoinder, but that a general verdict should be rendered for the defendant, because he claimed that the liability was one incurred on behalf of a firm of which he was a member, and not on behalf of himself as an individual. In fact, such is the contention made in the briefs for the plaintiff in error before this court. The plaintiff did not contend that the suit must be abated because not brought both against him and his alleged copartner, but that no judgment could be

rendered against him individually at all, if it appeared that he contracted the debt on behalf of the partnership. The two things are entirely distinct. Nonjoinder is a proper subject for plea in abatement filed under oath at the first term. If successful, the result is simply to abate the action then brought, but not affect the right to bring another suit with proper parties. If no such plea is filed, and the defendant goes to trial upon the merits of the case, he is not entitled to a verdict wholly freeing him from payment merely because he may have a partner who may also be liable. A general verdict for the defendant on the trial of the merits of the case would operate as a bar to any other suit against him based on the same cause of action. If the suit were brought again, such a verdict and the judgment entered thereon could be pleaded in bar. So that the contention made by the defendant would amount to saying that, because two persons were liable as partners, one of them, when sued alone, without interposing a plea in abatement and having a trial thereon, could obtain a judgment on the merits forever freeing him from any liability at all. Such is not the law.

Judgment affirmed. All the Justices concur.

#### SOUTHERN RY. CO. v. BANKSTON.

(Supreme Court of Georgia. Nov. 24, 1908.)

#### TRIAL (§ 252\*)—CARRIAGE OF PASSENGERS—ACTIONS—INSTRUCTIONS.

There being no evidence to authorize it, the court erred in charging the jury as follows: "The plaintiff, in addition to the nominal damages sued for, claims a right to recover punitive damages. In connection with that claim of the plaintiff I read you certain sections of the Code: 'In every tort there may be aggravating circumstances, either in the act or in the intention, in that event, the jury may give additional damages either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff.'"

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 610; Dec. Dig. § 252.\*]

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Jr., Judge.

Action by F. M. Bankston against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. E. Battle and A. J. Danielly, for plaintiff in error. R. C. Le Seur and H. A. Matthews, for defendant in error.

BECK, J. The plaintiff, while a passenger upon one of the trains of the defendant company, was carried beyond her destination through the negligence of the company's employes, and brought suit for the recovery of damages therefor, and upon the trial the

jury returned a verdict in her favor. A motion for a new trial was made and overruled, to which ruling the railroad company excepted.

The evidence, so far as it is material to the questions raised in the motion for a new trial, is, in substance, as follows: On the 24th day of November, 1906, the plaintiff, a young lady of about 15 years of age, boarded a train of the defendant company at Roberta, Ga., to go to the station of Lee Pope. The last-named station is a flag station; and the plaintiff paid her fare on the train from Roberta to the point of her destination, telling the conductor, at the time of making payment of the fare, that she wished to "go to Lee Pope." The train failed to stop at that station, and the plaintiff was carried to Ft. Valley. When she arrived there, having no money with her, she went to the house of an acquaintance, being accompanied there by a young man, the son of the acquaintance, with whom she spent the night. She was mortified and embarrassed at having to go to the house of an acquaintance to spend the night. Her acquaintance, referred to in this testimony, had lived previously at Roberta, Ga., the place of residence of the plaintiff, and there the acquaintance was formed. The plaintiff herself testified: "I never did visit Mr. or Mrs. Clark [the acquaintance at whose house the night was spent], nor did my father or mother that I know of. I knew they were respectable people, and spoke to them. I appreciated their hospitality, but I hated to go there. I felt safe of course, but I did not feel anyways good about it. I knew Mrs. Clark would take care of me—she said she would. \* \* \* Neither Mr. Woodall nor Mr. Mitchell showed me any discourtesy that night. They did not do anything at which I could take offense, only took me by [the station to which she was traveling]. After that they did nothing at which I took offense. He [the employé in charge of the train] did not say anything to worry me, only took me by. After I found Mr. Clark, it was about 100 yards to where his mother was. I was carried directly to his mother, and put in her charge by young Mr. Clark, and went on home with her and spent the night." On the following day the plaintiff boarded at Ft. Valley a train of the defendant company, and was carried, without charge of fare, to the station of Lee Pope, to which she intended to go when she first boarded the train at Roberta.

No discussion is necessary here to show that the court erred in giving the charge set forth in the headnote. The ruling made in this case follows necessarily from the application of the facts of the case to the law as stated in several decisions of this court heretofore made. The question under consideration has been so clearly ruled that it is only necessary to cite certain cases, which com-

pel the conclusion that we have reached, after reading the record in the case. *Southern Ry. Co. v. Harden*, 101 Ga. 263, 28 S. E. 847; *Southern Ry. Co. v. Bryant*, 105 Ga. 316, 31 S. E. 182; *Sappington v. Atlanta & West Point Railroad Co.*, 127 Ga. 178, 58 S. E. 311.

There were other grounds in the motion for a new trial besides the one complaining of the charge referred to; but, in view of the ruling made upon the controlling question, it is unnecessary to consider other assignments of error.

Judgment reversed. All the Justices concur.

#### STOKES v. CLARK et al.

(Supreme Court of Georgia. Nov. 21, 1908.)

##### 1. TRUSTS (§ 81\*)—RESULTING—SOURCE OF CONSIDERATION.

Where a husband buys land belonging to the estate of his wife's father at administrator's sale on 12 months' credit, gives his notes for the purchase money, and takes from the administrator a bond for title, and subsequently pays his notes, partly with money borrowed and partly with his wife's distributive share, with her consent, and takes a deed to the land in his own name, and thereafter sells one-half of the land in payment of the money borrowed (which was more than one-half of the purchase price), no implied trust as to the remaining one-half of the land arose in favor of the wife. The transaction amounts either to a gift or loan of money by the wife to the husband.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 115-118; Dec. Dig. § 81.\*]

##### 2. GRANT OF NONSUIT.

There was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Flite, Judge.

Action by W. L. Stokes against John Clark and another. Plaintiff was nonsuited, and brings error. Affirmed.

R. J. & J. McCamy and Ben T. Brock, for plaintiff in error. J. P. Jacoway and Payne & Payne, for defendants in error.

EVANS, P. J. This was an action by W. L. Stokes against Jno. Clark and J. A. Metcalf to recover an undivided half interest in a described tract of land, mesne profits, and for an accounting. Upon the conclusion of the plaintiff's evidence, a judgment of nonsuit was entered, and error is assigned thereon. The material parts of the evidence are as follows: In 1872, George Tittle died, seised and possessed of several lots of land, and left surviving him a widow and ten children as his heirs at law, one of whom was the wife of Jno. Clark. His real estate was sold by his administrator, and one of the lots of land was purchased by Jno. Clark for \$5,200. The sale was on 12 months' credit, and the administrator of Tittle received from Clark his notes for the purchase money and executed to Clark his bond for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

title. About 1874 Clark paid the administrator the purchase money, and the administrator made him a deed. On settling with the administrator, Clark used his wife's distributive share, amounting to something over \$1,100, and borrowed the other money from the other heirs of Tittle. Clark soon afterwards sold half of the land to one Carroll, and from the proceeds paid back the money which he had borrowed. Mrs. Clark allowed her distributive share in her father's estate to be used in part payment of the purchase of the land by her husband. Clark has been in possession of the land sued for since his purchase, seems to claim the property, and lived thereon with his wife until her death, and after his wife's death until he sold the land to Metcalf, who purchased with notice of the manner in which Clark acquired title to the land. A witness testified that, during the time Clark was in possession of the land, "Clark borrowed money from different individuals very often. I know where some of the parties wanted the wife to sign a mortgage with him. She did sign two or three mortgages. I was not present. She said she signed one to Mr. Patterson. Don't recollect whether said anything about it being Clark's property or not." It was also shown that there was an execution against Clark, which was outstanding against him before his wife's death, but which was not collected until after her death. Clark applied for a homestead, and did not include this land in his application. Mrs. Clark died in 1900, leaving her husband and a daughter. The plaintiff is the heir at law of the daughter.

The theory of the plaintiff's alleged cause of action is that when Clark purchased the land with borrowed money and his wife's distributive share, taking the title to the land, and afterwards sold one-half of the land and paid back the borrowed money with the proceeds of that sale, an implied trust arose in favor of the wife as to the remainder of the land. The plaintiff contends that the facts developed at the trial bring the case within the terms of Civ. Code 1895, § 3159: "Trusts are implied: (1) Whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase-money or other circumstances, is either wholly or partially in another. (2) Where, from fraud, one person obtains the title to property which rightly belongs to another. (3) Where, from the nature of the transaction, it is manifest that it was the intention of the parties that the person taking the legal title shall have no beneficial interest."

A casual reading of this Code section will suffice to show that it has no application to such a state of facts as the plaintiff developed in the trial of his case. There was no fraud or deception practiced by Clark on his wife. Her interest in her father's estate

was used by Clark in part payment of his purchase with her consent. He was not acting as her agent. He did not undertake to buy the land for her. The purchase of the land by Clark was his individual act. He bid off the land in his own name, executed his own notes for the purchase money, and when the notes were paid the deed to the land was made to him. When his wife permitted him to use her money in partial discharge of his notes, the transaction was either a gift or a loan of money. The law permits a wife to give money to her husband. If the transaction be construed as a loan, the wife's remedy would have been to recover her money. Certainly her heir cannot assert title to any part of the land.

But it is said that Clark did not include the land in his application for homestead, and that this was a recognition by him of his wife's title to the land. Many explanations might be given of the omission. It may have been an intentional one, or it may have been that when he applied for a homestead he had deeded the land to secure a debt. But whatever may have been Clark's reason for not including the land in his homestead application, it does not follow that the omission of the land from the application was a recognition of the wife's title. A nonsuit was the only logical termination of this case.

Judgment affirmed. All the Justices concur.

#### GOODMAN v. SPURLIN.

(Supreme Court of Georgia. Nov. 21, 1908.)

##### 1. VENDOR AND PURCHASER (§ 18\*)—OPTION—WITHDRAWAL.

A written option without consideration, for the sale of land, may be withdrawn or revoked before its acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 18.\*]

##### 2. NEW TRIAL (§ 65\*)—GRANT—ABUSE OF DISCRETION.

Under the law and facts of this case the verdict was not demanded, and there was no abuse of discretion in granting a new trial for the first time.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 180; Dec. Dig. § 65.\*]

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by J. M. Spurlin against A. B. Goodman. Judgment for plaintiff, and defendant brings error. Affirmed.

Blalock & Culpepper and Dayley & Chambers, for plaintiff in error. J. W. Wise, for defendant in error.

EVANS, P. J. Spurlin, as landlord, sued out a dispossessory warrant against Goodman, as a tenant holding over. Goodman filed the statutory counter affidavit, and al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so set up that he had purchased the land from Spurlin. The jury returned a verdict for the defendant, which was set aside on a motion for a new trial.

The discretion of the judge in the first grant of a new trial will not be disturbed unless the verdict was required under the law and the facts. The plaintiff made out a prima facie case. The defendant offered testimony tending to show: That the landlord during the tenancy verbally agreed to sell the land for \$1,500, due in installments, the first payment to be made November 1, 1906, or the whole purchase price might be paid by that time; that at his request the landlord, on June 16, 1906, put this proposal in writing in the form of a letter addressed to A. O. Blalock, who had promised the tenant to furnish the purchase money; that on September 3, 1906, the landlord in a letter to his tenant withdrew his proposal to sell the land for \$1,500, but offered therein to sell for \$1,850; that on October 30, 1906, the landlord, in a conversation with the tenant, after denying that he had proposed to sell the land for \$1,500, upon being shown his letter of June 16th, admitted having made the offer of \$1,500, and expressed his willingness to stand up to it; that upon being presented, on the afternoon of that day, with a deed for execution, he declined to sign it, because the consideration as expressed therein was \$1,500; and that on November 1, 1906, Mr. Blalock for the tenant tendered \$1,500 to the landlord, who declined it. The landlord denied making any parol contract of sale, denied the conversation alleged to have taken place between him and his tenant on October 30th, and denied that the purchase price had been tendered.

The theory of the defendant's case is that his possession, after the expiration of his tenancy, was that of equitable owner of the land under a contract of purchase made with the landlord pending the tenancy; but the evidence on which he relies to show ownership is insufficient. The letter of June 16th was but a proposal of sale, a mere option, founded upon no consideration, and revocable at any time before acceptance in such manner as would make it binding on the holder of the option. *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127, and cases cited in the note thereto. It is such acceptance which gives mutuality to the contract. Prior to the letter of September 3d, wherein the landlord revoked the option, it does not appear that the tenant had accepted the proposal of sale by any act of his which would have raised a legal obligation on him to comply with its terms. The landlord therefore had a right to withdraw his proposal. The tender of the purchase price after the revocation of the option was without avail.

There was something said by the tenant in his testimony about certain improvements which he claimed to have made on the faith of his option to buy. Their character and value did not appear, nor was it shown whether they were made before or after the revocation of the option. Besides, the landlord denied that any improvements had been made by the tenant.

Nor is it necessary to inquire what effect a parol republication of the option would have, as there was a conflict of evidence as to this. The law and the facts did not demand the verdict, and there was no abuse of discretion in granting a new trial.

Judgment affirmed. All the Justices concur.

#### IVEY et al. v. CITY OF ROME et al.

(Supreme Court of Georgia. Dec. 1, 1908.)

##### AMENDMENT OF PLEADING.

The amendment which was disallowed presented substantially the same features contained in the original petition; and, under the ruling made when this case was before the court on a former occasion (129 Ga. 286, 58 S. E. 852), it was not error to disallow the amendment and dismiss the petition.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by J. E. Ivey and others against the City of Rome and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Henry Walker, for plaintiffs in error. G. E. Maddox and W. J. Nunnally, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

#### EQUITABLE LOAN & SECURITY CO. v. KNOX.

(Supreme Court of Georgia. Nov. 25, 1908.)

##### MASTER AND SERVANT (§ 39\*)—CONTRACT OF EMPLOYMENT—ACTION FOR BREACH.

It appearing from the petition that contract for services had been made and broken by the employer (the defendant in the suit), and that the plaintiff had performed the services contemplated, the plaintiff was entitled to sue for and recover the loss sustained in consequence of the breach of the contract, and the general demurrer to the petition was properly overruled.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 45; Dec. Dig. § 39.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Fitzhugh Knox against the Equitable Loan & Security Company. Judgment for plaintiff. Defendant brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Fitzhugh Knox sued the Equitable Loan & Security Company for damages alleged to have resulted from a breach of contract. His petition contained the following allegations: In the fall of 1908 the petitioner entered into a contract with the defendant "to promote a certain building," now known as the "People's Building," situated in the city of Atlanta. Under this contract it was agreed that petitioner should furnish the plans and specifications for the erection of the building, and was to superintend its erection and construction. Defendant was to pay for this work the sum of \$750, and, in addition thereto, the sum of 2½ per cent. as commission on all leases and tenancies, which petitioner should secure for the basement, stores, and offices, when the building was completed, which leases petitioner, as manager of the building, was authorized to secure. Owing to the fact that greater work had devolved upon him in obtaining tenants and collecting rents, the defendant agreed to pay to petitioner a commission of 5 per cent. on all leases and tenancies for the offices in the building. He has fully complied with his part of the contract, having secured leases for the building, a copy of which leases is attached to the petition as an exhibit. He is entitled, under his contract with defendant, to a commission of 2½ per cent. from the rents accruing from the leasing of the stores and basements, and to a commission of 5 per cent. on the rents accruing from the renting of the offices of the building. On January 11, 1907, he received notice from the defendant, advising him that his services as manager of said building would cease on that date, and demanding of him that he turn over to the secretary of the defendant company all papers in his hands belonging to the company. He is fully capable of continuing to carry out his part of the contract. The act of the defendant in violating its terms and attempting to terminate his agency was unauthorized, and not occasioned by any improper act on his part, and he is entitled to the amount of commissions he would have earned on the unexpired leases. The defendant demurred generally and specially to the petition. The general demurrer and certain grounds of the special demurrer were overruled. To the order overruling the general demurrer the defendant excepted, but did not except to the ruling of the special demurrer.

Brown & Randolph and J. J. Bowden, for plaintiff in error. Payne & Jones, for defendant in error.

BECK, J. (after stating the facts as above). In the case of *Rogers v. Parham*, 8 Ga. 190, it was held that, when an agent is wrongfully dismissed from the services of his employer, he has the election of three remedies: "First, he may bring an action immediately, for any special injury which he may have sustained,

in consequence of a breach of the contract; second, he may wait until the termination of the period for which he was employed, and then sue upon the contract and recover his whole wages; third, he may treat the contract as rescinded, and may immediately sue on a quantum meruit for the work and labor he actually performed." In the case referred to it was adjudicated that the plaintiff, the party wrongfully dismissed from the services of his employer, had not brought his suit prematurely, and that his suit was for the recovery of special injury, which he alleged that he had sustained by the breach of the contract on the part of the defendant in that case. In the case at bar the suit is for the actual damages sustained by the plaintiff, and he fixes his damages at the amount that he would have been entitled to had he continued in the service of the defendant until the expiration of the leases of the tenants whom he had secured for the building in question. And that amount which he would have received as compensation may be taken into account in determining the amount of damages sustained by the plaintiff, should the finding of the jury on the final trial be in favor of the plaintiff. But it is also alleged that the plaintiff had performed all the services that would have been required of him under the contract. In the case referred to it was held that the plaintiff could recover damages, and the elements of the damages there recovered are very similar to those involved in the present case. In principle the cases can hardly be distinguished. Whatever differences there may be in the facts is in favor of the plaintiff. The facts in the *Parham Case*, which caused the writer of the opinion to doubt the soundness of the decision, do not exist in the case which we have for decision. See, in this connection, the case of *Beck v. Thompson & Taylor Spice Co.*, 108 Ga. 242, 33 S. E. 894.

Judgment affirmed. All the Justices concur.

#### HILL v. HILL.

(Supreme Court of Georgia. Dec. 1, 1908.)

#### ALIMONY AND ATTORNEY'S FEES.

There was no abuse of discretion by the court in awarding temporary alimony and attorney's fees under the pleadings and evidence. (Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by Willie Hill against J. W. Hill for divorce. From an order granting alimony and attorney's fees, defendant brings error. Affirmed.

A. H. Thompson, for plaintiff in error. H. A. Hull, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.



**CHAMBLEE v. ATLANTA BREWING & ICE CO. et al.****MORRIS v. SAME.**

(Supreme Court of Georgia. Nov. 19 and 21, 1908.)

**EXECUTION (§ 188\*)—CLAIMS BY THIRD PERSONS—PROCEEDINGS TO ESTABLISH—NATURE AND FORM.**

An equitable petition alleged, in substance, as follows: A testatrix was indorser on certain promissory notes, which were sued to judgment against the executors of her estate, after her death. Before the rendition of the judgment, all of the property of the decedent, consisting of real estate, had been conveyed by the sole legatee under the will, in separate parcels, to different purchasers, of whom the petitioner was one, and some of such parcels were again conveyed by the purchasers to others. One of the deeds by the sole legatee was also signed by the executors as individuals. Afterwards the judgment creditor caused his execution to be levied on several parcels of land so conveyed. The several purchasers, including the petitioner, interposed claims to their respective lots, and the claim cases thus made are still pending and about to be brought to trial. If any of the property levied on is subject to the execution, all of it is so; and there are also three lots not levied on. If subject, each parcel is bound to contribute a pro rata part of the judgment debt. The estate, the executors individually, and the legatee are each insolvent, and the executors and legatee are nonresidents of the state. There is no other property from which the amount due on the judgment can be realized. The ends of justice would be best subserved by having all of the issues tried in one case; and the proportionate amount due by each of the claimants, if any amount be so due, should be determined in one action. It was prayed that all of the claim cases be enjoined, that the rights of all the parties should be determined in this case, and the amount of contribution of each be decreed. The plaintiff in execution filed no demurrer. Two of the claimants of lots demurred. *Held*, that the petition was not subject to such demurrer.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 188.\*]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Equitable petition by the Atlanta Brewing & Ice Company and others against C. J. Simmons and others. Lena Chamblee, one of the defendants, interposed a demurrer; as did also E. S. Morris, another of the defendants, and, from the overruling thereof, each brings error. Affirmed.

The Atlanta Brewing & Ice Company filed an equitable petition against C. J. Simmons and several other defendants. It alleged, in brief, as follows: On September 25, 1905, Simmons obtained a judgment against L. D. and A. C. Morris, as individuals and as executors of the estate of Mrs. Elizabeth Morris, for \$4,500 principal, \$1,233.97 interest, and \$373.97 attorney's fees and costs; the judgment being based on a note given by L. D. & A. C. Morris and indorsed by Mrs. Elizabeth Morris in 1902. A *fi. fa.* issued and was levied on several tracts of land separately.

These were severally claimed by the other defendants besides Simmons. An abstract of title, briefly stating the grantor, grantee, consideration, date of execution, date of record, character of instrument, and the property covered by it as to each piece of property claimed, was set out, beginning in each case with a conveyance into Elizabeth Morris, and mentioning as one link in the chain her will dated in 1902, and recorded in August of that year. All of the property was owned by Mrs. Morris at the time of her death, and passed under her will to Miss Queen Morris. "If any of said property before described is subject to said *fi. fa.*, all of said property is equally subject; and all of said property should, in proportion to its value or upon other equitable principles, be required to contribute pro rata to the satisfaction of said *fi. fa.* Said C. J. Simmons claims that said property is subject to the *fi. fa.* owned by him on the ground that the property of Mrs. Elizabeth Morris was subject to the payment of her debts and legal obligations prior to any distribution of the estate left by her between her devisees." On information and belief it is alleged that L. D. and A. C. Morris are both insolvent. The petitioner has filed a claim to the lot held by it, and which has been levied on under the *fi. fa.* mentioned, and its claim and the others are now pending. In none of the cases can the property be subjected without other equitable proceedings. The suits are ready for trial, and some of them are being pressed for immediate trial in the superior court where this suit is filed. If each of them proceeds separately, the result would be a multiplicity of suits, and each of the claimants, after payment of the *fi. fa.*, would be entitled to contribution from the remainder of those holding their property in the same situation. Each of the claims would have to be tried separately, "and your petitioner avers that, under equitable principles, a temporary restraining order should be granted; and your petitioner shows that the ends of justice would be best subserved by having all of said issues tried in one case, and the proportionate amount due by each of said claimants, if there be any amount so due, should be determined in one action." It was prayed that the trial of the claim case be enjoined, and that the rights of all the parties should be determined in this case, and the amount of contribution of each of the defendants be decreed; also for general relief and process. Three other lots, the title to which came through the will of Mrs. Morris to the holders thereof, were described, and it was alleged that they were equally subject to the *fi. fa.* with the lot of petitioner, but were not levied on. By amendment it was alleged that the property described was all of the property of the estate of Mrs. Morris which the plaintiff could discover, or which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could be subjected to the execution of Simmons; that the estate is insolvent, the executors as such and as individuals and Queen Morris are all insolvent and nonresidents, and that, if the property of the petitioner were subjected to the payment of the *fi. fa.*, it would be compelled to proceed against the real estate described, which would be its only recourse for contribution; and that, in any event, the ratable proportion to pay petitioner, if any, could better be determined in a court of equity with all parties before it. Mrs. Chamblee, one of the defendants, who had interposed a claim to the levy of the execution of Simmons on a certain lot other than that claimed by the present petitioner, interposed a demurrer on the following grounds: "(1) Because the said petition sets forth no cause of action in favor of said plaintiff against said defendants, and especially as against this defendant. (2) Because the said petition sets forth no ground entitling the plaintiff to have any relief against this defendant. (3) Because the said petition does not set forth sufficient facts showing that the plaintiff is entitled to any contribution from this defendant. (4) Because the facts stated in the said petition show that said plaintiff has not paid nor been adjudged to pay any sum of money to the said defendant, Simmons, upon the said executions set forth in said petition, and that the said plaintiff is therefore not entitled to maintain a bill for contribution against this defendant. (5) Because the facts set forth in said petition fail to show that the property bought by this said defendant as set forth in said petition is subject to the said execution of the said Simmons. (6) Because the facts set forth in said petition show that the property of this defendant described in said petition is not subject to the said *fi. fa.* of the said Simmons. (7) Because the said petition shows that the said plaintiff has filed a claim to the levy of the *fi. fa.* of the said Simmons upon the property claimed by plaintiff in said petition as belonging to it, and in said claim is denying that said property is subject to said *fi. fa.*, and that, therefore, said plaintiff cannot maintain this equitable petition for the purposes set forth therein." The demurrer was overruled, and she excepted. E. S. Morris, another claimant, also demurred, and upon the overruling of his demurrer he excepted. The two cases were argued together in this court.

Edgar Latham, for plaintiff in error Chamblee. Jos. M. Terrell, King, Spalding & Little, E. A. Neely, and Edgar Latham, for plaintiff in error Morris. Slaton & Phillips and Rosser & Brandon, for defendants in error.

ATKINSON, J. Inasmuch as a judgment in Georgia binds all the property of the defendant from its date, and the plaintiff in the execution may levy on any of such property which is subject to the lien of his judg-

ment at his option (with the right in the defendant to point out property), if the defendant in an execution duly entered on the docket conveys any or all of his property to others, equity will not delay the plaintiff in execution in the enforcement of his legal right to levy on some portions of the property in order that the purchasers of different parts thereof may adjust among themselves their equities, and will not compel him to levy upon the property in the inverse order of its sale to such purchasers. *Barden v. Grady*, 37 Ga. 680. Where a plaintiff in execution has caused it to be levied on several pieces of property, and is proceeding to have it enforced in the ordinary legal method, and claims have been interposed by those holding the respective parcels, whether one of them can assert that it was necessary for the plaintiff to go into equity in order to enforce his execution, and allege his equities for him, and thus compel him to assert his equitable rights, instead of proceeding to try the legal issue of subject or not subject, over his objection, is not now before us. In this case the plaintiff in *fi. fa.* has not demurred to the petition or raised any objection thereto. It is not therefore a question as to whether he might be delayed in his common-law method of procedure in order to adjust the equities between the purchasers of land; but it is a question as to whether, between the purchasers themselves, two of whom alone raise objection by demurrer, an equitable cause of action is set out. Section 8422 of the Civil Code of 1895 declares that, "If the estate has been distributed to the heirs at law without notice of an existing debt, the creditor may compel them to contribute pro rata to the payment of his debt." See, also, section 3336. "If the heirs or legatees took with notice, they would certainly be in no better position. When assets of a trust character are misapplied, and can be traced in the hands of persons affected with notice of the misapplication, the trust attaches still to them, and equity will aid in restoring them to their legitimate purpose. A creditor of an estate may follow assets in the hands of legatees or distributees, though they receive them without notice." Civ. Code 1895, § 3201. An administrator may recover possession of any part of an estate from the heirs at law or purchasers from them if it is necessary for him to have possession for the purpose of paying debts or making a proper distribution. Civ. Code 1895, § 3358. "Equitable assets may be reached by a creditor in every case where he shows that there is danger of not being satisfied out of legal assets." Civ. Code, 1895, § 4004. Here the property was conveyed to third parties before the judgment was obtained against the executors of the estate. The conveyances were made by the sole devisee under the will, and in one instance the executors, not signing as such, but as individuals, joined with her in the conveyance.

The petition alleged that the estate was insolvent, as were also the executors and the devisee, and that the property which had thus been passed out of the hands of the executors while the debt against the testatrix was in existence, but before it had been reduced to judgment, was all out of which the debt could be realized. From the allegations of the petition most of the property was sold before the suit was instituted. Under these circumstances, it would seem that according to the ruling in *Castellaw v. Gullmartin*, 58 Ga. 305, the plaintiff could not reach and subject such property in the hands of purchasers from the devisee and those claiming under such purchasers by mere levy and sale, even if any of the other property could be reached by direct levy. It was not distinctly alleged that the estate had been distributed by the executors and assent given to the legacy to the devisee under whom the various claimants held, but substantially this was the case made. If the lots are all subject by reason of distribution and their passing into the hands of others while the debt was in existence but before the rendition of the judgment, they are liable pro rata. If they are liable pro rata and can only be made so in equity, and if the owner of one should pay more than his pro rata share, and could then require the others to contribute proportionately, there would seem to be no sound reason why the equities between the parties could not be adjusted in a single case. The liability of these lots to the payment of the debt in each case involves the question of distribution of the estate and conveyance by the devisee before payment of the debt. It was alleged that if one was subject, all were subject, and that each would be subject pro rata. If so, a determination of the valuation and pro rata liability of each lot in a separate contest with the plaintiff would not be binding on the claimants of the other lots; and, when they sought to adjust the equitable proration or contribution with each other, as between themselves, the whole subject would again be open to litigation; so that the petition presents a case where the same question must be litigated by the plaintiff with each of the claimants of the land, and afterwards, if they seek an adjustment among themselves, must be again litigated among them. If this be so, and the equitable power of the court must be constantly invoked in the litigation, why should it not adjust all the controversies in one proceeding?

It is contended that while the plaintiff in execution might have appealed to the equitable powers of the court, as he did not do so, the claimants of the lot could not institute this action. In the case of *Fleishel v. House*, 52 Ga. 60, property on which there was a legal lien was sold in parcels, but at one time at public auction. Some of the purchasers failing to comply with the terms of sale, others subsequently took the portions

bought by such purchasers so failing. The execution based on the attachment which constituted the lien was levied on the entire property. Two persons claiming lots as purchasers took an assignment and transfer of the execution and judgment from the plaintiff therein, and caused the original levy to be dismissed and a new levy to be made on two lots which had been purchased by another. He filed an equitable proceeding, praying for an injunction to restrain the sale, and to have the status of the different lots determined and the burden resting upon them respectively fixed. The trial judge denied the injunction. This ruling was reversed by the Supreme Court. The judges of this court apparently did not entirely concur in their views as to the status of the purchasers, two of them announcing that, under the circumstances stated, the rule as to the discharge of a lien in the inverse order of the sale by the debtor, as among purchasers, did not apply, but that all the purchasers were bound to contribute to the discharge of the lien in proportion to the amount respectively purchased by them. All concurred, however, in the reversal and in holding that equity would determine in one proceeding the controversy between all of the purchasers. It will be noticed that, while two of the purchasers had taken a transfer of the execution and caused it to be levied upon the lot bought by another, the equitable petition was not filed by these assignees, but by the person on whose lot the levy was made, for the purpose of adjusting the status of all the lot owners and their lots, and that this was done before the complainant paid the execution or any part thereof. In his opinion Chief Justice Warner said: "But conceding that Strickland, the original judgment creditor, could have levied the execution on any separate portion of the property subject thereto in satisfaction thereof, at his pleasure, and that his assignees of the judgment, as a general rule, would stand in his shoes, with the same rights that he would have had, still, when it is apparent that all the purchasers of these subdivided lots are bound to contribute ratably to discharge the common burden resting upon the land before the subdivision and sale, the defendant McGuire being insolvent, why, under this state of facts, should the assignees of the judgment, who are two of the purchasers of a part of the incumbered property, be allowed temporarily to protect their own property by having the execution levied on the property of other purchasers subject to the attachment lien, when those other purchasers can compel them ultimately to discharge their proportion of the common burden? In our judgment, under the facts disclosed by the record, the injunction prayed for should have been granted so as to prevent circuity of action and a multiplicity of suits." See, also, on the general subject, Civ. Code 1895, § 3320;

*Cheney v. Rodgers*, 54 Ga. 168; *Caldwell v. Montgomery*, 8 Ga. 106; *Johnson v. Lewis*, 8 Ga. 462; *Justices v. Moreland*, 20 Ga. 145, 147; *Jones v. Parker*, 55 Ga. 12; *Amlis v. Cameron*, 55 Ga. 451; *Wynn v. Bryce*, 59 Ga. 532; *Redd v. Davis*, 59 Ga. 826; *Jones v. Sikes*, 85 Ga. 546, 11 S. E. 664; *Crockett v. Mitchell*, 88 Ga. 166, 14 S. E. 118; *Watkins v. Gilmore*, 121 Ga. 490, 49 S. E. 598. In neither *Jones v. Parker*, 60 Ga. 500, nor *Long v. Mitchell*, 63 Ga. 769, was it alleged that the administrator was insolvent. Here insolvency both of the executors and of the estate is alleged, as well as nonresidence of the executors and the devisee. The doctrine of multiplicity of suits is clearly set forth in *Civ. Code 1895*, § 4894, and in the discussion in *Smith v. Dobbins*, 87 Ga. 318, 13 S. E. 496, and *Webb v. Parks*, 110 Ga. 639, 641, 36 S. E. 70. In *Portwood v. Huntress*, 113 Ga. 815, 39 S. E. 299, there was no question of equitable contribution or prorating of a common burden.

The fact that the petitioners and others had interposed claims under the statute to the levies of the execution furnishes no reason why, if the common-law procedure does not give a complete remedy, resort may not be had to equitable pleading for that purpose. Equitable pleadings in a claim case or equitable proceedings in aid of a levy or a claim are quite usual in proper cases. While the petitioner does not allege in terms that it concedes liability in equity, the facts set out in its petition, taken as true, would suffice to make a case of common burden for equitable apportionment. This is not strictly a case of legal contribution in which the rule laid down in the Code is applicable, that, among two or more persons, "where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others." *Civ. Code 1895*, § 3991. It is rather a case of equitable apportionment of a common burden upon different lots or owners thereof, and of requiring them in equity to contribute ratably, when such apportionment is made, to the satisfaction of the charge which is proceeding to subject the property.

In *Huey v. Stewart*, 69 Ga. 769, there was no question of determining the burden which should fall upon respective lots or lot owners, and which was uncertain in amount until the value of the respective lots should be ascertained, not any matter of multiplicity of suits. A recovery had been had against one administrator, who thereupon sought to obtain contribution from the representative of his coadministrator without paying the judgment. In that or similar cases payment would undoubtedly be necessary before seeking contribution. In *Jenkins v. Nolan*, 79 Ga. 295, 5 S. E. 34, an effort was made to file a bill of peace before a single claim had been tried without showing any sufficient reason why the legal question could not be adjudicated in the claim case. In

*Mayor v. Dean*, 124 Ga. 750, 53 S. E. 183, the mere fact that three executions based on assessments for local municipal improvements had been issued, and two of them levied on separate lots of the same person, was not alone sufficient to authorize an equitable proceeding to consolidate them on the ground of multiplicity of suits. In the case of *Home Ins. Co. v. Va. Carolina Chem. Co.*, 109 Fed. 681, the circuit court for the district of South Carolina went further than we find it necessary to go in this case. There suits had been brought by the same plaintiff against a number of insurance companies on policies of insurance, and all of such suits but one had been removed to the federal court. Two of the insurance companies filed a bill, alleging that there had been such an overvaluation of property as amounted to a fraud which avoided the policies, or at least did not bind the companies to the amount stated under the law of South Carolina; that, if the companies were liable, each was liable for a proportion only of the loss, namely, as the amount of the policy of each insurer bore to the total insurance, including any such total insurance for which the insurer was liable as a coinsurer in the event that it had failed to maintain insurance to the extent of 90 per cent. of the value of the property insured under the terms of the policy; that it was necessary that the amount of loss should be ascertained; that the amount of insurance maintained should also be ascertained, and likewise the per cent. that such insurance bore to the value of the property insured, and the amount, if any, that the insured was liable to contribute as a coinsurer; and that, if the court should hold that the complainants and the other companies were liable at all, the loss should be apportioned between each of the insurers and the insured in accordance with the terms and stipulations of their contracts as set forth. It was alleged that, by virtue of the contracts of insurance, each insurer was interested in the liability of the other, and the liability of the assured as a coinsurer; that, if these several matters were to be ascertained in 16 suits at law by different juries and on different trials, in one case one set of values might be fixed, in another another set, and in this way one insurance company might be called upon to pay its proportion in one case upon a different ratio than might be fixed in each of the other cases of the other insurers; and that this presented a case for the ascertainment of whether any liability at all existed, and, if so, then for making a common apportionment and determining the contribution which each of the insurers, including the insured, if found to be liable as a coinsurer, should make to the common loss. The insured and the other insurance companies were made parties defendant, and it was prayed that the suits upon the policies should be enjoined, and that the entire controversy

should be determined at once, and for other relief. That bill was sustained as against a demurrer, and the decision was upheld by the Circuit Court of Appeals. 113 Fed. 1, 51 C. C. A. 21. A petition was presented to the Supreme Court of the United States for a writ of certiorari, but was afterwards dismissed for want of prosecution. 189 U. S. 517, 23 Sup. Ct. 854, 47 L. Ed. 928. Duplicitly in pleading or multifariousness in an equitable action furnish good grounds for demurrer, but the same case may sometimes be presented in a dual aspect leading up to the same remedy, or upon an allegation of facts, in a proper case, there may be an alternative prayer without subjecting an equitable petition to demurrer on the grounds referred to. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Story's Eq. Pl.* (10th Ed.) § 42; *Fletcher's Eq. Pl. & Pr.* § 106, p. 140.

Whether or not the plaintiff in execution could have successfully contested the right of the petitioner to have enjoined him from proceeding, and to have brought the entire matter into equitable cognizance, is not before us, and is not decided. But, upon the case presented, the presiding judge did not err in overruling the demurrers which were interposed by claimants of other lots than that held by petitioner. The two demurrants filed separate bills of exceptions, but both are controlled by the same ruling, and the judgment in each is the same.

Judgments affirmed. All the Justices concur.

#### YOPP v. STATE.

(Supreme Court of Georgia. Nov. 21, 1908.)

CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS—MATTERS NOT SUPPORTED BY EVIDENCE.

There being no evidence to authorize a finding by the jury that the deceased assaulted the accused in order to prevent him from committing adultery with the wife of the deceased, it was error for the court, in its charge to the jury, to give the state the benefit of the law applicable to such a theory.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.\*]

(Syllabus by the Court.)

Error from Superior Court, Laurens County; J. H. Martin, Judge.

George Yopp was convicted of murder, and he brings error. Reversed.

George Yopp was indicted for murder, charged with the killing of Dock Cason. Upon the trial it appeared that there were only two witnesses to the homicide, Nat Jones and Nelly Cason, wife of the deceased. The state introduced Nat Jones, who gave the following account of the tragedy: Cason and his wife had separated about two months previously, and she had gone to live in a house belonging to her father. Witness was her

nephew and lived with her. About 8 o'clock at night, witness and Dock Cason met at the back door of the house occupied by Cason's wife, and, in the language of the witness, "Dock asked me was Aunt Nelly there, and I told him I did not know, nobody would answer, and he said, 'Let me see if I can make them hear.' I shook the back door first, and nobody answered. Then he did, and nobody answered. There wasn't but two rooms in the house. Dock went around to the window and raised it up and called me. He told me to come around there. I held it up for him, and then he did for me afterwards, and let me into the room where George and Nelly were. George was sitting on the side of the bed, and Nelly in a chair by the fireplace. Aunt Nelly said: 'Dock, what do you want to come in here for? Don't you know papa don't allow you to come in his house?' He said: 'Don't be so fretful. I am not going to hurt the house.' Dock said, 'Hello George,' and George said something to him. George said, 'Hello,' and Dock said, 'Have you got a pistol or a knife?' and George said, 'No, I haven't got either one.' George said, 'Dock, didn't we settle this thing Tuesday night?' and Dock said, 'I didn't come here to have any fuss at all, and, if you haven't got a pistol or a knife, get up and let's have some fun.' \* \* \* George sat there with his head down, and seemed like Dock was going to shoot him. And he walked around the table, and Dock backed, and George shot him. He walked back about three feet. He had his hand in his hip pocket. He backed back and stood still. Dock at that time said nothing. George shot him twice. I don't know where he got the pistol. He hit him once, and Dock fell in the door cat-cornered. \* \* \* George said after the shooting, 'The damn son of a bitch, I have killed him.' Dock said nothing after he was shot. He was killed dead. I didn't see Dock with anything. I didn't have time to look at him pull his hand out of his pocket. I didn't see anything in his hand. \* \* \* George left. I didn't know where he went. I run out of the house. \* \* \* I reckon I was gone about an hour, \* \* \* and when I got back I saw the knife down there by his right hand, I reckon about two feet from his hand." On cross-examination, the witness testified: "I called Aunt Nelly, and nobody would answer. George and Aunt Nelly were both in the kitchen. \* \* \* They were doing nothing but talking. George was on the bed, and Nelly was in the chair. I don't know what they were talking about." After detailing the conversation between Dock and George, as testified to on his direct examination, the witness further testified as follows: "George said, 'Didn't we settle this thing up town Saturday night?' He said, 'Yes,' and George said, 'What do you want to come here starting another fuss for?' and he said, 'I didn't

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

come for any fuss,' and George said, 'You act like it,' and Dock said, 'If you haven't a pistol or a knife, get up.' And George walked around the table and looked like he was going to shoot. They were both backing back. There was a door to this room, at the end, barred up. I reckon the door in front was fastened. He went out of the back door. I reckon when he got up he started around the table like he was going through the middle door out to the front. He went towards the door. The shooting occurred before he got there. When he left the bed, he went toward the middle door. He had to go around the table. Dock asked him before he started if he had his pistol or knife."

A witness for the state testified that he reached the scene of the homicide soon after the killing, and that a knife was lying near the left hand of Dock Cason. There was also evidence for the state to the effect that the knife found near the body of Dock Cason belonged to his wife, Nelly.

Nelly Cason testified, in behalf of the accused, as follows: "I \* \* \* was present the night that Dock was shot. I was living then with my father. \* \* \* Dock came to my house about 11 or a little bit later, and George Yopp was there. He came to the front door and knocked. He came from the front door to the back door, and when he knocked at the front door, I locked the back door, and he 'histed' the window and came in, and I asked him didn't he know he had done wrong by coming in the window, and he said yes. I told him my father said, if he couldn't live with me like a husband, he would rather he didn't come to my house. He asked George did he have a pistol, and George told him no, and I asked him to listen to me, and he would not. He asked George did he have a knife, and George told him no, and George asked him hadn't they drank and shook hands up town, and I asked Dock again to listen to me, and I told George not to say anything to him and to go on, and I told Nat to go to the store and tell my father to come there, and Dock told him he need not mind going for my father, and I asked him again to listen to me, and he turned to George and asked him did he have a pistol, and George told him no, and he stepped a few steps backward and took his knife and stepped a few steps forward, and said, 'Get up and let's have some fun.' He said he come there for business, and to get up, and George rose and shot him. Dock was going towards George when he shot him, and had got pretty close. \* \* \* There was a table in the rear of George that kept him from getting out of the way when he was going on him with a knife. Dock could not have gone through the wall. He was hemmed up like. Dock had the knife in a cutting position. He drew it from his hip pocket. It was open when he drew it out. I don't know where this knife came from." The witness testified that it was not her knife. She further testi-

fied that George came to see her occasionally, but there had never been any improper intimacy between them, that neither of them had had any clothes off on the night of the homicide, and she had not been on the bed at all that night.

There was evidence for the accused tending to show that the knife found near the body of Dock Cason was his knife. A witness for the state testified, in rebuttal, as follows: "I went by the house where Dock Cason was killed that night, somewhere between 11 and 12 o'clock, and heard something said by somebody in the house. I was passing by, and heard a knocking on the inside of the house, and I stopped a few minutes and heard a voice that seemed like it was in the lower room, said, 'Open the door,' and no one didn't say anything at that time, but I could hear a mumbling in the front room, and they knocked again several times, and after a while I heard a fellow speak, and say, 'You are not going to open that damned door,' and the other one said, 'Open the door, George, I am not going to hurt you,' and he [the defendant] said: 'Know damn good you are not going to hurt old George. Wait till I can get my pants on, and I will open the door.' And I went to get another fellow to come there and stop the row."

There was a verdict finding the accused guilty, with a recommendation to mercy. He made a motion for a new trial, which was overruled, and he excepted. From this motion it appears that upon the trial the court charged the jury as follows: "One of the contentions of the state in this case is that Dock Cason, if he did make an assault upon the defendant, George Yopp, he did so under such circumstances that he was justifiable in making the assault upon Yopp, and that Yopp is not and could not under the law be justifiable in defending himself against such an assault; the state claiming that Dock Cason made the assault upon Yopp to prevent Yopp from debauching or having illicit intercourse with the wife of Dock Cason. This contention is controverted and denied by the defendant, and that constitutes an issue of fact which the jury are to pass upon and determine. I charge you that it is only where there is an absolute necessity on the part of the husband to make a deadly assault to prevent adultery with his wife that the case would stand upon the same footing of reason and justice with other cases of justifiable assault; that is, that Dock Cason would only be justifiable in making an assault upon Yopp that was necessary to prevent an illicit intercourse or adultery or apparently so to him as a reasonable man under the facts and circumstances existing at the time. If you believe that he, Cason, made an assault, and was justifiable in making this assault, upon Yopp, then I charge you that Yopp would not be justifiable in repelling that assault by making a counter deadly attack or assault upon Cason; that is, if you

believe from the evidence in this case that Dock Cason assaulted Yopp under circumstances where there was an urgent and pressing danger of Yopp's committing adultery or illicit intercourse with the wife of Cason, if you find the woman alleged to be so was the wife of Cason, and that assault was absolutely necessary to prevent the adultery, then Yopp would not have been justifiable in making an assault. And if you find that to be the facts of the case, and that Yopp was in the act, or about to commit the act, of adultery with the wife of Cason, and this assault was made to prevent it, I charge you then that although Yopp himself, being in danger would have no right to defend himself by using any deadly weapon against Cason; the law being that what would justify the husband under such circumstances would not justify the adulterer in preventing by homicide or attempting homicide." These instructions were made the subject of several grounds of the motion for a new trial. Among the assignments of error were that the evidence did not make any such issue as stated by the court in these instructions, and that the charge was not authorized by the evidence.

H. P. Howard and D. M. Roberts, for plaintiff in error. J. E. Pottle, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

FISH, C. J. (after stating the facts as above). The instructions of the court, quoted in the statement of facts, were subject to the noted assignments of error thereon, made in the motion for a new trial. It is plain that these instructions were not authorized by the evidence. The jury could not find from the evidence that Cason, if he assaulted the accused with a deadly weapon, was justified in so doing because the accused was in the act of adultery with Cason's wife, or that the assault was made upon the accused to prevent him from committing adultery with the wife of Cason. Whatever may have occurred before Cason entered the room where his wife and Yopp were, or whatever may have been the intention of Yopp and Cason's wife before Cason came into the room, it is clearly evident from the testimony that Cason did not come upon his wife and Yopp while they were committing the act of adultery, or find them in such a situation relatively to each other as to indicate that such act would then be committed unless he, Cason, interfered by violence to prevent it. According to the testimony of both Nat Jones, who was introduced by the state, and Nelly Cason, wife of the deceased, who testified in behalf of the accused, when Dock Cason entered the room where his wife and Yopp were, Yopp was sitting on the side of the bed, and Cason's wife was not on or at the bed, but, if Jones was to be be-

lieved, she was sitting in a chair by the fireplace; and, if her evidence was accepted as true, she was then going from this chair, from which she had just arisen, to the back door to open it for Cason to enter the house. But, even granting that the law which the court charged would have been applicable to the facts if Cason, as soon as he entered the room, had made an attack upon Yopp. It is clear that such law was not applicable to the case when the evidence, both for the state and the accused, showed that Cason did not assault Yopp immediately upon entering the room and finding him and Cason's wife therein, but engaged in a conversation with him, one purpose of which appears to have been to ascertain whether Yopp was armed or not. So, if Cason assaulted Yopp at all, such assault was not made immediately after an act of adultery had been committed by Yopp and Cason's wife, nor at a time when the commission of such an act by them was imminent. No reasonable mind could conclude that Yopp intended to have sexual intercourse with Cason's wife while both Cason and his wife's nephew were present in the room. It is clear therefore that whether Cason made an assault upon the accused to prevent him from debauching or having illicit intercourse with Cason's wife was not an issue made by the evidence in the case; and the charge of the court, in which it was stated that this was an issue, and the instructions to the jury as to the law applicable thereto, were calculated to mislead the jury and to harmfully affect the rights of the accused, and consequently were cause for a new trial.

Judgment reversed.

#### SOUTHERN GRANITE CO. v. VENABLE BROS.

(Supreme Court of Georgia. Nov. 24, 1908.)  
CONTRACTS (§ 337\*)—ACTION FOR BREACH—PLEADING.

It appearing from the petition in this case that there had been a breach on the part of the defendant of the term of a contract between the defendant and the plaintiffs, and that damages had resulted to the latter from such breach, the general demurrer to the petition was properly overruled.

[Ed. Note.—For other cases, see Contracts. Cent. Dig. §§ 1682-1690; Dec. Dig. § 337.\*]

(Syllabus by the Court.)

Error from Superior Court, Dekalb County; L. S. Roan, Judge.

Action by Venable Bros. against the Southern Granite Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Venable Bros. filed an equitable petition against the Southern Granite Company, alleging, in substance, as follows: On August 2, 1902, the plaintiffs entered into a contract with the defendant and the T. F. McClure

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

& Sons Company, which provided, among other things, for the proportion of granite blocks each party should be entitled to ship to Cincinnati, Ohio, for the pavement of streets; the proportion being as follows: The defendant, the Southern Granite Company, 37½ per cent. of all the work secured; T. F. McClure & Sons Company, 25 per cent.; and the plaintiffs, Venable Bros., 37½ per cent. Subsequently to the execution of this contract, the parties thereto secured from J. A. Eberhart and F. H. Kirchner & Co., of Cincinnati, a contract for the furnishing of granite blocks, curbing, etc., for the pavement of certain streets in that city. Both contracts are attached to the petition as exhibits, and the latter provides for the same proportion of granite to be shipped as the former. The Southern Granite Company has shipped to Cincinnati an amount of granite largely in excess of its proportion, and is rapidly shipping the entire amount required, with an utter disregard of the plaintiffs' rights. J. A. Eberhart, vice president of the defendant company, is in active charge of the contract work of paving the streets in said city. All orders for stone to be shipped are made by him, and, as he is acting in this double capacity, he is interested in ordering the granite to be shipped by the defendant. To furnish all of the stone was a larger undertaking than any one or any two of said parties could safely contract to do. It required the combined resources of all of them to furnish the stone as it would be required to complete said public improvements. Plaintiffs have repeatedly demanded that the terms of the contract be carried out, and that they be allowed to ship their proportion of granite; but J. A. Eberhart has refused and still refuses to permit it to do so. Plaintiffs have on hand a large quantity of material, which has been quarried at great expense, and it can easily and in ample time furnish the balance which they are entitled to ship, and which they would ship if they were permitted to do so by the defendant.

As the case was originally brought, the plaintiffs sought to enjoin the defendant from discriminating against them in the carrying out of a certain contract which had been made between the plaintiffs, the defendant, and T. F. McClure & Sons Company. The injunction was heard by the court below on June 4, 1904, and the defendant was enjoined as prayed, but was allowed to dissolve the injunction upon giving bond to pay all damages that might result to the plaintiffs from violation of the contracts entered into between the parties. This bond was given by the Southern Granite Company. Subsequently the plaintiffs filed an amendment to the original suit, set up the bond so given, and declared that the transaction covered by said contracts had been completed, and that certain fixed damages had accrued to them by reason of the violation of said contracts, and sought to

recover damages from the defendant in the main case. The plaintiffs also alleged that certain profits which would and should have come to them upon the fulfillment of the contract had been reaped by the defendant, and the amendment prays an accounting for said profits. A demurrer to the petition as amended was filed, and, after hearing, was overruled, to which ruling the defendant excepted.

A. H. Cox, for plaintiff in error. Jas. L. Key, for defendant in error.

BECK, J. (after stating the facts as above). The contention of the plaintiff in error is that the petition set forth no cause of action against the Southern Granite Company, but that, on the contrary said petition, by its allegations and exhibits, shows that such cause of action as the plaintiffs might have had was against other parties. With this contention of the plaintiff in error we are unable to agree. It clearly appears from the allegations in the petition and the contracts attached thereto as exhibits that a certain amount of stone was to be shipped by the three companies, the Southern Granite Company, T. F. McClure & Sons Company, and Venable Bros., and that the plaintiff in error was, under the contract, entitled to ship to the contractors 37½ per cent. of the stone, T. F. McClure & Sons Company 25 per cent., and Venable Bros. 37½ per cent. Each of the parties named knew, under the explicit terms of the contract, that they were only entitled to ship that percentage of the stone allotted to them by the terms of the contract into which they had entered, so long as the other companies were able to fill such orders as might be given them for stone, and each of the companies knew, furthermore, if they shipped more than their allotted percentage, that, to the extent of the excess of the shipments over the percentage which they were entitled to make, other companies would be deprived of the right which they were to enjoy of shipping their full percentage. It is alleged in the petition that the shipments of the stone were to be made upon orders sent by J. A. Eberhart, who was vice president of the defendant company, as well as one of the contractors with the city of Cincinnati. The defendant company, for a sufficient consideration, had agreed, in the contract under consideration, that of the stone required by the contractors the plaintiffs in this action should be allowed to ship, as stated above, a certain percentage to fill the contract for paving with the city of Cincinnati. It would be putting a strained construction upon the contract to say that, while the plaintiffs complain that the breach of the contract consisted in the fact that they were not allowed by the defendant the Southern Granite Company to ship their proportion of the stone, the petition is fatally defective, in that it does not state "how the defendant company



disallowed or resisted in shipments by Venable Bros., nor does the petition show that the Southern Granite Company ever undertook to order out any stone from anybody in connection with this matter." For perfectly good and sufficient reasons, the stone was to be shipped to Cincinnati on different occasions. The entire amount could neither be sent, nor could it have been received and handled in Cincinnati if all shipped at once. For obvious economic reasons, the stone was to be forwarded to Cincinnati in such amounts as required there by the contractors.

Now, when the orders for shipments came from the contracts in Cincinnati to the producing companies, inasmuch as each of these companies knew what percentage of the stone they were entitled to ship, it could not matter which one of the companies received the orders, for the company receiving could not but understand, if it had already shipped that percentage of the stone which it was entitled to ship under the terms of the contracts with the other producing companies, that the order should be delivered to that company which had not shipped the proportion of the stone which it was entitled to ship, and if such an order as the one last referred to should come into the hands of the company which had already shipped a larger portion of the stone than that called for by the contract, and the company receiving such order should fill the same, thereby depriving the company which was entitled to furnish the stone called for by the order of the opportunity of filling it, it might be said, without too greatly stretching the meaning of the word, that the former had not allowed the latter to make the shipment to which it was entitled. And especially is this true in view of the fact that the party who was to give the order was vice president of the company which seems to have been favored in the matter of the distribution of the orders for granite. The contracts themselves do not state explicitly who were to issue these orders, but it is distinctly alleged in the petition that the stone was to be shipped upon the orders of J. A. Eberhart, the vice president of the defendant company, for, in paragraph 5 of the amendment to plaintiffs' petition, it is alleged "that petitioners were to ship said stone only upon the order of the defendant as given through their vice president, J. A. Eberhart." If it could be said that this allegation refers only to the shipments which were to be made after the filing of the suit, still we have in the original petition (paragraph 10) the allegation that the "said Eberhart, vice president of the Southern Granite Company, is in the active charge of the contract work of paving the streets above mentioned, in the city of Cincinnati, and that all orders of stone to be shipped are made by him." While the relation existing between the producing companies is not that

existing between the members of a partnership, they do sustain such a relation to one another, having entered into a joint compromise, as would require of them perfect good faith in the performance of the duties and the exercise of the privileges and the enjoyment of the advantages arising from the performance of the contract which they had jointly undertaken to perform. When they entered into the contract, these companies considered that the terms of the contract secured to them certain advantages which could not have been secured but for the concurrence of all in the enterprise contemplated, and it would be inequitable to permit the defendant company, by taking advantage of the fact that it was favored in the matter of having orders sent to it, to deprive another party to the contract of the advantages and profits which it would have enjoyed and received had the contract been carried out in good faith by all parties signing it. In this connection, see the case of *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261 (6), 52 S. E. 898.

The foregoing disposes of the questions raised by the demurrers, which were general in their nature, and which are argued in the brief of counsel for plaintiff in error. The special demurrer, on the ground that the "petition does not show the place of making the contract," is not referred to nor urged in the brief of counsel, and the question raised by it is not dealt with in the opinion.

Judgment affirmed. All the Justices concur.

#### SCARBOROUGH v. MERCHANTS' & FARMERS' BANK.

(Supreme Court of Georgia. Nov. 21, 1908.)

JUDGMENT (§ 299\*) — AMENDMENT AT SUBSEQUENT TERM.

Where a plaintiff sues out an attachment which is levied on certain personal property, and files his declaration in attachment, and gives the defendant notice thereof as provided by law, and no plea or traverse of the attachment is filed, and a verdict is rendered in favor of the plaintiff for the sum declared on, upon which verdict a judgment in personam is duly entered, and when such decree is amended at a subsequent term of the court by adding thereto a judgment in rem upon the property attached, the amendment to the judgment will not be set aside on motion of the defendant, predicated solely on the ground that it was made at a subsequent term of the court, on the ex parte application of the plaintiff.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 299.\*]

(Syllabus by the Court.)

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Action by the Merchants' & Farmers' Bank against R. B. Scarborough. Judgment for plaintiff, and defendant brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On December 17, 1904, the Merchants' & Farmers' Bank sued out a fraudulent debtor's attachment against R. B. Scarborough, in the superior court of Dooly county, which was levied on certain personal property in the possession of the defendant. Notice was served on the defendant, and a declaration was filed at the first term of the court. Upon the organization of Crisp county, the attachment proceedings were transferred to the superior court of that county. No traverse of the ground of attachment nor plea was filed, and at the March term, 1906, of the superior court of Crisp county, a verdict was taken for the plaintiff for the amount declared upon, and a general judgment was entered upon the verdict. At the July term, 1907, of the court, on motion of the plaintiff, the general judgment was amended by declaring that the sum recovered be a special lien upon the attached property. Subsequently the defendant in attachment filed his motion to vacate and set aside the amendment to the judgment, because the judgment was amended without notice to him, and because there is no authority of law to make an amendment of this character after the adjournment of the term of the court at which the judgment was rendered. The court refused the motion, and exception was taken to this order.

Walter F. Hall, for plaintiff in error. J. T. Hill, for defendant in error.

EVANS, P. J. (after stating the facts as above). Much liberality is allowed in the amendment of judgments. The Code provides that a judgment may be amended, by order of the court, in conformity to the verdict upon which it is predicated, even after execution issues. Civ. Code 1895, § 5113. The rule has always been recognized in this state that a judgment may be amended to conform to the verdict and pleadings at a subsequent term. *Dennis v. Colley*, 112 Ga. 114, 37 S. E. 119. In the case of *Alexander v. Troutman*, 1 Ga. 469, it was held that if, in the entering up of a judgment on a note bearing interest from date, upon a confession of judgment, the interest in the judgment is computed only from maturity, the judgment may be amended at a subsequent term so as to include the interest on the note from its date. In *Bell v. Bowdoin*, 109 Ga. 209, 34 S. E. 339, a judgment was rendered by a justice of the peace against the defendant for principal, interest, and costs, and this court held that the justice could amend this judgment at a subsequent term by inserting therein the several amounts which the pleadings showed to be due; but the judgment must be amended by an inspection of the record, including the pleadings and verdict, without resort to extraneous proof. *Dixon v. Mason*, 68 Ga. 478.

Let us apply this principle to the facts of the present case. The defendant had filed neither plea nor traverse. The plaintiff filed his declaration in attachment at the first term, and notice thereof was given the defendant, and a verdict was rendered for the amount declared on. Under the pleadings and verdict, the plaintiff was entitled to a judgment in personam, and also in rem, upon the property on which the attachment was levied. Civ. Code 1895, § 4575. As only a judgment in personam was entered, the plaintiff was entitled to amend his judgment nunc pro tunc so as to include a judgment in rem. In an attachment case, where no plea had been filed, an unauthorized judgment in personam was allowed to be amended at a subsequent term into a judgment in rem upon the property on which the attachment was levied. *Mahone v. Perkinson*, 35 Ga. 207.

The amendment was allowed on the plaintiff's ex parte motion, and the defendant insists that the amendment is void because he had no notice of the proceeding. The general rule is well established that a judgment cannot be amended after the term at which it was rendered, upon an ex parte application. Due and proper notice should be given the opposite party so as to give him an opportunity to resist the proposed amendment. Nevertheless, if the amendment is to be based upon matter of record, and the judgment as amended follows as a matter of course, the necessity of giving notice to the adverse party is not so evident. 1 Black on Judgments, § 164. In the case before us, the defendant could not file a plea contesting the amount of the judgment, because he is concluded by the final judgment in personam. Civ. Code 1895, § 4558. The statute requires a traverse of the grounds of the attachment to be filed at the return term of the attachment, and does not provide for a traverse at a subsequent term. Civ. Code, § 4560; *Banks v. Hunt*, 70 Ga. 741. In his motion to vacate the amendment to the judgment, the defendant does not allege that any fraud was practiced on him, or that he was prevented by any act of the plaintiff from seasonably filing a traverse of the ground of the attachment. His right to a vacation of the amendment to the judgment is predicated solely upon the ground that it was made at a term subsequent to the rendition of the original judgment, and without notice to him. Under the circumstances of this case, it would be idle to set aside the amendment to the judgment because of lack of notice, when the defendant omits to show that a different judgment would be possible had he been notified of the proposed amendment.

Judgment affirmed. All the Justices concur.

**SOUTH GEORGIA RY. CO. v. NILES.**

(Supreme Court of Georgia. Nov. 24, 1908.)

**1. DEATH (§ 18\*)—ACTIONS—RIGHT OF ACTION.**

It appearing from the petition that, at the time of the death of the plaintiff's son, he was in the employment of the defendant company as a brakeman and switchman on a freight train, and that the negligence of the other employees of the company was the proximate cause of her son's death, the latter himself being in the discharge of his duties and free from fault and not guilty of any negligence contributing to his death, and it further appearing that the plaintiff was a widow dependent upon the deceased for support, and that he contributed towards her support, a general demurrer to the petition was overruled.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

**2. AMENDMENT OF PLEADING.**

Such of the special demurrers as were meritorious were met by appropriate amendments.

**3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

That certain testimony was admitted over the objection duly urged, that the testimony was hearsay, will not require the granting of a new trial, it appearing that the evidence, though subject to the objection made, could not have affected the verdict rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

**4. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT—VERDICT.**

Under all the evidence in the case, the question as to whether the negligence of other employees of the defendant company was the proximate cause of the death of plaintiff's son, and whether the deceased was in the exercise of due diligence and free from fault at the time of his death, were questions for the jury; and there being some evidence to support their finding, and no errors of law hurtful to the defendant having been made to appear, a new trial will not be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.\*]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action for death by M. A. Niles against the South Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

L. W. Branch, for plaintiff in error. Hendricks, Smith & Christian, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

**ROLAND v. ROLAND.**

(Supreme Court of Georgia. Nov. 21, 1908.)

**1. HUSBAND AND WIFE (§ 229\*)—ACTIONS BETWEEN—PETITION TO CANCEL DEED—SUFFICIENCY.**

Where a wife sought to have a deed, made by her to her husband, canceled as a cloud on her title, on the ground that a sale and conveyance made by a wife to a husband was void, but

failed to allege that the conveyance was not confirmed by the superior court, the petition, in so far as it rested on that ground, was demurrable.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 229.\*]

**2. HUSBAND AND WIFE (§ 229\*)—PLEADING—DURESS—SUFFICIENCY.**

A mere general allegation, in a petition brought by a wife against her husband for the purpose of canceling a deed, that she could not say, whether or not such a deed was made, as she was acting under the fear and coercion of her husband, but, if it was made, it was void under the laws of the state, was insufficient as a basis for equitable relief, and was demurrable.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 229.\*]

**3. EQUITY (§ 31\*)—JURISDICTION OF THE PERSON.**

Although a principal defendant in an equitable action may be a nonresident of the state, yet if he is within the jurisdiction of the court, and is personally served with process, the action will not be dismissed on the ground that the defendant, against whom substantial relief is prayed, does not reside in the county where the suit was brought.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 93; Dec. Dig. § 31.\*]

**4. HUSBAND AND WIFE (§ 185\*)—SEPARATE PROPERTY—SALE—AUTHORITY OF JUDGE IN VACATION.**

Under Civ. Code 1895, § 2490, the authority to allow a sale made by a wife to her husband is conferred on the superior court, not upon the judge of that court in vacation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 720; Dec. Dig. § 185.\*]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Equitable petition by Uretta Roland against G. W. Roland. Judgment for plaintiff, and defendant brings error. Reversed.

Uretta Roland brought her equitable petition, in the superior court of Colquitt county, against G. W. Roland, alleged to be a citizen and resident of the state of Florida, and Tommy Matthews, a citizen and resident of the county of Colquitt, alleging, in brief, as follows: Roland is her husband, having married her in 1886. For a long time she has been the owner in fee simple of a described tract of land. She is also the owner of certain stock used on the farm. During the month of August, 1905, Roland having a short time before gone to Florida, and having rented the land to Matthews without her consent, she filed an equitable petition in the superior court of Colquitt county in order to secure her rights in the matter and the rents of the land. About Christmas, 1905, Roland returned to Colquitt county, and some time about the 1st of January, 1906, went to the place where she was staying, and told her that she had to settle the suit against him, and that he would force her to convey to him the land. In order to carry out his scheme he made these threats to her, and, taking her in a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

buggy, carried her to Moultrie, where "he secured her to sign" some paper, by which her said case was dismissed from the superior court. In doing this she was acting under the coercion of Roland, against her will. She is informed that Roland claims that about 10th day of January, 1906, she made a deed selling and conveying to him the land. She cannot say positively whether or not such deed was made, as she was acting under the fear and coercion of Roland; but she asserts that, if such deed was made, it is void under the laws of this state. While under the laws of Georgia a deed from a wife to her husband is void, and while the deed from her to her husband would be void on account of fraud, she is informed and believes that he is proceeding to claim the land, and trying to sell it in order to put it into the hands of innocent purchasers. The deed is a cloud on her title, and she desires to have it canceled as such. The other defendant, Matthews, is in possession of the land, and she desires to have him restrained from paying over any money for rents to any one but herself. She and husband have been living apart since July 5, 1905, and he has made no provision at all for her. He is also in possession of a sewing machine belonging to her, which he has refused to deliver to her, though she has made demand therefor. She desires not to be molested or interfered with in any way by Roland, and "prays an order of this court preventing said G. W. Roland from interfering with her or coming where she is." She further prayed an injunction against Roland to prevent him from selling, or attempting to sell, the land, and from disposing of the property described; that he "be restrained from interfering with or speaking to the petitioner"; that a receiver be appointed to "collect all of said property," and hold it subject to the order of the court; that she have judgment "for whatever sum may be meet and proper"; that the deed from her to her husband be canceled as a cloud on her title, and for process. By amendment the plaintiff attached to her petition a copy of the deed made to her husband by her. It was dated January 10, 1906, and purported to be for a consideration of \$500. The defendant Roland demurred to the petition. The demurrer was overruled, and he excepted.

J. A. Wilkes and Olin J. Wimberly, for plaintiff in error. Shipp & Kline, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1, 2. The plaintiff appears to have proceeded on two theories: First, that a deed of bargain and sale by a wife to her husband was void, and should be canceled as a cloud on her title. A sale by a wife to her husband must be allowed by the superior court. Civ. Code 1895, §§ 2490, 3188. The

deed here concerned recites a consideration, and the petition does not negative such recital; nor does it allege that there was no allowance of the sale by the court. If the allegations of the petition are to be construed as intending to allege that no consideration was paid, then the deed was apparently a deed of gift, which has been held to require no order of court to render it valid. *Cain v. Ligon*, 71 Ga. 692, 51 Am. Rep. 281; *White v. Stocker*, 85 Ga. 200, 11 S. E. 604; *Hadden v. Larned*, 87 Ga. 641, 13 S. E. 806. On the general theory that a sale and conveyance by a wife to her husband is void, the petition was demurrable. The other theory was that the deed from the wife to her husband was induced by fraud or duress. But while the words "fraud" and "duress" are used, there is no sufficient allegation of facts in the petition to show any fraud or duress at the time of the making of the deed. It is alleged, in a somewhat vague and general way, that the husband carried her in his buggy to the town of Moultrie, and "secured her" to sign some paper by which she dismissed a suit previously brought by her, and that he said she had to settle the suit, and that he would force her to convey him the land. This is alleged to have occurred about the 1st of January, while the deed in question is dated January 10th. The plaintiff alleged that she had been living separate and apart from her husband since the preceding July; and there is no allegation sufficient to show any fraud or duress exercised at the time when the deed was executed. Employment of those words alone will not suffice as a basis for equitable relief. Facts must be alleged, not mere conclusions. *Carter v. Anderson*, 4 Ga. 519; *Anderson v. Goodwin*, 125 Ga. 664 (S), 54 S. E. 679; 7 Enc. Pl. & Pr. 247, 248, and cit.; *Richardson v. Hittle*, 31 Ind. 119.

The allegation that plaintiff's husband is in possession of a sewing machine belonging to her adds no equitable strength to the petition. The prayers are not lacking in the quality of extensiveness, including even one that the defendant, who resides in the state of Florida, should be enjoined from coming where the plaintiff is, and from speaking to her. The difficulty with the petition is that it prays too much and alleges too little.

3. One ground of the demurrer was that the defendant Roland was the only defendant against whom any substantial equitable relief was prayed, and that the petition showed that he resided without the county of Colquitt. The petition went further. It showed that Roland resided in the state of Florida. But apparently he was in Colquitt county when the suit was brought, as he was personally served by the sheriff. If he was a nonresident of the state, but was within the jurisdiction where the other defendant resided, and was personally served, the court ought to proceed to a decree.

4. A motion was made by the plaintiff to strike "all the answer of the defendant re-

lating to the order granted by the judge of the superior court at chambers, authorizing or directing plaintiff to make a deed of conveyance to the defendant," on the ground that "there is no law authorizing a judge of the superior court at chambers to pass such order; and, if such order was passed, it was void." This motion was granted, the presiding judge holding that, "Said order, if so granted at chambers, as set out in defendant's answer, is void." To this exception was taken. The answer of the defendant was not specified to be sent up as a part of the record, nor was it so sent up. The failure of the petition to make proper allegations cannot be cured by recitals in the record indicating that the answer had set up some character of order. As we hold that the demurrer to the petition should have been sustained, we do not deem it necessary, under the authority which we have, to require the clerk to transmit a certified copy of the answer which was filed in order that we may pass upon it specifically. As the judgment which was rendered by the court on the subject recites that his ruling was that a judge of the superior court had no authority to pass an order at chambers allowing a sale by a wife to her husband, and this was the order to which exception was taken, we will only say that the legal position announced in the order was correct. It is the superior court, not the judge of the court at chambers, on which is conferred the authority to grant such an order. Civ. Code 1895, § 2490.

Judgment reversed. All the Justices concur.

### JOHNSON v. JOHNSON.

(Supreme Court of Georgia. Nov. 24, 1908.)

#### 1. DIVORCE (§§ 289, 312\*)—CUSTODY OF CHILDREN—REVIEW—EXCEPTION—NECESSITY.

In cases of divorce, it is the office of the judge, and not the jury, to determine in whose custody the minor children of the marriage shall be placed; and, where there is no exception to the decree, the discretion of the judge in awarding the custody of a child to one of the parents cannot be brought under review.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 773, 806; Dec. Dig. §§ 289, 312.\*]

#### 2. DIVORCE (§ 237\*)—ALIMONY—POWER TO AWARD.

A husband may be decreed to pay permanent alimony, although he may not have property, either at the time of the filing of the libel for divorce, or at the time of the trial, if it appears that he has an earning capacity.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 669; Dec. Dig. § 237.\*]

#### 3. DIVORCE (§ 306\*)—ALIMONY—ALLOWANCE TO CHILDREN.

Notwithstanding a wife may have accepted a sum of money from the husband in full settlement of alimony, the jury may, on the final verdict in the divorce case, allow a reasonable amount for the support of a minor child of the marriage, where by the terms of such settle-

ment no provision is made for the support of the child.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 306.\*]

#### 4. DIVORCE (§ 308\*)—ALIMONY—ALLOWANCE TO CHILDREN.

Where, on the final trial of a divorce case, it appears that a wife has barred herself of the right to demand permanent alimony, because of a settlement had with the husband, in which no provision is made for a child of the marriage, such settlement is not to be considered by the jury in estimating the allowance to a child which has not previously been awarded to her by decree of the court.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.\*]

#### 5. DIVORCE (§ 308\*)—ALIMONY—AMOUNT.

Where, on the trial of a libel for divorce, in which alimony is asked for the wife and a minor child, the evidence is undisputed that the wife had entered into an agreement with the husband and his father, whereby a certain sum of money had been accepted by the wife in full settlement of permanent alimony, and that the husband had no property, trade, or profession, and his earning capacity was that of an ordinary farm laborer, an award of alimony to the child by the jury of the full amount of the husband's earning capacity is excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 801; Dec. Dig. § 308.\*]

(Syllabus by the Court.)

Error from Superior Court, Warren County; Joseph N. Worley, Judge.

Divorce by Sybil Johnson against J. L. Johnson. Judgment for plaintiff, and defendant brings error. Reversed, with direction.

B. F. Walker and E. P. Davis, for plaintiff in error. L. D. McGregor and M. L. Felts, for defendant in error.

EVANS, P. J. After living together in the marital relation for 18 months Sybil Johnson separated from her husband, J. L. Johnson, because of his cruel treatment of her. She instituted a suit against him for an allowance of permanent alimony, and a suit for \$200 borrowed money, and also procured a warrant for wife beating to be issued against him. Pending these proceedings, the wife, the husband, and the husband's father entered into a written agreement, whereby the husband paid to the wife \$500 in full settlement of her claim for permanent alimony, \$200 for borrowed money, \$100 for counsel fees, and the court costs, these various sums aggregating \$835. In this settlement no mention was made of the child of the marriage, then an infant in the custody of the mother. Thereafter the wife filed her libel on the ground of cruel treatment, praying for a total divorce, alimony for herself and child, and the custody of the child. On the final trial a verdict was rendered in favor of the wife, granting her a total divorce, and awarding to the child \$10 per month, payable monthly, for its support until it reached the age of 16 years, the payment to be made to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the ordinary of Warren county for the mother of the child, to be used by her for the child's support.

1. In his motion for a new trial the defendant complains that the verdict should be set aside, because the custody of the child of the marriage was awarded to the plaintiff. The jury in their verdict did not award the child to the custody of either parent. The statute provides that, in all cases of divorce granted, the party not in default shall be entitled to the custody of the minor children of the marriage; but that the court, in the exercise of a sound discretion, after hearing both parties, may make a different disposition of the children, withdrawing them from the custody of either or both parties, and placing them, if necessary, in the possession of guardians appointed by the ordinary. Civ. Code 1895, § 2452. This section of the Code contemplates that the judge, and not the jury, shall dispose of the children of the marriage. If the court should award the custody of the child to the mother, and the father desired to except to the decree in this particular, error should be assigned upon the decree. It is not a ground for a new trial.

2. It appeared on the trial that the husband had no property, and that he was not equipped to follow any trade or profession. He was, however, a man of apparently robust health, capable of performing manual labor upon a farm, and earning the usual wages for such services. He contends that, being without property, the jury erred in awarding any support for the child. It is certainly a novel proposition that permanent alimony can only be granted out of the estate of the husband, and not out of his wages or his ability to earn. A husband is not excused from the support of his wife and children because he lacks an estate. If he has the capacity to labor, he should labor for their support; and, if reluctant, he may be compelled by the court to do so.

3. A wife may enter into a voluntary settlement with her husband, and bind herself by accepting a provision from him in full satisfaction of all permanent alimony; and, in the absence of fraud, such settlement will be binding upon her, unless made with the intention of promoting a dissolution of the marriage relation. *Sumner v. Sumner*, 121 Ga. 1 (3), 48 S. E. 727. But the jury, on the second or final verdict in a divorce case, may allow alimony for the permanent support of the minor children of the marriage, although from any legal cause the wife may not be entitled to permanent alimony, where the children are not in the same category. Civ. Code 1895, § 2463. Although the wife may have barred herself from having a provision for permanent alimony made for her in the final verdict, by an acceptance of a suitable provision made therefor by the husband in full satisfaction of such claim, still, where in such a settlement no provision is made for the support of the children of the

marriage, the settlement will not bar an allowance by the jury to the children in the final verdict.

4. On the trial the defendant proposed to prove by the plaintiff that she had a separate estate of 80 acres of land worth \$800, and \$700 of the money paid by him to her. The court allowed this testimony to go before the jury on the issue of allowing permanent alimony to the wife, but ruled that it should not be considered by the jury in making provision for the support of the child. A husband may voluntarily, by deed, make an adequate provision for the support and maintenance of his wife, consistent with his means and her former circumstances, which will be a bar to her right of permanent alimony, in a case of voluntary separation, or where the wife against her will has either been abandoned or driven off by her husband. In the absence of such provision, on the application of the wife, a court of equity may by decree compel the husband to provide for such support of the wife and such minor children as may be in her custody. Civ. Code 1895, §§ 2464, 2466. As the support of the children is among the family expenses, to meet which alimony is given, the wife's separate estate, and the provision made by the husband for her, may be considered in estimating the allowance for the support of the children of the marriage, in the wife's custody, in an equitable proceeding of this character. See, in this connection, *Campbell v. Campbell*, 90 Ga. 687, 16 S. E. 960; 2 *Bishop on Mar., Div. & Sep.* § 1217. But where a divorce suit is pending, Civ. Code 1895, § 2462, prescribes another mode of obtaining the allowance for the support of the children. This section is as follows: "If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, and until when, it shall be paid; and this they may also do, if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category; and when such support shall be thus granted, the husband shall likewise not be liable to third persons for necessities furnished the children embraced in said verdict who shall be therein specified." As has already been pointed out, it is the office of the judge, and not of the jury, to award the custody of the children of the marriage, and this function is usually discharged by the judge in entering the decree on the final verdict in the divorce case. Besides, the quoted Code section contemplates that a provision for the support of the child shall be made by the jury independently of the wife's allowance. It would seem that, inasmuch as it is undetermined, at the time the verdict is rendered which one of the parents shall have the custody of the children, or

whether they will be awarded to a stranger, the voluntary settlement by the wife of her right to alimony, or the amount of her property, should not be considered by the jury in fixing their support. The section in terms provides that, where the jury grants a support to the children, the husband is relieved of all liability to third persons for necessities furnished them. The jury cannot anticipate the decree of the court, and should not consider the provisions which the husband has made for the wife's permanent alimony. If in a contest between the husband and the wife, prior to the second verdict the child has been awarded, by the decree of the court, to the wife, and that fact is made to appear on the trial of the case, the rule might be otherwise. But if the custody of the children is undetermined at the time of the second verdict, and the judge should see fit to award their custody to a third person, since the husband is absolved from the duty of their further support, it would be a gross wrong to them to have their provision lessened by what the husband had done for the wife. This may be a harsh rule for the husband, but such is the plain meaning of the statute; and to prescribe a different rule would not only be violative of the statute, but would be unfair to the minor children.

5. Another ground of the motion complains that the provision made for the support of the child is grossly excessive under the undisputed facts of the case. It appeared on the trial that the wife had entered into an agreement with the husband and his father, whereby a certain sum of money had been accepted by the wife in full settlement of permanent alimony. At the time of this settlement the husband was possessed of property not exceeding in value \$420. This property the husband turned over to his father, when the latter paid to the wife \$835, as stipulated in the contract of settlement. It was not controverted that the defendant was a man without a trade or profession, and had no property or other means of support except his ability to work as a farm laborer, and that \$10 per month was the extent of his earning capacity as such. The evidence did not disclose that the husband had any estate in expectancy, or that there would be any future increase in his earning capacity. The husband is obliged to live; and, if his entire earning capacity is appropriated to the support of his child, it would be impossible for him to comply with the court's decree, and for this reason we think the allowance was excessive. On the next trial additional evidence may be produced that the husband possesses a greater earning capacity than was shown on the last trial. There was no conflict in the evidence upon which the wife relied for a divorce. In reversing the judgment refusing a new trial direction is

given that on the next trial the issue be limited to the amount which should be allowed to the child as a support, and, inasmuch as it appears that the child of the marriage has been awarded by the court to the plaintiff, that the court allow in evidence, for the consideration of the jury, proof of the wife's separate estate and its value, and any provision which the defendant has previously made for the plaintiff in settlement of her claim for permanent alimony.

Judgment reversed, with direction. All the Justices concur.

#### AVERETT v. WALKER.

(Supreme Court of Georgia. Nov. 24, 1906.)

TRIAL (§ 295\*)—EVIDENCE (§ 431\*)—APPEAL AND ERROR (§ 1050\*)—INSTRUCTIONS—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The portion of the charge excepted to, when considered in connection with its context and with the entire charge sent up as a part of the record, was not fairly subject to the criticism made thereon, the admission of the evidence in question was not error, and the verdict was not without evidence to support it.

[Ed. Note.—For other cases, see *TRIAL*, Cent. Dig. §§ 703-717; *Dec. Dig.* § 295;\* *EVIDENCE*, Cent. Dig. § 1976; *Dec. Dig.* § 431;\* *APPEAL AND ERROR*, Cent. Dig. §§ 4153-4155; *Dec. Dig.* § 1050.\*]

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by L. C. Averett against Jonathan Walker. Judgment for defendant, and plaintiff brings error. Affirmed.

Hal Lawson, for plaintiff in error. Max E. Land and Eldridge Cutts, for defendant in error.

FISH, C. J. This writ of error brings under review the overruling of plaintiff's motion for a new trial in an action brought by Averett against Walker for the breach of a contract which plaintiff alleged defendant made with him. Plaintiff's contention, in substance, was: He sold to Reynolds certain described personalty, constituting a brick-making outfit, and took Reynold's notes for the purchase price, retaining title to the property until the payment of these notes. The contract of sale was in writing and executed in duplicate, each of the parties thereto retaining a copy. Shortly after this contract was executed, and before the maturity of any of the notes, Reynolds sold and transferred all his interest in the property in question to defendant, Walker, the assignment or transfer being in writing, and for a description of the property to which it related, referring to the prior contract made between Averett and Reynolds, and in this connection containing the following recital:

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Which said contract is hereto attached and made a part of this agreement; and it is hereby further agreed that the said Jonathan Walker assumes the payment of the note described in said contract between said L. C. Averett and Joe Reynolds." Although this contract was not signed by Walker, he subsequently, and after taking possession of the property thereunder, agreed with Averett to carry out the stipulation in this last-mentioned contract that he should pay Averett the indebtedness due him by Reynolds for the property, and Averett thereupon, and in consideration of such agreement by Walker, released Reynolds from such indebtedness. Plaintiff submitted evidence tending to prove his contentions. The defendant contended that he never agreed to pay Reynolds's indebtedness to plaintiff; that he never made any contract whatever with plaintiff in reference to the property in question; that the only contract he ever entered into with Reynolds in reference to it was that he, the defendant, and another, were, for a stated consideration paid Reynolds, to have the use of the property for the purpose of making a kiln of brick; that he was illiterate, being unable to read or write; that he refused to sign the instrument wherein Reynolds assigned his interest in the property to him, and while he subsequently found such instrument among his papers, he could not recall how it came to be there, and that there was never attached to it, so far as he knew, a copy of the contract between Reynolds and Averett. The evidence submitted in behalf of the defendant tended to sustain his contentions. The special grounds of the motion for a new trial assigned error upon a portion of the charge and in the admission of evidence.

1. The motion for a new trial complained that the court, after charging the jury that a promise to answer for the debt, default, or miscarriage of another is not binding unless signed by the party to be charged therewith, or by some person lawfully authorized, gave, in the same connection, this further instruction: "Under this law even a delivery of the paper signed by the opposite party is not sufficient, but the party who is to be bound by it must have signed it." The assignments of error upon this quoted instruction were: (1) That it was not adjusted to any issue in the case. (2) That the only paper to which it could refer was the instrument wherein Reynolds assigned his interest in the brick-making outfit to the defendant, Walker, the acceptance of which by him bound him, by the terms thereof, notwithstanding the fact that he did not sign it. (3) That in effect it instructed the jury that, under the circumstances, there was no binding contract between Reynolds and Walker whereby the latter assumed the indebtedness of the former to Averett. The meaning of this excerpt from the charge of the court, as applied to the case, is not clear, but we do not think it was fairly subject to the criticisms made

upon it in the motion. The court in a marginal note to this ground of the motion refers to the entire charge, which comes up with the record in the case. We find upon an inspection of the whole charge that the court clearly and fairly stated to the jury the contentions of the parties, and, in immediate connection with that portion of the charge excepted to, fully and correctly instructed the jury as to the law relating to all such contentions, and therefore we are confident that, notwithstanding the obscure meaning of the excerpt in question, the jury were not misled thereby to the plaintiff's injury, and that the giving of the same was not cause for a new trial.

2. Another ground of the motion for a new trial was that the court refused to rule out all the testimony of the defendant, Walker, relative to the terms of the contract between himself and Reynolds, upon the ground that such contract was in writing and the writing the highest and best evidence of its contents, and the oral testimony of Walker varied such written instrument. The testimony sought to be excluded was to the effect that he, Walker, paid Reynolds \$70 simply for Reynolds to get out and allow witness Walker and Judge Land to make a kiln of brick, and that he, Walker, did not agree to the terms of the written instrument signed by Reynolds and purporting to be a conveyance by him to Walker of all his interest in the brick-making machinery. Walker never signed this instrument, and he, as well as Land, testified that he expressly declined to sign it and to enter into the agreement by which he was to pay plaintiff what Reynolds owed him as purchase money for the machinery. Walker testified that he never bought the machinery or offered to buy it from any one; that he never had it in his possession or control; that he had no use for it; and that while he found among his papers the instrument which Reynolds signed, purporting to convey to him Reynolds's interest in the machinery, he, Walker, could not account for such an instrument being among his papers, as he had no recollection of its ever having been delivered to him. In view of this testimony, it was not error to refuse to rule out the testimony of Walker as to the parol contract which he claimed he made with Reynolds with reference to the machinery, although the ruling was made before the testimony of Land and some of that of Walker above referred to had been submitted.

3. Complaint was made that the court erred in permitting Walker to testify, in reference to the machinery, over plaintiff's objection of irrelevancy, as follows: "The first time I saw it they were making brick, but mighty sorry." The quality of the brick that were being made when defendant first saw the machinery would seem to throw no light upon any issue in the case, but, admitting that this testimony was wholly irrelevant, it



was of such slight importance that we feel sure that a new trial should not have been granted because of its admission.

4. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

### COCHRAN v. BUGG.

(Supreme Court of Georgia. Nov. 21, 1908.)

#### 1. APPEAL AND ERROR (§ 728\*)—RECORD—QUESTIONS PRESENTED—EXCLUSION OF EVIDENCE.

An assignment of error upon the refusal to admit offered evidence cannot be considered when it fails to disclose, either literally or in substance, what the evidence was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3011, 3012; Dec. Dig. § 728.\*]

#### 2. APPEAL AND ERROR (§ 728\*)—RECORD—QUESTIONS PRESENTED—ADMISSION OF EVIDENCE.

An assignment of error upon the admission of evidence, must not only disclose the evidence admitted, at least in substance, but must make it appear that it was admitted over a designated objection of the complaining party, made when the evidence was offered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3011, 3012; Dec. Dig. § 728.\*]

#### 3. APPEAL AND ERROR (§ 713\*)—RECORD—QUESTIONS PRESENTED—RULINGS ON EVIDENCE.

Objections to the admission or the rejection of evidence appearing in the brief of evidence only cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 713.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 349\*)—RECOVERY OF LAND—ORDER OF ORDINARY—CONCLUSIVENESS.

In an action by an administrator against one who purchased from an heir at law of the intestate land which belonged to him at his death to recover such land for the purpose of paying debts of the estate, an order granted by the ordinary to the administrator to sell the land for the payment of such debts is, in the absence of any evidence showing that there was no necessity for such sale, prima facie evidence of the right of the administrator to recover the land. Civ. Code 1895, § 3358; Park v. Mullins, 124 Ga. 1072, 53 S. E. 568.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.\*]

(Syllabus by the Court.)

Error from Superior Court, Butts County; W. H. Felton, Jr., Judge.

Action between J. T. Cochran and L. F. Bugg, administrator. From the judgment, Cochran brings error. Affirmed.

Ray & Ray and W. C. Munday, for plaintiff in error. W. E. Watkins, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

### HUTCHINSON v. LOWNDES COUNTY.

(Supreme Court of Georgia. Dec. 1, 1908.)

#### 1. COUNTIES (§ 222\*)—RESTRAINING OPENING OF ROAD—COUNTIES—PLEADING.

(a) Where application was made for an injunction against a county to prevent it from taking the land of the applicant for use as a public road, an answer filed in the name of the county, signed by its counsel, and verified by the affidavit of one of the county commissioners of roads and revenues having jurisdiction over the public roads of such county, was not subject to the objection that it was not the answer of the defendant in such case, on the ground that the answer and affidavit thereto did not show that such commissioner had authority in making such affidavit to act for the other commissioners or for the county.

(b) Such answer, and the affidavit thereto annexed, were admissible in evidence upon the hearing for an interlocutory injunction under such application.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 222.\*]

#### 2. HIGHWAYS (§ 64\*)—RESTRAINING OPENING OF ROAD—COUNTIES.

"As the landowner's remedy at law was ample, it was not erroneous to refuse to enjoin the county commissioners from continuing a proceeding to establish a public road pursuant to Pol. Code 1895, §§ 520-522, in advance of the hearing provided for in section 521." Atl. & West Point R. Co. v. Redwine, 123 Ga. 736, 51 S. E. 724.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 165; Dec. Dig. § 64.\*]

#### 3. HIGHWAYS (§ 19\*)—STATUTORY PROCEEDINGS—REPEAL.

The provisions embraced in Pol. Code 1895, §§ 520-525, were not repealed by the act of 1894 (Acts 1894, p. 95), embodied in Civ. Code 1895, § 4657 et seq., or by the act of 1900 (Acts 1900, p. 66).

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 19.\*]

#### 4. RESTRAINING OPENING OF ROAD.

Under the evidence, there was no abuse of discretion in refusing an injunction at the interlocutory hearing.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Suit for injunction by S. M. Hutchinson against Lowndes County. Judgment for defendant, and plaintiff brings error. Affirmed.

C. S. Morgan, for plaintiff in error. Denmark & Griffin, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur.

### TAYLOR v. STATE. (No. 1,451.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

#### 1. CRIMINAL LAW (§ 918\*)—TRIAL—HARMLESS ERROR—PREJUDICE.

To authorize the grant of a new trial where evidence is adduced which fully warrants the verdict rendered, not only error, but injury, must be shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2163; Dec. Dig. § 918.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

## 2. CRIMINAL LAW (§§ 552, 565, 673, 824\*)—EVIDENCE—INSTRUCTIONS.

In proving the allegations of an indictment, the state is not restricted to the date alleged nor confined to direct proof of the offense. It may attempt to prove either by direct evidence or by circumstances the commission of the offense alleged, and may, by either method, prove the commission of the same offense more than once, and a conviction will be authorized if any one of the criminal transactions be proved to the satisfaction of the jury, although the attempt to prove others may result in failure. Where it is sought to be proved that a defendant has more than once within the statute of limitations committed the offense charged in the accusation, the jury should be charged upon written request, to that effect, except in those cases where the transactions are so connected in time and so similar in their other relations that the same relevancy may be imputed to all, that each of the transactions sought to be proved as constituting an offense is to be considered by the jury apart from any similar, disconnected transaction, and that evidence of one is not to be used as corroborative of the other, that the guilt of the defendant is to be determined by whether any specific transaction identified by the evidence, as within the statute of limitations, has, without the aid of any different transaction, satisfied them of the defendant's guilt. In the absence of a request that the jury be thus instructed, it is not the duty of the court to point out to the jury that the state may have failed to sustain one or more instances of alleged liquor selling, if the evidence as to any one transaction proved by the state would clearly authorize the conviction of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1259-1262, 1270, 1874-1876, 1996-2004; Dec. Dig. §§ 552, 565, 673, 824.\*]

## 3. CRIMINAL LAW (§ 200\*)—FORMER JEOPARDY—IDENTITY OF OFFENSES.

Evidence of the acquittal of a defendant upon the charge of keeping intoxicating liquors for sale is irrelevant upon his trial for the offense of selling intoxicating liquors. One may sell liquors which he does not keep for sale.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 397; Dec. Dig. § 200.\*]

## 4. WITNESSES (§ 361\*)—EVIDENCE TO SUSTAIN CHARACTER OF WITNESS IMPEACHED.

A witness whose impeachment has been attempted by proof of general bad character may be sustained by the testimony of witnesses who admit that his general character is bad, but not so bad but that they will believe him upon his oath. The rule which admits testimony as to the character of a witness, and testimony which is dependent upon character, recognizes that there are gradations in character which are established by purely opinionative evidence. These gradations as well as the comparative value of the opinionative evidence is exclusively for the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1167; Dec. Dig. § 361.\*]

## 5. INTOXICATING LIQUOR (§ 236\*)—CRIMINAL LAW (§ 394\*)—OFFENSES—EVIDENCE—ADMISSIBILITY.

That one accused of unlawfully selling intoxicating liquors is in possession of quantities of liquors, beer, bottles, jugs, and measures is a circumstance which, in connection with other circumstances, will authorize the inference that the owner is engaged in the unlawful sale of intoxicants. Such evidence is admissible, though obtained by unlawful seizure.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\* Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. § 394.\*]

## 6. WITNESSES (§ 362\*)—IMPEACHMENT—EFFECT.

A jury may believe a witness upon the subject-matter of his testimony, although he may have been impeached by the proof of general bad character or by contradictory statements previously made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1176; Dec. Dig. § 362.\*]

## 7. CRIMINAL LAW (§ 1147\*)—WRIT OF ERROR—REVIEW—SENTENCE.

This court will not review the sentence imposed in a criminal case unless it appears that it exceeds the statutory limit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3072, 3073; Dec. Dig. § 1147.\*] (Syllabus by the Court.)

Error from City Court of Griffin; T. E. Patterson, Judge.

John Taylor was convicted of selling intoxicating liquor, and he brings error. Affirmed.

Robt. T. Daniel and Cleveland & Goodrich, for plaintiff in error. W. H. Beck, Sol., and W. E. H. Searcy, Jr., for the State.

RUSSELL, J. The plaintiff in error was convicted of selling intoxicating liquors. He moved for a new trial upon the ground that the verdict was contrary to evidence and contrary to law, and afterwards amended his motion by assigning error upon various rulings as to the admissibility of evidence and upon certain instructions of the court to the jury, and the refusal of the court to charge in accordance with certain written requests. The motion for new trial was overruled, and this judgment is the error assigned in the bill of exceptions.

1, 2. The tenth, eleventh, and thirteenth grounds of the amended motion are abandoned in the brief of the plaintiff in error, and therefore will not be considered. As to the general grounds of the motion, it is only necessary to say that the state produced three witnesses who testified that the defendant during August, 1908, sold a bottle of whisky and was paid, and accepted, \$1.50 in cash for the whisky, and that this transaction took place in his store in Griffin, Spalding county, Ga. In the absence of anything else in the case, this evidence, if believed, authorized the conviction of the defendant, and we will therefore examine the grounds of the amendment to the motion to see if the result was influenced by any error of the trial court. In the fourth ground of the amended motion it is insisted that the court erred in admitting in evidence the barrel of beer and jugs of whisky and empty bottles seized by the officers in the raid on the storehouse and dwelling house of the defendant on May 8, 1908, when the accusation charged the sale of whisky in August following, and the sale directly testified to, if made, was made in August, 1908. The objection urged to this evidence is that it could not possibly have been any part of the whisky that was sold, and

that it could not throw light upon the transaction which occurred many months thereafter, and, further, this evidence is insisted to be illegal because witnesses testified that Taylor's possession was legal. This ground of the motion for new trial need not have been considered by the trial judge, nor need we consider it, because it does not appear that the objection urged in the motion for new trial was stated upon the trial, nor in fact that any specific objection was made at that time. However, we do not think that the court erred in admitting the testimony complained of. It was competent for the state to prove a sale, either by direct or circumstantial evidence, and the prosecution had the right to prove as many distinct sales as it could as having been made by the defendant at any time within two years prior to the filing of the accusation. The state was not confined to the sale testified to by Bethune and others as having taken place in August, but could have shown as well sales in March, April, or May, and a conviction could have been had upon any of these sales which the jury might have found to be established by testimony. The circumstance of possessing a complete outfit necessary for carrying on a "blind tiger" might not by itself have authorized the conviction of the defendant of illegal sales in May, but the fact that the state failed, if it did, to complete the proof as to the transaction in May, could not render illegal a conviction of a sale at another time. It is true, as insisted by counsel for the plaintiff in error, that the evidence adduced by the state in the unsuccessful attempt to show a sale in May (if the circumstances adduced were, indeed, insufficient to show a sale to have been made in May) might be prejudicial to the defendant because it might be used by the jury as corroborative, to some extent, of the statement made as to other sales; but this probably harmful influence, however, could have been removed by a timely request for an instruction that the jury would not be authorized to convict of any sale which had not been proven satisfactorily to them, and that the evidence as to each sale, whether direct or circumstantial, was to be considered apart from evidence of any other distinct sale to which the testimony, direct or circumstantial, might point, if they believed that there was such testimony.

3. The complaint of the fifth ground of the amended motion is that the court refused to admit in evidence an accusation in the city court of Griffin charging the defendant with keeping for illegal sale a quantity of liquor upon which a verdict of not guilty had been rendered. We think this evidence was properly excluded. The fact that a jury found a defendant not guilty is not better proof of his innocence of the charge than the fact that a jury found a defendant guilty is proof of his guilt. The verdict is conclusive of the defendant's guilt or innocence in so far as it affords a bar to his prosecution for the

same offense, but the finding of the jury on the substantive fact of guilt or innocence there made, as related to collateral matters, is of no probative value. While the "same transaction test" is of force in this state, still selling intoxicating liquors and keeping such liquors for sale do not in every instance necessarily involve the same transaction. But can it be said that one cannot sell liquor which he has not kept for sale? May he not be guilty of selling intoxicating liquor which another has kept, which is another's property, or which he may even have stolen from another and immediately disposed of? There is not necessarily an identity between keeping for sale and the selling. It seems to us that under the rule referred to in 23 Cyc. 252, the acquittal of a defendant on a former prosecution is not admissible where the two offenses are so dissimilar that his acquittal on the one charge could prove nothing as to his innocence of the other. The purpose of the testimony offered was to bar the prosecution and to avoid a conviction upon the transaction in May. To be effective for this purpose, a plea in bar should have been filed.

4. It is insisted that the court erred in permitting certain witnesses to testify that they would believe Bethune (a witness sought to be impeached by proof of general bad character) after they had each testified that Bethune's character was bad. It is argued that under the terms of Civ. Code 1895, § 5293, a witness sought to be thus impeached cannot be sustained unless the sustaining witness, after having testified that he is acquainted with the character of the witness in question, further testifies that the witness' character is good, and that from that good character he is induced to believe him. Section 5293 is as follows: "A witness can be impeached as to his general bad character. The impeaching witness shall be first asked as to his knowledge of the general character of the witness, and next, as to what that character is, and lastly he may be asked, if from that character, he would believe him on his oath. The witness may be sustained by similar proof of character," etc. It is insisted that, unless the sustaining witness testifies that the general character of the witness whom he is introduced to sustain is good, he should not be permitted to testify that he would believe him, and that when a witness, after having testified that the witness whom he is called to sustain is of bad character, still testifies that he would believe him, this testimony is merely the individual opinion of the witness. It must be remembered that there are many gradations in character, and it must also be borne in mind that both the impeaching and the sustaining evidence, where a witness is sought to be impeached by proof of general bad character, is wholly opinionative. Each class of witnesses has a knowledge of the character of the witness under review, derived from

the general impression or opinion of those who are acquainted with the witness. After looking at this mental photograph of the character of the witness, the witness' answer to the second question (as to whether the character of the witness is good or bad) is likewise dependent entirely upon his own opinion of what constitutes good character or bad character. A witness who entertains a high standard of morals might consider from what he has heard that the witness in question has a bad character, while another, not so scrupulous, and having heard the same things, but considering perhaps what the first witness deemed to be grave defects as at best but petty peccadillos, might testify that the same character was in his opinion good. Such instances as these frequently arise, and it is for the jury to give their own valuation to all opinionative evidence. It is clear that this is not the exact point now before us. But, if it be conceded that witnesses may grade character upon the same state of facts from bad to good or from good to bad, why cannot a witness testify to degrees in either goodness or badness? The effect of the testimony in such a case as this, where witnesses testified that the character of a designated witness was bad, and yet that they would believe him upon his oath, might be analyzed by the jury as follows: "I know this witness' character, and know from what I have generally heard of him that his character is bad, and yet, from what I have heard of him, it is not so bad as to render him unworthy of belief when testifying upon his oath." Of course, such testimony as this might not be as satisfactory to counsel attempting to sustain a witness as the testimony of a witness that in his opinion the character of the witness sought to be impeached was good, and for that reason he would believe him on oath; and yet the credit to be attached to the testimony might depend upon the manner of the witness, his caution and his credibility as it might appear to the jury. The opinion of some witnesses that another, although generally accredited to be of bad character, was entitled to credit upon his oath, would be worth more than the testimony of other witnesses who might swear glibly that the witness under review had a good character, and that due to that circumstance they would believe him. Section 5293 forbids the "opinions of single individuals" as to the first two questions asked of witnesses brought to attack or sustain another, but the third question is always addressed to the witness as an individual. The first two questions are asked in order to put before the jury the facts upon which he predicates the opinion which he gives in reply to the third question, and thus enable the jury to see whether the conclusion reached by the witness is correct. The question at last for the jury to determine is whether the opinion of the witness is a logical sequence to the facts in his possession. We do not see why

a witness may not as well say that he measures character by different standards from others by saying that he will believe a witness although in some respects he has a bad character as by saying that, though others (summing up what they have heard of a certain individual) esteem his character to be bad, still from his standpoint the facts related do not imply bad character.

5. The seventh, eighth, and ninth grounds of the amended motion properly present objections urged to testimony of the same character as that mentioned in the second division of this opinion, and have been sufficiently dealt with. It need only be said in addition that under the indictment the state could show by circumstances, if it could, that a sale of whisky was made by the defendant in May, and it was immaterial under the allegations of the accusation whether such sale was shown at the residence or at the store of the defendant, provided both were in Spalding county. As we have stated above, any prejudicial effect of this evidence could have been removed by a specific instruction in the charge of the court that the jury should not consider this evidence as illustrating any other sale, but should consider it only for the purpose of determining whether it of itself demonstrated a sale within the statute of limitations, and, if it was not sufficient for this purpose, should disregard it entirely. And this instruction should have been requested.

The objection to the testimony of the witness Brown that it was irrelevant and prejudicial to the defendant, because the evidence testified to, as contended in the brief, was obtained by illegal search and seizure, is not set forth in the record with sufficient fullness to be considered. But, even if the point had been directly raised, it would seem to be settled by our decision in *Smith v. State*, 3 Ga. App. 326, 59 S. E. 934.

6. The court charged the jury that, "if a witness is impeached, he is not to be believed unless corroborated by other witnesses or circumstances in proof, unless you believe that the witness has spoken the truth." It is insisted that, if a witness has been impeached, he is not to be believed unless corroborated by witnesses or circumstances in proof, and that the court erred in stating to the jury that, if they believed the witness had spoken the truth, they still had the right to believe a witness who had been impeached and had not been sustained or corroborated. There is some conflict of authority upon the subject here presented, and the court used the word "impeach" in too broad a sense. His instruction would have been technically more correct had he said, "A witness sought to be impeached is not to be believed unless you believe he has spoken the truth"; and yet the whole question of impeachment is for the determination of the jury only, and the jury has the right to be-

lieve a witness as to the particular facts with reference to which he testifies, although they may be satisfied of the truth of the impeaching testimony. Any other rule would deprive the jury of its right of being at last the arbiter as to what is the truth of the case. The most recent rulings of the Supreme Court upon this subject approve of this charge. Practically the same charge was delivered by the court in *Ector v. State*, 120 Ga. 545, 48 S. E. 315 (2); and the case of *Davis v. State*, 94 Ga. 399, 19 S. E. 243, is cited in support of the ruling announced in the *Ector Case*. In the *Davis Case* proof of the witness' bad character and of contradictory statements were both uncontradicted, but the Supreme Court held that the jury had the right to find that the impeachment was unsatisfactory for purposes of discrediting the witness because they had the right to believe his testimony. See, also, *Sindy v. State*, 120 Ga. 202, 47 S. E. 554.

7. As has already been held by this court, we cannot review the sentence of a trial judge unless it exceeds the statutory limits. The verdict being supported by the evidence, and it not appearing that any of the errors assigned could have misled the jury or influenced their finding, we find no error in the judgment refusing a new trial which would authorize a reversal.

Judgment affirmed.

ARNOLD et al. v. RAGAN. (No. 1,330.)

(Court of Appeals of Georgia. Nov. 25, 1908.)

APPEAL AND ERROR (§§ 294, 690\*)—RESERVATION AND PRESENTATION OF ERROR—SUFFICIENCY—DIRECTION OF VERDICT—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSION OF EVIDENCE—SETTING OUT EVIDENCE.

Although it appears from the record that the verdict in the case was rendered under the direction of the court, the proposition that this action of the judge was unauthorized because of the conflicting state of the evidence adduced at the trial is not presented for review, where the only exception is to the overruling of a motion for a new trial containing the general grounds and several special grounds in none of which is the point presented. In such a case the court will pass upon the propositions presented by the motion for a new trial as if the verdict had been returned by the jury after they had been regularly charged as to the law of the case. The verdict in the case now before the court is not without evidence to support it. The exceptions to the rulings upon the admission of testimony are not in form. This court, therefore, affirms the judgment without passing upon the question as to whether the evidence was so free from material conflict as to authorize the judge to direct the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1727, 2899; Dec. Dig. §§ 294, 690.\*]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by one Ragan against Arnold &

Morrison. Judgment for plaintiff, and defendants bring error. Affirmed.

Ragan sued and recovered judgment against Arnold & Morrison, and to the overruling of a motion for a new trial they bring error. The defendants were formerly partners in business. On July 8, 1903, they dissolved partnership; Morrison retiring and Arnold continuing in business. In September, 1903, they joined in executing a promissory note for \$49.21 to Ragan for a debt previously contracted by the partnership. In 1905 Arnold deeded his property to a trustee, reciting that he was indebted to a number of persons listed in the conveyance in approximately the amount stated opposite the name of each person listed, and directed the trustee to sell the property and pay these debts named if the creditors would accept the composition, otherwise to hold the proceeds to his credit. In this conveyance a debt to Ragan of \$233.37 was listed, also a debt to Morrison for \$500. Morrison agreed to release his debt entirely if the other creditors would accept the composition. Upon this paper the following agreement was indorsed: "We agree to the foregoing agreement so far as our debt to T. P. Arnold is concerned." This was signed by all the creditors, including Ragan. The trustee sold the property, and sent to Ragan a check for his proportionate part of the sum realized, and he accepted it. Through this transaction both defendants claimed to be released. Ragan claimed that the sum of \$233.37 named in the proposition of composition as being due him was the exact amount of an individual debt contracted by Arnold after the giving of the note, and that the note was not included in this sum. The plaintiff also produced evidence that both defendants had promised to pay this note subsequently to the time of the composition, though one of them as a witness in the case denied making the promise.

Lipscomb, Willingham & Doyal, for plaintiffs in error. Sharp & Sharp, for defendant in error.

POWELL, J. (after stating the facts as above). It is recited in the record that the verdict was directed by the trial judge. However, the exception is to the overruling of a motion for a new trial, and only the grounds presented therein are under review. This motion contains the general grounds and several special grounds. In none of them is the point presented that the court erred in directing the verdict because the evidence was conflicting, and that proposition is therefore not before us for review. The case stands here just as if the court had charged the jury at length and the verdict was their regular finding. *Dickenson v. Stults*, 120 Ga. 632, 48 S. E. 173; *Rosenblatt v. State*, 2 Ga. App. 650, 58 S. E. 1107. The reason for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rule is stated in the Dickenson Case, *supra*. Certainly in this view of the case there is evidence enough to support the finding. Indeed, we incline to the view that the direction of the verdict was the only legal termination of the case under the facts presented. There are certain exceptions to the testimony; but they are not in form, as they do not set out the substance of the testimony to which the objections relate.

Judgment affirmed.

**MANCE v. STATE.** (Nos. 1,431, 1,432.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

**1. CRIMINAL LAW (§ 295\*)—FORMER JEOPARDY—BURDEN OF PROOF.**

The burden of proof under a special plea of former jeopardy is upon the defendant. In the case at bar the defendant did not successfully carry the burden.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 674; Dec. Dig. § 295.\*]

**2. CRIMINAL LAW (§ 297\*)—FORMER JEOPARDY—VERDICT AGAINST PLEA—EVIDENCE.**

Where a defendant is tried and acquitted of an offense, and thereafter within a period of time less than that prescribed by the statute of limitations is again accused of a crime of the same general denomination, and files upon the second trial a special plea that the previous prosecution was for the same transaction and offense as that for which he is about to be tried, and the state takes issue on the plea and a verdict is rendered against the plea, the state is estopped, on the trial of the case in chief, from relying for a conviction upon any transaction which might legally have been investigated and adjudicated under the former prosecution, and the court should so instruct the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 297.\*]

**3. LARCENY (§ 5\*)—PROPERTY SUBJECT.**

Intoxicating liquor may be the subject-matter of larceny, though it is not the subject-matter of lawful sale.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 11; Dec. Dig. § 5.\*]

**4. LARCENY (§ 77\*)—POSSESSION OF STOLEN GOODS—INSTRUCTIONS.**

An instruction upon the presumption that the jury is authorized to draw from possession of stolen property is erroneous if it omits all reference to the recency of the possession.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199, 202-204; Dec. Dig. § 77.\*]

(Syllabus by the Court.)

Error from City Court of Richmond County; Wm. F. Eve, Judge.

John Mance was convicted of larceny from the house, and brings error. Affirmed as to one case, and reversed as to another.

F. W. Capers and F. L. McElmurray, for plaintiff in error. J. C. C. Black, Sol., and John M. Graham, for the State.

**POWELL, J.** At the April term, 1908, of the superior court of Richmond county, the defendant was indicted for burglary, with a count charging larceny from the

house, in which the stealing of certain enumerated brands of liquors was charged. He was tried at the same term and was acquitted. This burglary and the larceny were alleged to have been committed at a bailiff's room in the county courthouse at Augusta. Subsequently the defendant was found in possession of certain liquors and the state preferred an accusation against him in the city court of Richmond county charging him with larceny from the house. He filed a special plea of former jeopardy and acquittal. It appeared in the proof taken on the trial of this plea that, prior to the trial of the burglary case, there had been a number of distinct entrances into and larcenies from the room in the courthouse in which the liquors (which had been seized in a raid on a "blind tiger") were being kept. The defendant was not able to make it appear on the trial of his special plea that any of the liquors named in the accusation were the same as those designated in the burglary indictment, or that they were stolen along with or at the same time as any of those liquors which were the subject-matter of the former prosecution. The burden of proving this special plea was upon the defendant, and he was not able to establish the identity of the larceny with which he was accused in the city court with any offense that might have been tried under the former indictment, and the jury were therefore authorized to find against him.

2. The position assumed by the state's counsel as to the special plea and the verdict under it thereafter operated to estop the state from relying for a conviction upon any larceny which might have been the subject-matter of conviction in the burglary case. It was not thereafter, as in ordinary cases, permissible to convict by showing that the defendant at any time within two years of the filing of the accusation had stolen the articles named or any of them. It was incumbent upon the state to prove a larceny which was not, and could not have been, the subject-matter of investigation and judgment in the former case; for the state's counsel by a solemn declaration in *judicio* had in substance declared he was so prosecuting. *Haber-Blum-Bloch Hat Co. v. Friesleben*, 5 Ga. App. —, 62 S. E. 712; *Nixon v. State*, 121 Ga. 145 (3), 48 S. E. 966; *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95. On the trial in chief the court should have presented this proposition to the jury, as it was a vital issue in the case. Former jeopardy, while it must be asserted by special plea to be available as a bar to a pending prosecution, is nevertheless a defense favored by the law and the courts. 12 Cyc. 364.

3: Intoxicating liquor, though not lawfully the subject of sale in this state, is not so lacking in the element of value that it cannot be

the subject of larceny. *Fears v. State*, 102 Ga. 279, 29 S. E. 463. "Value," as the word is used in prosecutions for larceny, does not necessarily mean money value or market value. *Ayers v. State*, 3 Ga. App. 305, 59 S. E. 924.

4. The following instruction to the jury is erroneous, in that it omits the element of recency as to the possession of the stolen property: "If you are satisfied that the larceny was committed, that this property was taken in that larceny, and that it was afterwards found in the possession of the defendant, and he does not satisfactorily account for the possession of it, then the law says you may presume him to have been the original thief, and be justified in finding him guilty unless he satisfactorily accounts for the possession." *Cuthbert v. State*, 3 Ga. App. 604, 60 S. E. 322.

Judgment affirmed as to case No. 1,432.  
Judgment reversed as to case No. 1,431.

**GEER et al. v. COWART.** (No. 1,184.)  
(Court of Appeals of Georgia. Nov. 25, 1908.)

**1. SET-OFF AND COUNTERCLAIM (§ 22\*)—WHEN SET-OFF ALLOWED.**

In this state the statutory right of set-off is confined to demands or claims of a similar nature, and a claim arising ex delicto cannot be set off against a claim arising ex contractu. Civ. Code 1895, §§ 3996, 4944; *Ingram v. Jordan*, 55 Ga. 356; *Smith v. Printup*, 59 Ga. 610.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 32; Dec. Dig. § 22.\*]

**2. SET-OFF AND COUNTERCLAIM (§ 8\*)—RELIEF IN EQUITY.**

Except as above limited, the right of set-off, if it exists, is purely an equitable right, cognizable only in a court of equity jurisdiction. *Hecht v. Snook*, 114 Ga. 923, 41 S. E. 74.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 9; Dec. Dig. § 8.\*]

**3. COURTS (§ 129\*)—EQUITY JURISDICTION.**

The superior courts of this state have exclusive jurisdiction in equity causes. Civ. Code, 1895, § 5842.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 129.\*]

**4. COURTS (§ 188\*)—EQUITY JURISDICTION—EQUITABLE SET-OFF.**

The city court of Miller county is without equity jurisdiction, and therefore, where a suit was brought in that court on a promissory note, and the defendants filed a plea of set-off, claiming damages for a tort not in any manner connected with the note, and requiring for its maintenance affirmative equitable relief, the court was without any jurisdiction to entertain such defense, and the plea was properly stricken. *Hecht v. Snook*, supra.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 188.\*]

**5. PLEADING (§ 404\*)—WANT OF JURISDICTION—MOTION TO STRIKE.**

The want of jurisdiction was apparent on the face of the pleadings, and could be taken advantage of at any time. Civ. Code 1895, § 5046.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 404.\*]

**6. REVIEW ON APPEAL.**

No error of law appears, and the evidence demanded the verdict.

(Syllabus by the Court.)

Error from City Court of Miller County;  
C. C. Bush, Judge.

Action between G. W. Geer and others and A. J. Cowart. From the judgment, Geer and others bring error. Affirmed.

W. I. Geer, for plaintiffs in error. Bush & Stapleton, for defendant in error.

HILL, C. J. Judgment affirmed.

**HOOKS v. BAILEY.** (No. 1,166.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

**LANDLORD AND TENANT (§ 75\*)—ACTION FOR RENT—SUBLETTING—RELEASE OF TENANT.**

The question of law in this case is controlled by the decision of this court in *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983, and by the decision of the Supreme Court in *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178, and the evidence demanded the verdict as directed by the court.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 229; Dec. Dig. § 75.\*]

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by D. A. Bailey against B. A. Hooks. Judgment for plaintiff, and defendant brings error. Affirmed.

Davis & Adams, for plaintiff in error. W. L. & Warren Grice, for defendant in error.

HILL, C. J. Bailey brought suit in the city court of Dublin to enforce a written contract arising on the following state of facts: Bailey had leased from Mrs. Elmira J. Horne what was known as the "Joyner House," in the city of Hawkinsville, Ga., and had also leased from Mrs. Horne what was known as an "Annex" to the hotel. This lease contract for a stipulated consideration was transferred by Bailey to the plaintiff in error, B. A. Hooks, and Hooks transferred the lease to one Powell. During the occupancy of the premises by Powell, the owner thereof, Mrs. Horne, through her agents, collected from him the rent. When Bailey originally leased the premises from Mrs. Horne, he gave to her a series of notes for the rent, which were deposited in the Planters' Bank of Hawkinsville for collection. When the premises were sublet by him to Hooks and by Hooks to Powell, no new rent notes were given, but each succeeding lessee assumed the payment of the original rent notes from Bailey to Mrs. Horne, and when they became due, they were collected through the bank where, as above stated, they had been deposited. No objection was made by Mrs. Horne to the subletting, either by Bailey to Hooks or by Hooks to Powell.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

but her agent collected the rent directly from Powell in the manner above indicated; and during the tenancy of Powell certain repairs were needed upon the premises, and, upon notice to Mrs. Horne, Powell was notified by her to make the needed repairs, and deduct the amount of the cost from the amount of the rent. The foregoing arrangement went on without objection and without any trouble until Powell, the tenant, filed a voluntary petition in bankruptcy, and was adjudicated bankrupt. Bailey was thereafter, when the rent fell due, called upon by Mrs. Horne to pay the same, and he, in turn, called upon his tenant, Hooks, to pay the rent according to the terms of his contract. This Hooks refused to do, and Mrs. Horne sued out a distress warrant against Bailey. Bailey, at the request of Hooks, defended the distress warrant by counter affidavit, and notified Hooks to appear and assist in the defense. This Hooks did not do by himself or attorney, and did not, in any manner, assist Bailey in the defense set up by him to the distress warrant, and Bailey made all possible defense which he could under the facts and the law to the collection of the said rent by Mrs. Horne from him. Having been compelled to pay Mrs. Horne the amount of the rent, Bailey thereupon brought suit against Hooks upon the written contract, in which Hooks undertook, among other things, to pay the rent notes which he, Bailey, had given to her. To this suit Hooks set up the defense that Mrs. Horne had recognized his subtenant, Powell, as her tenant of the premises for which the rent notes were given, that she collected the rents from Powell, and that, on notice by Powell to her that certain repairs were needed on the rented property, she directed Powell to make such repairs and deduct from the rent the cost of the same, that this conduct was an election to treat Powell as her original tenant, and that this election released Bailey from his contract to pay the rent, and consequently released Hooks from his contract with Bailey. There was no controversy as to any of these facts, and, at the conclusion of the evidence, the court directed a verdict for the plaintiff for the principal and interest shown to be due on the rent notes. The defendant filed a motion for new trial based on the usual general grounds, and on the special ground that the court erred in directing a verdict for the plaintiff, as there were questions of fact in the case that the jury should have passed upon; it being insisted in support of this assignment of error that there was evidence tending to show that the owner of the building had accepted and treated Powell as her tenant, and in doing so had released Bailey

and that consequently Hooks was released from his contract with Bailey, and that this issue, if no other, should have been submitted to the jury.

It will be seen from the foregoing statement of the facts, which were not in dispute, that the only question for this court to decide is as to whether the conduct of Mrs. Horne, the owner of the premises, amounted to an election on her part to make the subtenant, Powell, her tenant, thereby releasing Bailey from his contract of tenancy; for, of course, if her conduct did amount to such substitution, it would have the effect to release Bailey from his contract, and consequently Hooks from contract with Bailey. The extent of the evidence illustrative of this point is that Mrs. Horne, through her agent, collected the rent from Powell, but this act must be taken in connection with the further facts that the original rent notes executed by Bailey to her had been deposited in the bank for collection, and no new note had been taken from the subtenant, Powell, but the rent as it fell due was paid by the payment of the rent notes made by Bailey and deposited in the bank for collection. The fact that the owner of the premises still retained the notes made by Bailey to her strongly indicates that she did not intend by accepting payment of the rent from Powell, the subtenant, to release Bailey. This court has held in the case of *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983, following the decision of the Supreme Court in *Hudson v. Stewart*, 110 Ga. 37, 35 S. E. 178, that the landlord does not waive his right of action against his tenant by allowing a subtenant to remain in possession of the premises, even though he accept payment of the rent from the subtenant with knowledge of such subletting; that the collection of rents from a subtenant is not such affirmative action on the part of the landlord as to amount to an election by him to treat the subtenant as his tenant. See, also, *Americus Mfg. Co. v. Hightower*, 3 Ga. App. 65, 59 S. E. 309; *Taylor's Landlord & Tenant*, § 524. Nor do we think the fact that the landlord directed the subtenant to make needed repairs on the property, and to deduct the cost of the repairs from the rent, shows that the landlord elected to treat the subtenant as her tenant. It is the duty of the landlord to keep the premises in repair, whether they be occupied by his tenant or his subtenant. Civ. Code 1895, § 3123. We therefore conclude that there could have been but one verdict under the undisputed evidence in the record, and this was the verdict directed by the court.

Judgment affirmed.



## RED CYPRESS LUMBER CO. et al. v.

BEALL. (No. 1,107.)

(Court of Appeals of Georgia. Nov. 23, 1908.)

## 1. LOGS AND LOGGING (§ 3\*)—DAMAGES (§ 157\*)—JUDGMENT—RIGHT TO TURPENTINE—USE OF TIMBER—ACTIONS—NATURE AND FORM—CONFORMITY TO PLEADINGS—PRAYER FOR RELIEF.

Where the standing pine timber on land is owned by one person and the land itself by another, the turpentine and the right to box the trees for it are appurtenances of the timber, and not of the land.

(a) Where a landowner conveys the standing timber without limitation as to the use to which it is to be appropriated, the grantee may use it for any ordinary purpose.

(b) Where the owner of land sells the standing timber thereon unconditionally save as to the time within which it is to be cut, but subsequently contracts with the vendee of the timber that he shall not work the timber for turpentine purposes and in violation of the contract he does so work it, the landowner is not entitled to sue in trespass for the value of the turpentine though he may have an action upon the contract as to any legal damages which may have been occasioned to him through the breach.

(c) Although a plaintiff may make out a case showing a right to recover general damages, yet, if it appears from the petition that he has not sued for general damages, but for special damages only, and the special damages are not recoverable under the facts shown, a verdict in his favor is unauthorized.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3; \* Damages, Cent. Dig. § 429; Dec. Dig. § 157.\*]

## 2. CONTRACTS (§ 68\*)—CONSIDERATION—COMPROMISE OF DISPUTE.

The compromise of a bona fide dispute as to the ownership of a property right may legally constitute the consideration of a contract in which one party agrees to give up certain rights he otherwise would be entitled to enforce against the other; but the contract is not binding if the party in whose favor it is executed waives nothing, gives up no claim, and furnishes no other consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 328-330; Dec. Dig. § 68.\*]

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by M. L. G. Beall against the Red Cypress Lumber Company and others. Judgment for plaintiff, and defendants bring error, Reversed.

Pope & Bennet, for plaintiffs in error.  
Mann & Milner, for defendant in error.

POWELL, J. The view we take of the controlling questions in the case renders it necessary to state only the following portions of the facts: Mrs. Beall owned the "Hickory Level," place consisting of several lots of land, in Dougherty county. On January 6, 1902, she executed a warranty deed conveying to the Red Cypress Lumber Company, its successors and assigns, the timber growing upon the land comprising the "Hickory Level" place, together with the right

of ingress and egress by tram roads, wagon roads, etc. The grantor reserved the right to use the timber on one of the lots (No. 292) for fence purposes, and to use for firewood on the plantation timber not suitable for mill purposes. It was stipulated that the grantees should have 10 years from the date of the deed in which to cut and remove the timber. It was also provided that the grantees should not cut pine timber for the purpose of making rails or cordwood for market. The Red Cypress Lumber Company thereafter granted the right to cut and work the pine timber for turpentine purposes to McConnell. On November 29, 1904, the following writing was executed: "This agreement entered into this day between J. B. Beall, agent for Mrs. M. L. G. Beall, of the first part, and E. A. Hallam and J. S. Davis, receivers of the Red Cypress Lumber Company, and G. B. D. McConnell, purchaser of the turpentine privileges on the Beall Hickory Level place, of the second part. The parties of the second part agree to turpentine the following land only on said place: All timbered lands east of the road running from Ducker Station to Newton, also the two parcels of woodland situated in what is known as the new ground, west of Newton road, the same being two ponds; also the wood north of the plantation road from the quarter to Land Tarrer and running north of the Clayton place line. And further gives R. P. Hall the privilege of clearing all the highlands on lot 292. [Signed] Edwin A. Hallam, Receiver. J. B. Beall, Agent. G. B. D. McConnell, Jos. S. Davis, Receiver. Witness: R. P. Hall, Clerk Superior Court, Dougherty County, Ga." J. B. Beall had a power of attorney and had full authority to act for his wife, Mrs. M. L. G. Beall. Mrs. Beall filed the present action against the Red Cypress Lumber Company and McConnell, alleging that subsequently to the execution of the foregoing agreement the defendants entered upon that portion of Hickory Level place excepted in the agreement, and damaged her in the sum of \$2,000 by boxing the timber and removing \$2,000 worth of turpentine. It seems that there were a number of roads running through the Hickory Level place; and there was a large amount of testimony as to which of these roads were referred to by the description given in the agreement, and as to whether any of the boxing had been done beyond the limits set in the agreement. It was not shown that any of the rail timber reserved in the first conveyance was boxed. The jury returned a verdict for the plaintiff in the sum of \$400, and the defendant presents on review a number of exceptions.

1. The plaintiff's case is affected with the radical infirmity that she sued for and recovered the value of that which was not hers actually or constructively. The timber deed from her to the Red Cypress Lumber Com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany conveyed all the timber without limitation as to the purpose for which it was to be used (except as to rail timber and cordwood). Hence the grantees took the full title to it with the right to use it for any ordinary purpose not expressly excepted. *Gray Lumber Co. v. Gaskin*, 122 Ga. 342 (5), 50 S. E. 164; *Brinson v. Kirkland*, 122 Ga. 487, 50 S. E. 369; *Mills v. Ivey*, 3 Ga. App. 559-560, 60 S. E. 299. Turpentine and the right to take it from the pine trees are appurtenances of the timber, and not of the land, where the land and timber are owned by different persons. Hence the turpentine and the right to work the trees belonged to the Red Cypress Lumber Company or its assigns, and not to Mrs. Beall, on and after the execution of the foregoing conveyance, unless she subsequently acquired title to it. The agreement of November 29, 1904, did not purport to convey to Mrs. Beall anything. If valid at all, it merely bound the Red Cypress Lumber Company and McConnell, to whom that company had sold the turpentine privileges, not to turpentine that portion of the timber not included within the limits there given. Hence, if the defendants worked the timber beyond the limits specified, they violated the contract, but the turpentine they took was not the property of Mrs. Beall. We pointed out in the case of *Mills v. Ivey*, supra, how a person might be willing to sell timber for certain purposes, and at the same time be unwilling for it to be used otherwise. Hence it was competent for Mrs. Beall to contract with those who owned the timber standing on her land that they would not work it for turpentine purposes. If she made a valid contract to that effect, and the other parties thereafter worked the timber for turpentine, she might have an action on the contract for the breach of it; but her damages would not consist in the value of the turpentine taken, for the turpentine was not hers, and, if she had undertaken to box for it and gather it, the Red Cypress Lumber Company, notwithstanding their agreement that they would not box it themselves, might have held her for the value of it or for the damages done the timber.

If the agreement of November 29, 1904, is valid, it is possible that Mrs. Beall might have maintained an action of trespass against the defendants for entering upon her lands and for passing to and fro thereon in gathering the turpentine, for it may be reasonable to construe that contract as limiting the right of ingress and egress which the grantees under the timber deed were otherwise entitled to enjoy; but she has not laid any damages for this technical trespass. It clearly appears from an amendment filed to her petition and allowed on May 21, 1907, that she sued only for the value of the crude turpentine taken. Compare *Christophoulos Café Co. v. Phillips*, 4 Ga. App. 819, 62 S. E.

562; *Wright v. Smith*, 128 Ga. 432, 57 S. E. 684.

2. The agreement of November 29, 1904, was not in our opinion shown to be a valid contract. It lacked the necessary element of consideration. It expressed no consideration. The proof on the trial disclosed no benefit to the promisors or detriment to the promisee to support it. We recognize the rule asserted by counsel for the defendant in error that the compromise of a controversy existing between the parties may furnish a consideration for a contract. We think that, if there was a bona fide dispute between the parties as to whether the grantees under the timber deed had the right to work any of the timber for turpentine, and in settlement of this controversy Mrs. Beall agreed that she would no longer dispute their right to cut a certain portion if they would no longer claim the right to cut the remainder, such a contract would not be lacking in the element of consideration; but we find no such concession agreed on the part of Mrs. Beall or her attorney in fact. If she really claimed that her grantees under the timber deed did not have the right to use the timber for turpentine—and the proof as to this is very meager and indefinite—there is no proof that she contracted to abandon any portion of this claim as a consideration for the agreement subsequently made. A compromise in which one party makes the entire concession and receives nothing in return is not mutual or binding.

Judgment reversed.

## LIFE INS. CO. OF VIRGINIA v. HAIRSTON.

(Supreme Court of Appeals of Virginia. Nov. 19, 1908.)

### 1. EVIDENCE (§ 472\*)—OPINION EVIDENCE.

In an action on a life policy, not in force until issued and the first premium paid during the good health of insured, testimony of the agent procuring the insurance that when a policy is delivered it is binding on insurer is, when preceded by testimony that insured paid part of the first premium in cash, and gave a note for the balance, which was paid some days after its maturity, the opinion of the agent on a point in issue.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472.\*]

### 2. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—ERROR IN EXCLUDING EVIDENCE SUBSEQUENTLY RECEIVED.

Error in refusing to permit a party to propound questions to a witness is not prejudicial, when the questions are subsequently asked the witness and answered without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

### 3. INSURANCE (§ 137\*)—CONTRACT—REQUISITES—PAYMENT OF PREMIUM.

An insurer issuing a life policy may accept, in payment of the first premium, the lia-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 62 S.E.—67

bility of a third person; and, where insurer debits the premium to the agent, and looks to him ultimately for payment, then, as between insured and insurer, the premium is paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 235; Dec. Dig. § 137.\*]

**4. INSURANCE (§ 141\*)—CONTRACT—REQUISITES—PAYMENT OF PREMIUM—WAIVER.**

The stipulation in a life policy that it shall not be deemed complete until payment of the first premium in cash may be waived by an agent having power to execute and issue contracts for insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 256, 257; Dec. Dig. § 141.\*]

**5. INSURANCE (§ 141\*)—CONTRACT—REQUISITES—PAYMENT OF PREMIUM—WAIVER.**

The stipulation in a life policy that it shall not be deemed complete until payment of the first premium in cash is waived by an absolute delivery of the policy, by an agent having power to execute and issue contracts for insurer under such circumstances as will justify an inference that credit is to be given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 260; Dec. Dig. § 141.\*]

**6. INSURANCE (§ 137\*)—CONTRACT—REQUISITES—PAYMENT OF PREMIUM.**

Where a special agent, bonded to make good to insurer all that might be due by him to it, solicited a policy of insurance, accepted the note of insured for the first premium, and became responsible to insurer for the amount thereof, and it was the practice of insurer to permit its agents to give credit for premiums, and to be themselves responsible for the payment thereof, the policy became effective on its delivery to insured, though it stipulated that it should not be deemed complete until payment of the first premium in cash.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 241-243; Dec. Dig. § 137.\*]

**7. EVIDENCE (§ 276\*)—DECLARATIONS BY DECEDENT AGAINST INTEREST.**

In an action on a life policy, issued on an application reciting that insured had never used opium, the evidence of a physician, seeing insured after the policy became complete, that insured was then under the influence of opium, and that insured then stated that he could take two or three bottles of laudanum a day, and had been taking that much for two or three years, was properly excluded; the interest of insured being so remote as not to be deemed of a pecuniary nature, and not being so direct as presumably to have been present in his mind at the time of his declaration.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 276.\*]

**8. EVIDENCE (§ 276\*)—DECLARATIONS AGAINST INTEREST.**

Evidence of declarations against the interest of the person making them, is not favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, and the evidence is not admissible, unless the statements were made to the knowledge of the declarant, against his obvious and real, pecuniary or proprietary, interest.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 276.\*]

**9. INSURANCE (§ 654\*)—LIFE INSURANCE—ACTIONS—EVIDENCE—ADMISSIBILITY.**

In an action on a life policy, not to become effective unless issued and the first premium paid during the good health of insured, evidence of the condition and habits of insured subsequent to the time the policy became effective is immaterial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1681; Dec. Dig. § 654.\*]

**10. EVIDENCE (§ 122\*)—RES GESTÆ.**

In an action on a life policy stipulating a reduced liability on insured committing suicide, a letter written by insured to his wife the morning of the day of his death, or in the evening, is not a part of the res and is inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 122.\*]

**11. TRIAL (§ 189\*)—INSTRUCTIONS—THEMATICAL STATEMENT OF FACTS.**

It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, provided the statement presents the case shown in evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. §§ 442-445; Dec. Dig. § 189.\*]

**12. INSURANCE (§ 669\*)—ACTION ON POLICY—MISLEADING INSTRUCTIONS.**

In an action on a life policy stipulating a reduced liability in case insured committed suicide, an instruction that the fact that insured died on the evening of his death, was followed by convulsions, which continued until he died, that strychnine was discovered in his stomach, was not alone sufficient to prove suicide and was misleading.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**13. TRIAL (§ 200\*)—INSTRUCTIONS—MATHEMATICAL STATEMENT OF FACTS.**

The court should content itself with stating the general principles of law, and leaving them to be applied by the jury to the facts, or else it should, where it presents a hypothetical case, put before the jury all the facts bearing on the issue which the evidence tends to prove.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 471; Dec. Dig. § 200.\*]

**14. TRIAL (§ 235\*)—INSTRUCTIONS—EVIDENCE.**

In an action on a life policy, stipulating a reduced liability on insured committing suicide, an instruction that, if insurer seeks to avoid payment of the policy on the ground that insured committed suicide, it must show that every hypothesis of accidental death is excluded, accidental death being presumed by the law, which presumption cannot be overcome except by proof of facts excluding every hypothesis of death except by suicide, is correct, though it would have been better to have said that the evidence, to warrant a verdict for insurer, should exclude every reasonable hypothesis of accidental death.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 235.\*]

**15. INSURANCE (§ 669\*)—LIFE INSURANCE—ACTIONS—INSTRUCTIONS.**

An instruction, in an action on a life policy, that no answer to any interrogatories made by an applicant for a policy should bar a recovery by reason of any warranty in the application, unless it is proved that such answers are willfully false or fraudulently made, etc., is in the language of the statute, and correct.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**16. INSURANCE (§ 669\*)—LIFE INSURANCE—ACTIONS—INSTRUCTIONS.**

In an action on a life policy, stipulating that it should not be complete until payment of the first premium in cash, an instruction that, if insurer delivered the policy to its agent, who delivered it to insured, and if at no time thereafter and before the death of insured insurer gave notice that it wished to cancel the policy, insurer waived the condition of prepayment was misleading, as ignoring the fact that the agent who delivered the policy might have vio-

lated instructions limiting his authority, with the knowledge of insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**17. INSURANCE (§ 646\*)—LIFE INSURANCE—ACTIONS—BURDEN OF PROOF.**

An insurance company, seeking to avoid the payment of a life policy on the ground that insured was guilty of material misrepresentations and fraud, has the burden of proving the misrepresentations and fraud, and the same will not be assumed on doubtful evidence or circumstances of mere suspicion.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1650; Dec. Dig. § 646.\*]

**18. EVIDENCE (§ 60\*)—PRESUMPTIONS—PRESUMPTIONS IN FAVOR OF HONESTY.**

The law never presumes fraud, but the presumption is in favor of innocence and honesty.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.\*]

**19. INSURANCE (§ 665\*)—LIFE INSURANCE—DEFENSES—SUICIDE—WEIGHT OF EVIDENCE.**

The defense of suicide, in an action on a life policy stipulating for a reduced liability on insured committing suicide, must be established by clear and satisfactory proof, and the preponderance of the evidence should be such as to overcome the presumption of innocence of moral turpitude.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1720; Dec. Dig. § 665.\*]

**20. INSURANCE (§ 646\*)—LIFE INSURANCE—DEFENSES—SUICIDE—BURDEN OF PROOF.**

The burden of establishing the defense of suicide, in an action on a life policy, is on insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1663; Dec. Dig. § 646.\*]

**21. INSURANCE (§ 669\*)—LIFE INSURANCE—ACTIONS—SUICIDE—INSTRUCTIONS.**

In an action on a life policy, defended on the ground that insured committed suicide, an instruction that, in determining whether insured died from suicide or from natural or accidental causes, the jury must consider first what facts are established by preponderance of the evidence, and, having ascertained what facts are established, the jury must further consider whether there is any reasonable hypothesis consistent with death from natural or accidental causes, and if such facts are inconsistent with death from natural or accidental causes, they must find for insurer, properly submits the issue.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**22. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS COVERED BY THOSE GIVEN.**

It is not error to refuse a requested charge substantially covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**23. TRIAL (§ 234\*)—LIFE INSURANCE—SUICIDE—ACTION—INSTRUCTIONS.**

In an action on a life policy, defended on the ground of suicide by insured, an instruction that, if the jury believe from the evidence, to the exclusion of every other hypothesis, that insured committed suicide, they must find for the insurer is open to the objection that the court erred in not stating to the jury that the evidence should exclude every reasonable hypothesis.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 234.\*]

**24. INSURANCE (§ 669\*)—LIFE INSURANCE—MISREPRESENTATIONS—INSTRUCTIONS.**

In an action on a life policy, an instruction that, if the jury believe that answers to questions in the report of the medical examiner were not true, and that the questions and answers were material, they must find for insurer correctly submitted the issue of misrepresentations in the application.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**25. TRIAL (§ 200\*)—INSTRUCTIONS—FORM OF INSTRUCTIONS—REQUESTS.**

The court, in an action on a life policy, defended on the ground that insured committed suicide, may refuse a requested charge under taking to state the case made by the record on the issue of suicide, and leave the jury to apply the evidence, with such aid as is afforded by giving general principles of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 471; Dec. Dig. § 200.\*]

**26. TRIAL (§ 252\*)—INSTRUCTIONS—EVIDENCE—APPLICABILITY TO EVIDENCE.**

It is not error to refuse an instruction submitting an issue where there is no sufficient evidence to warrant it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**27. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING EVIDENCE.**

It is not error to refuse an instruction which ignores part of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

Error to Circuit Court of City of Roanoke.

Action by S. W. Hairston, for Frank Willis and others, against the Life Insurance Company of Virginia. There was a judgment for plaintiff, and defendant brings error. Reversed.

The following are the instructions given and refused:

Instructions given on motion of the plaintiff:

"No. 1 (given). The court instructs the jury that, although you may believe from the evidence that the deceased was found the evening of his death having convulsions, and that he continued to have them until he died, and that strychnine was found in his stomach, this alone is not sufficient to prove suicide. The defendant company must go further, and show that the deceased intentionally and willfully, for the purpose of committing suicide, took strychnine, and this must be shown by such evidence as will exclude every reasonable supposition of accidental death; and, unless this is so shown from all the evidence, you must find for the plaintiff on the issue of suicide.

"No. 2 (given). The court further instructs the jury that, if the defendant company seeks to avoid the payment of the policy on the ground that the accused came to his death by suicide, the defendant company must show that every hypothesis of accidental death is excluded by the evidence. Accidental death is presumed by the law, and this presumption cannot be overcome except by proof of facts

which exclude every hypothesis of death except by suicide.

"No. 3 (given). The court instructs the jury that no answer to any interrogatories made by an applicant for a policy of life insurance shall bar the right to recover, upon any policy issued upon such application, by reasons of any warranty in said application of policy contained, unless it be clearly proved that such answers are willfully false, or fraudulently made, or that it was material.

"No. 4 (given). The court instructs the jury that, if they believe from the evidence that the defendant company delivered the policy sued on to A. H. Ayers, agent, who delivered it to the deceased, D. P. Willis, and further believe that at no time after the policy was so delivered, and before the death of D. P. Willis, did the defendant company give said Willis notice that it wished to cancel the policy, this was a waiver of the condition of prepayment to deliver a policy without requiring the prepayment of the premium.

"No. 5 (given). The court instructs the jury that, if the defendant company seeks to avoid the payment of said policy on the grounds that the deceased has been guilty of material misrepresentations and fraud, the burden of proving the misrepresentations and fraud is on the defendant company; that he who alleges fraud must clearly and distinctly prove it. It is not to be assumed on doubtful evidence or circumstances of mere suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty"—to the giving of which, and of each of which, the defendant by counsel objected, which objection was overruled by the court, and the said instructions, and each of them, given to the jury, to which action of the court the defendant by counsel excepted.

And thereupon the defendant by counsel moved the court to instruct the jury as follows:

Instructions first asked for by the defendant:

"No. 1 (refused). The court instructs the jury that all the defendant company is required in this action to do is to prove by a preponderance of the evidence the facts necessary to be shown to entitle it to a verdict according to the other instructions given to the jury. By the term 'preponderance of the evidence' as applied to the proof of any particular fact in this case, is meant that the greater probability from the evidence is in favor of the existence of such fact. That is to say, if the jury believe, considering all the evidence in the case relating to any given fact, that the greater probability from all the evidence before them is in favor of the existence of that particular fact, then they must so find. For example, if the defendant relies upon the fact that the deceased died from strychnine poisoning, and not from other causes, and, if the jury believe from all the evidence on that subject that that contention, to wit, that the deceased died from

strychnine poisoning, is more probably true than the contrary contention, then it is their duty to determine, in making up their verdict, that said fact has been shown.

"No. 2 (refused). The court instructs the jury that, in determining whether the deceased, Willis, died from suicide or from natural or accidental causes, they shall consider, first, what facts are established by a preponderance of all the evidence on that subject, and, having ascertained what facts are thus established, they shall further consider whether there is any reasonable hypothesis, based upon those facts, and those facts alone, which is consistent with death from natural or accidental causes; and, if the jury believe that those facts, considered as a whole and taken together, are inconsistent with death from natural or accidental causes, then they must find for the defendant company.

"No. 3 (refused). The court instructs the jury that, if they believe from the evidence that the statements testified to by witnesses Wright and Hale in reference to the use by the deceased in respect to indulgence in wine, ardent spirits, or malt liquors were substantially true, and that the same were not substantially embodied in the answers to questions 11 and 12 of the application aforesaid, and if they further believe from the evidence that, if said statements had been substantially set out in said application, the application would have been denied, and the policy in question would not have been issued, then the jury are instructed that they must find for the defendant company.

"No. 4 (refused). The court instructs the jury that, if they believe from a preponderance of the evidence, as above defined, the deceased, Willis, on the 23d day of March, 1906, died not from natural or accidental causes, but by his own hand or act, whether sane or insane, they must find for the defendant company.

"No. 5 (refused). The court further instructs the jury that, if they believe from the evidence that at the time when the balance due on the first premium under said policy was paid, and witness Ayers delivered the premium receipt therefor, the said Willis was not then in sound health, they must find for the defendant company.

"No. 6 (refused). The court instructs the jury that, if they believe from the evidence that the answers to questions 11 and 12, or either of them, in the report of the medical examiner, were not substantially true, and that said questions and the answers thereto, are clearly shown to have been material, then they must find for the defendant company."

But the court refused to give said instructions, or either of them, and gave in lieu thereof the following five instructions:

Instructions given by court.

"No. 1 (given). The court instructs the jury that all the defendant company is required in this action to do, except the proof of suicide,

is to prove by a preponderance of the evidence the facts necessary to be shown to entitle it to a verdict according to the other instructions given to the jury. By the term 'preponderance of the evidence,' as applied to the proof of any particular fact in this case, is meant that the greater probability from the evidence is in favor of the existence of such fact. That is to say, if the jury believe, considering all the evidence in the case relating to any given fact, that the greater probability from all the evidence before them is in favor of the existence of that particular fact, then they must so find. For example, if the defendant relies upon the fact that the answers to certain questions in the application introduced in evidence are not true, and if the jury believe from all the evidence on that subject that that contention is more probably true than the contrary contention, then it is their duty to determine, in making up their verdict, that said fact has been shown.

"No. 2 (given). The court instructs the jury that, in determining whether the deceased, Willis, died from suicide or from natural causes, they shall consider, first, what facts are established to the exclusion of every other hypothesis, and, having ascertained what facts are thus established, they shall further consider whether there is any reasonable hypothesis based upon those facts, and those facts alone, which is consistent with death from natural or accidental causes; and, if the jury believe that those facts, considered as a whole and taken together, are inconsistent with death from natural or accidental causes, then they must find for the defendant company.

"No. 3 (given). The court instructs the jury that, if they believe from the evidence that the statements testified to by witnesses Wright and Hale in reference to the use by the deceased of wine, ardent spirits or malt liquors substantially were true, and that the same were not substantially embodied in the answers to questions 11 and 12 of the application aforesaid, and if they further believe from the evidence that, if said statements had been substantially set out in said application, the same would have been denied and the policy in question would not have been issued, then the jury are instructed that they must find for the defendant company; and it is for the jury alone to determine from the whole evidence whether such statements 11 and 12 were false.

"No. 4 (given). The court instructs the jury that, if they believe from the evidence, to the exclusion of every other hypothesis, that the deceased, Willis, on the 23d day of March, 1906, died by his own hand or act, whether sane or insane, they must find for the defendant company.

"No. 5 (given). The court instructs the jury that, if they believe from a preponderance of the evidence, as hereinbefore defined, that the answers to questions 11 and 12, or either

of them, in the report of the medical examiner, were clearly not true, and that said questions and the answers thereto are clearly shown to have been material, then they must find for the defendant company"—to which action of the court in refusing to give the instructions as asked for by the defendant, and to the giving in lieu thereof of the five instructions last above mentioned, the defendant by counsel excepted.

And thereupon, after the said instructions had been given to the jury by the court, and after the refusal of the court to give the instructions as asked for by defendant, the defendant asked the court to further instruct the jury as follows:

Second set of instructions asked for by defendant.

"A (refused because it is improper to instruct as to what is sufficient evidence). The court further instructs the jury that, while the facts set out in plaintiff's instruction No. —, are alone not sufficient to prove suicide as set out in said instruction, but those facts, accompanied by such other facts as these, namely, the leaving, by the person referred to, of the house of an acquaintance where he had been conversing for an hour and a half or two hours, without any symptoms of being affected by poison, saying he was going to his daughter's house; his being seen within half an hour to stagger and fall; his subsequent death within 3½ hours, preceded by undoubted symptoms of strychnine poisoning; his exclamations of pain or suffering in the first manifestations of those symptoms; the failure of the person so attacked to ask for relief when approached shortly afterwards, or to give any explanation of his condition, he being then rational; the refusal by such person of assistance or medical aid, when rational, during the manifestations of said symptoms, and the statements by him, when first found and rational, that he wanted to be let alone, saying 'I came here to die; I want to die, and I am going to die right here'; that he did not want to be carried to anybody's house, and denying that anything was the matter with him—are sufficient to justify a verdict in this case for the defendant company.

"B (given). The court further instructs the jury that, while it is true that, where a defendant company seeks to avoid the payment of a policy on the grounds that the deceased has been guilty of material misrepresentations and fraud, the burden in proving the misrepresentations is on the defendant company; that where fraud is relied upon, it must be proved clearly and distinctly, and not assumed on doubtful evidence, and the law never presumes fraud, as set out in plaintiff's instructions Nos. 3 and 5, yet it is not incumbent upon the defendant company in this action to prove more than that the misrepresentations relied on were false and material, and, if it be true that the answers to the questions in the report of the medical

examiner were merely false, and also material, then the proof of such facts, in the manner set out in these instructions, will entitle the defendant to a verdict in its favor.

"C (given). The court further instructs the jury that, if they believe from the preponderance of all the evidence in the case that the deceased, Willis, was not in sound health at the time of the delivery of the policy sued on in this case, they must find for the defendant.

"D (refused). The court further instructs the jury that, if it is clearly shown by a preponderance of all the evidence in this case that the deceased was addicted to the use of opium at any time prior to the date of his examination by the medical examiner of the company, Dr. Simmons, and that his answers to the questions in the report of said medical examiner were material, then they must find for the defendant.

"E (refused). The court instructs the jury that, under the contract of insurance sued on in this case, each premium, unless paid at the home office, can only be paid in exchange for the defendant company's receipt signed by the president or secretary, and countersigned by the local agent designated therein, and that under its terms the policy sued on does not take effect until the first premium is paid, and not then if the insured is not in sound health on the date of such payment. Therefore, if the jury shall believe from the evidence that the said first premium was not paid by an exchange for the receipt of the company signed by the president or secretary of the company, etc., until the 16th day of March, 1906, and if they further believe from the evidence that the insured was not in sound health on said date, then they must find for the defendant, unless the company had by its president, vice president, or secretary changed said contract in respect to requiring such receipt in exchange for such premium.

"F (given). The court instructs the jury that in considering this case you must not go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely chimerical or conjectural. A doubt as to the fact of suicide must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge of suicide, you are satisfied beyond a reasonable doubt, and must find for the defendant."

N. H. Hairston and Walter R. Staples, for defendant in error.

KEITH, P. S. W. Hairston, as the next friend of certain infants, recovered a judgment against the Life Insurance Company of Virginia in the circuit court of the city of Roanoke, and upon the petition of the defendant company the record is now before

us to review certain rulings of the trial court.

On the 6th of February, 1906, the company issued a policy of insurance upon the life of David Peter Willis, the father of the infant plaintiffs, in consideration of the application for said policy, which is made a part thereof, and upon condition that the quarterly annual premium of \$20.41 should be paid in advance on the delivery of said policy, which the declaration alleges was duly paid. It is also averred that Willis died on the 23d of March, 1906, while the policy was in force; that due proof of his death had been furnished the defendant; that all the conditions of the policy had been complied with; and that nevertheless the defendant refused to pay it.

The application, which was signed by Willis, the applicant, and countersigned by the agent of the company, contains, among others, the following provisions:

"(1) That I warrant the statements and representations made above, as well as those made or to be made to the company's medical examiner, to be full, complete and true, whether written by my hand or not, and that they, together with this agreement, shall form the basis and become a part of any contract of insurance that may be issued under this application.

"(2) That the liability of the company under said policy will be limited to the amount of reserve under said policy according to the American Experience Table of Mortality, and 3 per cent. interest, if during the next two years following the date of issue of the policy of insurance for which application is hereby made \* \* \* I die by my own hand or act, whether sane or insane, or if my death be caused by the use of narcotics or alcoholic stimulants within two years from the date of said policy. \* \* \*

"(4) That the company shall incur no liability under this application until it shall have been received and approved at the home office of said company, the policy issued and the first premium paid and accepted by the company or by its authorized agent during my lifetime and my good health. \* \* \*

"(6) That if any premium be not duly paid, all rights, claims or interest in the policy hereby applied for, or in any of its provisions, guaranties or benefits other than those stipulated in the said policy, whether required or provided for by the statute of any state or not, are hereby specifically waived and relinquished.

"7. That I shall have the right to change the beneficiary or beneficiaries in the policy applied for, whenever or as often as I may desire, except when the beneficiary is a married woman or a married woman and her children or her husband's children, and, further, that I as the insured may without the consent of the beneficiary or beneficiaries receive any benefit, exercise every right and

enjoy every privilege conferred upon the insured by the policy applied for if one be issued."

In the medical examination, referred to in this application, it was asked:

"Have you ever used malt or spirituous liquors to excess? A. Fifteen years ago used whisky slightly to excess.

"Q. State the quantity you use each day of malt liquors, wines, spirits? A. Average about two drinks of whisky or beer a week. Do not drink either daily.

"Q. Have you ever used opium? A. No.

"Q. Chloral? A. No.

"Q. Or any narcotic? A. No."

The policy sued on appears on its face to have been issued subject to certain conditions, among others, that it "shall not take effect until the first premium is paid, nor unless on the date of said payment the insured is living and in sound health, and when this contract is completed by its delivery and by the payment of the first premium, it shall be construed as having been in force from the date of its execution, as stated on the first page thereof. Each premium is due and payable at the home office of the company in the city of Richmond, but at the pleasure of the company will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary and countersigned by the local agent designated therein"; that "thirty days' grace, during which time the policy will remain in force, will be allowed in the payment of any premium except first"; that "Agents are authorized to receive and forward applications for insurance, but only the president, the vice president or secretary has power on behalf of the company to make or modify this or any other contract of insurance, or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter made, unless made in writing by one of the said officers."

The defendant filed certain special pleas, presenting the defenses arising upon these warranties and stipulations in the policy.

One plea avers that the applicant did within two years from the date of the policy, to wit, on March 23, 1906, die by his own hand, by administering to himself strychnine poison, which caused his death; that the amount of the reserve under said policy, according to the tables aforesaid on the date of his death, was \$14.21, which amount, with interest, had been duly tendered the plaintiffs, and, being refused, was brought into court.

The defendant also pleaded that the insured had warranted the answers given on the medical examination to be full, complete, and true, and that the warranty had been broken in this: That the answers above mentioned were not full, complete, and true, but were false.

Upon these pleas issue was joined.

The first assignment of error in the petition is as to the admission of evidence set out in bills of exceptions Nos. 1, 2, and 3.

The plaintiff put the witness Ayres upon the stand to prove the due payment, in advance, of the first quarterly premium, amounting to \$20.41. After testifying that he was, in January and February, 1906, the special agent of the defendant company; that he received from D. P. Willis the application, and delivered the policy attached to the declaration during his lifetime—the witness was asked, by the attorney for the plaintiffs, if the premium mentioned in the policy was paid to him as agent for the company before the policy was delivered on February 8, 1906. To this question the witness answered as follows: "The amount of \$5.41 was paid to me when this policy was delivered, and note given for \$15, for the balance of the premium, made personally to me." On the 10th of March following he indorsed this note, and put it in bank for collection, and never accounted to the company or delivered the premium receipt until the note was paid, March 16th, six days after its maturity. He stated that the note was given to him for the payment of the premium. Thereupon counsel for plaintiffs asked the witness the following question: "What is the rule of your company, according to your instructions, and according to the practice of your company, with reference to the delivery of a policy? A. When a policy is delivered—when it is issued and delivered by the company—it is binding on the company." Objection was made to this question and answer by the plaintiff in error, but the court overruled the objection, and allowed the evidence to go to the jury.

Defendant in error, in answer to this assignment, asserts that the "answer of the witness was no more than a statement of a rule of law which is unquestionably correct—that is to say, that the policy is binding when it is issued and delivered by the company"—all of which is true. But it is something more than a statement of a rule of law. It is a statement of a rule of law which is predicated upon the proof of certain antecedent facts. It is the application of the law to the facts, and calls upon the witness to express an opinion upon the point in issue between the plaintiffs and defendant.

In May on Insurance (4th Ed.) § 43a, it is said to be incompetent for a witness to say that in his opinion insurance is effected and completed by the acceptance of the order.

And in *Lindauer v. Delaware, etc., Ins. Co.* 13 Ark. 470, the opinion was expressed, by a witness in his deposition, "that the insurance is effected and completed by the acceptance of the order for insurance, and the company would have been bound to pay in this case if loss had accrued." The court was of opinion that "the admission of such a statement as evidence, against the objection of the



defendants, was a violation of the rules of evidence. Inasmuch as the merits of the case turned on the question whether, upon the facts stated, the company had incurred any risk, so as to have earned the premium, the witness might as well have testified that the plaintiff is entitled to recover in this case."

We shall again refer to this question when we come to consider the instructions given by the court to the jury.

Bill of exceptions No. 2 was taken to a ruling of the court refusing to permit plaintiff in error to propound certain questions to a witness; but it appears that the questions were afterwards asked the witness, and answered without objection, so that plaintiff in error was not aggrieved by this ruling of the court.

The next exception was taken to the refusal of the court to permit a physician to testify as to certain statements made to him by the insured on the 14th day of March, 1906. The physician testified that on that day he found Willis, the insured, under the influence of opium; that from his personal examination, and from information at the time received from the insured, he was confident that he was under the influence of opium; that in answer to his question Willis told him "that he could take two or three bottles of laudanum a day, and had been taking that much for two or three years." When asked how he got in the habit of taking the drug, he replied that it was from the fact of its having been prescribed by a physician. The court refused to permit this evidence to go before the jury, upon the ground that this conversation occurred on the 14th day of March, while the policy in suit had been delivered to the insured on the 28th day of February, who had previously paid a portion of the first premium, and had given his note for the balance thereof payable to the agent who had delivered the policy, and of this partial payment the company had notice, prior to the 14th day of March, the date of the conversation of the physician with the insured, that the general agent of the company knew that the special agent who wrote and delivered the policy had taken a note payable to himself on the 10th of March for the balance of the first premium, and that the special agent was responsible to him for the amount of the note.

We think it fully appears that the general agent was informed as to every detail of the transaction—the partial payment, the taking of the note—that the note was not paid at maturity on the 10th of March, and that it was subsequently paid on the 16th day of that month.

Vance on Insurance, at page 206, says: "The insurer may always accept in payment of the premium the liability of a third party, and therefore, if the insurer debits the premium to the agent, and looks to him ulti-

mately for payment, then as between the insured and the insurer, the premium is paid." And on page 178 it is said: "Even though the parties may have expressly agreed that the contract shall not be deemed complete until payment of the (first) premium in cash and in full, this stipulation may be waived by the insurer or any of his agents having competent authority. As a general rule, any agent having power to execute and issue contracts on behalf of the insurer has power to waive a condition of prepayment. And an absolute delivery of the policy by such an agent without payment of the premium, under such circumstances as will justify an inference that credit is to be given, will constitute a waiver of a condition of prepayment."

In this case, the special agent, Ayres, had given the bond of a guaranty company to make good all that might be due by him to the insurance company; and it appears from the evidence of the general agent that it was a practice, known to and approved by the company, for agents to take such notes, payable to themselves, and charge themselves therewith in their agency account, the company holding the agent responsible as for a cash collection.

In *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861, and in *Kimbro v. N. Y. L. Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A. (N. S.) 421, it is held that such a transaction is a payment of the premium as between the insured and the company.

We think this is shown by the following questions and answers of the general agent:

"Q. When he (Ayres) accepted the note, he was responsible to you for the amount of the note? A. Yes, sir.

"Q. Then when he became responsible to the company, or to you, for the amount of that note, it was because the company had given some value for the amount of that note, and had a right to the money, was it not? A. Yes, sir.

"Q. What other value could you have given except the delivery of the policy? A. No other."

It also appears that it was a practice of the company to permit its agents to give credit for premiums, and to be themselves responsible for the payment thereof.

These admissions were brought out during the cross-examination of the general agent, and he did, without doubt, make statements in apparent conflict with the quotations which we have made from his evidence; but we think that it may fairly be deduced from all that this witness said that the company was advised of what had occurred in this case between the special agent and the applicant for insurance; that while they did not trust to the personal liability of Ayres, they did rely upon the bond which he had given as surety for the faithful performance of his duties, and it further appears that

what occurred in this case was in accordance with the practice of the company in other cases.

The policy, then, being in force on the 14th day of March, the question as to the admissibility of the statements made by the insured to his physician turns upon whether or not they were statements made against the interest of the insured.

In 16 Cyc. p. 1218, it is said that such testimony is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it, or at least require the evidence to be brought clearly within the conditions requisite for its reception. They are not admissible unless they were made to the knowledge of the declarant against his obvious and real interest (*Turner v. Dewan*, 41 N. O. Q. B. 361), and that interest must have been of a pecuniary or proprietary nature (*Burton v. Scott*, 3 Rand. 399; *Tate v. Tate*, 75 Va. 522).

Looking to the provisions of the policy in this case, the interests of the insured were so remote and contingent as scarcely to be deemed of a pecuniary or proprietary nature, and were not so direct and obvious as presumably to have been present in his mind at the time of the declaration.

We think there was no error in this ruling of the court.

Bill of exceptions No. 4 is to the refusal of the court to permit plaintiff in error to show by a witness the condition of the deceased on March 14, 1906, and his habits at that time as to the use of intoxicants.

We are of opinion that this evidence was properly excluded. The contract was at that time complete, and the condition of the insured was no longer material. If the theory of plaintiff in error that the policy did not become effective until March 16th, when the note for a part of the initial premium was actually paid, were correct, its contention would not be without force, and it might be proper to inquire as to the condition of his health on March 14th, under that clause of the policy which provides that it shall not take effect unless at the date of payment of the first premium the insured is in sound health; but, being of opinion that, under all the circumstances of this case, the policy became effective when it was delivered by the special agent, evidence as to the condition of the insured on the 14th of March is immaterial and inadmissible.

The fifth bill of exceptions is to the action of the court in permitting the wife of the deceased to read in evidence the letter received by her from him on the date of his death.

This letter was written by Willis on the morning of the 23d of March, 1906, and received by his wife about 4 o'clock in the afternoon of that day. It is postmarked as mailed at Roanoke at 1 o'clock p. m., and was certainly written before that hour. We do not think it of much importance to the

case, but are of opinion that it constitutes no part of the *res gestæ*, and should have been excluded.

We come now to the instructions given and refused at the trial.

Instruction No. 1, given on behalf of the plaintiff, is erroneous in this: That it is predicated upon only a portion of the facts shown in evidence bearing upon the question of suicide. It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, but that statement must present the case shown in evidence fairly to the jury. The instruction under consideration tells the jury that, if the deceased on the evening of his death was found in convulsions which continued until he died, and that strychnine was discovered in his stomach, this alone is not sufficient to prove suicide. Another instruction, then, might have been given presenting another part of the evidence, in which the jury might with propriety be told that it was insufficient to warrant a conviction, while, if all the facts had been grouped in one instruction, a wholly different conclusion should have been reached.

The tendency of such a method of presenting the facts of a case to the jury is to distract and mislead them, and the court should content itself with giving the jury general principles of law, and leaving them to apply those principles to the facts in evidence before them, or else it should be careful, if it prefers to present a hypothetical case to the jury, to put before the jurors all the facts bearing upon the issue which the evidence proves, or tends to prove.

The second instruction propounds to the jury a general principle, and propounds it correctly, except that it would have been better to have said that the evidence, to warrant a verdict for the defendant on the ground that the accused came to his death by suicide, should exclude every reasonable hypothesis of accidental death. See *Cosmopolitan L. Ins. Co. v. Koegel*, 104 Va. 619, 62 S. E. 166.

The third instruction is in the language of the statute, and was properly given.

The fourth instruction should not have been given in the form in which it was presented. Under that instruction it might be that the defendant company placed the policy in the hands of its agent Ayres, who delivered it to the insured, and by such delivery he may have violated express instructions limiting his authority, which limitations were known to the applicant, and the company have been ignorant of the fact of delivery in violation of its instructions, and yet it would be liable, unless it gave the applicant notice that it wished to cancel the policy, upon the ground that it would thereby have waived the condition of prepayment of the premium.

Our view is, as we have already stated, that the policy was in effect in this case, be-

cause the company, through its general agent, knew of all that had taken place between the special agent and the insured, and because, under the circumstances of the case, and in accordance with the practice of the company, there had been, as between the applicant and the company, a payment of the premium before the policy was delivered.

The fifth instruction was properly given. See *Va. Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8.

The first instruction given by the court was doubtless in lieu of the first instruction asked for by plaintiff in error. We do not think that either of them is strictly accurate. We are of opinion that the defense of suicide should be established by clear and satisfactory proof, such as is required to establish a fraud.

As was said by this court in *Va. Fire & Marine Ins. Co. v. Hogue*, supra, the burden of proof to establish such a defense is upon the defendant, and he must make it out by clear and satisfactory proof—not proof beyond a reasonable doubt, nor a preponderance in the ordinary sense, but such a preponderance as is necessary to overcome the presumption of innocence, of moral turpitude, or crime.

But, on the other hand, it does not require that degree of proof which is necessary to convict in a criminal prosecution, where it is proper to instruct the jury that they should acquit, unless the evidence is sufficient to establish guilt beyond a reasonable doubt. As applied to the proof of fraud or of suicide, the preponderance of the evidence should be such as to overcome the presumption of innocence of moral turpitude or crime; and, if upon a consideration of all the evidence relating to any fact, the jury should be of opinion that the greater probability from all the evidence is in favor of the existence of that particular fact, then they must so find, and the result of the facts thus ascertained must be such as to overcome the presumption of innocence of moral turpitude or crime.

The second instruction given by the court was in lieu of the second instruction asked for by plaintiff in error. It follows from what we have said that in our opinion the instruction asked for should have been given.

Instruction No. 3 given by the court is in the place of No. 3 asked for by plaintiff in error. They are substantially the same—at least we discover no such difference between them as would render the substitution by the court of its own instruction and the refusal by it of that asked for by plaintiff in error ground for reversal.

The fourth instruction given by the court we think is open to the objection already considered with reference to other instructions. As was said, with reference to the second instruction given at the request of defendants in error, it would have been proper for the court to have told the jury

that the evidence should exclude every reasonable hypothesis.

We think instruction No. 5 given by the court was correct, upon the authority of *Life Ins. Co. v. Hogue*, above cited.

Plaintiff in error asked for a second set of instructions, the first of which, taking up instruction No. 1 given by the court on motion of the plaintiff, undertakes to state the case made by the record upon the issue of whether or not the insured came to his death by his own act. It embraces much that was omitted from the instruction given by the court, but we think that the court rightly concluded that it was wiser to leave the jury to apply the evidence, with such aid as the court could afford by propounding general principles of law.

All of the second set of instructions asked for by plaintiff in error were given, except the first, and those marked, respectively, "D" and "E".

In instruction "D" the court was asked to tell the jury that, if it was shown by a preponderance of all the evidence that the deceased was addicted to the use of opium prior to the date he was examined by the medical examiner, they must find for the defendant. This was properly refused, because there was no sufficient evidence before the jury to warrant an instruction upon that point.

Instruction "E" goes back to the original proposition that each premium, unless paid at the home office, can only be paid in exchange for the defendant company's receipt, signed by the president or secretary, and countersigned by the local agent designated therein, and that the policy did not take effect until the first premium was paid, and not then if the insured was not in sound health on the date of such payment, and that "therefore, if the jury should believe from the evidence that the first premium was not paid in exchange for the receipt of the company, signed by the president or secretary of the company, etc., until the 16th day of March, 1906, and if they further believe from the evidence that the insured was not in sound health on said date, then they must find for the defendant, unless the company had, by its president, vice president, or secretary, changed said contract in respect to requiring such receipt in exchange for such premium."

This leaves out all the evidence with respect to the general agent and the general course of business on the part of the company, and was properly refused.

As the case must go back for the reasons given, we shall refrain from any expression of opinion as to the evidence.

The judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a trial to be had in accordance with the views herein expressed.

Reversed.

# WHITEHURST v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina. Dec. 2, 1908.)

## 1. FRAUD (§ 64\*)—ACTIONS—QUESTIONS FOR JURY.

Where there is doubt as to whether representations were intended and received as mere expressions of opinion, or as statements of fact, the question must be submitted to the jury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 69; Dec. Dig. § 64.\*]

## 2. FRAUD (§ 13\*)—FRAUDULENT REPRESENTATIONS—STATEMENTS RECKLESSLY MADE.

An averment of the existence of a material fact, recklessly or positively, by a person consciously ignorant whether it is true or false, is actionable fraud, especially where the parties are not upon equal terms.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 5; Dec. Dig. § 13.\*]

## 3. FRAUD (§ 3\*)—ELEMENTS OF.

To support an action for deceit, there must have been a statement untrue in fact, the person making it must have either known that it was untrue, or have been culpably ignorant, it must have been made with intent that the other party should act upon it, and he must have so acted to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. § 3.\*]

## 4. FRAUD (§ 23\*)—FACTS NOT EQUALLY KNOWN.

The false representation of a fact materially affecting the value of the contract, and which is peculiarly within the knowledge of the person making it, and in respect to which the other party has not an equal opportunity of ascertaining the truth, is fraudulent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 20; Dec. Dig. § 23.\*]

## 5. FRAUD (§ 13\*)—FRAUDULENT REPRESENTATIONS—RELIEF IN STATEMENT.

A misrepresentation is a fraud at law, though made innocently and with an honest belief in its truth, if made by a person who ought to have known the truth.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 4, 5; Dec. Dig. § 13.\*]

## 6. FRAUD (§ 64\*)—ACTIONS—QUESTIONS FOR JURY.

Whether a representation by a life insurance agent, to induce the taking out of a policy, that the company would at the end of a certain period pay back the premiums with interest, insured being blind, and the agent having read the policy to him and so explained a certain clause, was intended as a statement of fact and accepted and reasonably relied upon by insured, was for the jury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 69, 70; Dec. Dig. § 64.\*]

Appeal from Superior Court, Craven County; W. R. Allen, Judge.

Action by M. E. Whitehurst against the Life Insurance Company of Virginia. Judgment for plaintiff, and defendant appeals. Affirmed.

At the close of plaintiff's testimony, and again at the close of the entire testimony, there was motion of nonsuit under the Hinsdale act, motions refused, and defendant excepted. On issues submitted the jury ren-

dered the following verdict: "(1) Did the defendant falsely represent to the plaintiff that under the policies in controversy the plaintiff would be repaid the amount of premiums paid by him with about 4 per cent. interest thereon at the expiration of 10 years? Answer: 'Yes.' (2) If so, did the plaintiff rely on said representations, and was he induced to accept said policies? Answer: 'Yes.' (3) Has the plaintiff waived the right to rely upon failure to deliver to the plaintiff policies that provided for the return of premiums paid and about 4 per cent. interest at the expiration of 10 years? Answer: 'No.' (4) Is the defendant indebted to the plaintiff, and, if so, in what sum?" And thereupon the court rendered judgment as follows: "This cause coming on to be heard before his honor, Judge W. R. Allen, and a jury, and being heard, and the jury having answered all the issues in favor of the plaintiff, except the one as to the quantum of damages, and the amount and dates of payments having been agreed upon, and it having been agreed that his honor should answer the issue as to the quantum of damages, and his honor having found that the payments, together with interest on each up to the 10th day of February, 1908, amounting to \$359.63, it is therefore considered by the court and adjudged that the plaintiff recover of the defendant \$359.63, with interest thereon from the 10th day of February, 1908, till paid, and the costs of the action to be taxed by the clerk." Defendant excepted and appealed.

H. C. Whitehurst and Simmons, Ward & Allen, for appellant. W. W. Clark, for appellee.

HOKE, J. (after stating the facts as above.) We find no reversible error in the record, and are of the opinion that the case has been tried in substantial accord with the principles announced and upheld in the cases of Caldwell v. Insurance Co., 140 N. C. 100, 52 S. E. 252, Sykes v. Insurance Co., 148 N. C. —, 61 S. E. 610, Stroud v. Insurance Co., 148 N. C. —, 61 S. E. 626, and other decisions of like import. There was evidence tending to show: That plaintiff obtained and held for some time a policy in defendant company, containing, among others, a stipulation as follows: "That if plaintiff should be living at the end of ten years, the policies could be continued or surrendered by the insured under one of the following options: \* \* \* (4) Surrender this policy and draw the entire cash value, that is, the legal reserve, computed according to the Actuary's Table of Mortality, and 4 per cent. interest, together with the dividend." That plaintiff was blind and unable to read the policy himself, and, at the time the contract was entered into, and as an in-

ducement thereto, the defendant's agent read the policy to plaintiff, and told plaintiff that at the end of 10 years the whole amount paid in would be returned, with interest. That the agent explained the fourth clause to mean that the company would pay the premium back at the end of 10 years, etc. And that plaintiff accepted the policies and paid the premiums thereon to the amount indicated, relying upon these statements and assurances of defendant's agent referred to, etc.—and on this evidence we think his honor correctly ruled that the questions at issue should be submitted to a jury. While it is a correct principle, as we have held in *Cash Register Co. v. Townsend*, 137 N. C. 652, 58 S. E. 306, 70 L. R. A. 349, that expressions of commendation and opinion, or extravagant statements as to value, or prospects and the like, are not, as a rule, regarded as fraudulent in law, it is also true that, when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and, though this declaration may be clothed in the form of opinion or estimate, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of fact to be regarded as material, the question must be submitted to the jury. 14 A. & E. p. 35; 20 Cyc. p. 124; *Morse et al. v. Shaw*, 124 Mass. 59. In 20 Cyc., supra, it is said: "Whether the representation was merely the expression of opinion or belief, or was the affirmation of a fact to be relied upon, is usually a question for the jury, so ordinarily it is for the jury to say whether representations as to value, solvency, or a third person's financial ability are statements of fact or opinion." And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood, and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation; the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying, and having reasonable ground to rely, upon the statements as importing verity. *Modlin v. Railroad*, 145 N. C. 218, 58 S. E. 1075; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Pollock on Torts* (7th Ed.) 276; *Smith on the Law of Fraud*, § 3; *Kerr on Fraud & Mistake*, 68.

The conditions under which these mis-

representations as to material facts in the course of a bargain may be made the basis of an action for deceit, as a general proposition, will be found very well stated in *Pollock*, supra, as follows: "To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage." And as to responsibility for these statements attaching, when the parties are not upon equal terms in reference to them, it is said in *Smith on Fraud*, supra: "The false representation of a fact which materially affects the value of the contract, and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, is a fraud which is actionable. Where facts are not equally known to both sides, a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion." And so in *Kerr on Fraud & Mistake*, p. 68: "A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him accordingly to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness."

Applying the principle announced and sustained by these authorities, we are of opinion, as stated, that the motion to nonsuit, entered by defendant, was properly overruled. The policy held by plaintiff in defendant's

company contained stipulations to some extent ambiguous and certainly indefinite, and when an agent of defendant company, in the effort to induce plaintiff to take out the policy, said to him that, under one of these stipulations, "the company at the end of 10 years would pay back the premiums, with interest," we think that, under the conditions attending the transaction, and having due regard to the respective positions of the parties, it was a question for the jury as to whether these assurances, given by defendant's agent, were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract, and that the verdict establishes an actionable fraud, imputable to defendant company, entitling plaintiff to recover the premiums paid and interest. *Sykes v. Insurance Co.*, supra.

There is no error, and the judgment below is affirmed.

No error.

#### CITY OF KINSTON v. LOFTIN et al.

(Supreme Court of North Carolina. Nov. 25, 1908.)

#### 1. MUNICIPAL CORPORATIONS (§ 469\*)—SPECIAL ASSESSMENTS—AMOUNT OF ASSESSMENT—FRONTAGE.

An assessment for a street improvement according to the frontage, as directed by statute, is valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1113-1117; Dec. Dig. § 469.\*]

#### 2. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW—SPECIAL ASSESSMENTS—NOTICE—SUFFICIENCY.

A notice which will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of a special assessment before it becomes a fixed charge on his property is sufficient, against the objection that property is taken without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\*]

#### 3. CONSTITUTIONAL LAW (§ 290\*)—DUE PROCESS OF LAW—SPECIAL ASSESSMENTS.

Where, in an action by a city to enforce a special assessment as authorized by Priv. Laws 1905, c. 338, providing that the owner may deny the amount claimed and plead irregularity as to the assessment or any fact relied on questioning its legality, the owner who is afforded an opportunity to establish every defense available, either because of the irregularity or on the merits, cannot complain that the judgment against him is the taking of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.\*]

Appeal from Superior Court, Lenoir County; Neal, Judge.

Action by the City of Kinston against S. H. Loftin, guardian of Fred Isler Sutton, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

There was judgment for plaintiff for the amount of the assessment claimed, and defendant excepted and appealed, noting their exceptions as follows: "The defendants excepted to the judgment rendered for the reason that, under the evidence and the facts found, it should have been rendered in favor of the defendants and against the plaintiff, as no notice was given to the defendants of the assessment against the said land until after the assessment was made, and, the defendants having been given no opportunity to appear before the board of aldermen before the assessment was made, the said assessment was the taking of property without due process of law, in violation of the Constitution of the United States."

Wooten & Clark, for appellants. Y. T. Ormond, for appellee.

HOKE, J. The right to make assessments of this character, and the reasons upon which it may be properly made to rest, are fully and forcibly stated in the opinion delivered by Shepherd, J., for the court, in the case of *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, and the method of assessment per front foot, being the one directed and pursued in this instance, has been also sanctioned with us by express decision (*Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738), and the correct doctrine, with reference to notice required in these proceedings, is against the position contended for by defendants. On this question it is well established that, if notice is provided for "which will enable the property owner to appear before some duly authorized officer, board, or tribunal, and contest the validity and fairness of the assessment made against him, before it can become a fixed and established charge upon his property, it will be sufficient." 25 A. & E. (2d. Ed.) 1216, citing *Gillmore v. Hunting*, 33 Kan. 150, 5 Pac. 781. And our own decisions recognize and uphold this as substantially correct. *Lumber Co. v. Smith*, 146 N. C. 199, 59 S. E. 653. In this case, the statute in question (Priv. Laws 1905, p. 874, c. 338), after authorizing the improvement and establishing the method by which same shall be made and the cost collected, in the latter paragraph of section 9, and in reference to the collection of the assessment, provides: "That the same may be enforced and collected by suit instituted by the city of Kinston, in the superior court of Lenoir county, and in his answer to the action so instituted, the owner shall have the right to deny the whole, or any part, of the amount claimed to be due by the city, and to plead any irregularity in reference to the assessment or any fact relied upon, to question the legality of the assessment, and the issues raised shall be tried and the cause disposed of according to law and the course of practice of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court." In the case before us, it appears from the findings of fact that the statutory methods have been strictly pursued. The order for the improvement was formally made, the work has been well done at a reasonable cost, and the amount assessed well within the limit allowed and established by the law; and in the present suit, instituted as provided by the statute, the defendants have been afforded opportunity to assert and establish every defense available to them, either by reason of irregularity or on the merits. In *Davidson v. New Orleans*, 96 U. S. 104, 24 L. Ed. 616, Miller, J., delivering the opinion of the court said: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The objections of defendant therefore, urged on the ground that no proper notice was provided for, cannot be sustained. The other objections adverted to in defendants' brief are not presented in the record, and, there being no valid objection shown, the judgment of the superior court is affirmed.

**Affirmed.**

#### HANSTEIN v. FERRELL et al.

(Supreme Court of North Carolina. Nov. 25, 1908.)

##### 1. BOUNDARIES (§ 37\*)—LOCATION—EVIDENCE.

The description in a deed, beginning at a stake on W. street, in a certain town, 27½ feet from the N. W. corner of B.'s lot on said street, and running N. 41 W. about 25½ feet to S. street; thence with S. street, S. 48 W., 117½ feet; thence S. 41 E., about 25½ feet to S. street, etc., and concluding "the same being the corner lot at the intersection of W. and S. streets," with testimony that the wall of plaintiff's store on the lot projects 7 inches into S. street—is sufficient to locate the lot, proceeding from the second corner, given a physical placing as 7 inches short of the wall of plaintiff's store.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.\*]

##### 2. BOUNDARIES (§ 48\*)—RECOGNITION AND ACQUIESCENCE.

Recognition of, and acquiescence in, a line by the owners and occupants of adjoining lots as the true division line is evidence of its being the true boundary.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

Appeal from Superior Court, Sampson County; Neal, Judge.

Civil action by M. Hanstein against T. M. Ferrell and another to recover land. At close of plaintiff's evidence, on motion, there was a judgment of nonsuit, under the *Hinsdale* act, and plaintiff excepted and appeals. Reversed.

F. R. Cooper and Faison & Wright, for appellant. Geo. E. Butler, for defendant.

HOKE, J. As we understand, the nonsuit was ordered, because in the opinion of the lower court the evidence offered as to the location of plaintiff's deed was not sufficient to justify or permit the submission of that question to the jury. The answers of the defendants admit that the plaintiff owned the lot covered by the deed, which is set out in the complaint, and contains in part the following description: "A certain lot or parcel of land in the town of Clinton, Sampson county, N. C., described as follows: Beginning at a stake on Wall street, in said town, 27 feet and 6 inches from the N. W. corner of the C. T. Butler lot on the same street, and runs N. 41 W. about 25½ ft. to Sycamore street; thence with Sycamore street S. 48 W. 117½ ft.; thence S. 41 E. about 25½ feet, etc., etc., the same being the corner lot at the intersection of Wall and Sycamore streets." And the plaintiff, a witness in his own behalf, testified, as to his present brick store, built along Sycamore and fronting on Wall Street, among other things, "that the wall of his brick store now on the lot above the ground, was 7 inches into Sycamore street, and this infringement on Sycamore street had been satisfactorily adjusted with the authorities of the town." This evidence of itself would require that the question of location should be passed upon by the jury, for it furnished data from which the second corner called for in plaintiff's deed, the intersection of Wall and Sycamore streets, could be given a physical placing, to wit, at a point 7 inches short of the wall of plaintiff's brick store; for, while the more correct way to locate plaintiff's deed would be to establish the beginning corner "at a point on Wall street 27½ feet from the N. W. corner of the C. T. Butler lot," and then run according to the course and calls of the deed, in the absence of evidence offered or available as to the placing of this beginning corner, under the description as expressed in the deed, the location could proceed from this second corner if its placing was fixed and determined, the description to be run from this point according to the course and calls of the deed (*Lindsay v. Austin*, 139 N. C. 463, 51 S. E. 990; *Duncan v. Hall*, 117 N. C. 443, 23 S. E. 362), unless a greater certainty of identification could be obtained by reversing the first call and ascertaining the beginning corner in that way, which method

is sometimes allowable. *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349; *Dobson v. Finley*, 53 N. C. 495.

In the present case the result would seem to be the same whether the one method or the other were adopted; but in either case the testimony, if believed by the jury, afforded data from which the location of plaintiff's deed could have been legally determined. Again, the evidence tended to show that the lots occupied and claimed by plaintiff and defendants adjoined each other, and both were formerly owned by T. M. Lee, deceased; that said Lee had constructed two wooden store buildings on these lots, and his heirs had conveyed one of these and the corner lot to one J. H. Stevens, who had later conveyed to plaintiff, and the other the heirs had sold to defendant, and the same was held under a bond for title pursuant to the contract of sale; that these store buildings, built so close together that their eaves had the same drip, and the water falling caused one and the same trench on the ground between them, were destroyed by fire, and the plaintiff, in preparing to rebuild his present brick store, and in order to ascertain the correct dividing line between the lots, had measured the distance between the brick pillars of the two stores, which remained standing after the fire, and staked a line midway of this distance and along the middle of the trench caused by the common drip from the eaves of the two stores; that plaintiff had started the foundation of his present store below the ground 4 inches back from the line indicated, and above the ground had drawn the wall 8 inches further back, making the outside of plaintiff's wall above the ground 12 inches back from the line ascertained and marked in the manner above stated. We are of opinion that this is proper evidence to be submitted to the jury on the question of location, tending, as it does, to show, on the part of the owners and occupants of these lots, recognition of this adopted line, and acquiescence in it as the true divisional line between them. The doctrine by which this testimony is held to be relevant to the inquiry is thus stated in 5 Cyc. p. 940: "Recognition of, and acquiescence in, a line as the true boundary line of one's land, not induced by mistake, and continued through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line." And, while such recognition and acquiescence may not as a rule, justify a departure from the true dividing line when otherwise clearly defined and established, the authorities cited fully justify this statement of the doctrine as applied to the facts presented on this appeal. *Davidson v. McD. Arledge*, 97 N. C. 172, 2 S. E. 378; *M. E. Society v. Akers et al.*, 167 Mass. 560, 46 N. E. 381.

There was error in the order dismissing the action, and the cause will be restored to the docket for trial, according to the course and practice of the court.

Reversed.

### POWELL v. WOODCOCK.

(Supreme Court of North Carolina. Nov. 25, 1903.)

#### 1. WILLS (§ 559\*)—CONSTRUCTION—DESCRIPTION OF PROPERTY—"ESTATE"—"PROPERTY."

The word "estate," used in its primary sense in a will, without anything in the context to limit it, is nearly synonymous with the word "property," where that word is not qualified by the addition of the word "personal," and under the word "estate," in its primary sense, real property will ordinarily pass; the presumption being that the testator used the word in its inclusive signification, unless the context restricts its meaning to some particular species of property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1209; Dec. Dig. § 559.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653, 7654; vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

#### 2. WILLS (§ 448\*)—CONSTRUCTION—PRESUMPTION OF TESTACY.

The presumption is that a testator intended by his will to dispose of all his property, and not that he intended to die intestate as to any part of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.\*]

#### 3. WILLS (§ 587\*)—CONSTRUCTION—RESIDUARY CLAUSE—PROPERTY INCLUDED—"ESTATE."

The word "estate," as used in the residuary clause of a will, devising "all the rest, residue and remainder of my estate of whatsoever name and description and wheresoever situated" includes the testator's land, as well as personal property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1282; Dec. Dig. § 587.\*]

#### 4. POWERS (§ 9\*)—CREATION—LANGUAGE.

No technical language need be used in the creation of a power, and any words definite enough to disclose its nature, the donee, and its objects are sufficient.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 9; Dec. Dig. § 9.\*]

#### 5. POWERS (§ 9\*)—CREATION.

A power of sale may be created by express words or by implication of law.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 9-20; Dec. Dig. § 9.\*]

#### 6. EXECUTORS AND ADMINISTRATORS (§ 138\*)—MANAGEMENT OF ESTATE—SALE OF REAL PROPERTY—POWER UNDER WILL.

An executor, to whom all of the testator's residuary estate is devised, "in trust to receive, hold, invest and reinvest," has by implication power to sell real estate to the end that he may discharge the trust.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 562; Dec. Dig. § 138.\*]

Appeal from Superior Court, Buncombe County; Ward, Judge.

Action by George S. Powell against Julian A. Woodcock. From a judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.



This action was heard in the superior court upon the following case agreed: "(1) On the 13th day of September, 1902, Sarah S. Newton, wife of George H. Newton, being the owner in fee and in possession of a tract of land in the city of Asheville, executed her will which, on the 31st day of October, 1903, after the death of the said Sarah S. Newton, was duly probated and recorded, as prescribed by law. (2) The said Sarah S. Newton, at the time of her death, left surviving her George H. Newton, her husband, and one child, Nelnon Newton, who was at that time, and still is a minor. (3) The provisions of the will material to this controversy are as follows: 'I hereby give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever name and description and wheresoever situated to my husband, George H. Newton, in trust to receive, hold and invest and reinvest the same in such securities as he may deem meet and proper for the best interest of my estate and to take, receive and appropriate to his own use and benefit the entire income and profit therefrom until my daughter Nelnon Newton, shall attain the age of twenty-one years. When my daughter shall attain the age of twenty-one years, he shall pay to her the entire profit and income from said estate until she shall attain the age of thirty-five years, and when she shall attain the said latter age to pay over and deliver to her the entire principal of said estate and the trust hereby created shall thereupon cease and determine. Should my said daughter Nelnon die before attaining the age of thirty-five years, then upon her death the principal of my estate shall pass and vest in my said husband, George H. Newton, and his heirs forever.' The said George H. Newton has duly qualified as executor of the last will of Sarah S. Newton. (4) On the 16th day of October, 1905, Geo. H. Newton, individually, and as trustee appointed in said will, duly executed and acknowledged a deed of conveyance, sufficient in form and words to convey to George S. Powell in fee simple the said lot or parcel of land, which said deed was thereafter duly recorded. (5) In the year 1906 J. C. Martin of Buncombe county, N. C., duly qualified as the guardian of Nelnon Newton, and as such guardian instituted a special proceeding in the superior court for the purpose of selling and conveying, as prescribed by statute, all of the right, title, and interest of Nelnon Newton in said lot of land to George S. Powell, in order that the interest of the said minor in said land might be converted into money, and transferred to her domicile. Said proceeding was regular in all respects, and a judgment was therein duly entered by the clerk of the superior court, and approved by the judge of the superior court, directing the guardian to convey, by a proper deed, the interest, right, and title of Nelnon Newton in and to said lot of land to George S. Powell for the consideration agreed upon between the parties

thereto, and that thereafter the guardian duly executed and delivered to George S. Powell a deed of conveyance, sufficient in form and words to convey to him all of the right, title, and interest of Nelnon Newton in and to said tract or parcel of land; that the total consideration paid by George S. Powell for the land was \$1,500. (6) In the month of August, 1908, George S. Powell, claiming to be the owner of said lot of land, and by virtue of said deeds of conveyance, agreed to sell and convey the land to the defendant J. A. Woodcock in fee simple, and the defendant Julian A. Woodcock agreed to purchase the said land at the price of \$2,000 in cash, and George S. Powell is ready, willing, and able, and has offered, to execute and deliver a proper deed of conveyance for the land, purporting to convey the same to said Woodcock in fee simple, upon the payment of the amount agreed to be paid by Woodcock, but the said Woodcock has refused to accept the deed, and has refused to pay the purchase money, or any part thereof, upon the ground that the said deeds executed to George S. Powell are not sufficient in law to pass to Powell a complete and perfect title to said land, and that Powell is therefore not able to make to him a good title in fee simple to said property. (7) If the court is of the opinion that the will and the said several deeds to George S. Powell are sufficient in form and substance to pass to him all of the right, title, and interest which Sarah S. Newton owned in said lot of land, then judgment shall be entered herein in favor of the plaintiff, and against the defendant, for the sum of \$2,000, and for specific performance of the contract of sale in accordance with the course and practice of the court; otherwise judgment is to be entered for the defendant." The court, upon the facts admitted by the parties, decided in favor of the plaintiff, and entered judgment accordingly. The defendant appealed.

Merrick & Barnard, for appellant. Julian C. Martin, for appellee.

WALKER, J. There are two questions presented in this case: (1) Does the word "estate," used in the residuary clause of Mrs. Newton's will, include her land? (2) Is the power to sell the land given to George H. Newton by implication? The identical questions, we think, are fully discussed and affirmatively answered in *Foll v. Newsome*, 138 N. C. 115, 50 S. E. 597, which is substantially like this case in its facts. "The word 'estate' taken in its primary sense as used in a will, without anything in the context to limit it, is a word of very extensive meaning. It is nearly synonymous with the word 'property,' where that word is not qualified by the addition of the word 'personal.' Under the word 'estate,' used in its primary sense, real property of every description will ordinarily pass, and the presumption is that

the testator, in using the word, uses it in its broad and inclusive signification, unless the context restricts its meaning to some particular species of property." 1 Underhill on Wills, § 295; Foll v. Newsome, *supra*. The presumption is that the testatrix intended by her will to dispose of all of her property, and not that she intended to die intestate as to any part of it. Glascock v. Gray, 148 N. C. —, 62 S. E. 433; Harper v. Harper (at this term) 62 S. E. 533. In the case last cited we held that the word "estate" included the testator's land, and was not restricted to his personal property. The language used in the will, which was construed in that case, did not indicate as clearly that such was the intention of the testators as does the language of the will now under consideration. In the will of Mrs. Newton the words are, "all the rest, residue and remainder of my estate, of whatsoever name and description and wheresoever situated to my husband, George H. Newton, in trust to receive, hold, invest and reinvest." This language is very broad and comprehensive and, by itself, and certainly when considered with what follows in the will, evinces unmistakably the purpose of the testatrix to dispose of both real and personal property. Gardner on Wills, pp. 389-411.

The other question is also free from difficulty. No technical language need be used in the creation of a power. Any words definite enough to disclose its nature, the donee, or the person by whom it is to be exercised, and its objects are sufficient; and, so with a power of sale, it may be created by express words, or by implication of law. 18 Cyc. 320. It has therefore been held that: "Where a testator, in the disposition of his estate, imposes on his executor trusts to be executed, or duties to be performed, which require for their execution or performance an estate in his lands or a power of sale, the executor will take by implication such an estate or power as will enable him to execute the trusts or perform the duties devolved upon him." *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802. Chief Justice Shaw stated the rule in these words: "If a testator, having a right to dispose of his real estate, directs that should be done by his executor, which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deed of conveyance." *Going v. Emery*, 16 Pick. 107, 28 Am. Dec. 645. In *Foll v. Newsome*, *supra*, this court said: "We are also of the opinion that the trustee has by implication the power to sell the land for the purpose of converting it into an income producing property. The usual rule adopted by the courts is to find, in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property, an im-

plied power to sell real estate to the end that he may discharge such duty. This construction reconciles the use of the words 'invest,' 'pay over interest or income'"—citing *Vaughn v. Farmer*, 90 N. C. 607; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Council v. Averett*, 95 N. C. 131. The cases of *Foll v. Newsome* and *Cook v. Cook*, 47 Atl. (N. J. Ch.) 732, are direct authorities for such a construction of the will as devolves upon the trustee the duty, and therefore the power, to sell the lot, the title to which is in controversy. It all results in this: That the deed from George S. Powell to Julian A. Woodcock will convey a good and perfect title to the latter, under the facts admitted in the case agreed. *Carlton v. Goebler*, 94 Tex. 93, 53 S. W. 829.

It is not necessary to decide the other question raised as to the nature of the estate acquired by Nelson Newton under the will—that is, whether it is a vested or contingent one—nor need we consider whether the deed from Newton to Powell will estop the former. Our decision upon the other matter disposes of the case.

Affirmed.

#### BARKLEY v. SOUTH ATLANTIC WASTE CO.

(Supreme Court of North Carolina. Dec. 2, 1908.)

##### 1. MASTER AND SERVANT (§ 103\*)—CONSTRUCTION OF SCAFFOLD—DELEGATION OF DUTY.

A master who delegated the construction of a scaffold on which his servants worked to another was responsible for the manner in which it was constructed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

##### 2. APPEAL AND ERROR (§ 1097\*)—FORMER DECISION AS LAW OF THE CASE.

The decision of the Supreme Court on appeal is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4363; Dec. Dig. § 1097.\*]

Appeal from Superior Court, Mecklenburg County; Moore, Judge.

Action by D. A. Barkley against the South Atlantic Waste Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 147 N. C. 586, 61 S. E. 535.

Brevard Nixon, J. F. Newell and J. D. McCall, for appellant. Morrison & Whitlock, for appellee.

PER CURIAM. As the learned counsel for the defendant was prevented by unavoidable delay from favoring us with an argument, we have given their carefully prepared brief, as well as the record, a very careful examination. There are no assignments of error presented in their brief relating to

the rejection or admission of testimony. All the alleged errors pointed out and discussed relate to the charge of the court. To discuss them seriatim is unnecessary, and would be simply in large measure repeating what has been said in the opinion of Justice Brown on the former hearing of the case. 147 N. C. 586, 61 S. E. 565.

There is abundant evidence to show that Michael in his relation to plaintiff was not a fellow servant but a vice principal, applying the test contended for by the defendant. But whether Michael was a fellow servant or not is not essential in the determination of this case. We have held that "the defendant company owed to its employes, who were directed to work on this scaffold, the duty to exercise due care in selecting materials reasonably suitable and safe for its construction." Page 587 of 147 N. C., page 566 of 61 S. E. There is evidence that the defendant delegated the performance of this duty to Michael, and therefore, whatever place in its service Michael filled, the defendant is responsible for the manner in which he discharged this duty. *Tanner v. Lumber Co.*, 140 N. C. 475, 53 S. E. 287, and cases cited in former opinion.

The law of this case was settled on the first appeal, and the questions now presented are almost exclusively of fact. We think his honor correctly presented the matter to the jury in the light of our former opinion.

No error.

#### HILL et al. v. LANE et al.

(Supreme Court of North Carolina. Dec. 2, 1908.)

#### 1. ADVERSE POSSESSION (§ 113\*)—EVIDENCE—COLOR OF TITLE.

The report of commissioners in partition found, among an allottee's papers and restored to the records on proof of its genuineness, was properly admitted to show color of title to land sued for; all public records of the partition proceedings having been destroyed.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 113.\*]

#### 2. RECORDS (§ 6\*)—RESTORATION OF PAPERS.

Upon being satisfied that a report of commissioners in partition found in private files was an original paper belonging to his office and should be recorded, the clerk of the county court was bound to file and record it.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 6.\*]

#### 3. RECORDS (§ 6\*)—PRESUMPTIONS.

In the absence of a contrary showing, it must be presumed that the clerk of the county court duly recorded a report of commissioners in partition as required by an order of the court.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 6.\*]

#### 4. LIMITATION OF ACTIONS (§ 73\*)—RECOVERY OF LAND—SUSPENSION OF STATUTE—CURTESY.

Decedent having been seised of land during coverture, her husband's estate by the curtesy

for his life suspended limitations as a bar to her heirs during its continuance.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 412; Dec. Dig. § 73.\*]

#### 5. APPEAL AND ERROR (§ 928\*)—REVIEW—PRESUMPTIONS—INSTRUCTIONS.

Correct instructions are presumed to have been given, where the charge is not in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3750; Dec. Dig. § 923.\*]

Appeal from Superior Court, Greene County; W. R. Allen, Judge.

Action by Neeley Hill and others against B. F. Lane and others. From a judgment for plaintiffs, defendants appeal. **Affirmed.**

This action was brought for the recovery of a part of a tract of land, known as lot No. 1 in the division of the land of Henry Edwards, deceased. The plaintiffs introduced in evidence the report of the commissioners to divide said land, by which it appears that lot No. 1, including the land in controversy, was allotted to Richard Edwards, the father of Susan Beaman. The plaintiffs are the heirs at law of Susan Beaman. At the end of the report of the commissioners is the following entry: "North Carolina, Greene County, May Term, 1835. Then was the foregoing report of commissioners, made in open court, confirmed and ordered to be recorded. Attest: William Williams, Clerk." The report was found among the papers of N. H. Beaman, the husband of Susan Beaman, and Richard Edwards, her father, and was delivered by N. A. Beaman, son of N. H. Beaman, to the clerk of the superior court of Greene county in March, 1908. The report is correct in form and signed by the several commissioners under their seals. The clerk of the superior court, upon evidence adduced before him as to the handwriting of William Williams, clerk of the county court, the clerk who signed the certificate as to the genuineness of the report, found as a fact that it is the original report, and thereupon ordered it filed and recorded as a proper record of his office, and further ordered it to be registered, all of which was afterwards done. The court house of Greene county was destroyed by fire in 1876, with all the records and papers of the court and the office of the register of deeds, and there is no record of the partition proceedings in the clerk's or register's office. It appears in the body of the report that it was returned by the commissioners to the February term, 1835, of the court of pleas and quarter sessions. It does not appear whether or not the testimony as to the genuineness of the report was taken after notice to the defendants. The report was offered by the plaintiffs as color of title, and it was admitted by the court for that purpose only. Defendants excepted.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

W. M. Caraway, a witness for the plaintiffs, testified: "I am 66 years old. Knew Susan C. Beaman. She was the daughter and only child of Richard Edwards and was raised on the tract of land in controversy. I know the boundaries of lot No. 1, in the division of the lands of Henry Edwards. These boundaries cover the land in dispute. The plaintiffs are the heirs at law of Susan C. Beaman, daughter of Richard Edwards. Susan C. Beaman has been dead about 20 years. She was married to N. H. Beaman. He has been dead about two years. N. H. Beaman was in possession of lot No. 1 after the death of Susan C. Beaman. James Jones took possession of the land in dispute about 52 years ago. Susan C. Beaman was then a married woman." At this point, the defendants admitted that the title to the land in controversy was out of the state, and further admitted that Susan C. Beaman was in possession of the land in controversy from her childhood to her death.

N. A. Beaman, a witness for the plaintiffs, testified: "My mother has been dead about 29 years, and she was about 32 years old when she died. After the death of my mother, my father was in possession of all of lot No. 1 except the disputed part. He died in September, 1906. I am 42 years old. My father and mother have been in possession of lot No. 1 as long as I can recollect, except that James Jones was in possession of the disputed part when I first knew it. Jones sold to Faircloth. Faircloth went into possession of the disputed part and died 8 or 10 years ago. Faircloth conveyed to Lane." It is admitted that Susan C. Beaman was in possession of the land in controversy during the whole of her life up to the time James Jones went into possession, and that since that time Jones, Faircloth, and Lane have been in possession of the land in controversy.

Plaintiffs rested, and thereupon the defendants moved to nonsuit the plaintiffs. The motion was overruled, and the defendants excepted. The jury returned a verdict for the plaintiffs. Defendants' motion for a new trial having been overruled, and a judgment entered upon the verdict, the defendants appealed.

Wooten & Clark, Abernathy & Davis, and Paul Frizzelle, for appellants. L. V. Morrill and C. B. Aycock, for appellees.

WALKER, J. (after stating the facts as above). The court below properly admitted in evidence the report of the commissioners as color of title. This was not an attempt to restore a burnt or lost record, but the report of the commissioners was a part of the original record in the cause. It was itself an original paper, and it was not necessary to resort to parol or other evidence, such as a certified copy extant, to prove the contents of the original, as would be re-

quired in the case of a lost or burnt record. When the clerk was satisfied that the record was an original paper belonging to his office and which should be spread upon its records and registered, under the order of the court which appeared upon its face, it was not only within his authority, but it was his duty, to file and record the paper. *Greenlee v. McDowell*, 39 N. C. 484; *Harris v. McRea*, 26 N. C. 81; *Boteler v. State*, 8 Gill & J. (Md.) 359; *State v. Morris*, 84 N. C. 757. In *Greenlee v. McDowell*, supra, the court says: "The plaintiffs' allegation is that, upon the loss of the records of the former suit, a copy of the original bill, properly certified by the clerk, was filed without and against his consent, and that no copy has been served upon him. He further alleges that the amendments upon it, and the entries upon the record, were made without his knowledge or consent. That the records and papers had been lost or destroyed is stated by the plaintiff, and, in that case, it cannot be doubted that the court, without or against the will of the plaintiff, had full power to order a copy of the original bill to be filed. That the copy filed was a correct one is not questioned." It must be presumed, in the absence of any proof to the contrary, that the clerk duly recorded the report in his office, and it was registered in accordance with the order of the court. It is provided by Revisal 1906, § 328 (Code, § 56), that all original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require; but as the report was recorded by the clerk, upon satisfactory proof, and a duly certified copy was introduced in evidence, it was competent, in the absence of any suggestion that the report was not genuine or had been forged. There was no such intimation, although it was open to attack by the defendants in the proper way. It had, on the contrary, every appearance of being the original report, duly certified by the clerk of the county court, to which it was returned, as having been confirmed and ordered to be recorded in his office and registered as required by the statute. It was color of title, as the judge correctly held. *Bynum v. Thompson*, 25 N. C. 578; *Smith v. Tew*, 127 N. C. 299, 37 S. E. 330; *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811.

The motion to nonsuit was properly overruled. While the evidence is somewhat meager, it was sufficient for the consideration of the jury, and tended to show an adverse possession in Susan C. Beaman for more than seven years under color, and also that she was seised in deed during the coverture, so as to entitle her husband to an estate by the curtesy at her death. This estate for his life suspended the operation of the statute of limitations, as a bar to the plaintiffs, during its continuance. There was some

uncertainty as to when James Jones took possession of the land, and there was evidence that, whenever it was, Susan C. Beaman was at the time a married woman, so that the statute did not run against her during her coverture. The charge of the judge to the jury is not in the record, and we must assume that they were correctly instructed as to the law applicable to the case.

The parties having admitted that the title to the land was out of the state, and the jury having found, under sufficient evidence, that the plaintiffs and those under whom they claim had acquired the title by adverse possession under color, and that the statute of limitations had not barred the plaintiff's right of entry, there was no error in the judgment.

No error.

### WOOLDRIDGE v. BROWN et al.

(Supreme Court of North Carolina. Dec. 2, 1908.)

#### 1. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Defendants' assignment of error "for errors in the charge" is sufficiently definite, where the jury were instructed to find for plaintiff upon the whole evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3013; Dec. Dig. § 730.\*]

#### 2. SALES (§ 435\*)—ACTION FOR PRICE—DEFENSES—BREACH OF WARRANTY—NECESSITY FOR PLEADING.

In an action for the price of coal, the buyer cannot show a warranty, alleged to have been breached, without pleading it.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 435.\*]

#### 3. SALES (§ 261\*)—WARRANTY—STATEMENTS CONSTITUTING.

That the buyer of coal told the salesman that he was buying it to burn brick, and that the salesman told him the grade contracted for would burn brick, and was used for that purpose, does not show a warranty of quality, or that the grade ordered would burn brick.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-732; Dec. Dig. § 261.\*]

#### 4. SALES (§ 261\*)—WARRANTY—FORM—ESSENTIALS.

While no specific form of words is essential to a warranty of soundness, the seller must, by some appropriate language, show an intent to make a warranty, and the buyer must understand that one is being given.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-732; Dec. Dig. § 261.\*]

#### 5. SALES (§ 40\*)—DECEIT—WHAT CONSTITUTES.

That, on a buyer of coal telling him that he was buying it to burn brick, the salesman told him that the grade contracted for would burn brick, and was used for that purpose, does not tend to show fraud or deceit on the seller's part.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 40.\*]

#### 6. SALES (§ 360\*)—COAL—INFERIOR QUALITY—BUYERS' RIGHTS.

That a seller of coal knew the purpose for which coal was to be used does not entitle the

buyer to a deduction from the price because of its inferior quality, in the absence of a warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. 1061; Dec. Dig. § 360.\*]

Appeal from Superior Court, Cabarrus County; Moore, Judge.

Action by James R. Wooldridge against M. C. Brown and another, executors. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was originally brought against R. A. Brown. After the pleadings were filed, defendant died, leaving a last will and testament, and the present defendants, his executors, were made parties. Plaintiff alleged that, between the 1st day of August and the 9th day of October 1906, he sold and delivered to defendant's testator 14 car loads of coal at a stipulated price, which defendant's testator promised to pay; that said coal was received and used by defendant's testator. A statement showing amount, date, and price of the shipments was made a part of the complaint. Defendant's testator admitted the sale and delivery of the coal and the price thereof. He alleged, by way of defense to plaintiff's demand, that five car loads of the coal "were of such inferior quality and contained so large a per cent. of slate that, although he made every effort, he could not get the same to burn in such a way as to furnish anything like the necessary amount of heat for his purpose—that of burning brick"; that he did not discover the inferior quality of the coal until he used it; that it was practically worthless for defendant's purpose; that, by reason of its inferior quality, the bricks burned were soft, and that he was damaged to the amount of \$500. Plaintiff, by way of reply, denied the matter set up as a defense. The only issue submitted to the jury was: "Are the defendants indebted to the plaintiff, and, if so, in what sum?" No warranty of the quality of the coal was alleged, nor was any fraud or concealment charged. Evidence tending to sustain defendant's contention was admitted over plaintiff's objection. At the conclusion of the evidence the record contains this entry: "The evidence taken to show a warranty of the coal, and likewise the evidence taken to show that the coal was worth less than the contract price and of inferior quality, is refused, and the defendants except. Thereupon the defendants withdraw counterclaim, and take a nonsuit as to the same." Plaintiff excepts. His honor instructed the jury: "That the defendants are not entitled to recover any damages from the plaintiff on account of either the freight paid by their testator or the losses which it is alleged that he sustained, on account of the alleged unfitness of the coal for the purpose of burning brick. The defendants do not allege that the plaintiff

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

expressly warranted the quality of the coal, and the law does not imply a warranty of the quality of an article of personal property sold, the defendants having admitted, during this trial, that their testator ordered the coal; that the contract price was, as stated, in the statement of account annexed to the complaint; that the coal was shipped by the plaintiff to the defendants' testator—the court charges you, as a matter of law, that the plaintiff is entitled to recover in this action the contract price of the coal, and it is admitted that the contract price of the coal was \$562, and that this sum bears interest from the 25th day of September, 1907, if it is due at all. Therefore the court charges you to answer the issue, 'Are the defendants indebted to plaintiff, and, if so, in what sum?' 'Yes; \$562, with interest from the 25th day of September, 1906.'" Defendants excepted. Judgment for plaintiff. Defendants appealed, assigning as error, refusal to admit competent testimony showing a warranty of the coal, and that it was worth less than the contract price, and of inferior quality and value, and for errors in the charge of the court.

L. T. Hartsell and M. B. Stickley, for appellants. Montgomery & Crowell, for appellee.

CONNOR, J. (after stating the facts as above). Plaintiff insists that the assignment of error in respect to the charge is too indefinite, coming within the definition of a "broad side exception," which the court has uniformly held insufficient. In view of the fact that his honor instructed the jury to find for the plaintiff upon the whole evidence, we think the exception well taken as to form.

It seems that upon cross-examination of plaintiff's representative, who took the order for the coal, defendants were permitted to show that defendants' testator told him that he was buying the coal to burn brick, and that the witness told him that this grade of coal would do so, and that it was used for that purpose. Plaintiff objected, but the testimony was admitted. After the evidence was concluded his honor struck it out. It was clearly incompetent to show a warranty, because no warranty was alleged in the answer, and for the further reason that, taken as true, it did not show that the quality of the coal was warranted, or that the grade of coal ordered would burn brick. While it is true, as uniformly held, that no specific form of words is necessary to constitute a warranty of soundness, yet there must be evidence that the seller, by some appropriate language, intended to make and that the buyer understood that a warranty was being given. Again, it is not alleged that there was any fraud or deceit on the part of plaintiff, either in respect to the grade of the coal or its quality, nor did the rejected testimony tend to show any such element in the transaction.

We are thus brought to consider the question whether, if alleged and proven, the fact that plaintiff knew the purpose for which the coal was to be used entitled the defendant to a reduction in the price by reason of its being of an inferior quality. The exact question was presented and decided by this court in *Dickson v. Jordan*, 33 N. C. 166, 53 Am. Dec. 403. The defendants, who were the owners of a fishery purchased by order "seine rope" of plaintiff, informing them that it was to be used at their fishery. The rope sent was of the size and kind known as "seine rope." Defendants used it, but it proved to be of an inferior quality, repeatedly broke in drawing the seine, and was unfit for use for fishing purposes. Pearson, J., said: "It is a principle of the common law that no warranty of quality is implied in the sale of goods. Caveat emptor. In the absence of fraud, if the article be of bad quality, the purchaser has no redress unless he has taken the precaution to require a warranty." Further discussing the exceptions, he says: "His honor was of the opinion that in this case there were two facts which furnished a sufficient ground for making exception to the general rule. The plaintiffs knew the purpose for which the rope was intended, and it was not present to be judged by the defendants. One or both of these facts might have been a very sufficient reason for requiring a warranty. \* \* \* But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves." The learned justice notes the further fact that the defendants did not have an opportunity to discover the inferior quality of the rope until they had used it, and rejects the argument made by counsel that, from this fact, a warranty would be implied. The facts in that case strikingly illustrate the principle applicable here. The decision has been cited with approval. If the defendants had alleged that a grade of coal different from that contracted for had been sent, the plaintiff would have failed in his action upon an express contract for a stipulated price, and, if the coal had been used by defendant, would have been driven to sue as for a quantum valebat on the "common count," when defendant would have been entitled to show the real value of the coal. *Waldo v. Halsey*, 48 N. C. 107. In *Guano Co. v. Tillery*, 110 N. C. 29, 14 S. E. 639, the plaintiff contracted to sell defendant "Peruvian Guano." The jury found that the article furnished was not "Peruvian Guano." Defendant, not knowing this, used it. The court held that he was only liable for the actual value of the article sold and used. In *Lewis v. Rountree*, 78 N. C. 323, defendant sold plaintiff "strained rosin." It turned out that the rosin delivered was not "strained," this being a well-known grade of rosin in the market. Held that defendant was liable. When an article

is manufactured for a specific purpose, the law will imply a warranty that it is fit for such purpose. *Thomas v. Simpson*, 80 N. C. 4. In *Love v. Miller*, 104 N. C. 582, 10 S. E. 685, the contract was to sell cotton to be of "average grade of low middling," etc. Held a warranty that it would come up to the description. In *Reiger v. Worth*, 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865, the contract was to sell "good seed rice." Held a warranty. *Critchler v. Porter McNeal Co.*, 135 N. C. 542, 47 S. E. 604; *Allen v. Thompkins*, 136 N. C. 208, 48 S. E. 655. The only defense set up in this case, and the only one which the testimony tended to show, was that the coal was of inferior quality. This can only be guarded against by a warranty. His honor therefore correctly rejected the testimony and instructed the jury.

We have discussed the defendants' appeal as if the proper allegations were made. In no point of view can the exceptions be sustained. We do not pass on plaintiff's exception to defendants' withdrawal of their counterclaim. It is not presented.

There is no error.

#### REEVES v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 25, 1908.)

##### 1. CARRIERS (§ 264\*)—CARRIAGE OF PASSENGERS—AGENT'S BREACH OF CONTRACT—RIGHT TO RECOVER.

That plaintiff through her agent purchased transportation over defendant's line between specified points; that the fare was paid to the agent at the destination, who negligently failed to keep his agreement to notify the agent at the starting point to deliver a ticket to plaintiff, whereby plaintiff, who had no money with her, was unduly delayed to her great damage—shows a cause of action.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 264.\*]

##### 2. CARRIERS (§ 276\*)—PASSENGERS—AGENT'S AUTHORITY.

Evidence held to show that a railway ticket agent was authorized to receive money for a ticket reading from another station to his.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 276.\*]

##### 3. CARRIERS (§ 276\*)—PASSENGERS—TICKET AGENTS—NEGLIGENCE—EVIDENCE.

Evidence held to show that a railway ticket agent was negligent in failing to notify another agent to deliver a ticket to plaintiff, for which her agent had paid.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 276.\*]

Appeal from Superior Court, Lee County; Long, Judge.

Action by Cora Reeves, by next friend, against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for damages for a breach of contract of transportation, alleged to have been

made on behalf of the plaintiff, Cora Reeves, with the defendant. The court submitted these issues: "(1) Did the defendant agree to furnish the plaintiff transportation, as alleged in the complaint? (2) Did the defendant willfully and negligently fail and refuse to furnish said transportation, as alleged in the complaint? Answer. Yes. (3) What amount, if any, is plaintiff entitled to recover of the defendant? Answer. \$200." From the judgment rendered the defendant appealed.

Jno. D. Shaw, U. L. Spence, and Murray Allen, for appellant. Seawell & McIver, for appellee.

BROWN, J. 1. The defendant moved the court to dismiss the action because the plaintiff fails to state a cause of action. We see no ground upon which to found such contention. Briefly stated, the cause of action clearly set forth is that the plaintiff, through her agent, John Houston, purchased transportation from Kittrell, N. C., to Sanford, N. C., over defendant's line, that the fare was paid to the agent at Sanford, who contracted to notify agent at Kittrell to deliver ticket, from that station to Sanford, to plaintiff, and that the agent at Sanford carelessly and negligently, for the space of six days, failed to notify the agent at Kittrell, whereby plaintiff, who had no money with her, was unduly delayed to her great damage. We think his honor properly overruled the motion.

2. Upon the first consideration of the case we were of opinion that there is no evidence in the record tending to prove that the defendant's agent at Sanford had authority from the company to receive money for the purchase of a ticket from Kittrell to Sanford to be delivered to plaintiff by the agent at the former place. Upon more careful examination we are of opinion that there is evidence from which such authority may properly be inferred. The witness Houston testifies that he was sending plaintiff to school at Kittrell, that when the session was over, on June 1, 1906, he "went to the Seaboard ticket office at Sanford, and bought a ticket from the agent of the defendant from Kittrell to Sanford," that the ticket was to be delivered to Cora Reeves at Kittrell next day by the agent there, and that the agent at Sanford agreed to notify the Kittrell agent immediately. Houston further testified that he at once wrote plaintiff to call for the ticket. The evidence proves that she did call for it, and could not get it, and was delayed several days before the agent at Sanford notified the agent at Kittrell. The agent at Sanford gave to Houston the following receipt: "Received of John Houston \$2.55 for one first-class ticket to be furnished Cora Reeves, Kittrell, N. C., to San-

ford, N. C." After several days unexplained delay the agent at Sanford sent the following telegram to the Kittrell agent: "Sanford, 6—5: Agent: Please furnish Cora Reeves one first-class ticket to Sanford advising for P. P. O. E. Penny, Agent S. A. L." Terrell, the agent at Kittrell, testifies that plaintiff called for the ticket, but "I had no authority to issue it until I got the order above referred to." We think from the above evidence that it may be reasonably inferred that under the rules and regulations of the company the agent at Sanford was authorized to receive at that office the price of a ticket from Kittrell to Sanford, and that it was his duty to notify the agent at Kittrell without delay, to the end that he may deliver it to plaintiff. The language of the witness Terrell, agent at Kittrell, is to the effect that upon receipt of the telegram he did have authority to issue the ticket, and the only reasonable construction to be placed upon his testimony is that he derived such authority from the regulations of the company. The form of the telegram would indicate that such transactions were not foreign to the business of the defendant, and that its business regulations provide for such "pre-paid orders."

3. The defendant excepted to the action of the court in submitting to the jury an issue as to "willful negligence," and contends that there is no evidence of willful negligence. There is abundant evidence of negligence upon the part of the agent at Sanford, not only from the plaintiff, but from the defendant. In any view of the evidence the agent at Sanford, upon his own testimony, as well as upon all the other evidence, was guilty of negligence in the discharge of his duty to the plaintiff, and such negligence was actionable. This being so, in consequence of the statement contained in the record, the question as to whether there is any evidence of willful negligence would be material only upon the issue as to damages. In reference to the damages the record states that there was no contest as to the ruling, if the facts were found as shown, about the amount, "provided the court had not erred in refusing defendant's motion to nonsuit." We have held upon the facts as shown by defendant's own evidence the court did not err in refusing the motion to nonsuit, as a case of actionable negligence was clearly made out. Therefore the damages fixed upon by consent remain undisturbed, as the contingency upon which the court would be authorized by the agreement to review that issue has not arisen. Evidently the sum agreed upon was more satisfactory to the defendant, in the event the motion to nonsuit could not be sustained, than the trouble and expense of another trial.

Upon a review of the entire record we find no error.

ALLEN v. NORTH CAROLINA R. CO.  
(Supreme Court of North Carolina. Dec. 2, 1908.)

1. RAILROADS (§ 400\*)—COLLISIONS—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

A train in the nighttime backed along a place used by the public as a common walkway, and struck a pedestrian. There was no light on the end of the car, 15 feet high and 36 feet long, but two men stood in the middle of it with lanterns in their hands hanging by their sides. *Held*, that whether the lanterns served the same purpose as a light on the end of the car, so as to give warning of the approach of the train, was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1373; Dec. Dig. § 400.\*]

2. RAILROADS (§ 369\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

It is negligence for a railroad to back its train in the nighttime along a place used by the public as a common walkway without a light on the end of it, so as to give warning of its approach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1261; Dec. Dig. § 369.\*]

3. RAILROADS (§ 383\*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

The failure of a railroad, backing its train in the nighttime along a place used by the public as a common walkway, to place a light on the end of the train, so as to give warning of its approach, does not relieve a pedestrian of all obligations to look and listen for trains, when he attempts to walk on or cross the tracks, nor does it absolve him from the consequences of his neglect to take proper precautions.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1309; Dec. Dig. § 383.\*]

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

Action by Dora Allen, administratrix of P. H. Allen, deceased, against the North Carolina Railroad Company. From a judgment of nonsuit plaintiff appeals. Reversed, and new trial ordered.

McNinch & Kirkpatrick and Morrison & Whitlock, for appellant. W. B. Rodman, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff's intestate was killed on defendant's track on February 2, 1908, in the city of Charlotte. He was an employé of the Seaboard Air Line, and had left his work to go to his home. The tracks of the Seaboard Air Line and defendant are parallel for some distance, and people habitually walk on the tracks of both roads along where the accident occurred. There is a path between the two roads, which crossed the track of the defendant twice between the two crossings. The scene of the accident was between the two crossings, on a very dark and windy night. A train, operated on defendant's road, consisting of an engine and two box cars, moving backwards, the engine pushing the cars, struck the intestate and killed him. The alleged scene of this accident is on an embankment some 15 feet



high, and about 586 feet north of this crossing of the two railroads. The tracks of the defendant and the Seaboard Air Line are both located on this embankment, and 10 feet, 8 inches apart. The steam of the engine was shut off, and the train was moving downgrade at the rate of about 12 miles per hour.

The plaintiff alleged three distinct acts of negligence, to wit, that the defendant operated an engine and train of cars over a portion of its track running through A. street, or if not A. street, then a place used as a common walkway by the public in the city of Charlotte, on a very dark and rainy night, without having a light or other proper signal on the lead or forward car; that it ran the train faster than the law allowed; that it ran the train without ringing the bell, as the law required. We are of opinion that there is error in his honor's ruling in sustaining the motion to nonsuit, and that upon the evidence he should have submitted the case to the jury upon proper issues and instructions. It is in evidence that the car which was on the end of the backing train had no light on the end of it, but that two men were standing in the middle of it with lanterns in their hands hanging by their sides. As the cars, according to the evidence, are about 15 feet in height, from the earth, and near 36 feet in length, we are unable to say whether lanterns so held in the middle of the car could be readily seen by an observant person on the tracks below. Much would depend upon the height at which the lantern was held above the top of the car. We think this is a matter peculiarly for the consideration of the jury as to whether a lantern so placed would answer the same purpose as one on the end of the car. It has been repeatedly held by this court that it is negligence in a railroad company to back its trains along a place used by the public as a common walkway, in the nighttime, without a light on the end of the backing train so as to give warning of its approach. It is true, as contended, that such breach of duty does not relieve the individual of all obligation to look and listen for engines and trains, when he attempts to walk on or cross the tracks of the company, nor does it absolve him from the consequences of such negligence. *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391; *Heavener v. Railroad*, 141 N. C. 247, 53 S. E. 513. But we find in the record nothing that would warrant a judgment of nonsuit upon the ground of contributory negligence apparent from plaintiff's evidence.

There is also evidence that, although the whistle was blown for a crossing 586 feet from where the intestate was killed, the bell was not rung, and no other signal given of the approach of the train after it passed the crossing. We fail now to see how the speed

of the train, whether 4 or 12 miles per hour, whether in violation of the city ordinance or not, could have been the proximate cause of the injury under the circumstances of this case, but that may be made clearer upon the next trial.

New trial.

## STATE v. SHINE

(Supreme Court of North Carolina. Nov. 19, 1908.)

### 1. CRIMINAL LAW (§ 218\*) — PRELIMINARY WARRANT — SUFFICIENCY — "FELONY" — "MISDEMEANOR."

Since the punishment for retailing spirituous liquors is that fixed for a misdemeanor, under Revisal 1905, § 3291, providing that a "felony" is a crime punishable by either death or imprisonment in the state's prison, and that any other crime is a "misdemeanor," the word "feloniously," in a warrant charging that accused unlawfully, willfully, and feloniously retailed spirituous liquors, is superfluous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 218.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662; vol. 5, pp. 4533, 4534; vol. 8, p. 7722.]

### 2. CRIMINAL LAW (§ 218\*) — PRELIMINARY WARRANT—SUFFICIENCY.

The words "guilty of a second offense," in a warrant charging accused with retailing spirituous liquor, may be treated as surplusage.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 218.\*]

### 3. CRIMINAL LAW (§ 220\*) — PRELIMINARY WARRANT—AMENDMENT.

Under Revisal 1905, § 1468, authorizing the allowance of amendments to pleadings on appeal, etc., the superior court, on appeal from a conviction in the recorder's court of a violation of Laws 1905, p. 495, c. 497, § 12, prohibiting the sale of intoxicating liquors, may permit an amendment to the warrant by striking out the word "feloniously" and the words "guilty of a second offense," provided sufficient matter remains to permit the court to proceed to judgment within Revisal 1905, § 3254.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 220.\*]

### 4. COURTS (§ 41\*)—ORGANIZATION OF COURTS —STATUTES—VALIDITY.

Under Const. art. 4, § 12, empowering the General Assembly to distribute jurisdiction below the Supreme Court among other courts prescribed in the Constitution, or which may be created by the Legislature, if done without conflict with other provisions of the Constitution, Laws 1907, p. 1258, c. 860, § 4, creating the recorder's court of a county with exclusive original jurisdiction of misdemeanors, etc., and preserving the right to a jury trial by giving the right of appeal and trial de novo in the superior court, is valid.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 41.\*]

Appeal from Superior Court, Union County; B. F. Long, Judge.

Will Shine was convicted of retailing spirituous liquors, and he appeals. Affirmed.

Redwine & Sikes, for appellant. Asst. Atty. Gen. Clement, for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CLARK, C. J. The defendant was tried in the superior court upon appeal from the recorder's court of Monroe. The offense charged was retailing spirituous liquor. In the warrant it was charged that the offense had been committed unlawfully, willfully, and "feloniously." The punishment prescribed is that of a misdemeanor (Revisal 1905, § 3291), and that fixes the grade of the offense. *S. v. Fesperman*, 108 N. C. 770, 13 S. E. 14; *S. v. Lytle*, 138 N. C. 744, 51 S. E. 66. The word "feloniously" must therefore be treated as surplusage (*S. v. Edwards*, 90 N. C. 710, and cases there cited), as must also the allegation that the defendant was "guilty of a second offense." The unnecessary words did not vitiate *S. v. Fain*, 106 N. C. 766, 11 S. E. 593, *S. v. Hart*, 116 N. C. 978, 20 S. E. 1014, and *S. v. Darden*, 117 N. C. 697, 23 S. E. 106. Besides, on appeal his honor permitted the warrant to be amended, as he had the right to do (Revisal 1905, § 1468) by striking out these superfluous words, and still "sufficient matter appears in the bill to permit the court to proceed to judgment" (Revisal 1905, § 3254) for an offense under Laws 1905, p. 495, c. 497, § 12.

Laws 1907, p. 1258, c. 860, § 4 (5), creating the recorder's court of Monroe provides that: "Said court shall have exclusive original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of a felony as now defined by law, and all other such offenses committed within the county of Union are hereby declared to be petty misdemeanors." The Constitution (article 4, § 12) gives to the General Assembly express power to allot and distribute the jurisdiction below the Supreme Court among the other courts prescribed in the Constitution, or which may be created by the Legislature, in such manner as it may deem best, if done without conflict with other provisions of this Constitution. In pursuance of this provision the General Assembly created criminal courts with right of appeal direct to this court. This, we were compelled to hold, was "in conflict with other provisions of this Constitution." *Rhyn v. Lipscombe*, 122 N. C. 650, 29 S. E. 57; *Tate v. Commissioners*, 122 N. C. 661, 29 S. E. 60. In response to the public needs and a general public demand for courts that could make speedy and inexpensive trial of lesser offenses the General Assembly thereupon instituted the policy of establishing courts for the trial of petty misdemeanors, without jury, preserving the right to a jury trial by giving the right of appeal and trial de novo in the superior court. This was assailed by attacking the statute creating the police court of Asheville, but it was held constitutional in *State v. Lytle*, 138 N. C. 738, 51 S. E. 66, after the fullest consideration. It was there held, at pages 743, 744 of 138 N. C., 51 S. E.

66, that the General Assembly, having transferred high misdemeanors into the grade of felony, was acting in the scope of its powers in classing all other misdemeanors as petty misdemeanors. This not only comports with the words and spirit of the Constitution, but a party who has been tried before one of these courts, with opportunity to answer, has been put to no disadvantage, as compared with those whose first hearing is before the grand jury, where neither he nor his witnesses have any opportunity to be heard. The right of appeal preserves the right of trial by jury. *State v. Jones*, 139 N. C. 618, 52 S. E. 240, 2 L. R. A. (N. S.) 313, and *State v. Brittain*, 143 N. C. 670, 57 S. E. 352, citing with approval *State v. Lytle*, supra. Though the defendant was sentenced to 12 months on the roads, he was convicted of a misdemeanor only, and had his trial before jury and judge in the superior court. In *State v. Baskerville*, 141 N. C. 818, 53 S. E. 742, this court sustained the constitutionality of the act creating the police court of Raleigh, which conferred upon such court "power and jurisdiction over all misdemeanors committed within the corporate limits" of Raleigh or in Raleigh township. The police court of Winston was upheld in *State v. Jones*, 145 N. C. 460, 59 S. E. 117, though its constitutionality was assailed on the same ground as here that there was no indictment found by a grand jury. The offense there charged was a "petty misdemeanor for larceny of goods less than \$10 in value." The court said the "same point has been fully discussed and settled in *State v. Lytle*, 138 N. C. 738, 51 S. E. 66." We regard the matter as settled.

No error.

HAINES et al. v. SMITH et al.

(Supreme Court of North Carolina. Dec. 2, 1908.)

1. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

An instruction, in an action on a note assigned to plaintiffs to secure a debt, defendants pleading payment of the debt, that, plaintiff having produced the note, and the execution and assignment to plaintiffs having been admitted, the burden was on defendants to establish their contention was not reversible error, where the court instructed that the burden of the issue of indebtedness was on plaintiff, and that if on considering the defense the jury were satisfied by the greater weight of the evidence that defendants were indebted to plaintiffs, they should find for plaintiffs.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

2. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

If, when instructions are construed together, they present the law fairly, error in an instruction considered apart will not authorize a reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

Appeal from Superior Court, Gaston County; Justice, Judge.

Action by Henry A. Haines and another against J. A. Smith and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

The action was to recover the amount of a note for \$3,000, secured by a mortgage on property, executed by defendant Pinchback, indorsed by him to his codefendant Smith, and by him assigned by indorsement to plaintiffs. On issues submitted there was verdict for plaintiffs, and defendants excepted and appealed.

A. G. Mangum and Tillett & Guthrie, for appellants. O. F. Mason and Clarkson & Duls, for appellees.

**PER CURIAM.** The objection to the validity of this trial, chiefly insisted on by defendants, was for alleged error in a portion of his honor's charge in reference to the burden of proof. The execution of the note and mortgage and transfer by indorsement to plaintiffs were admitted on the trial, and the evidence tended to show that these instruments were executed and assigned to plaintiffs to secure them for certain advancements made, and to be made, by plaintiffs, and the plaintiffs' evidence tended to show that under this contract they had made advancements to defendants, and that more than \$8,000 of such money was unpaid and still due from defendants. Defendants in their answer denied any and all indebtedness by reason of these advancements, and claimed, further, that any and all advancements made by plaintiffs to defendants had been fully paid. In connection with this denial of indebtedness the answer contained further statement indicating that the note and mortgage had been assigned to secure advancements to the amount of \$8,533, alleged by plaintiffs to have been already made, and on condition that additional advancements should be made by plaintiffs; but these allegations do not lead to any definite averment, and, as we interpret the answer, it amounted to a denial of any indebtedness and a claim of payment, and we do not discover in the record any objection to the issues submitted, one being on the indebtedness by note and mortgage, and the second as to the amount of same. The court charged the jury on these issues, and the portion of the charge objected to was that wherein his honor told the jury that, plaintiffs having produced the note and mortgage in question, and the execution and assignment by indorsement to plaintiffs having been admitted, this would make a prima facie case, and thereupon the burden would shift to defendants to establish, by the greater weight of the evidence, that the contention made by defendants, in order to discharge themselves from

liability in the note, was true; the position being that, as the evidence showed that the note was given as collateral, its production and proof of execution did not make out plaintiffs' case of itself, but it was still incumbent on plaintiffs to establish the indebtedness and the amount thereof by evidence ultra. The position is no doubt correct, but we do not think it is available to defendants on this record. We have held, in several recent decisions: "The charge to a jury must be considered as a whole, in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." And a correct application of this wholesome principle will show that the charge is free from reversible error. The court at the outset had placed the burden of this issue of indebtedness on the plaintiff, and in the closing paragraph of the charge had told the jury: "If upon all the testimony, taking into consideration the defense set up by defendants, or if upon all the testimony given, you are satisfied, by the greater weight of the evidence, that the defendants are indebted to the plaintiffs, you will answer the first issue 'Yes.'" Taking the charge as a whole, we think the burden of the issue to establish the debt secured by the mortgage was clearly placed on the plaintiffs, and in the portion of the charge objected to the court, in placing upon the defendants the burden of establishing his "contention," could only have referred to defendants' position as to payment, and the charge was no doubt so understood by the jury.

Every position available to defendants on the evidence was fairly presented to the jury in the principal charge of the court, and in response to defendants' prayers for instruction, which were given to the jury without substantial alteration.

We find no error in the record, and the judgment is affirmed.

No error.

LANEY et al. v. HUTTON & BOURBONNIAS et al.

(Supreme Court of North Carolina. Dec. 2. 1908.)

1. JUSTICES OF THE PEACE (§ 122\*)—JUDGMENT BY DEFAULT—PROCESS AGAINST NONRESIDENTS.

A justice's judgment by default entered against nonresidents of his county on a summons served less than 10 days before the return day, contrary to the Revisal of 1906, § 1451, which is intended to afford such defendants reasonable time to appear and plead, is not void, but irregular, or at most voidable, and, if

defendants do not appear to ask for time to plead or move to set aside the judgment, the irregularity is waived.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 383; Dec. Dig. § 122.\*]

## 2. JUSTICES OF THE PEACE (§ 161\*)—REVIEW—APPEARANCE—WAIVER OF DEFECTS.

An appearance and demurrer, on appeal from a justice's judgment by default entered against nonresidents of his county on a summons served less than 10 days before the return day, contrary to the Revisal of 1905, § 1451, is a waiver of the irregularity in the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 596; Dec. Dig. § 161.\*]

## 3. JUSTICES OF THE PEACE (§ 174\*)—REVIEW—DEMURRER ON APPEAL.

If the summons and the justice's return on appeal do not show a misjoinder of causes of action, an objection on the ground of misjoinder should be taken by answer, as required by Revisal 1905, § 477, and not by demurrer.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 690½; Dec. Dig. § 174.\*]

## 4. APPEAL AND ERROR (§ 882\*)—REVIEW—ESTOPPEL.

A party cannot complain on appeal of testimony admitted without objection; similar testimony having been elicited by himself on cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

Appeal from Superior Court, Caldwell County; Ferguson, Judge.

Action by W. R. Laney and others against Hutton & Bourbonnias and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

M. N. Harshaw, for appellants. Mark Squires and E. B. Cline, for appellees.

**WALKER, J.** This action was brought before a justice to recover an indebtedness by the defendants to the plaintiffs for work and labor performed at their request. The summons was issued January 18, 1907, to Caldwell county for Will Wilkerson, who resided therein, and to Catawba county for Hutton & Bourbonnias, returnable February 1, 1907. It was served on Hutton & Bourbonnias January 28, 1907. They did not appear, and the justice gave judgment for the plaintiffs on February 1, 1907. Defendants afterwards appealed to the superior court. The defendants, Hutton & Bourbonnias, alone appealed to this court. The jury returned a verdict for the plaintiffs, and judgment was entered thereon.

In the superior court, the defendants demurred for misjoinder of causes of action, as each plaintiff had a separate cause of action. The defendants Hutton & Bourbonnias contended here that the action should be dismissed, as the justice entered judgment when the summons had not been served 10 days before the day on which it was returnable, contrary to Revisal 1905, § 1451. The irregularity in this respect was waived, as

the defendants did not appear before the justice and ask for further time to plead, nor did they move before him to set aside the judgment, nor did they move in the superior court to dismiss, if that would have been a proper motion, but they entered a general appearance and demurred, and, besides, have had full opportunity to plead to the merits and have the issues tried by a jury. The defect in the justice's proceedings was thereby waived or cured. *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424; *Wheeler v. Cobb*, 75 N. C. 21. Section 1451 of the Revisal of 1905, was evidently intended to afford the defendants a reasonable opportunity to appear and plead. The judgment was not void, but irregular, or at most voidable. *Guion v. Melvin*, 69 N. C. 242; *Strayhorn v. Blalock*, 92 N. C. 293.

The demurrer for misjoinder was properly overruled, as it appears from the summons and justice's return that the plaintiffs alleged that the debt was due to the plaintiffs jointly, and not severally. If this was not true, the objection should have been taken by answer, for, in passing upon the defendants' demurrer, we can consider only the allegations of the complaint. Revisal 1905, § 477.

With regard to the declarations of Wilkerson, it may be said that the plaintiff, W. R. Laney, testified, without objection, that Hutton had told him that Wilkerson was working for Hutton & Bourbonnias, and, on cross-examination by the defendants, he further testified fully in regard to the matter and to the same effect.

The motion to nonsuit upon the evidence was properly overruled, as there was sufficient evidence to establish the plaintiffs' claim. W. R. Laney testified that Hutton told him the debt was due and would be paid.

We have examined the numerous exceptions carefully, and find no error in the rulings of the court. The exceptions not mentioned by us require no special discussion.

No error.

MOORE et al. v. PARKER et ux.

(Supreme Court of North Carolina. Dec. 2, 1908.)

## PARTITION (§ 116\*)—EFFECT OF ACTUAL PARTITION—WATER RIGHTS ACQUIRED.

An owner of land through which two streams flowed built a mill on the first stream, and cut a channel from the second into the head of the pond, and maintained a dam in the second to divert the water into the channel. The land was partitioned, and the lot on which the mill stood together with the full power of the mill and water power, was awarded to one. The value of the mill was considered in making the division. Held that, on the water power being included in the lot so awarded, he acquired an easement to use water from the second stream, added to the water of the first, so as to obtain full power of the mill at the

height of the dam when the mill was used by the owner.

[*Ed. Note.*—For other cases, see *Partition*, Dec. Dig. § 116.\*]

Appeal from Superior Court, Wilkes County; Ferguson, Judge.

Action by P. H. Moore and others against Leroy Parker and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Action against defendants for obstructing plaintiff's use of water from Rocky creek to aid in running his mill, and counterclaim pleaded because plaintiff, by raising his dam, had water-sobbed the land of defendant. The jury gave each side a verdict for \$100. The lands of the plaintiff and defendant formerly belonged to William Anderson. Hunting creek and Rocky creek both flowed through the lands of William Anderson. Upon the bank of Hunting creek William Anderson built a mill. Rocky creek by its natural course ran into Hunting creek about 100 yards below the mill, and naturally the water of Rocky creek furnished no additional power to Anderson's mill. He, being the owner of the land, conceived the idea of increasing the power of his mill, by cutting an artificial channel from Rocky creek into the head of his mill pond on Hunting creek. This channel was cut over the land, which afterwards became lot No. 4, in the partition proceedings, and fell to the defendants. After cutting this channel it was necessary to keep a little dam or obstruction in Rocky creek, at the mouth of the channel, in order to divert the water from its natural flow. William Anderson had the right, of course, to construct this channel, and to keep it in repair, and use the water for the purpose of increasing the power of his mill. During the remainder of his lifetime, he used the channel for thus conveying water whenever needed. At his death a partition proceeding was filed by his heirs at law for a division of his lands. The commissioners went upon the premises and divided his lands into nine parts. This mill being situated upon the lands, in making a division its value was considered. The mill without the water power would be of very little value. It stood upon lot No. 9 owned by plaintiff, as to which the allotment provided "so as to include the full power of the mill shoal and water power on both sides of the mill pond, so as to keep it in repair and convey water to the mill." From the verdict and judgment the defendants appealed.

Finley & Hendren, for appellants. W. W. Barber, for appellees.

CLARK, C. J. (after stating the facts as above). His honor charged the jury: "It is conceded by both parties that William Anderson owned the lands in controversy, and that partition was had between his heirs, to one

of whom section 9 was assigned, including the mill on Hunting creek, and without giving a description of the land assigned it to C. L. Anderson. This provision is added to the general description: 'So as to include full power of the mill shoal and water power on both sides of the mill pond, so as to keep in repair, to convey water to the mill.' If you find from the evidence, by its greater weight, that at the time the partition was had, and, therefore, while William Anderson was the owner of all the lands set out in the partition proceedings, and the owner of the mill, water was brought from Rocky creek into the mill pond as a part of the water power necessary for running the mill; that the water power was included in the partition proceedings and assigned to C. L. Anderson, who was to be the owner of section No. 9—and if you should so find, then you will inquire whether the defendant has diverted the water from that course so as to lessen the water power used by Anderson, and in contemplation of the commissioners at the time they made the partition." The defendant excepted, but we find no error. The jury found that the defendant had wrongfully diverted the water, and wrongfully refused to allow the plaintiff to convey the water from Rocky creek, to his damage \$100, and that the plaintiff had maintained his dam at a height greater than the mill dam was at the time of the partition, thus overflowing and sobbing defendant's land, to his damage \$100. The court thereupon adjudged that: "The plaintiff is entitled to the use of the same amount of water as was usual to run through the artificial channel from Rocky creek to the head of the mill pond of plaintiff, when a dam or obstruction was in the creek at the head of the channel, at or prior to the date of the partition of the lands of William Anderson, and such amount of water as was used by the said William Anderson; and the plaintiff shall have a right to enter upon the lands of the defendant for the purpose of keeping open the artificial channel used for diverting water from Rocky creek to the mill pond, and also for the purpose of keeping such dam or obstruction in the creek as will cause the water to flow through the artificial channel in such quantity as was used by William Anderson during his lifetime, for the purpose of furnishing power to the mill. It is further ordered and adjudged by the court that the plaintiff recover of the defendant the sum of \$100 for damages for the wrongful diverting of the water from the mill pond of the plaintiff's mill. It is further considered and adjudged by the court that, the jury having found that the plaintiff is maintaining his dam in excess of what it was at the date of the partition proceedings, and that by reason of said dam being raised and so maintained the land of the defendant has been sobbed, it is therefore considered

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and adjudged by the court that the defendant recover of the plaintiff the sum of \$100 for all damage—part, present, and prospective—by reason of the raising of the dam to its present height; both parties consenting that the amount named should be for all damages. It is further considered and adjudged by the court that the plaintiff recover cost of the defendant in his action." The defendants except because the jury did not find how much water from Rocky creek William Anderson was accustomed to use, but they submitted no issues or prayers on that subject. The contest was whether the plaintiff had an easement to use the water as William Anderson had done. There was no demand to more particularly specify its extent. The easement was to use enough water from Rocky creek, added to that from Hunting creek, to "include the full power of the mill shoal and water power on both sides of the mill pond" at the height of the dam when the mill was used by William Anderson, and now by this verdict, and with the consent of parties as expressed in the judgment, the "full power" is what is required to run the mill with the dam at its present height. If the plaintiff should seek to use more water from Rocky creek than is reasonably necessary, and shall waste it by running it over his dam, the defendant by proper proceedings can have the extent of the easement more accurately measured and defined, unless the parties by themselves, or by friendly arbitration, shall agree upon what is an adequate, but not excessive, enjoyment of the easement—which they should be able to do, now the legal questions involved are determined.

No error.

# RHEINSTEIN DRY GOODS CO. v.

McDOUGALL et al.

(Supreme Court of North Carolina. Nov. 25, 1908.)

## 1. PARTNERSHIP (§ 37\*)—LIABILITY AS PARTNER—INFORMATION TO AND FROM COMMERCIAL AGENCIES.

Defendant, having erroneously informed a commercial agency that he was a member of a firm, was liable to plaintiff, who, on receiving such information from the agency, sold to the firm, for such goods as plaintiff sold to it prior to expiration of a reasonable time, after defendant gave notice to the agency correcting the error, for the agency to give plaintiff such new information.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 52; Dec. Dig. § 37.\*]

## 2. EVIDENCE (§ 357\*)—LETTERS WRITTEN TO AGENT OF OTHER PARTY.

A commercial agency, of which plaintiff obtained information that defendant was a member of a firm, was the agent of plaintiff, which, on the strength of the information, sold to the firm, so that it was competent for defendant to put in evidence a copy of his subsequent letter to the agency that he was not a member of the firm.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1492-1495; Dec. Dig. § 357.\*]

## 3. EVIDENCE (§ 185\*)—PAROL EVIDENCE OF LETTER—NOTICE TO PRODUCE.

Defendant not having kept a copy of the letter written by him to a commercial agency, the agent of plaintiff, in order to give proof of its contents, properly gave notice to produce the letter to plaintiff's attorney, without giving any to the agency, which was not a party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 653, 655; Dec. Dig. § 185.\*]

Appeal from Superior Court, New Hanover County; Long, Judge.

Action by the Rheinstein Dry Goods Company against Bettie McDougall and others. Judgment for plaintiff. Defendant L. A. Monroe appeals. Reversed.

H. McClammy and M. L. John, for appellant.

CLARK, C. J. The appellant is the same defendant (Monroe), and the question is in regard to liability incurred by him for the same firm, as in *Drewry v. McDougall*, 145 N. C. 286, 59 S. E. 73. In October, 1902, Monroe wrote a letter to R. G. Dun & Co., in reply to their inquiry, in which he stated that he, with others named, was a member of the firm of B. & S. McDougall. R. G. Dun & Co. gave that information to the plaintiff company, one of their patrons, who sold goods to said B. & S. McDougall from January 5, to March 27, 1903. The defendant Monroe sought to show that he notified R. G. Dun & Co., prior to the time plaintiff sold these goods, that the letter of October, 1902, was erroneous, and that he (Monroe) was not a member of the McDougall firm.

Monroe could not foresee who would sell to the firm, and if he gave R. G. Dun & Co. notice, in reasonable time, to correct its former information to plaintiff before it sold its goods to the McDougalls, Monroe did all he could do, and would not be liable, except for such goods as plaintiff might have sold the firm prior to the expiration of such reasonable time during which R. G. Dun & Co. should have notified plaintiff. This is what is held in *Drewry v. McDougall*, 145 N. C. 286, 59 S. E. 73.

The defendant Monroe kept no copy of his alleged letter of correction sent to R. G. Dun & Co., and, to let in parol evidence of its contents, he served notice upon the counsel of plaintiff, and also upon the agency of R. G. Dun & Co., at Wilmington, N. C. An official of the latter answered the subpoena and testified that the Wilmington office could not produce the letter, because in 1902 all correspondence of R. G. Dun & Co., from the section in which the defendants lived, was sent to the Richmond office. The counsel of plaintiff averred himself unable to produce the letter, because he was not counsel for R. G. Dun & Co. and had no knowledge of the matter. The court declined to permit the defendant to give oral testimony as to the contents of the letter. R. G. Dun & Co.

were not parties to this action. They were agents of the plaintiff, who furnished it information of Monroe's letter of October, 1892, on which it sold goods to the McDougalls, relying, it asserts, upon Monroe being a partner. If, before plaintiff sold this bill of goods, Monroe corrected his statement to R. G. Dun & Co., it was their duty to notify the plaintiff in reasonable time. It was competent for Monroe to put in evidence a copy of the letter, if he had kept one. As he did not, it was competent for him to prove orally its contents, provided he served notice on the opposite party in sufficient time before the trial (as he did here) to produce the original letter to the defendant's agent.

The letter is competent because written to plaintiff's agent. Its proof by oral evidence is admissible only if the opposite party has reasonable notice in time to produce the letter and fails to do so. Such notice was properly served on the counsel of plaintiff, and, it having failed to produce the letter, it was error to exclude oral evidence of its contents.

The notice need not be served, and in fact could not be served, on the nonresident agency of R. G. Dun & Co., who are not parties to this action.

Error.

#### FAISON et al. v. KELLY.

(Supreme Court of North Carolina. Dec. 2, 1908.)

##### 1. EJECTMENT (§ 147\*)—IMPROVEMENTS—BURDEN OF PROOF.

The burden is on a defendant, in an action for land claiming for improvements, to show that they were made in good faith when he believed and had good reason to believe that he owned the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 147.\*]

##### 2. EJECTMENT (§ 148\*)—CLAIM FOR IMPROVEMENTS—JURY QUESTION.

It appearing under defendant's claim for improvements that he took and paid for the land sued for under deeds approved by counsel, believing they conveyed good title, and that he retained possession for over 30 years asserting absolute ownership, his claim was properly submitted to the jury.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 522; Dec. Dig. § 148.\*]

##### 3. EJECTMENT (§ 148\*)—CLAIM FOR IMPROVEMENTS—WHEN DISPOSED OF.

Under the express provisions of Revisal 1905, § 652, the claim of one sued for land for improvements may be disposed of at the trial with the question of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 509; Dec. Dig. § 148.\*]

Appeal from Superior Court, Sampson County; W. R. Allen, Judge.

Action by Edward L. Faison and others against Thomas Kelly. From the judgment, plaintiffs appeal. Affirmed.

Plaintiffs as children and issue of Edward L. Faison, deceased, claimed the land in con-

troversy, under and by virtue of the will of Wm. Faison, in terms as follows: "Eightly: I give, devise and bequeath unto my son, Matthew J. Faison and his heirs, in trust, for the use and benefit of my son, Edward L. Faison, during his life, after the determination of my wife's estate in the lands devised to her, the land whereon I reside, my chestnut lands on the west side of Six runs, my Meares, Fortner, Davis, Herring and Brewington lands in Rowan, my stock thereon, and after the death of my said son, Edward, to his issue forever, and in case of his death, without leaving issue, I give, devise and bequeath the lands devised in trust to him unto his surviving brothers and their heirs; and in case of their death before him and leaving children, to such issues and their heirs." And it was admitted that the land in controversy was included in the description. Defendant denied plaintiffs' ownership, and claimed the lands under deeds conveying same to him in fee executed by said Edward L. Faison and wife and Matthew J. Faison, now dead, the trustee mentioned in the will. And defendant, alleging the validity of the deeds under which he claimed the land, alleged further that while in possession of said land, claiming to own the same under these deeds assuming to have title, he had made permanent and valuable improvements thereon to the amount of \$1,500, etc. On issues submitted, the jury rendered the following verdict: "First. Are the plaintiffs the owners of and entitled to the immediate possession of the land in controversy? Answer: 'Yes.' Second. What is the annual rental value of the land in question? Answer: '\$100.' Third. Did the defendant take the deed set out in the pleadings in good faith, and believing thereby he was acquiring a fee-simple title to the land in controversy? Answer: 'Yes.' Fourth. If so, did he make permanent improvements thereon in good faith and under such belief? Answer: 'Yes.' Fifth. If so, what is the value of the improvements? Answer: '\$1,000.'" Thereupon judgment was rendered that plaintiffs owned the land sued for, and were entitled to recover possession of same on payment into court, for defendant's benefit, of the sum of \$725, the difference between the rental due and the value of the improvements as assessed by the jury. Plaintiffs excepted and appealed.

Geo. E. Butler, for appellants. Faison & Wright, Fowler & Crumpler, and J. D. Kerr, for appellee.

HOKE, J. In Faison v. Odom, 144 N. C. 107, 56 S. E. 793, the court, construing the clause of the will here in question, held that the same conferred only a life estate on the grantor of defendants, the Edward L. Faison mentioned in the will, and that on his death the plaintiffs, his children, could recov-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er the land. In accordance with this ruling, the plaintiffs recovered the land, and the question presented in this appeal is in reference to defendant's claim to betterments. Speaking to this question, in a recent decision (*Alston v. Connell*, 145 N. C. 4, 58 S. E. 442), the court said:

"This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by Ashe, J., in the case of *Wharton v. Moore*, 84 N. C. 482, 37 Am. Rep. 627, as follows: 'This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and, while it has been adopted in many of the states, it is not recognized in others. But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him only upon terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity.' Here it will be noted that the claimant must be an innocent person, and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith—that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner."

Under this statement of the doctrine, it will be noticed that, in order to make his claim good, it is incumbent on defendant to show that the improvements were made in good faith, at a time when he believed, and had good reason to believe, that he was the true owner. And we are of opinion that, on the testimony every essential of this requirement has been met; for, while the court of last resort has held that the clause of the will in question gave to defendant's grantor, E. L. Faison, only a life estate, this construction overruled the decision of the lower court, which had taken a contrary view of its meaning, showing that the matter was not free from difficulty. And it furthermore appeared that the defendant had been in possession of the land, asserting absolute ownership, for more than 30 years, under a deed conveying to him a title in fee executed by Edward L. Faison and wife and Matthew J. Faison, the trustee named in the will, and that the land had been bought and paid for by defendant, and these deeds taken under advice of counsel learned in the law that the execution of the deeds by Edward L.

Faison and the trustee would convey the true title. The testimony offered by defendant tending to establish these facts was directly relevant to the issue, and, under the circumstances indicated, we are of opinion that, under our decisions, the court, as stated, correctly ruled that the defendant's claim for betterments should be submitted to the jury. *Railroad v. McCaskill*, 98 N. C. 528, 4 S. E. 468; *Justice v. Baxter*, 93 N. C. 405.

We do not understand that the decision of *Merritt v. Scott*, 81 N. C. 385, cited and relied on by plaintiffs, is contrary to the disposition we make of the present appeal. In that case, as we interpret it, John Merritt, who had a life estate in the land in controversy, and who was in possession, claiming to own such interest, conveyed this life estate to one John Cox, and, on the death of John Cox, his administrators, under court proceedings, sold the land and conveyed same to defendant in fee. On action brought by the remaindermen, the defendant sought to set up a claim for betterments, by reason of improvements made by the life tenant when he was in possession claiming the land as life tenant, and also for improvements by himself after he purchased and obtained a deed for the land, and the court, in disallowing the claim for improvements made by the life tenant, said: "We think it clear that improvements of any kind put upon land by a life tenant during his occupancy constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management, or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority." The defendant seems to have recovered for improvements made by him after he bought the land and entered, claiming to own the same in fee, having a deed purporting to convey such a title, and in that view the decision is authority favoring defendant's position.

The objection further made, that defendant's claim could not be asserted on this trial, is without merit. By fair intendment, the claim was made in the answer, and the disposition of the matter at the same time the question of title was disposed of is directly sanctioned by the statute. Revisal 1905, § 652, under the title of "Betterments," contains the provision: "That in any such action, such inquiry and assessment may be made upon the trial of the cause."

There is no error, and the judgment below is affirmed.

No error.



**JOHN F. DAVIS & SON v. THORNBURG et al.**

(Supreme Court of North Carolina. Nov. 25, 1908.)

**1. HIGHWAYS (§ 213\*)—FRIGHTENING HORSES—DISABLED TRACTION ENGINE—NEGLIGENCE.**

Plaintiff's horse was, on Tuesday morning, frightened by defendant's traction engine, which late on the previous Saturday had broken down and been left on the side of the highway. Held that, the engine being permitted by Revisal 1905, § 2727, to travel on the highway, defendants were not liable unless they had unreasonably delayed in repairing and removing it, which was a question for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 536; Dec. Dig. § 213.\*]

**2. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Exclusion of evidence as to a matter shown by subsequent uncontradicted testimony was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.\*]

Appeal from Superior Court, Gaston County; Moore, J.

Action by John F. Davis & Son against L. A. Thornburg and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

The court submitted these issues: "(1) Were plaintiff's horse, buggy, and harness injured by the negligence of the defendants as alleged in the complaint? Ans. No. (2) Did plaintiff's agent, by his own negligence, contribute to the injury of said horse, buggy and harness, as alleged in the answer? Ans. ———. (3) What damages, if any, are plaintiffs entitled to recover? Ans. ———."

O. F. Mason and A. G. Mangum, for appellants.

**BROWN, J.** The horse of plaintiff, driven by his son, took fright at a traction engine of defendants, and backed off a bridge with buggy attached, and was injured. The evidence tends to prove that the engine had broken down near the foot of the bridge, and was left on the side of the public road from Saturday at 5 p. m. until the following Tuesday morning. It is contended by the plaintiffs that the engine was left on the public highway an unreasonable length of time, and that it thereby became an obstruction and nuisance.

There is no evidence whatever in the record that the engine so obstructed the road as to prevent the passage of vehicles, although it may have been such an object as tended to frighten some horses. So would a broken-down coach, top wagon, or the like. A traction engine, operated and guided by the owner or his agent, may as lawfully traverse the public highway as plaintiff's horse and buggy. Revisal 1905, § 2727. It is not a nuisance per se, but a highly useful instrumentality among

modern labor saving machines. If it breaks down on the highway, it becomes the duty of the owner to remove it, but he is allowed a reasonable time within which to do so. What would be a reasonable time depends upon circumstances, and is not, under the evidence and circumstances of this case, exclusively a question of law. *Claus v. Lee*, 140 N. C. 552, 53 S. E. 433: As the engine broke down Saturday afternoon at a late hour, and Sunday intervened, the defendants used only one work day in getting it repaired. This delay would not appear prima facie to be unreasonable. His honor left the matter very properly to the jury, who found for the plaintiff.

The exception to the ruling of the court refusing to allow plaintiff to prove that his animal was a reasonably gentle animal cannot be sustained. Such question was undeniably proper, but we think the plaintiff received the full benefit of such evidence in the subsequent uncontradicted testimony, which proves that his mare was an animal of gentle qualities.

We think there is no merit in the exceptions to evidence, and that the learned judge put the case to the jury in a charge full, fair, and free from error.

No error.

**STATE v. SEABOARD AIR LINE RY.**

(Supreme Court of North Carolina. Dec. 2, 1908.)

**1. SUNDAY (§ 29\*)—RUNNING FREIGHT TRAINS ON SUNDAY—CRIMINAL PROSECUTIONS—INDICTMENT—TIME OF OFFENSE.**

The time of committing the offense of running freight trains on Sunday contrary to statute being immaterial, a variance between the indictment and proof in respect thereto is not fatal.

[Ed. Note.—For other cases, see Sunday, Dec. Dig. § 29.\*]

**2. CRIMINAL LAW (§ 1149\*)—APPEAL—REVIEW—DISCRETION OF COURT—BILL OF PARTICULARS.**

The requiring of a bill of particulars in a criminal case under the express provisions of Revisal 1905, § 3244, as well as the proper compliance with an order therefor, rests in the discretion of the court, and its action will not be disturbed on appeal in the absence of manifest and prejudicial abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3041; Dec. Dig. § 1149.\*]

**3. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS—PURPOSE.**

The object of a bill of particulars in a criminal case is to enable accused to properly prepare his defense, where the indictment, though correct in form and sufficient to apprise him in general terms of the charge against him, is so indefinite as to the particular occurrence referred to that it does not afford a fair opportunity to procure his witnesses or prepare his defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316, 317; Dec. Dig. § 121.\*]

**4. CRIMINAL LAW (§ 1167\*)—APPEAL—REVIEW—HARMLESS ERROR—BILL OF PARTICULARS.**

Where, on a former trial, accused was fully informed of the particular occurrence charged against him, and obtained the entire case of the prosecution as developed at the trial, the acceptance by the court of an insufficient bill of particulars on the second trial would not be prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1167.\*]

**5. CRIMINAL LAW (§ 1172\*)—APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

If there be no conflict in the evidence in a criminal case, and, if believed, no inference permissible therefrom but that of guilt, a charge that if the jury believe the evidence they should render a verdict of guilty, while not the best form, would not be reversible error; but if there be a conflict in the evidence on any essential feature of the charge, or when, though there be no such conflict, more than one inference of fact is permissible, and any one of them be consistent with accused's innocence, the charge would be reversible error as usurpation by the judge of accused's constitutional right to a jury trial, the jury being the constitutional judges not only of the truth of the testimony but of the conclusions of fact resulting therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155; Dec. Dig. § 1172.\*]

Appeal from Superior Court, Franklin County; Lyon, Judge.

The Seaboard Air Line Railway was convicted of running freight trains on Sunday, and appeals. Affirmed.

See, also, 145 N. C. 570, 59 S. E. 1048.

It appeared that, at a former term of the court, the judge having ordered a bill of particulars, the same had been furnished at April term, 1907, as follows: "The state files a bill of particulars herein as follows: 'First. The train was running north. Second. The day on which the same was run was a Sunday between the 1st of May and the latter part of July; the exact date the state is unable to state.' The solicitor stated that the above bill of particulars was all that he was able to furnish, and the same was accepted by the court as full compliance with the order of the court." After this was done, to wit, at August term, 1907, the cause was tried, and defendant was convicted and sentenced, and on appeal a new trial was ordered for error in charge of the court. See case reported 145 N. C. 570, 59 S. E. 1048. This opinion having been certified down, and cause called for trial at April term, 1908, defendant moved to quash the bill of indictment, for that the order for bill of particulars had not been complied with. Motion was denied, and defendant excepted. Defendant further contended that there was a fatal variance between the allegation and the proof, the charge assigning the date to have been January 20, 1907, and the proof tending to fix the occurrence in July previous, and, on that account, moved to "dismiss the action," and further requested the court to instruct the jury that, on account of the vari-

ance claimed, they would render a verdict of not guilty; this was refused, and defendant excepted. Verdict of guilty, judgment, and defendant excepted and appealed.

Day, Bell & Allen and T. W. Bickett, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

HOKE, J. The indictment is sufficient in form, and, time not being material, the variance claimed was not of the substance, and the prayer of the defendant, that a verdict of not guilty should be thereupon directed, was properly overruled. *State v. Pickett*, 118 N. C. 1231, 24 S. E. 350; *State v. Williams*, 117 N. C. 753, 23 S. E. 250; *State v. Jones*, 80 N. C. 415.

Nor was there error in denying the motion to quash the bill of indictment for non-compliance with the order requiring a bill of particulars. The bill as rendered was accepted by the court as sufficient compliance with the order, and the authorities are to the effect that both the original order and the question of a proper compliance with the same are matters which rest in the discretion of the court. As to the original order, our statute places the matter in the discretion of the trial court in express terms. This statute (Revisal 1905, § 3244), which is a very correct embodiment of the general law on the subject of these bills, provides as follows: "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters."

And the decisions hold that the question of sufficient compliance with the order is likewise properly made to rest in the court's discretion. *Abbott's Trial Briefs*, Criminal Causes, p. 48, citing *State v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616; *State v. Hill*, 13 R. I. 314. And, while the court is inclined to the opinion that the term "discretion," as used and contemplated in the statute and in these decisions, should be construed to mean the sound legal discretion of the trial court, it is well understood that the action of the lower court will not be reviewed or disturbed on appeal, unless there has been manifest abuse in this respect to defendant's prejudice (*State v. Dewey*, 139 N. C. 556, 51 S. E. 937), and we are clearly of opinion that in the present case no such abuse has been shown. Furthermore, the order of the lower court should not in any event be disturbed in this instance, for the whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements as to the

particular charge or occurrence referred to that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. And, in this case, it appears that there has heretofore been a trial of the cause, when the witnesses were examined and the particular occasion was spoken to in open court by the state's witnesses; and defendant was therefore fully informed, not only of the particular occurrence imputed to him for a crime, but was possessed of the entire case of the prosecution, as developed in the former trial, and a further bill of particulars, which is the usual course when the one offered is insufficient, could have given defendant no further information than he already had. See *State v. Howard*, 129 N. C. 584, 40 S. E. 71, in which it was held as follows: "(2) Where, on motion of the defendant, the solicitor is ordered after the evidence is in to elect, and thereupon nol prosses several counts, which gave as full information as a bill of particulars, the defendant cannot complain of the refusal of the court to order a bill of particulars."

As there seems to have been some misapprehension as to the true purport of the decision made in the former appeal in this cause, reported in 145 N. C. 570, 59 S. E. 1048, we deem it not amiss to say that neither in that case, nor any other, has this court ever held that, when there was no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would constitute reversible error for a trial judge to charge the jury, "if they believed the evidence, they would render a verdict of guilty." A judge writing the opinion has, in several instances, said that it was better form to express the charge, "if you find the facts to be as testified," etc. (*State v. Barrett*, 123 N. C. 753, 31 S. E. 731; *State v. Hill*, 141 N. C. 769, 53 S. E. 311; *State v. Simmons*, 143 N. C. 613, 56 S. E. 701), but, under the circumstances indicated, this distinction has never been held reversible error.

The ruling made on the former appeal in this case, and sustained in the forcible opinion of Associate Justice BROWN, was that, when there was conflict in the evidence on any essential feature of the charge, or when, though there was no such conflict, more than one inference of fact was permissible, and any one of these consistent with defendant's innocence, the question of his guilt or innocence was for the jury and not for the court. This is by no means a trivial or technical distinction, but goes to the integrity and very existence of the right of a citizen to a trial by jury. If, on the testimony, there is an inference of defendant's innocence permissible, and a judge is allowed to charge the jury, "if they believe the evidence, they will find defendant guilty," this is condemnation by the judge, and the right of trial by jury, so justly valued as the ultimate protection of

freemen under the forms of law, is usurped by the judge, and the constitutional rights of the defendant are denied him. "No person shall be convicted of crime, but by the unanimous verdict of a jury of good and lawful men in open court," is the language of our Bill of Rights; and, if there is an inference of guilt and one of innocence arising on the evidence, the jury must determine which inference shall be established. As said by Henderson, J., in *Bank v. Pugh*, 8 N. C. 206: "The jury are the constitutional judges, not only of the truth of the testimony, but of the conclusions of fact resulting therefrom." See *State v. Railway* (at present term) 62 S. E. 754.

In the present trial, the principle declared in the former appeal has been properly applied by the trial court, and, there being no error in the record, the judgment against defendant is affirmed.

No error.

#### STATE v. HARRIS.

(Supreme Court of North Carolina. Dec. 2, 1908.)

#### INCEST (§ 5\*)—ELEMENTS—RELATIONSHIP.

A man having carnal intercourse with a daughter of his half-sister commits incest in violation of Revisal 1905, § 3352, defining the crime to be such intercourse between "uncle and niece."

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. §§ 3, 4; Dec. Dig. § 5.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3491, 3492; vol. 8, p. 7684.]

Appeal from Superior Court, Anson County; Webb, Judge.

George Harris was convicted of incest. Defendant was indicted for violating the provisions of section 3352, Revisal 1905, charging that he committed incest in that he had carnal intercourse with a woman who was the daughter of his half-sister. There was evidence tending to prove the act. Defendant requested the court to instruct the jury to return a verdict of not guilty. Denied, and defendant excepted. Verdict of guilty, and defendant appeals. Affirmed.

J. A. Lockhart and McLendon & Thomas, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

CONNOR, J. The sole question presented by defendant's exception to the refusal of his honor to direct a verdict of not guilty is whether the daughter of defendant's half-sister comes within the language of the statute. Section 3351 defines incest to be carnal intercourse between grandparent and grandchild, parent and child, brother and sister of the half or whole blood. Section 3352 defines the crime to be such intercourse between uncle and niece, nephew and aunt. For obvious reasons, nothing is said of the half or

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in the preceding section. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that the mother of the girl is only half-sister of defendant cannot affect the case. To have had such intercourse with her mother—his half-sister—would have been incest. The exact question seems to have been decided in *State v. Reedy*, 44 Kan. 180, 24 Pac. 66, *Shelly v. State*, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926, and *State v. Wyman*, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753. We think the defendant and his niece, the daughter of the half-sister, clearly within the statute. There was no error in his honor's refusal to give the instruction asked. It must be so certified.

No error.

# ASHEBORO WHEELBARROW & MFG. CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 2, 1908.)

## 1. CARRIERS (§ 72\*)—CARRIAGE OF FREIGHT— DELAY—PERSONS ENTITLED TO SUE—CON- SIGNEE.

Under a shipment of iron consigned to the seller, "notify" the purchaser, title does not pass to the purchaser, in the absence of anything to the contrary, and the purchaser must look to the seller, and not the carrier, for damage sustained because of delay.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 72.\*]

## 2. CARRIERS (§ 105\*)—CARRIAGE OF FREIGHT— DAMAGES—MEASURE.

Interest on the capital invested in a plant during the time it was necessarily idle as a result of delay in a shipment of iron, and the wages paid during such time, cannot be taken as the measure of damages, where there was nothing to indicate the use to which the iron was to be put, or that any special damages would be sustained by delay in prompt shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.\*]

Appeal from Superior Court, Randolph County; Council, J.

Action by the Asheboro Wheelbarrow & Manufacturing Company against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Error.

The record shows that on December 6, 1906, the Carnegie Steel Company delivered to the Pennsylvania Railroad Company at Pittsburg, Pa., a car load of iron consigned to the Carnegie Steel Company, Asheboro, N. C.—"notify Asheboro Wheelbarrow and Mfg. Co." The bill of lading was properly indorsed to the plaintiff company, with a sight draft attached, and sent to bank for collection. Plaintiff paid the draft, took the bill of lading, and received the car load of iron January 17, 1907. It was delivered to de-

fendant company at Alexandria, December 11, 1906, and reached Asheboro, N. C., January 16, 1907. The distance between Alexandria, Va., and Asheboro is 300 miles. The car should have moved about 100 miles a day. There was evidence tending to show the value of plaintiff's plant, number of hands idle by reason of delay, wages paid, etc. The plaintiff sues for damages caused by the delay in delivering the iron. Defendant moved for judgment of nonsuit upon the plaintiff's evidence. Motion denied, and plaintiff excepted. Defendant submitted several prayers for instructions in regard to the measure of damages, all of which were refused. Defendant excepted. His honor instructed the jury that the measure of damages was the legal interest on the capital invested in the plant during the time it was necessarily idle, as a result of the delay, and the wages paid the hands during such time. Defendant excepted. There was a verdict for plaintiff, assessing its damages at \$100. Judgment. Defendant duly assigned error, and appealed.

Elijah Moffitt, for appellant. J. T. Brittain, for appellee.

CONNOR, J. (after stating the facts as above). It is unnecessary to discuss the exceptions directed to the admission of evidence, because we are of the opinion that his honor should have granted defendant's motion for judgment of nonsuit. It is common learning that when the vendor delivers an article to the common carrier to be transported by the usual route to the vendee, taking an open bill of lading, the title to the article passes to the vendee or consignee. This is true, although, by the terms of the sale, the vendee is to pay cash. For any injury to the article while in transit, or delay in transportation or delivery, the carrier is liable to the consignee. *Stone v. R. R.*, 144 N. C. 220, 56 S. E. 932. Where, however, the goods were not to be the property of the vendee until delivered, the consignor may sue the carrier for delay. *Summers v. R. R.*, 138 N. C. 295, 50 S. E. 714. When the goods are shipped by bill of lading deliverable to the order of the vendor, in the absence of any evidence to the contrary, it is almost decisive to show his intention to reserve the *jus disponendi* and to prevent the property passing to the vendee. *Benj. on Sales* (17th Ed.) 372, where the decided cases are cited and commented upon at length. *Dows v. Nat. Bank*, 91 U. S. 618, 23 L. Ed. 214. In *Bank v. Logan*, 74 N. Y. 568, *Folger, J.*, discusses the question and reviews the decided cases. In *Bank v. Crocker*, 111 Mass. 163, *Ames, J.*, says: "A carrier may be a mere bailee for the consignor; and when, by the terms of the bill of lading, the goods are to be delivered to the consignor's or-

der, the carrier is his agent and not the consignee's. \* \* \* In a contract of sale the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary, is decisive to show his intention to preserve the *jus disponendi* and to prevent the property from passing to the vendee."

"By such a bill of lading the seller does not reserve merely a lien, but the absolute right of disposal of the goods." 6 Am. & Eng. Enc. 1066, note 1. Until the draft is paid, the contract between the consignor and consignee is executory; that is, the consignor agrees to ship and place in the hands of the carrier the goods at the place designated, to be sold and delivered to the consignee when the draft is paid, both the title and possession remaining in the consignor until that time. If, in such case, the goods were injured or destroyed, the loss falls upon the consignor. If they are delayed in the carriage, the carrier is liable to the consignor. It is the fault of his agent. If the contract of the consignor imposed upon him the obligation to deliver the goods at any specified time, or in a reasonable time, and they are delayed by his agent, the consignee may recover of the consignor such damages as he may sustain as were in the contemplation of the parties. The only evidence in this case was that the goods were shipped to consignor's order—"notify" plaintiff. The authorities appear to be uniform that in such case the consignee is not brought into any contract relation with the carrier, and must look to the consignor for any damage sustained by a delay, who, in turn, must look to the carrier. In *Railroad v. Barnes*, 104 N. C. 25, 10 S. E. 83, the buggy was shipped to the vendee to be delivered on payment of the purchase money. It delivered the goods without the payment of the money to the vendee, who sold to defendant. It was held that the plaintiff could not recover the buggy because the title passed, by the shipment, to the vendee. *Shepherd, J.*, says that, if the title had not passed, the decision would have been different. It is manifest here that, if the iron had been delivered to plaintiff without delivering the bill of lading to the carrier, no title would have passed. The defendant was the bailee of the vendor to deliver to plaintiff when the draft was paid, and, until that condition precedent was complied with, it had no power to do so. Viewed from any aspect, it is clear that the plaintiff has no cause of action against the defendant. Judgment of nonsuit should have been rendered. We do not wish to be understood as approving the ruling of the court in regard to damages. There is nothing in the evidence, as set out in the record, to show that the case comes within the principle of *Rocky Mount Mills v. R. R.*, 119 N. C. 693, 25 S. E. 845, 56 Am. St. Rep. 682, or *Manfg. Co. v.*

*Express Co.*, 148 N. C. —, 62 S. E. 146. There is nothing to indicate the use to which the iron was to be put, or that any special damage would be sustained by a delay in prompt shipment.

In refusing the judgment of nonsuit, there was error.

JONES et al. v. W. A. SMITH & CO.

(Supreme Court of North Carolina. Dec. 2, 1908.)

1. HUSBAND AND WIFE (§ 14\*)—ESTATES BY ENTIRETY—NATURE AND INCIDENTS.

At common law, a husband and wife acquiring real estate held as tenants by entirety, and neither could convey his or her interest so as to affect the right of survivorship in the other, nor could a partition of the estate be had, but the survivor took, not as a new acquisition, but under the original limitation.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. § 14.\*]

2. HUSBAND AND WIFE (§ 14\*)—ESTATES BY ENTIRETY—NATURE AND INCIDENTS.

The nature, incidents, and properties of an estate by entirety are not changed by the constitutional provisions relating to married women.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 80; Dec. Dig. § 14.\*]

3. HUSBAND AND WIFE (§ 14\*)—ESTATES BY ENTIRETY—NATURE AND INCIDENTS.

The severance of timber from land, owned by a husband and wife as tenants by entirety, does not convert their estate in the timber or the lumber cut therefrom into a tenancy in common.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 14.\*]

4. PARTITION (§ 12\*)—ESTATES WHICH CAN BE PARTITIONED—ESTATES BY ENTIRETY.

A wife cannot maintain a partition of the lumber into which timber, cut on land owned by herself and husband as tenants by entirety, has been sawed by a purchaser of the timber from the husband.

[Ed. Note.—For other cases, see *Partition*, Dec. Dig. § 12.\*]

Appeal from Superior Court, Wilkes County; Ward, Judge.

Action by D. C. Jones and another against W. A. Smith & Co. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

The plaintiffs are husband and wife and were at the time of the transactions herein-after mentioned. The plaintiff J. M. Jones, the husband, who is only a nominal party to the action, contracted to cut certain timber from a tract of land owned by him and his wife as tenants by entirety and deliver it at the defendant's mill for a price fixed in the contract. The timber was cut and delivered to defendant, and he paid for the same. It was agreed by the parties that the timber should be sold and the proceeds of sale should be held subject to the decision in this case. This action was brought by the feme plaintiff for a partition of the lumber into which the cut timber had been sawed. The allegation of the petition is that she and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendant are tenants in common; each owning a one-half interest in the lumber. The petitioner asks for a sale of the property in order that there may be an equal division between the parties. The court suggested that the feme plaintiff might amend and sue for her share of the money due for the timber. This she declined to do, but insisted on her right to recover according to the allegations of her petition. The court then intimated that she could not recover, whereupon she submitted to a nonsuit and appealed.

W. W. Barber, for appellants. Finley & Hendren, for appellees.

**WALKER, J.** (after stating the facts as above). The plaintiffs as husband and wife were seised of the land, including the timber, not properly as joint tenants or tenants in common, but as tenants by entirety, for, being considered as one person in law, they cannot take the estate in moieties, but both are seised of the entirety, that is per tout et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. 2 Blk. 182. In 1 Washburn on Real Property (5th Ed.) p. 706, it is said: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they still continue to hold in common; but, if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship, but are what are called tenants by entirety. While such estates have, like a joint tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seised, in the eye of the law, of moieties, but of entireties. In such cases, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other, so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate." See, also, 11 Am. & Eng. Enc. (2d Ed.) p. 49; *West v. Railroad*, 140 N. C. 620, 53 S. E. 477; *Bynum v. Wicker*, 141 N. C. 95, 53 S. E. 478, 115 Am. St. Rep. 675; *Bruce v. Nicholson*, 109 N. C. 204, 13 S. E. 790, 26 Am. St. Rep. 562; 2 Kent's Com. 133. The nature, incidents, and properties of this estate by entirety were not changed by the provisions of the Constitution relating to married women. *Long v. Barnes*, 87 N. C. 329. As the plaintiffs were thus seised of the timber, its

severance from the land by cutting it did not convert the estate in the trees, when severed, or in the lumber cut from the logs, into a tenancy in common, nor is the feme plaintiff, by reason of the severance, entitled to maintain this action for partition. If she could have enjoined the husband from cutting the timber, under the principle stated in *Bynum v. Wicker*, supra, she is certainly not entitled to have a partition of the lumber, into which the timber had been converted, no more than she would have been entitled to partition of the land or the trees standing or growing thereon. This is the only question before us, as the feme plaintiff insisted upon her legal right to partition as alleged and asserted in her petition.

The intimation of the court was correct, and therefore the nonsuit, to which the plaintiff submitted in deference thereto, must stand. It may be that the present state of the law as to married women, under the Constitution and statutes and a wise public policy, call for a change in the incidents and properties of this anomalous estate (tenancy by entirety), so that it may be turned into a tenancy in common, but this is a question which addresses itself to the Legislature, and not to us.

No error.

COTTON v. NORTH CAROLINA R. CO.  
(Supreme Court of North Carolina. Nov. 25, 1908.)

1. TRIAL (§ 165\*)—QUESTION OF LAW OR FACT—MOTION TO DISMISS.

Where a motion to dismiss an action is made under the statute, the evidence must be construed most favorably to the plaintiff, and every fact which it tends to prove, and which is an essential to the cause of action, must be taken as established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 374; Dec. Dig. § 165.\*]

2. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by the collapse of a baggage truck, evidence held to require submission of defendant's negligence in failing to properly inspect the truck, etc., to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1029; Dec. Dig. § 285.\*]

3. MASTER AND SERVANT (§ 101\*)—INJURIES TO SERVANT—SAFE PLACE—DUTY OF MASTER.

While an employer does not guarantee his employee's safety, he is bound to use reasonable care and prudence to provide a safe place for him to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192; Dec. Dig. § 101.\*]

4. MASTER AND SERVANT (§ 102\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—DUTY OF MASTER.

A master performs his duty to furnish appliances reasonably fit and safe if, in the selection thereof, he uses that degree of care which a man of ordinary prudence would use in re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gard to his own safety, if he were supplying them for his personal use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 174; Dec. Dig. § 102.\*]

**5. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—BURDEN OF PROOF.**

In order that a servant may recover for injuries through alleged defective appliances, the servant must show that the appliance furnished was defective at the time of the injury, that the master knew of the defect, or was negligent in not discovering it and in making needed repairs, and that the defect was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-879, 888, 889; Dec. Dig. § 265.\*]

**6. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—INSPECTION—DUTY.**

A master owes to a servant, required to use appliances furnished by the master liable to become out of repair, the duty to inspect and repair the same at reasonable intervals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 235; Dec. Dig. § 124.\*]

Appeal from Superior Court, Guilford County; Moore, J.

Action by Peter Cotton against the North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. The plaintiff, who on May 13, 1906, was in the employ of the defendant, was ordered by George W. Vernon, the baggage agent at Greensboro, N. C., to carry some trunks from the north-bound train No. 34, which had just arrived, to the east-bound train No. 112. Vernon told him to make haste, as the east-bound train was about to leave. Plaintiff and Will Suggs started with the truck, which weighed 1,000 pounds and was loaded with trunks. He was pulling with his back towards the trunks, and Suggs was pushing the truck. In going from one train to the other they had to pass around another truck. Will Suggs testified: "When we went around [the other truck], he was guiding the truck, and I was pushing. It was heavily loaded. When he turned around he ran the off wheel of the truck over the rail, and as he turned the wheel came off and the truck caught his foot. That is the way it happened. The wheel that fell off the truck had crossed the iron track—the right wheel. It was going right straight across it, and did not run in any groove. It was right level there. It was night, but the lights were around there. I said a minute ago that, in running around the other truck, the wheel went on the outside of the rail. There is no flange to the wheel. The rail is higher than the inside of the track, but is about level with the floor. In between the floor in the center of the track and the rail there is a groove, so that, in coming around from the inside, the wheel would have to pass over that groove and against the rail.

The wheel went straight across the track; did not run down the track." The plaintiff testified that the wheel fell off the spindle when the truck struck the south-bound track. George W. Vernon, a witness for the defendant, testified: "I made an examination of the wheel right then and there. The platform is so built up there that the outside is up level and smooth with the top of the rail. On the inside is a space of about three inches. The spindle had fallen on the platform a few inches from the rail, and the wheel had fallen on the spindle. I took the wheel off the spindle and examined it. The pin was in the spindle, but had been bent outwards. Both ends of the pin were bent down flat to the spindle, and the wheel had drawn off over the pin, the wheel coming over both the pin and the spindle. The pin was not broken; it was simply bent. The pin was a little worn. The truck had been used some time. There was no wear on the spindle or pin that would injure the use of the truck that I could observe. I found the spindle lying down near the groove in the track, and the wheel over the spindle, and the pin and spindle in the condition I have described. I didn't see the wheel when it came off. I could not tell how long the pin had been in use, but it was somewhat worn. I could not tell how long the truck had been in use, but it had been used for some time. It would be impossible for me to tell, as we are always getting in new trucks. I could not tell the length of time it had been in use; could not say whether it had been in use three years; might have been, and it might have been less. Could not tell whether we had trucks that had been in use four or five years." There was evidence tending to show that the plaintiff was struck by the iron bar of the truck and also by one of the trunks which fell from the truck. At the close of the evidence the defendant moved to nonsuit the plaintiff. The motion having been refused, the defendant excepted. There was a verdict for the plaintiff, and judgment having been entered thereon, the defendant appealed.

John A. Barringer, for appellant. Wilson & Ferguson, for appellee.

WALKER, J. (after stating the facts as above). Where a motion to dismiss an action is made under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony. *Brittain v. Westall*, 135 N. C. 492, 47 S. E. 616. Applying this rule, we think there was evidence in the case proper for the consideration of the jury upon the question of negligence. The duty

of the employer to his employé is thus stated in *Marks v. Cotton Mills*, 135 N. C. 290, 47 S. E. 433: "The employer does not guarantee the safety of his employé. He is not bound to furnish him an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one, and recommended for our guide in all such cases. It measures accurately the duty of the employer, and fixes the limit of his responsibility to his employé"—citing *Harley v. B. C. M. Co.*, 142 N. Y. 31, 36 N. E. 813. So that the liability of the employer to the employé, in damages for any injury the latter may receive while engaged in his work, depends upon whether the employer has been negligent. *Avery v. Lumber Co.*, 146 N. C. 592, 60 S. E. 646; *Barkley v. Waste Co.*, 147 N. C. 585, 61 S. E. 565. In respect to instrumentalities provided by the master for the use of the servant, the latter, in order to establish his case, must show (1) that the implement furnished by the master was, at the time of the injury, defective; (2) that the master knew of the defect, or was negligent in not discovering it and making the needed repairs; (3) that the defect was the proximate cause of the injury. *Hudson v. Railroad*, 104 N. C. 491, 10 S. E. 669; *Shaw v. Manufacturing Co.*, 143 N. C. 131, 55 S. E. 433; *Railroad v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. We may omit any reference to the duty of the servant to inform the master of any defect found by him, as there is no evidence in this case that fixes the plaintiff with any knowledge of the alleged defect in the truck, either in law or in fact. There is another duty the master owes to his servant, and that is to inspect, at reasonable intervals of time, the implements he furnishes for use by his servant. 1 Labatt, M. & S. §§ 154 and 157; *Bailey's Pers. Inj.* § 2638; *Leak v. Railroad*, 124 N. C. 455, 32 S. E. 884. At what intervals this inspection should be made will depend upon the kind of implement used and the special facts and circumstances of the case. The defendant alleges in the answer that the pin was not in the spindle, and for that reason the wheel fell off, and further that

the plaintiff should have known that the pin was missing; but there is no evidence to sustain this allegation. The defendant's own witness testified that the pin was "somewhat worn," and that "both ends of the pin were bent down flat on the spindle and the wheel had drawn off over the pin."

We cannot say, as matter of law, that the pin had not been weakened by being worn, and was strong enough to hold the wheel in its place on the spindle. The truck was being moved in the ordinary and usual way, so far as appears, and in the proper place. As it gave way, under the circumstances, and was worn by constant use, the jury might well have inferred, as they did, that it was either originally defective and insufficient, or had become so by being "somewhat worn." It was for the jury to say whether by a careful inspection the defendant could have discovered its defective condition. We must assume, in the absence of the charge by the court, that they were properly instructed as to this feature of the case. In *Car Co. v. Parker*, 100 Ind. 181, the court holds: "It is the duty of the master to use ordinary care and diligence to provide safe and suitable machinery for use by the servant whom he employs to work upon it. The master's duty does not end with providing safe and suitable machinery, but he is also bound to exercise a reasonable supervision over it, and to exercise ordinary care in keeping it in safe condition for use by his servants, and this duty he cannot rid himself of by casting it upon an agent. It is only ordinary care that must be exercised by the master, such care as the peculiar conditions and circumstances would suggest to a man of ordinary prudence, but this requires that he should take notice of the liability of an implement he places in the hands of his servant to become worn and unsafe from age and use." See, also, *Parsons v. Railroad*, 94 Mo. 286, 6 S. W. 464, *Hackett v. Manufacturing Co.*, 101 Mass. 101, *Railroad v. Holt*, 29 Kan. 149, and *Bailey's Pers. Inj.* §§ 2634-2638, where the subject is fully discussed. In *Hackett v. Mfg. Co.*, supra, it was held that whether an employer was negligent in not ascertaining that a chain, which operated or held an elevator, had been worn and become thinner and therefore unsafe, by reason of which the elevator fell and injured the plaintiff, was a proper question for the jury. The same authorities also sustain the proposition that the plaintiff, when he was ordered by Vernon to use the truck, had the right to assume that it was in a safe condition.

Our conclusion is that the court properly submitted the case to the jury upon the evidence.

No error.



McCULLOCH et al. v. SOUTHERN  
RY. CO. et al.

(Supreme Court of North Carolina. Dec. 2, 1908.)

1. RAILROADS (§ 134\*)—LEASES—RIGHTS AND  
LIABILITIES OF LESSORS AND LESSEES.

A lessor railroad company is liable for the acts of its lessee done in the performance of the public duties of lessor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 423; Dec. Dig. § 134.\*]

2. TRESPASS (§ 37\*)—ACTIONS—PARTIES.

A grantor, under whose deed a trespasser undertakes to justify, is not a necessary or proper party to an action for the trespass.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 75; Dec. Dig. § 37.\*]

3. RAILROADS (§ 134\*)—LEASES—RIGHTS AND  
LIABILITIES OF LESSORS AND LESSEES.

A lessor railroad company is not liable for the acts of its lessee, done outside of its rights under the lease, and not in the performance of the public duties of lessor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 423; Dec. Dig. § 134.\*]

4. RAILROADS (§ 134\*)—LEASES—RIGHTS AND  
LIABILITIES OF LESSORS AND LESSEES—RIGHT  
OF WAY.

An entry upon land and taking thereof by a lessee railroad company which may be justified under the charter of the lessor railroad company, and which is done in furtherance of its business, is lawful, and there is no cause of action against either company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 423; Dec. Dig. § 134.\*]

5. REMOVAL OF CAUSES (§ 74\*)—AMOUNT IN  
CONTROVERSY—TIME OF DETERMINATION—  
"MATTER IN DISPUTE."

The right to remove an action, wherein a money judgment is demanded, to the federal court is determined by the sum demanded as appears by the record at the time the petition for removal is filed; and, where an amendment is made, the sum last demanded is "the matter in dispute."

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 130; Dec. Dig. § 74.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4414, 4415; vol. 8, p. 7718.]

6. REMOVAL OF CAUSES (§ 89\*)—FILING PETI-  
TION AND BOND IN STATE COURT—EFFECT.

Under Act March 3, 1887, c. 373, § 1, 24 Stat. 554 (U. S. Comp. St. 1901, p. 510), providing that, on filing a petition and bond in a state court for removal to a federal court, it shall be the duty of the state court to accept the petition and bond and proceed no further, the jurisdiction of the state court ceases eo instante, and the court is without jurisdiction to declare that an amended complaint does not state a cause of action against defendant and remit plaintiff to his original complaint, and thereby prevent a removal because the amount involved is not within federal jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 189; Dec. Dig. § 89.\*]

7. REMOVAL OF CAUSES (§ 23\*)—SUBJECT OF  
CONTROVERSY—CONDEMNATION PROCEED-  
INGS.

An action, wherein it was alleged that plaintiffs were the owners and in possession of a tract of land on which defendant railroad company had committed a trespass, and that it was undertaking to justify under a deed to another railroad company, its lessor, and that the trespass could not be justified thereunder be-

cause the land was not taken to carry on the business of lessor railroad company, but for the separate business of defendant company, did not involve a question of whether property should be appropriated under the power of eminent domain against the owner's will, of which the federal court would have no jurisdiction so as to prevent a removal, but involved solely a question as to what compensation should be paid for an unwarranted use of the land, by defendant company, constituting a trespass.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 23.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; E. B. Jones, Judge.

Action by J. F. McCulloch and others against the Southern Railway Company and the North Carolina Railroad Company. Defendant Southern Railway Company filed a petition for removal to the federal court, which was denied, and it appeals. Reversed.

W. B. Rodman and Wilson & Ferguson, for appellant. Scott & McLean, Justice & Broadhurst, and Douglas & Douglas, for appellees.

BROWN, J. The history of this case is as follows: Action was commenced August 1, 1903. The pleadings were filed and the cause came on for trial at the July term, 1907, and a judgment was rendered in favor of defendants dismissing the action. From this judgment plaintiffs appealed to the Supreme Court, and the appeal was heard at the fall term, 1907, upon an agreed state of facts. 148 N. C. 316, 59 S. E. 882. A new trial was awarded, and the court suggested to plaintiff an amendment to the pleadings. The plaintiff, on the 1st day of April term, 1908, of the superior court of Guilford county, acting in accordance with the suggestion of this court, filed an amendment to the complaint, and instantly the defendant Southern Railway Company filed a petition for removal. The court overruled the motion to remove, and defendant Southern Railway Company appealed.

The Southern Railway Company is the lessee of the North Carolina Railroad Company, and as such is operating the line of railway extending from Charlotte through Greensboro to Goldsboro. As such lessor, the North Carolina Company is liable for the acts of the lessee done in the performance of the duties of the lessor as a common carrier. The effect of the franchise to construct and operate a railroad is to require the licensee to perform certain public duties, and the licensee cannot avoid its part of this contract with the sovereign by subletting its franchise. The licensee from the state nevertheless remains liable for the manner in which its lessee performs these public duties which the lessor has agreed with the public to perform. Logan v. Railroad, 116 N. C. 940, 21 S. E. 959. Upon no other principle of law can the decision in the Logan Case be sustained. It has never been held by any court that the lessor of a

railroad company is liable for the tortious acts of its lessee done, not while carrying on the business of its lessor, but while carrying on an entirely separate and distinct, though similar, business of its own.

The gravamen of the plaintiffs' complaint is that they are the owners and in possession of a tract of land, on which the Southern Railway has committed a trespass, and that it is undertaking to justify its tortious act under a certain deed to the North Carolina Company, its lessor, and that the trespass of the Southern on this land cannot be justified under that title, because the land was not taken to carry on the business of the North Carolina Railroad Company, but for the separate and independent business of the Southern Railway Company. How is the North Carolina Railroad Company interested in an action of trespass against the Southern Railway Company? It is no more interested than any other grantor under whose deed any alleged trespasser undertakes to justify, and such grantor is admittedly not a necessary or proper party to the action for damages for the supposed trespass. If this act of taking possession of the locus in quo was an act done in the conduction of the public business of the North Carolina Railroad Company, and which the North Carolina Railroad Company was under the law required to do, then under the former decision in this case, the plaintiffs' action fails entirely and should be dismissed. The plaintiffs recognize this, and seek to avoid it by expressly alleging in section 11 of the complaint that the act of taking possession of this locus in quo was not done in the conduct of the public business of the North Carolina Company, but for the purpose of conducting a separate and distinct part of the Southern's business. The former company, according to the complaint, has done nothing. Upon what principle of law, then, can it be held liable for the acts of the Southern, alleged by the plaintiff to be done outside of and beyond its rights under the lease, it being expressly denied in the complaint that these alleged wrongful acts of the Southern were done in the performance of the public duties which it had undertaken to discharge for the North Carolina Company as its lessee? A cursory reading of the former opinion in this case will disclose that the very ground upon which a new trial was awarded is that the Southern Railway Company was doing the acts complained of, not in the performance of the public duties of the North Carolina Railroad Company, but in the performance of the duties of the Southern Railway Company, because it owns and operates certain other railroads, and that the acts are done in performance of the public duties of those roads, and, plaintiffs' predecessors in title, not having granted the land which was taken to be used for that purpose, it was placing an additional servitude on the land, and for this additional servitude the Southern Railway Company should be made to pay. If

this alleged act in entering upon and taking the locus in quo may be justified under the charter of the North Carolina Company, and was done in furtherance of its business, then it is lawful, and there is no cause of action against either company. *Raleigh & A. Air Line R. R. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263. If the appropriation of the property may not be so justified, then only the Southern can be held liable, and in any event the North Carolina Company is not liable upon the facts stated in the complaint. It is plain that the controversy is not only separable, but that, under the pleadings and the former opinion of this court, there is only one controversy, and that is between the plaintiffs and the Southern Railway Company. That was the ruling of this court when it held that the judge of the superior court should have submitted the issues set out in the former opinion on page 319 of 146 N. C., on page 884 of 59 S. E., for those issues present a controversy with the Southern Railway only.

It is suggested that the amended complaint, in which the damages are laid at \$4,000, filed in pursuance of our opinion at the last term, does not state a cause of action against the Southern Railway, and therefore the plaintiff would be remitted to his first complaint for \$1,500, a sum not within the federal jurisdiction. This contention does not appear to find much support in the following clause of that opinion: "The plaintiffs are entitled in this action to have permanent damages assessed in the nature of condemnation for the additional burden placed upon the lot by its use for purposes other than those for which defendant uses the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572, in which case this proposition is so clearly and fully reasoned out by Connor, J., with full citation of authorities." But we are prevented from considering this question because, having held that the controversy is separable, and that no cause of action is stated against the North Carolina Railroad Company, when the petition and bond for removal was filed by the Southern Railway Company, the jurisdiction of the state court was at once ousted, and that court can proceed no further. When a money judgment is demanded, as in this case, the right of removal is determined by the sum demanded as appears by the record at the time the petition is filed. When an amendment is made, the sum last demanded is "the matter in dispute." *Moon on Rem.* § 88. After the petition and bond for removal are filed, the jurisdiction of the state court ceases eo instanti. It can make no order, except that further proceedings be suspended. The plaintiff cannot even take a nonsuit. He must go into the federal court to do that. If the state court has no jurisdiction to allow a nonsuit, how can it take

jurisdiction to pass on the validity of a cause of action? In this case, according to this court, there are two causes of action attempted to be pleaded. If the controversy is separable, as it is practically admitted to be, it is removable. If, then, the state jurisdiction ceases when the petition is filed, so that a nonsuit could not be taken, whence does the state court acquire jurisdiction to declare the larger cause of action invalid so as to prevent a removal?

The federal statute prescribes that when, and as soon as, such petition and bond are filed in an action, "it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit." Act March 3, 1887, c. 373, § 1, 24 Stat. 554 (U. S. Comp. St. 1901, p. 510). In construing this statute in a case like this, this court has said: "The intention so expressed is that the jurisdiction of the state court shall cease at once upon the application sufficiently made for the removal of the action. The latter in its condition, in all respects, at the time must be removed. It is not intended that the state court shall after that time have control of the action for the purpose of changing its nature or condition, or the form thereof, or the pleadings therein, in any respects whatever. It then ceases to have jurisdiction, and has no authority to make any order, decree, or judgment in the action. This is settled by many decisions of the United States, several of them much like this case." *Merriman, C. J., in Winslow v. Collins*, speaking for a unanimous court, including our present Chief Justice, 110 N. C., 121, 14 S. E. 512.

If this case involves a separable controversy, or a single controversy with the Southern Railway Company, as is practically admitted and heretofore decided, then this court has no jurisdiction to pass on the validity of any cause of action set out in the complaint, and could not even allow a nonsuit. Its jurisdiction terminated with the filing of the petition and bond. *Kanouse v. Martin*, 15 How. 198, 14 L. Ed. 690; *Railroad v. Koontz*, 104 U. S. 5, 26 L. Ed. 643; *Railroad v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *S. S. Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; *Kern v. Huldekoper*, 103 U. S. 485, 26 L. Ed. 354; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.

No order of the superior court, or of this court, was essential to the removal, nor to put an end to the state jurisdiction. It terminated eo instanti by force of the statute. *Stone v. S. C.*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 902; *Ins. Co. v. Dunn*, 19 Wall. 214, 22 L. Ed. 68.

The plaintiff could not withdraw the amended complaint if he desired, nor could the court allow him to do so. This is held in *Winslow v. Collins*, supra, where it is said: "Hence, also the order allowing the amendment striking out the second cause of

action was unauthorized and without force." In that case the second cause of action was stricken out in the superior court, so as to bring the sum in controversy below the federal jurisdiction. *Dillon on Removal*, pp. 66, 68; *Foster's Fed. Prac.* 385; *Moon on Removal*, pp. 71, 72, and notes. The *Tobacco Case*, 144 N. C. 369, 57 S. E. 5, was before us upon the question of removal to the federal court. This court refused to consider whether the complaint stated a cause of action, saying "Whether the plaintiff in its complaint has set forth any actionable wrong is not open for us at this time." The authorities are conclusive that, where at the time the petition and bond are filed the record as it then stands shows on its face a removable cause, or a separable controversy which is removable as to one defendant, the state court has no jurisdiction to make any order whatever, except that it will proceed no further.

We have considered the suggestion that the defendant, the Southern Railway has no power of condemnation, and therefore permanent damages cannot be assessed, so that no cause of action is stated in the amended complaint, and we have shown by controlling authority that, after the petition was filed, the jurisdiction of the state court was ousted, and that therefore we are debarred from considering that question. It is again suggested that this is a condemnation proceeding in which the Southern Railway Company is attempting to exercise the power of eminent domain under the laws of this state, and that the United States courts have no jurisdiction over such proceedings. We will not advert to the apparent inconsistency of the two contentions, but only to the fact that we have practically held, in the former opinion in this case, that this is not a condemnation proceeding, but a civil action, in which the plaintiffs are entitled to damages in the "nature of condemnation." The railway company does not seek to condemn plaintiff's land. That land was conveyed by plaintiffs to the North Carolina Railroad Company by deed, and is within its right of way and necessary for the use of that company. The Southern Railway Company could not condemn it if it had the right of eminent domain, as it is already devoted to and necessary for the exercise of the franchise of the North Carolina road. *Railroad v. Railroad*, 83 N. C. 489. The Southern Railway does not claim any right or seek to condemn this land, but contends that it does not need to condemn it, as it has the right to use it as lessee of the North Carolina Company. The plaintiffs only ask for compensation for what they aver is an unwarranted use of the land by the Southern Railway Company constituting in law a trespass. In our former opinion the contention of plaintiff is stated by the Chief Justice, with his usual clearness, as follows: "The plaintiffs in their brief submit that this is all they wish; i. e.,

compensation for the alien and additional burden, and tersely say "Take and pay." If this cause of action is defectively stated, when the case goes back the pleadings can be amended." 146 N. C. 318, 59 S. E. 882. The whole record and our former opinion clearly show that this is not a condemnation proceeding commenced before the clerk under the statute, or in the superior court in term, in which the railway company is seeking to condemn property under the power of eminent domain, but that it is a civil action, commenced in term time, by the plaintiffs, to recover \$4,000 damages for a trespass. This is not a "question as to whether property shall be appropriated" under the power of eminent domain against the owner's will, but solely a question as to what compensation shall be paid to the original landowner for an alleged unlawful burden placed on the property by the lessee of the North Carolina Railroad Company, to whom the plaintiffs have heretofore conveyed it for railroad purposes. It is not a question of appropriating property against the owner's will, but simply a question of compensation; and, where that is the case, the federal courts always have had jurisdiction even in condemnation proceedings. Under Removal Act 1875 (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), "the question of compensation for land appropriated, if triable in a state court, might be removed to a United States Circuit Court." Moon on Removal, pp. 136, 137. In section 75, p. 139, quoted in part in the opinion of the Chief Justice, Mr. Moon goes on to say: "On the other hand, if all questions that are non-judicial have been determined before going into court, and the court proceeding involves only the judicial question of compensation for the rights taken, the cases holding similar proceedings, under the act of 1875, to be within the jurisdiction of the United States Circuit Court, are controlling under the present act." *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206.

For the reasons given, and upon the authorities cited, we are of opinion that the cause is removable as to the defendant the Southern Railway Company.

The judgment of the superior court is reversed.

CLARK, C. J. (dissenting). This is an action begun against the North Carolina Railroad Company (a North Carolina corporation) and the Southern Railroad Company (a foreign corporation), the former being lessor and the latter lessee of the former's property. The action was brought to recover \$1,500 damages, for trespass in using the easement in the right of way of lessor company for purposes not covered by the rights acquired by the latter in its capacity as lessee. This case was here at fall term, 1907. 146 N. C. 318, 59 S. E. 882. In deciding that any use by lessee

of the property for purposes other than those pertaining to it in that capacity was wrongful, this court said: "The plaintiff is entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot by its use for purposes other than those for which defendant used the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572." That the court was speaking generally in the abstract, and not holding that this lessee company possessed the right of condemnation, is clear from this further paragraph: "Whether the Southern Railroad Company, not being a North Carolina corporation, can take the property for this additional servitude, under the right of eminent domain \* \* \* is a matter not now before us." When the case went back, the plaintiffs, under leave of court, amended their complaint by adding among other allegations that the Southern Railroad Company is a foreign corporation, and cannot exercise the right of eminent domain by taking any land under its lease from North Carolina Railroad Company for its own use, or for the use of any other road not an actual or integral part of the North Carolina Railroad, adding further that, while insisting that the additional servitude imposed for purposes not incident to its rights as lessee of North Carolina Railroad Company, was "unlawful and tortious, and claiming damages for such injuries, the plaintiffs are willing that permanent damages may be assessed in this action for the value of the land," and amended their prayer for judgment by "adding thereto, in the nature of an alternative relief," the sum of \$4,000 for permanent damages. The Southern Railroad Company thereupon filed a petition for removal to the federal court, averring that this was a severable controversy affecting itself alone. But if the Southern Railroad Company, does not possess the right of eminent domain, it cannot be conferred by the plaintiffs. It can be granted by the sovereign alone, and it follows that the amended complaint and prayer for judgment state no cause of action, and there is before the court no legal controversy, save for \$1,500 damages for trespass, which is not removable.

In *Mills' Eminent Domain*, § 48, it is said: "The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power, they should be resolved adverse to the claim of power. *Railroad v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Webb v. Railroad*, 4 Myl. & Cr. 116. Although a corporation may be engaged on a great public work, in which the power of condemnation would be of great service, yet the authority must be clearly conferred. Otherwise the corporation must purchase from the owners as best they can. *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) 501." The plaintiffs could have sold to Southern Railroad

Company if the latter were authorized to acquire realty in this state, but the plaintiffs could not authorize or call upon the courts to exercise the sovereign powers of eminent domain in favor of a foreign corporation when the Legislature has not conferred that power upon it. In *1 Lewis' Em. Domain*, § 242, it is said: "It is solely for the Legislature to judge what persons, corporations, or other agencies may properly be clothed with this power. *Ash v. Cummings*, 50 N. H. 591." The same author (section 243) says that "such power of eminent domain, when conferred by the Legislature, is a personal trust, and cannot be delegated or transferred, except by legislative authority. *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73. Purchasers, grantees, lessees, of the property and franchises of a corporation do not by such purchase, grant, or lease acquire the right of eminent domain"—citing many cases. To same purport, *Randolph, Em. Domain*, § 108, and cases cited.

The Southern Railroad Company, being a foreign corporation, with no charter from this state, has had no legislative grant of this power. The general grant (Revisal 1905, § 2575) is only to corporations created by the authority of this state. The authority conferred on foreign corporations by Revisal 1905, §§ 1193, 1194, does not include the right of eminent domain. The only valid cause of action set out in the complaint is an action for trespass, averring \$1,500 damages. But if there is a cause of action, it is for a right of condemnation under the state's right of eminent domain, which a federal court has no jurisdiction to administer; besides, it is not a "suit" within the meaning of the removal statute. Hence this case is not removable. *Moon on Removal*, § 75, pp. 133, 134, citing *Railroad v. Railroad*, 17 W. Va. 812; *Railroad v. Jones* (Brewer, J.) [C. C.] 29 Fed. 193; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415. "The appropriation of private property for public use is an act of sovereignty on the part of the state." *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Cherokee Nation v. Railroad* (D. C.) 33 Fed. 900. It is not in any proper sense a judicial act. *Railroad v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Navigation Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. "The question whether property shall be appropriated being solely a nonjudicial question to be decided by the state authorities, a proceeding to determine the propriety or necessity, method or extent, of any proposed appropriation is not within the original jurisdiction of a United States Circuit Court or removable thereto from a state court." *Moon on Removal*, p. 133, citing *Railroad v. Cockcroft* (C. C.) 46 Fed. 881; *Railroad v. Montague* (C. C.) 94 Fed. 227, and other cases.

**HUDNELL et al. v. DANIELS et al.**  
(Supreme Court of North Carolina. Sept. 16, 1908.)

Appeal from Superior Court, Beaufort County; Lyon, Judge.

Action by W. T. Hudnell and others against L. G. Daniels and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Ward & Grimes and Simmons, Ward & Allen, for appellants. Small, McLean & McMullan, for appellees.

**PER CURIAM.** The court, having carefully examined the record in this case and given it full consideration, finds that the questions presented are largely of fact, and is of opinion that no reversible error appears in the rulings of the superior court necessitating in the interest of substantial justice a new trial.

No error.

**STATE ex rel. PEOPLE'S BANK OF GREENVILLE v. GOODWIN**, County Sup'r, et al.

(Supreme Court of South Carolina. Nov. 16, 1908.)

1. **MANDAMUS** (§ 106\*)—**COUNTIES—FISCAL MANAGEMENT—PAYMENT OF PAST INDEBTEDNESS.**

Civ. Code 1902, § 809, prohibits the application of funds arising from current taxes to the payment of indebtedness contracted in any previous fiscal year, and section 809 forbids the supervisors to draw checks unless the county treasurer has reported funds in the county treasury to pay them, and forbids payment of checks drawn in violation of its provisions. *Held*, that mandamus would not lie to require the issuance and payment of a check for past county indebtedness for which no funds had been reported.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 234; Dec. Dig. § 106.\*]

2. **MANDAMUS** (§ 112\*)—**OFFICERS—COUNTY COMMISSIONERS—LEVY OF TAX.**

Mandamus will not lie to compel county supervisors to levy a tax not within their official duty or power.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 245; Dec. Dig. § 112.\*]

3. **COUNTIES** (§ 192\*)—**FISCAL MANAGEMENT—PAST INDEBTEDNESS—POWER TO TAX.**

Civ. Code 1902, § 799, providing that the county board shall prepare an estimate of the amount necessary to pay the expenses incurred by the board and for ordinary county expenses, and report the same to the Comptroller General in order to provide the necessary taxation for county purposes, includes past county indebtedness, and embraces all claims legally approved by the board up to the date of the estimate.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 192.\*]

4. **COUNTIES** (§ 191\*)—**FISCAL MANAGEMENT—"ORDINARY COUNTY EXPENSES."**

The words "ordinary county expenses," used in Civ. Code 1902, § 799, providing for an estimate by the board of commissioners of the amount necessary to pay such expenses, are those to be incurred for the current fiscal year.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 300; Dec. Dig. § 191.\*]

5. **COUNTIES** (§ 206\*)—**CLAIMS—ALLOWANCE—EFFECT—INVESTIGATION.**

Action of a county board in approving or disallowing a claim presented in such form as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

to give the board jurisdiction constituted an adjudication, which, while subject to attack for fraud in a direct proceeding, was not affected by the conclusions of an investigating committee that the claim was invalid for any reason.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322-330; Dec. Dig. § 206.\*]

#### 6. COUNTIES (§ 206\*)—CLAIMS—INVESTIGATION—STATUTES.

An investigating committee, appointed under Act 1905 (24 St. at Large, p. 1109), authorizing a commission to examine and report concerning the financial affairs of Greenville county, conferred no power on the committee except to investigate and did not authorize it to pass on the merits of claims against the county.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 206.\*]

#### 7. COUNTIES (§ 206\*)—CLAIMS—ALLOWANCE—EFFECT.

Civ. Code 1902, § 806, makes it unlawful for any officer to contract for any purpose in a sum in excess of the tax levied or the amount appropriated for the accomplishment of such purpose. *Held* that, where a claim against a county is allowed by the board of commissioners, the allowance constitutes an adjudication that the claim does not rest on a contract in excess of the tax levied or the amount appropriated for the purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322-330; Dec. Dig. § 206.\*]

#### 8. COUNTIES (§ 201\*)—CLAIMS—ITEMIZATION—JURISDICTION OF COUNTY BOARD—STATUTES.

Civ. Code, 1902, § 806, providing that no claims against a county shall be audited or ordered paid unless itemized, etc., and that the county board may refuse to audit or allow a claim unless made out and verified in the manner provided, is mandatory, so that proper itemization of claims against a county is necessary to confer jurisdiction on the county board to audit and allow the same.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 313; Dec. Dig. § 201.\*]

#### 9. COURTS (§ 90\*)—DECISIONS—CONCLUSIVE-NESS.

Where a majority of the Supreme Court concurred in the result only, the expressions in the opinion are not controlling authority as stare decisis, but are entitled to consideration as the views of the judge writing the opinion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 316; Dec. Dig. § 90.\*]

#### 10. COUNTIES (§ 201\*)—CLAIMS—JURISDICTION OF COUNTY BOARD—ITEMIZATION—STATUTES.

Civ. Code 1902, § 806, requires the itemization of all county claims, and section 1354 requires all bridge work, when the amount exceeds \$10, shall be by contract, and, if the amount exceeds \$100, shall be let after advertisement for bids. *Held* that, while a substantial compliance with the statute is sufficient to confer jurisdiction on a county board to allow claims, claims for bridge work in an amount exceeding \$10 are not properly itemized, unless the contract under which the work is done is so referred to that it may be identified.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 313; Dec. Dig. § 201.\*]

#### 11. COUNTIES (§ 201\*)—CLAIMS—ITEMIZATION—"MADE OUT IN ITEMS"—DATE.

Civ. Code 1902, § 806, requires that all claims against counties shall be "made out in items," and section 808 provides that no claim shall be valid and payable unless it be presented to and filed with the county board during the fiscal year in which it is contracted or the next thereafter. *Held*, that a claim is not prop-

erly "made out in items" which does not indicate the year in which it arose, so as to indicate that it accrued within the period prescribed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 313; Dec. Dig. § 201.\*]

#### 12. COUNTIES (§ 201\*)—CLAIMS—"ITEMIZED ACCOUNT."

To itemize an account, within Civ. Code 1902, § 806, requiring itemization of all claims against counties, means merely to state in detail the particulars of the claim so that the account may be examined and its correctness tested.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 313; Dec. Dig. § 201.\*]

#### 13. COUNTIES (§ 202\*)—CLAIMS—VERIFICATION.

Verification of a claim against a county reciting after the venue "personally appeared before me — and made oath in due form of law that the above account is correct, just, and due for — dollars, and that no part thereof has been paid. Subscribed and sworn to," etc.—constituted a sufficient compliance with Civ. Code 1902, § 806, requiring an affidavit that the items are correct, and that the labor, services, and other matters charged therein have been in fact done, made, rendered, or are due, and that no part of the same has been paid or satisfied.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 314; Dec. Dig. § 202.\*]

#### 14. COUNTIES (§ 201\*)—CLAIMS—ITEMIZATION.

Where a claim against a county for lumber did not specify, in the body of the account, the dates of the sale, but the bills of lading attached thereto showed the date of the shipment, the claim was not defective for want of sufficient itemization as to the date.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 313; Dec. Dig. § 201.\*]

#### 15. MANDAMUS (§ 184\*)—JUDGMENT—DEFECT.

A writ of mandamus requiring a county board to include, in its estimate to be submitted to the General Assembly as a basis for tax rate, certain claims and items as adjudicated debts for past expenses of the board, on the theory that the board's adjudication could not be collaterally attacked, and refusing to direct such writ as to claims not sufficiently itemized to give the board jurisdiction to act, did not affect the county's right to assail the judgments of the county board directly for fraud, nor the right of the petitioner to represent any of the claims not sufficiently itemized in the form required by law for audit and approval.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 184.\*]

Petition for mandamus by the state, on relation of the People's Bank of Greenville, against J. P. Goodwin, county supervisor, and others. Petition granted in part, and denied in part.

See, also, 59 S. E. 35, 361.

J. A. McCullough, for petitioner. Oscar Hodges and H. J. Haynsworth, for respondents.

WOODS, J. In this petition for mandamus, the People's Bank of Greenville alleges it purchased for valuable consideration and without notice of any defects, if any exist, a number of claims, listed in the petition, against the county of Greenville, which had been audited and approved by the county board of commissioners. The petition fur-

ther alleges: "That although the county had and now has funds applicable to the payment of the said claims, J. W. Walker, county supervisor, and being the predecessor of the present incumbent and the old board of county commissioners, refused to take any steps towards paying the said claims, but denied the validity thereof, and the present respondents, after demand made upon them, refuse to take any steps towards the payment of the said claims, and J. P. Goodwin, county supervisor, refuses, after demand made upon him, to draw his order or warrant upon the county treasurer upon the funds in his possession applicable to the said claims or any of them, and the respondents, after demand upon them, have failed and refused to do the acts required of them by law, looking towards the payment of the said claims or any of them, and they deny the validity of the said claims, or that the county, if liable on account thereof, and the county commissioners of Greenville county refuse to levy a tax to pay the said claims or any part thereof, as they are required by law to do, and they further refuse to include the said claims or any part of them, in the budget of expenses incurred for ordinary county expenses and report the same to the Comptroller General of the state, by him to be submitted to the General Assembly, in order to provide the necessary taxation for county purposes, and they have attempted to repudiate the said claim and have refused, and still refuse, to take any action whatsoever, looking towards the recognition and payment thereof." The prayer is: "That J. P. Goodwin, county supervisor, be required to draw his order or warrant upon the county treasurer for such funds as may be in his hands, applicable to the said claims or any of them. (2) That the board of county supervisors of the said county be required to levy a tax in payment of the said claims. (3) That the said board of county commissioners be required to include in the budget, or estimate of the amount of money necessary to pay the expenses incurred by the said board and for ordinary county expenses, the claims aforesaid, and report the same to the Comptroller General of the state, to be by him submitted to the General Assembly in order that their payment may be provided for. (4) That the respondents and each of them be required to do any and all acts required of them by law looking towards the recognition and payment of the said claims. (5) For such other and further relief as petitioner may be entitled to."

The return shows there are no funds in the hands of the county treasurer applicable to the claims set out in the petition, which are for past indebtedness, and section 809 of the Civil Code of 1902 prohibits the respondents, as public officers, from applying the funds arising from the taxes for the current year to the payment of indebtedness contracted in any previous fiscal year. Sec-

tion 809 of Civil Code forbids the supervisor to draw checks unless the county treasurer "has reported funds in the treasury to pay the same," and it forbids the county treasurer to pay checks drawn in violation of its provisions. There is therefore no ground to ask for mandamus to require the issuing and payment of a check for the amount of petitioner's claims. By section 5, art. 10 of the Constitution, the General Assembly was authorized to vest in the municipal authorities of a county the power to lay taxes for corporate purposes, but the General Assembly has not seen fit to confer the power on the county board of commissioners, except a limited power to lay a special tax of one mill for roads. 23 St. at Large, p. 1012. Therefore this court cannot issue a mandamus to require that board to do an act not within its official duty or power. In *Supervisors v. U. S.*, 18 Wall. 77, 21 L. Ed. 771, the court says: "It is very plain that a mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred on them by the author of their being. And it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it then the duty of the board of supervisors of a county in the state of Iowa to levy a special tax, in addition to a county tax, of four mills upon the dollar, to satisfy a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the state." *U. S. v. Clark*, 96 U. S. 37, 24 L. Ed. 686; *U. S. v. County Court of Macon County*, 99 U. S. 582, 25 L. Ed. 331. It is true the principle thus stated in *Rails v. U. S.*, 105 U. S. 733, 26 L. Ed. 1220, has been generally recognized and followed: "It must be considered as settled in this court that when authority is granted by the legislative branch of the government to a municipality or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation." *U. S. v. Clark Co.*, *supra*; *Quincy v. Jackson*, 113 U. S. 337, 28 L. Ed. 1003; *Scotland Co. v. Hill*, 140 U. S. 44, 11 Sup. Ct. 697, 35 L. Ed. 353. But this principle has no

application here, because the claims here are not extraordinary debts, but ordinary county claims for current expenses of the class for which the General Assembly undertakes to provide by a direct legislative levy. *City of Cleveland v. U. S.*, 111 Fed. 341, 49 C. C. A. 383. Besides, it will be found in all the cases above cited in which the power and duty to levy a tax to pay a debt has been implied from the authority to make the debt, the officers to whom such power and duty have been attributed were authorized by law to levy taxes, for the general purposes of the municipality.

For the courts to undertake to create the machinery of taxation would be to usurp a legislative function. This court therefore has no power to issue a mandamus to require the levy of a special tax to pay the petitioner's claims. But the petitioner alleges the claims now in controversy against the county having been approved by the county board of commissioners, the court should issue its writ of mandamus requiring the board to include the claims in its estimate to be submitted under section 799, Civ. Code 1902, which reads as follows: "The county board of commissioners shall prepare an estimate of the amount of money necessary to pay the expenses incurred by said boards and for ordinary county expenses, and report the same to the Comptroller General of the state, on or before the 5th day of January of each year, to be by him submitted to the General Assembly, in order to provide the necessary taxation for county purposes." This section was clearly intended to embrace past indebtedness. The purpose of the estimate is to enable the General Assembly "to provide the necessary taxation for county purposes," and taxation is as essential for the payment of past indebtedness as for payment of current expenses. But it is not necessary to resort to the spirit of the act. By its express language, the section require "an estimate of the money necessary to pay the expenses incurred by said boards, and for ordinary county expenses." The expenses already incurred by the board clearly embrace all claims legally approved by the board up to the date of the estimate. Ordinary county expenses are those to be incurred for the current fiscal year.

The respondents, however, allege these claims should not be included in the estimate required by the statute: (1) Because a number of the claims were fraudulent, and the rest, for other reasons affecting the merits, were not valid against the county; (2) because the claims exceeded the appropriation and the tax levied for the year in which they are alleged to have been incurred; and (3) because they were approved by preceding county boards of commissioners without being itemized and verified. As to the merits of the claims, it is well settled by a number of decisions of this court that the action of the county board of commissioners in ap-

proving or disallowing a claim against the county, presented in such form as to give the board jurisdiction, is an adjudication. *Richland v. Miller*, 16 S. C. 236; *State v. Kirby*, 17 S. C. 535; *Jennings v. Abbeville*, 24 S. C. 543; *State v. Appleby*, 25 S. C. 103; *Kendall v. County Commissioners*, 28 S. C. 258, 5 S. E. 622; *Tinsley v. Union County*, 40 S. C. 281, 18 S. E. 794; *Lockwood v. Adams*, 63 S. C. 191, 41 S. E. 82. No doubt such a judgment may be set aside for fraud by a direct proceeding instituted for that purpose. *Farrow v. Dial*, 1 McMul. 292, 36 Am. Dec. 267; *Brown v. Buttz*, 15 S. C. 488; *Lockwood v. Adams* and *Richland v. Miller*, supra. But it is not affected by the conclusions of an investigating committee that the claim upon which it rests is invalid for fraud or any other reason. *Wheeler v. County*, 18 S. C. 135; *State v. Appleby*, supra. The finding of the investigating committee appointed under the act of 1905 (24 St. at Large, p. 1109) as to the merits of the claims can have no effect. Indeed, the act confers on the committee no power except to investigate. No proceeding has been instituted to set aside the approval or audit of the claims for fraud, and mandamus could not be refused for lack of merit in the claims.

In support of the second objection, the respondents rely on section 606 of the Civil Code of 1902, and similar provisions in the appropriation acts of 1903 (Laws 1903, p. 155, § 16) and 1904 (Laws 1904, p. 570, § 10). Section 606 provides: "It shall be unlawful for any public officer, state or county, authorized by law to so contract, to enter into or contract, for any purpose whatsoever, in a sum in excess of the tax levied, or the amount appropriated for the accomplishment of such purpose." When a claim is presented to a county board of commissioners, one of the questions for consideration of the board is whether it rests upon a contract in excess of the tax levied or the amount appropriated for the purpose under which the claim falls. This is not a question of jurisdiction, but of fact, between the claimant and the county, to be determined on the consideration of the claim. In approving the claim, the board necessarily adjudicates that question in favor of the claimant.

But it is alleged in return that under the statute the county board of commissioners has jurisdiction to audit and approve claims against the county only when they are itemized and verified, that the claims here in controversy were not itemized and verified as required by law, and therefore the attempted audits and approvals were nullities. The relator traverses the return, alleging that the claims were duly itemized and verified. The relator further takes the legal position that, even if the claims were not itemized and verified, the defect was not jurisdictional, and that it was within the power of the county board of commissioners to waive or dispense with these formalities. Section 806 of the



Civil Code of 1902, provides: "No accounts shall be audited, and ordered to be paid by the county board of commissioners for any labor performed, fees, services, disbursements, or any other matter, unless it shall be made out in items and accompanied with an affidavit attached thereto, and made by the person or officer presenting or claiming the same, that the said items are correct, and that the labor, fees, disbursements, services, or other matters charged therein have been in fact, done, made, rendered or are due, and that no part of the same has been paid or satisfied. And the clerk of the court, the sheriff and magistrate shall declare further on oath that the costs in such cases have not been recovered out of the defendants, and that the defendants are unable to pay costs; and also that the fines and penalties heretofore collected by them have been faithfully and fully paid over to the county treasurer. In every case the magistrate shall exhibit the original papers in which costs have accrued. Nothing in this section shall be construed to prevent the board from disallowing any account, in whole or in part, when so rendered and verified, if it appears that the charges are incorrect or that the services or disbursements have not, in fact, been made or rendered, nor from requiring any other or further evidence of the truth or propriety thereof. No allowance or payment beyond legal claims shall ever be allowed. And the board may refuse to audit or allow any claim or demand whatsoever, unless made out and verified in the manner herein specified. No fees shall be paid by the county commissioners for the proof of any claim or claims presented to them against their respective counties. All public officers are required to probate without compensation all claims against their respective counties."

There is some confusion in the verbiage, in that the first part of the section explicitly forbids the county board of commissioners to audit or order to be paid claims of any sort against the county, unless made out in items and verified in the manner set forth; while, in another sentence, it is provided the board may refuse to audit or allow a claim, unless made out and verified in the manner required. If the provision authorizing, but not enjoining, the board to require itemizing and verification stood alone, there would be strong reason for the implication that the board might dispense with these formalities; but there is no room for such implication when the former part of the same statute expressly exacts that they shall not be dispensed with. There are very strong practical reasons of public policy for regarding the enactment mandatory, and not directory. The items and oath are required not only that the county board of commissioners may be satisfied with the account, but that the board and its successors in office, as well as the grand jury and the citizens at large, may, by examinations of the claims, ascer-

tain how the affairs of the county have been conducted. If it be within the power of the county board of commissioners to audit and approve claims not made out with items and verification, it would be within their power to allow claims so made out as to give no information as to their origin and character, and thus keep those concerned for the welfare of the county and the citizens generally in complete ignorance of the management of public works and the appropriation of the public revenue. There are some expressions in *Myers v. Appleby*, 25 S. C. 103, indicating the inclination of Mr. Justice McGowan to entertain the opinion that an audit and approval, though irregular for lack of items and verification, would be binding on the county; but the mandamus there asked for was refused, and the majority of the court concurred in the result only. These expressions in the opinion are therefore not controlling under the principle of *stare decisis*, though, of course, they are entitled to great consideration as the views of an eminent and learned judge. On the other hand, in the later case (*Green v. County Com'rs*, 27 S. C. 14, 2 S. E. 620), we find this language used by the court tending strongly to sustain the conclusion we have reached that the lack of itemizing and verification is a jurisdictional defect: "If the claim had been allowed, and a warrant for its payment issued, it would have become a part of the records of the office of the county commissioners, and ought to show on its face such facts as would make a proper charge upon the county; whereas, in its present form it shows nothing of the kind." Being an inferior tribunal, the facts necessary to give the county board of commissioners jurisdiction must appear on the record, and, if they do not appear, its judgment may be treated as a nullity wherever encountered. *Devall v. Taylor*, *Cheves*, 5; *McCall v. Cohen*, 13 S. C. 198.

In determining whether the claims were itemized and verified as required by law, substantial, and not technical and precise, compliance with the letter of the statute should be the test. The members of county boards of commissioners, as well as the persons with whom they deal, are not usually learned in the law nor accustomed to technical accuracy, and therefore it could not have been contemplated that anything more than such substantial compliance with the statute as would meet the purpose in view should be necessary to the jurisdiction of the board.

Those claims for work done on bridges must be considered in view of another statute, section 1354, Civ. Code 1902, which requires: "All work on bridges given out by the county supervisor, when the amount shall exceed the sum of ten dollars, shall be done by contract. When the amount shall exceed the sum of one hundred dollars, the county supervisor is hereby required to ad-

vertise the same in at least one of the papers of the county; said proposal shall in all such cases be accompanied by two or more sufficient sureties. When the amount is less than one hundred dollars and is over ten, he is required to advertise the same by posting a notice in three public places, one of which must be at the place where the work is to be done; said notices to be posted ten (10) days prior to the day on which the work is to be let, and the county supervisor shall have the right to reject any or all bids if in his judgment the interest of the county so requires." The question is not involved here whether one who bids and contracts in pursuance of his accepted bid with the county supervisor for work on bridges under this statute is bound to see that all the requirements of the statute as to advertisement are followed; but it is certainly a condition of the power or jurisdiction of the county board of commissioners to allow his claim that a contract should be in existence, for the language of the statute is mandatory, and not permissive, as it was in the statute construed in *Dillingham v. Spartanburg*, 75 S. C. 549, 56 S. E. 381, 8 L. R. A. (N. S.) 412, 117 Am. St. Rep. 917, and a claim presented under such a contract is not properly itemized unless the contract is so referred to that it may be identified.

It is to be further borne in mind, in deciding whether claims are properly "made out in items," that section 808 of Civil Code of 1902 provides: "No claim against any county of this state shall be valid and payable unless the same be presented to and filed with the county board of commissioners of such county during the fiscal year in which it is contracted or the next thereafter." Reading this statute and section 806 together, it seems clear that no claim can be said to be "made out in items" which does not indicate at least the year in which it arose, so as to inform the county board of commissioners, and others concerned, whether the claims arose within the period limited by the statute.

To "itemize an account" means to state in detail the particulars of it, so that the account may be examined and its correctness tested. When merely the different articles furnished or the different services rendered are set down without dates, one of the most important particulars necessary to the examination of the account is omitted. Especially is this true when the board whose duty it is to examine into the correctness of the account is limited to the consideration of claims arising within the current or preceding year. It remains to consider the accounts in detail and determine whether they were presented in such form that the county board of commissioners had jurisdiction to audit and adjudge them valid claims against the county of Greenville.

The verification of all the claims, as ap-

pears by affidavits of former clerks of the county boards of commissioners, is in the following form, with slight variations furnished by the successive boards and in general use since 1885: "State of South Carolina, County of Greenville. Personally appeared before me ———, and made oath in due form of law that the above account is correct, just, and due for ——— dollars, and that no part thereof has been paid. Subscribed and sworn to this ——— day of ———, A. D. 190—. [L. S.] Notary Public for S. C." While a more explicit following of the words of the statute would have been better, the verification is a substantial compliance with the statute.

Under the conclusion stated as to the meaning of the statute requiring accounts against the county to be "made out in items," the following accounts as enumerated in the petition were presented so itemized and verified as to give the county board of commissioners jurisdiction to audit and approve them, and the audit and approval of the board made the judgments against the county: No. 24, for \$33.50; No. 25, for \$44; No. 26, for \$48.10. The same is true as to the first three charges on account No. 7, amounting to \$300.95, less a payment of \$173.35. On this last account it is true the dates of the sale of lumber are not set down in the body of the account, but the bills of lading attached show the date of the shipment. The claim of W. N. Miller for a balance of \$31, and the claim of J. N. King for \$98, numbered respectively 3 and 17 in the petition, have been lost. Affidavits as to these claims have been submitted without objection, and counsel for respondents have filed a written statement saying as to these claims: "We will not insist upon any other invalidity in the form of the claims than such as may be disclosed by Mr. McCollough's petition for mandamus." The petition described both claims as itemized, verified, and approved, and therefore they are to be regarded as judgments against the county.

The petitioner is therefore entitled to a writ of mandamus requiring the county board of commissioners of Greenville county to include in its estimate to be submitted to the General Assembly these claims and items as adjudicated debts for expenses incurred by the county board of commissioners, and it is adjudged that the writ do accordingly issue. As to all the other claims, the petition for the writ of mandamus is denied. In these other accounts, the charges for bridges are over \$10 and refer to no contract. One of the accounts was not verified before an officer. Some of the charges for labor and for lumber and other articles furnished may be sufficiently specific, but others are quite indefinite, giving no information as to their origin. The fatal objection to them all is that no date, not even the year, is given when the service was rendered or the ar-

title furnished to the county. It is hardly necessary to say this judgment does not affect the right of the county of Greenville to assail the judgments of the county board of commissioners for fraud by a direct proceeding, nor does it affect any right the petitioner may have to present any of the claims to the county board of commissioners of Greenville county in the form required by law for their audit and approval.

### FOLK v. GRAHAM.

(Supreme Court of South Carolina. Nov. 28, 1908.)

#### 1. COVENANTS (§ 46\*)—CONSTRUCTION—SUBJECT-MATTER.

A covenant of warranty, in a deed of a tract of land containing 1,276 acres, more or less, and warranting but 1,000 acres, does not extend to and cover all the land embraced in the deed, but is limited to 1,000 acres.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 46.\*]

#### 2. COVENANTS (§ 130\*)—BREACH—DAMAGES.

In an action for breach of a covenant of warranty, recovery is limited to the difference between the number of acres held and the number warranted.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 253; Dec. Dig. § 130.\*]

#### 3. COVENANTS (§ 130\*)—BREACH—DAMAGES.

In an action for breach of a covenant of warranty, a recovery is limited to the purchase price of the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 245-253; Dec. Dig. § 130.\*]

#### 4. DEEDS (§ 110\*)—CONSTRUCTION—QUESTIONS FOR JURY.

The construction of a deed offered in evidence is for the court, and it was error to receive the evidence of a party as to his construction thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 255; Dec. Dig. § 110.\*]

#### 5. DEEDS (§ 90\*)—CONSTRUCTION—TRANSPPOSITION OF WORDS.

The intention must be gathered from the whole deed; and, if the intention requires a transposition of words, such transposition will be made.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 236; Dec. Dig. § 90.\*]

Appeal from Common Pleas Circuit Court of Bamberg County; R. C. Watts, Judge.

Action by John H. Folk against Benjamin Graham. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

R. C. Holman and B. T. Rice, for appellant. James Aldrich Wyman, for respondent.

POPE, C. J. The plaintiff by his amended complaint alleges that on the 26th day of February, 1901, the defendant, for a valuable consideration, conveyed by deed, to the plaintiff in fee simple, a certain tract of land situate in Bamberg county, containing 1,276 acres, more or less, while the grantor only warrants 1,000 acres. That the deed contained the usual covenant: "And I do hereby

bind myself and my heirs," etc.; that the plaintiff lawfully entered upon a part of the said premises and became seized thereof accordingly, but a portion was in the possession of one Mrs. Julia R. Carroll, who claimed the same as her own; that the defendant has not warranted and defended that portion occupied by Mrs. Carroll; that plaintiff brought action in the court of common pleas for the recovery of same, and a verdict was rendered in favor of Mrs. Carroll, and that Mrs. Carroll still lawfully holds him out of the same to his damage \$500; that the said premises so occupied are within the bounds of the land conveyed by the defendant to this plaintiff. The second and third causes of action are the same as the first, except a different parcel of land held by one Jacob Butterfield, and for which he claims damage for \$100, and another portion of said tract, being in possession of persons claiming under Abraham Middleton, for which he claims damages for \$800; the plaintiff demanding judgment in all for \$1,200. The answer of the defendant denies the first, second, third, and fourth paragraphs of the complaint, and alleges that on the 26th day of February, 1901, in consideration of the sum of \$1,000, this defendant conveyed to the plaintiff a tract of land in Bamberg county, but the deed only warranted 1,000 acres, and that in a suit in the court of common pleas the plaintiff agreed in open court to a verdict vesting the same to Julia R. Carroll, and such action relieves defendant from any liability. The answer to the second cause is practically the same as the first, except that defendant denies that the 7 acres of land held by Joseph Butterfield was not described in his deed to plaintiff. The third cause of action, relating to the 69 acres of land held by persons claiming under Abraham Middleton, is not a part of the land conveyed to the plaintiff, but that Middleton holds the land by a title older and better than that of the plaintiff. Wherefore defendant demands judgment that the complaint be dismissed, with costs. This case came on to be heard before Judge Watts in April, 1906, and the following is a copy of the judge's order: "The above-entitled cause coming on to be heard upon the pleadings, a demurrer having been interposed by the defendant on the grounds that the complaint does not state facts sufficient to sustain a cause of action, and upon the additional grounds that the court has no jurisdiction of the defendant, after hearing B. T. Rice, Esq., for the defendant, and J. Aldrich Wyman, Esq., for the plaintiff, it is ordered that the demurrer of the defendant be overruled in all respects except as to the first cause of action, and, as to the same, the second ground of demurrer alone is sustained. Further ordered that the plaintiff have leave to amend his complaint as to the first cause of action set forth in his complaint, and he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall serve a copy of said amended complaint upon the attorney of the defendant, and the said attorney shall have 20 days, after service of amended complaint, within which to answer said complaint." The cause then came on to be heard before his honor R. W. Memminger, and a jury, at the fall term, 1907. After the charge by his honor the jury rendered a verdict in favor of the plaintiff for \$695.80. The defendant now appeals upon six exceptions, which we will consider in their order.

"(1) Because his honor erred in refusing defendant appellant's motion for nonsuit at the trial of the cause, upon the ground that the deed from Benjamin Graham to John F. Folk, dated February 28, 1901, contained a limited warranty to 1,000 acres of land only, and that the testimony of plaintiff John F. Folk, showed that he was in the peaceable possession of at least 1,000 acres of land; and his honor erred in not granting the motion of nonsuit made by the defendant at the close of plaintiff's case." The presiding judge erred in refusing defendant's motion for a nonsuit on the ground that the deed expressly warranted 1,000 acres, and Folk was in the peaceable possession of at least 1,000 acres. It was held in *Easterby v. Helbron*, 1 McM. 462: "It is the fundamental rule of construction of all written instruments by the court to ascertain the intention of the parties from the instrument." See, also, *Morris v. Owens*, 3 Strob. 203. This exception is sustained.

"(2) That his honor erred in charging the jury that the covenants of warranty in the said deed extended to and covered all the lands embraced in said deed, whereas his honor should have held that it was the clear intent of the grantor to convey 1,000 acres of land with the covenant of warranty, and to limit said covenants to 1,000 acres of land only." We think his honor erred in charging the jury as presented by this exception. The grantor clearly warranted 1,000 acres by his deed, and he should have so charged. In the case of *Morris v. Owens*, supra, Judge Wardlaw says: "The declaration that the grantor conveys only 200 acres is equivalent to a declaration that he does convey 200 acres. The reference to the claim of Goode, as a thing whose extent is to be found coupled with the conveyance of 200 acres, is a representation that at least 200 acres will remain after satisfaction of that claim; and the provision for the grantee's right in case that more than 200 acres should remain, with entire silence as to the case of less remaining, and the omission of the words 'more or less,' or any words expressive of uncertainty, show that quantity was in the contemplation of the parties, and the number of acres was an essential part of the contract." See, also, *Whalon v. Kauffman*, 19 Johns. (N. Y.) 97. This exception is sustained.

"(3) Because his honor erred in not charg-

ing the jury that the recovery of the plaintiff could not exceed the value of the land less than 1,000 acres, whereas his honor should have charged the jury that the basis of his recovery should be the number of acres, and the value of said number, between 1,000 acres and the number of acres of which he held in undisturbed possession, and such should have been his honor's construction of said deed and of the warranty and conveyance therein." We agree with the appellant in this exception. The plaintiff's recovery was limited to the difference between the number of acres that he held and the number warranted by the deed, and also he was entitled only to the purchase price per acre of the land. The circuit judge should have charged the jury to this effect, and it was error for him not to do so. This exception is sustained.

"(4) Because his honor erred in admitting the testimony of John F. Folk as to his construction of the deed of Benjamin Graham to John F. Folk against the objection of defendant's counsel, whereas his honor should have held that the said deed was free from ambiguity, and the testimony of John F. Folk should not have been admitted by the court to vary or explain the terms of said deed." The circuit judge should not have received the testimony of the witness Folk as to his construction of the deed of Benjamin Graham to John F. Folk. The deed itself was in evidence, and governed both parties thereto. Folk should not have been permitted to assail that deed before the jury. It was in writing, and the parties thereto are bound by its terms. At any rate, being a paper submitted to the court, the construction thereof should be made by the court, and not by one of the parties. "The intention must be ascertained from the whole deed, and if the intention requires a transposition of words, such transposition will be made." *Evans v. Corley*, 8 Rich. Law, 315, 320. This exception is sustained.

"(5) Because his honor Judge R. C. Watts erred in not sustaining the demurrer of the defendant appellant to the complaint of the plaintiff respondent as a whole, whereas his honor should have held that the demurrer was well taken, and should have dismissed the complaint upon the grounds set out by the defendant in the demurrer." Judge Watts was authorized by law to construe the deed, but in so doing he was bound by the law, and, being so bound, it was incumbent upon him to declare that the plaintiff Folk was bound by the covenants of the deed from Graham, and those covenants must be construed as an entirety. We think that the demurrer was well taken and should have been sustained. This exception is sustained.

"(6) Because his honor erred in not charging the jury that John F. Folk's recovery could not exceed the purchase price per acre

of the lands of which he was ousted by title paramount, and his honor should have held and charged the jury that the plaintiff respondent could only recover the purchase price per acre of the said lands at the time of the alienation of the same to him by the defendant." What we have already held in the foregoing exceptions sustains this exception. *Evans v. Corley*, supra.

It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial granted.

#### HOLDEN v. ALEXANDER.

(Supreme Court of South Carolina. Dec. 1, 1908.)

##### 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—WRITTEN CONTRACT—DEED.

Where a deed described the land as commencing on a rock on the Keowee river at the mouth of the second drain branch running W. 19 chains, thence S. W. to the original line, containing 100 acres more or less, parol evidence was inadmissible to show an agreed line different from that described in the deed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 441.\*]

##### 2. BOUNDARIES (§ 6\*)—"SOUTHWEST COURSE."

Where a deed called for a "southwest course," without stating the degrees, it meant a course equally diverging from south and west or south, 45 degrees west.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 47; Dec. Dig. § 6.\*]

##### 3. EVIDENCE (§ 441\*)—AGREED LINE—DESCRIPTION IN DEED.

Where an alleged agreed line was laid off prior to the execution of a deed describing the boundary, the boundary so described controlled, where it did not coincide with the agreed line.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 441.\*]

Appeal from Common Pleas Circuit Court of Oconee County; D. E. Hydrick, Judge.

Action by William V. Holden against Thomas E. Alexander. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

The exceptions and grounds of appeal are as follows:

"The defendant appeals to the Supreme Court on the following exceptions and grounds of appeal:

"(1) Because the description of the premises conveyed in the deed by Jane Holden, as executrix of Isaac Holden, deceased, to L. F. Moore, on February 2, 1883, being plain and without ambiguity or uncertainty, it was error to admit parol testimony for the purpose of changing, varying, or contradicting the description of the dividing line between the tract of land conveyed by said deed and the remaining portion of the tract of land then belonging to the estate of Isaac Holden, deceased; said dividing line being described in said deed as: 'Commencing on a rock on the bank of Keowee river, at the mouth of

the second drain branch above the original line running west nineteen chains; thence southwest to the original line.' Said description being plain and unambiguous and set forth by courses and distances from a fixed point, it could not be changed, varied, or contradicted by parol testimony, substituting a line of only 15 chains and 90 links to a certain red oak (no such oak being called for in deed), and thence almost south by varying courses and distances to a poplar tree (no such poplar tree being called for in deed), about halfway along the line from said black oak toward the original line, and leaving as open the remainder of said line beyond said poplar tree to the original back line, thereby cutting down and taking from the tract of land included within the boundary described in said deed about 51 acres; and the court erred in not thus holding and ruling.

"(2) Because the court erred in charging the jury as follows: 'When this deed was made, if nothing had been done, if no marks were made on the ground at the time, and if each successive owner just bought that deed, then as a matter of law, that line must run west 19 chains, and after it gets 19 chains run southwest until it gets to the old line. That is, if you find nothing else was done but make out that deed. But if the parties at that time went upon the land and marked out a line and agreed upon that, then they are bound by that, and their successors in title are bound by that, unless you find as a fact, after those lines were marked out, that the title to the land was changed in some one by being in adverse possession of the land for 10 years, because that will, as I told you, give rise to title in itself.' The error being:

(a) The intention or meaning of the parties must be ascertained from the written instrument itself, whether words of grant, covenant, or description, and where only courses and distances from a given monument, natural or artificial, are mentioned in a deed, the boundary of the land must be ascertained by such courses and distances, and it was error to hold and charge otherwise. (b) Courses and distances must govern unless controlled by monuments, natural or artificial, mentioned in the deed or grant, and the court erred in not so holding and charging. (c) Monuments, natural or artificial, cannot be set up by parol testimony so as to change or vary the plain and express terms in the deed or grant, and the court erred in not so holding and charging. (d) Parol evidence is only to be resorted to to show the circumstances under which the deed was made, to define technical terms, or to explain latent ambiguities—and the court erred in not so holding and charging.

"(3) Because the court erred in charging the jury as follows: 'Now then, it is a question of fact for you to say, whether at the

time this deed was made, anything was done to mark out those lines on the ground.' The error being: (a) The submission to the jury of a question that must be answered from the terms of description in the deed, which are plain and unambiguous and should have been construed by the court; (b) because the jury were thus allowed and invited to take into consideration the oral testimony of Jane Holden and W. V. Holden as to an alleged line of only 15 chains and 90 links in length, stopping at a certain black oak and running thence almost south by varying courses and distances to a certain poplar tree, none of such artificial monuments being mentioned in the deed.

"(4) Because the court erred in overruling the objection of defendant to the testimony given by Jane Holden, as follows, to wit: Question by plaintiff's attorney: 'Tell what you did when you marked out the line.' (Defendant objects to any testimony that might tend to contradict or vary the terms of the deed signed by witness conveying said tract to L. F. Moore). Answer: 'We commenced at the river at the mouth of a little drain branch and went up to the top of the hill to an oak. We were to go to the old fence row, but when we got there he decided to come back to the oak, and went straight over to the branch. There was an old road coming down the ridge before we got to the branch. We crossed said old road and went down the ridge to the branch. We agreed for the line to go straight on to the Craig line. Q. State whether or not you made any marks along this line, and what, if any? A. Mr. Moore and my son made marks along the line. I don't know what kind they made. They made some cross marks on the poplar and backed some along the line.' The error being: (a) The intention or meaning of the parties must be ascertained from the written instrument itself, whether words of grant, covenant, or description, and where only courses and distances from a given monument, natural or artificial, are mentioned in a deed, the boundary of the land must be ascertained by such courses and distances, and it was error to hold and charge otherwise. (b) Courses and distances must govern, unless controlled by monuments, natural or artificial, mentioned in the deed or grant, and the court erred in not so holding and charging. (c) Monuments, natural or artificial, cannot be set up by parol testimony so as to change or vary the plain and express terms in the deed or grant, and the court erred in not so holding and charging. (d) Parol evidence is only to be resorted to to show the circumstances under which the deed was made, to define technical terms, or to explain latent ambiguities, and the court erred in not so holding and charging.

"(5) Because the presiding judge erred in refusing motion for new trial on the minutes of the court on the following grounds, to wit: (a) Because, it is respectfully submitted, the

description of the premises conveyed in the deed by Jane Holden, as executrix of Isaac Holden, deceased, to L. F. Moore, on February 2, 1883, being plain and without ambiguity, or uncertainty, it was error to admit parol testimony for the purpose of changing, varying, or contradicting the description of the dividing line between the tract of land conveyed by said deed and the remaining portion of the tract of land from which the portion conveyed was cut off and sold to L. F. Moore; said dividing line being described in said deed as 'commencing on a rock on the bank of Keowee river, at the mouth of the second drain branch above the original line, running west nineteen chains, thence southwest to the original line.' Said description of said line being plain and unambiguous, and set forth in said deed as the dividing line agreed upon by the grantor and grantee, it could not be changed, varied, or contradicted by parol testimony substituting a line of only 15 chains and 90 links to a certain black oak, and thence almost south by varying courses and distances to a poplar tree about halfway along the line from said black oak toward the original line and leaving as open and uncalled for the remainder of said line from said poplar tree on to the original back line, thereby cutting down and taking from the boundary called for in said deed, about 51 acres of the premises granted therein. That the testimony of the witnesses, Jane Holden and W. V. Holden, as to colloquiums, conversations, agreements or acts of the grantor and grantee, with respect to the dividing line previous to the execution of said deed, were merged into the agreement as to the dividing line contained in said deed, and it became the chart for ascertaining the contract between the parties. (b) Because, it is respectfully submitted, it was error to charge the jury that they could consider what was said and done between Jane Holden, as executrix of Isaac Holden, deceased, and L. F. Moore, the grantee, previous to the execution of said deed, with respect to said dividing line, in finding the location thereof; the description of said line set forth in said deed being given by courses and distances commencing at a rock on the bank of Keowee river, and running west 19 chains, thence southwest to the original line. (c) Because, in the description of the premises granted in said deed, there is no mention of a corner on an oak tree any given distance from the rock corner on the bank of Keowee river, no mention of a poplar tree on a branch, and no mention of a line of varying courses and distances between said oak tree and poplar tree, and it is respectfully submitted that it was error to rule as competent the parol testimony of Jane and W. V. Holden as to an alleged line from said oak tree to said poplar tree, and to charge the jury that such oral testimony could be considered in locating the dividing line. (d) Because the oral testimony failed to show any marked line

between said poplar tree and the original or back line, the only marked line attempted to be set up by such testimony being the line commencing at the rock on the bank of Keowee river, and running to said oak 15.90 chains, and thence by varying courses and distances, to said poplar tree on the branch which was orally agreed upon as a corner, the line beyond said poplar tree being simply agreed upon by word of mouth, said dividing line as thus attempted to be set up, by parol testimony, being radically and materially different from the dividing line described in the deed, thereby cutting off a boundary of 51 acres from the area embraced in the description contained in said deed; and, it is respectfully submitted, it was error to hold such oral testimony competent, and to charge the jury that it could be considered in ascertaining the location of said dividing line. (e) Because the verdict is not sustained by the testimony. (f) Because the possession of 51 acres inside the dividing line described in the deed by Jane Holden, executrix of Isaac Holden, deceased, to L. F. Moore, on February 2, 1883, was not adverse, notorious, and continuous by Jane Holden, as such executrix, subsequent to said date; that her possession of the upper or remaining portion of the original tract from which the tract conveyed to Moore was taken could not be extended across or beyond the line described in her deed, without there being entry and holding beyond such line, openly, notoriously, continuously, and adversely for 10 years or more; and that the testimony fails to show any such adverse possession on the part of the plaintiff or of his grantor. (g) Because the deed must be construed more strongly against the grantor, and he is bound by the terms of his deed in the absence of ambiguity or uncertainty, and oral evidence that the grantor measured less than the distance expressly mentioned in his deed is incompetent to show that less passed by the deed than the number stated in it. The intention or meaning of the parties must be ascertained from the written instrument itself, whether words of grant, covenant, or description, and where only courses and distances from a given monument, natural or artificial, are mentioned in a deed, the boundary of the land must be ascertained by such courses and distances. Distances may be increased or decreased, and sometimes courses departed from in order to preserve the boundary, but the rule authorizes no other departure from the former than such as is necessary to preserve the latter. Courses and distances must govern, unless controlled by monuments, natural or artificial, mentioned in the deed or grant. Monuments, natural or artificial, cannot be set up by oral testimony so as to change or vary the plain and express terms in the deed or grant. The intention of the parties must be ascertained from the instrument itself, and, where it is clearly expressed therein, outside evidence

will not be admitted to frustrate it, or to alter the terms of the description. Parol evidence is only to be resorted to to show the circumstances under which the deed was made, to define technical terms, or to explain latent ambiguities, and it was error not to so hold and charge.

"(6) Because his honor erred in charging the jury as follows: 'When I say a deed cannot be varied by parol testimony, it does not mean that the line cannot be shown as to where it was at the time; but, if nothing was done but the making of that deed, it is your duty to find a verdict for the defendant. But if these people went out upon the ground as a part of their contract and marked out a line, then you hold them to the line marked out. If it is different from the line specified in the deed, and if it was attempting to describe the line specified in the deed, then they are bound by it. If they went out and undertook to mark out a line upon the ground, and undertook to describe it in the deed, they are bound by it.' The error being: (a) In locating land covered by a deed the main questions are: What land does the deed cover? What land does the deed show the grantor conveyed? (b) In answering these questions the intention of the grantor must be ascertained from the description of the land contained in the deed, and not from any parol evidence which might tend to contradict or vary its terms. (c) In locating land covered by deed it is the duty of the jury to try and ascertain what land the grantor conveyed, and in doing this they must look to the deed itself and locate the land by that description in the deed which most certainly shows the intention of the grantor. (d) The deed is the repository of the agreement between the grantor and grantee, and a line radically different from the line described in the deed cannot be set up by parol evidence in plain contradiction of the terms of the description set out in the deed. (e) Even the oral testimony in this case failed to show any marked line between said poplar tree and the original or back line; the only line marked as a land line being the one commencing at the rock on the bank of Keowee river and running west 19 chains, the line between said oak tree and said poplar tree being without any surveyors' marks, only a few trees being blazed as if for a fence row on a zig-zag line between said oak and poplar; and said dividing line, as thus attempted to be set up by parol testimony, being materially and radically different from the dividing line mentioned in the deed, thereby cutting off 51 acres from the 126 acres included in the line described in the deed.

"(7) Because his honor erred in submitting to the jury the construction and interpretation of the deed executed by Jane Holden, as executrix of Isaac Holden, deceased, to L. F. Moore, on February 2, 1883, the same being plain and without ambiguity or uncertainty, and the intention of the grantor as

to the premises conveyed by said deed must be gathered from its terms.

"(8) Because his honor erred in refusing to charge the following request of defendant: That if the defendant entered upon the land in dispute in good faith under claim of ownership thereof through the deed executed by Jane Holden, as executrix of Isaac Holden, deceased, to L. F. Moore, of date February 2, 1883, and the successive deeds of conveyance down to defendant, such entry under such claim of rightful ownership not being willful or wanton, plaintiff cannot recover, and the verdict should be for defendant.

"(9) Because his honor erred in refusing to charge the following request of defendant: That the burden is in plaintiff to establish by the preponderance of the evidence that defendant's entry upon the land in dispute was willful and wanton. A wanton and willful entry and trespass is one thing, while an entry under claim of ownership is another, and if the entry by defendant be under claim of ownership, and not willful and wanton, plaintiff cannot recover."

R. T. Jaynes, for appellant. J. R. Earle, for respondent.

POPE, C. J. This action was commenced on the 14th day of December, 1906, by the service of summons and complaint. The plaintiff claims to be the owner of a tract of land in Oconee county containing 200 acres, more or less, and has had possession for more than 20 years. The plaintiff believes that the defendant entered upon a portion of said tract in 1903, and cut timber, that he has never given permission to defendant to enter upon his land, and defendant committed trespass upon said land, and he has been damaged in the sum of \$200. The defendant, answering, denies each and every allegation in the complaint, and says that he is seised in fee and possessed of the tract described in the complaint under a deed dated August 23, 1903, from the Seneca Bank, and denies that he has entered upon land of plaintiff, or cut and removed any trees therefrom, or committed any trespass upon any land of the plaintiff. The cause came on for trial before his honor, Judge D. E. Hydrick, and a jury, at the November term, 1907, of the court of common pleas for Oconee county. Upon agreement of counsel the circuit judge announced that a verdict as to damages would settle the matter as to the land. The jury rendered a verdict for plaintiff for \$80. Defendant now appeals upon numerous grounds. Let the exceptions be reported.

The appellant in his argument discusses the exceptions under the heads: (1) Error in the admission of parol testimony for the purpose of changing, varying, or contradicting the deed; (2) error in charge; and (3) error in refusing new trial. We will now consider these questions and the exceptions relating thereto.

The plaintiff sought to introduce testimony to show that it was agreed between Mrs. Holden, the original grantor, that the dividing line between the said grantor and grantee should be from a rock on the bank of the Keowee river at the mouth of the second drain branch, running to a red oak tree, thence to a poplar tree, thence S. W. to the original line, thence to the beginning. Whereas, defendant's deed requires that the land should commence on a rock on the Keowee river at the mouth of the second drain branch running W. 19 chains, thence S. W. to the original line, containing 100 acres, more or less. Now the plaintiff insisted that it was competent for him to show by testimony a dividing line, and he seeks by the different persons who held the title that such was the dividing line agreed upon by all the parties. The defendant seeks to restrict the line to the language of the deed. The serious question therefore is: Shall this agreed line be the boundary between the parties?

By all the authorities it seems to us that the plaintiff should not have been allowed to introduce testimony showing the dividing line, and the defendant insists that, as was required in *Owen v. Henderson*, 16 Wash. 39, 47 Pac. 215, 58 Am. St. Rep. 17: "That you cannot modify a deed by parol evidence of the understanding of the parties, or show by a prior conveyance that such parol testimony was inadmissible." Also, in *Wynne v. Alexander*, 29 N. C. 237, 47 Am. Dec. 326: "Parol evidence to prove the true boundary is a line of marked trees, not mentioned in the deed, and, varying from the written course and distance, is inadmissible." Also, in *Hamilton v. Cawood*, 3 Har. & McH. (Md.) 437, 1 Am. Dec. 378: "Where a conveyance describes land by course and distance without any natural boundary, the party in locating his land must be confined to courses and distances, and cannot explain by parol proof what land was intended to be conveyed." In *Pack v. Thomas*, 13 Smedes & M. (Miss.) 11, 51 Am. Dec. 135, it is held: "The rule as to varying written instruments by parol evidence is that where the law requires the written instrument, or where the parties adopt that mode of contracting, it is a matter of principle and policy to prevent inferior evidence from being used either as a substitute for or an alteration of the written contract. The operation of the instrument cannot be varied by showing that a different intention existed at the time it was made. Its legal effect must be preserved, and all contemporaneous expressions or circumstances which tend to vary it must be excluded, unless established by proof of the same character." In 4 A. & E. Enc. L. 705, it is stated: "The intention of the parties must be ascertained from the instrument itself, and, where it is clearly expressed therein, outside evidence will not be admitted to frustrate it, or to alter the terms of the description. Parol evidence is only



to be resorted to to show the circumstances under which the deed was made, to define technical terms, or to explain latent ambiguities." In the same volume at page 847, it is said: "The general rule is that parol evidence is not admissible to vary the description of a boundary in a deed." In *Hogins v. Boggs* (Cal.) 34 Pac. 633, it is held: "Where a deed conveys a certain number of feet along the street, beginning at a certain point only that number of feet passed by the deed, and evidence that the grantor measured more than that number of feet is incompetent to show that more passed by the deed than the number of feet stated in it."

Our own cases are to the same effect. As is said in *Martin v. Simpson*, 1 Harp. 454: "The defendant Simpson, having produced a regular chain of title, derived from an older grant than that of the plaintiff Martin, was entitled to a verdict; but in what manner his survey ought to have been closed was the question." On appeal the instruction of the circuit court was held to be erroneous. The opinion of the court was delivered by Mr. Justice Huger, who said: "It is important to the quite enjoyment of landed property that the rules by which it should be located should be simple and few. If a case can therefore be as well decided by an already well known and established rule, it is better to be satisfied with it, than to make a new one, or to resort to another not so well known. It has already been well settled that the courses and distances must govern, unless controlled by artificial boundaries or natural objects." In *Johnson v. McMillan*, 1 Strob. Law, 143, it is held: "The great principle which runs through all rules of location is that, where you cannot give effect to every part of the description, that which is more fixed and certain shall prevail over that which is less so. The rule that natural or artificial boundaries will control distances or courses authorizes no other departure from the course and distance than such as is necessary to effectuate the apparent intention of the grantor." Chief Justice O'Neill, in *Senterfit v. Reynolds*, 3 Rich. Law, 129, says: "There is no doubt that extrinsic evidence may be received to distinguish the subject of a devise when from the words used there is such a description given as can by parol be rendered certain. But this does not intend that the grantor and grantee shall be allowed to give construction to the words used; \* \* \* but his declarations that he intended to convey to such a line when his deed would not warrant such a construction, are plainly inadmissible, on the ground that parol cannot contradict a written instrument."

Mr. Greenleaf on Evidence, at section 277, says: "It is a general rule of evidence long since established and now well settled that parol testimony cannot be introduced to vary, add to, or alter a written instrument which

in itself is plain and free from doubt. The parties themselves having reduced their contract to writing, they are supposed to have done so, in part at least, with a view to exclude everything else but the writing itself, in determining their contract, which writing must be interpreted by the court according to well-established rules not necessary to be here considered. The writing, however, being the act and instrument of the parties, finally and solemnly agreed upon, no other words than those found therein can be added to it or substituted in its stead by oral testimony. Nor can testimony of a previous colloquium or of conversation or declaration at the time when completed or afterwards be offered to explain." As is said in *Starkie on Evidence*, 648: "So we think it is error on the part of the circuit judge in declaring null and void the solemn agreement under seal of the defendant Evans, on the ground that there was a stipulation between the parties to the agreement not embraced within the terms of the writing itself. The language of the instrument is unambiguous, free from doubt, and it was error to permit parol testimony which would tend to enlarge, vary, or contradict its terms."

The deed of Jane Holden to L. F. Moore on 2d day of February, 1883, in plain and unambiguous terms, describes the dividing line between the parties of the tract of land of the estate of Isaac Holden, deceased. It makes no difference that the parties to the deed sought by conversation or act itself to lay down a rule other than that expressed in the deed as the dividing line. It was enough that they agreed and embodied in their deed such dividing line. Having so made their deed, it was not in their power by parol testimony to vary, add to, or modify the same. There is no ambiguity in that deed. There was no necessity to show what was meant by the language used. It was error therefore on the part of the circuit judge to admit any parol testimony to vary, alter, or modify the terms of the deed. While the course "southwest" called for in the deed without stating degrees is unusual, and possibly might not have been intended to mean an exact course, yet southwest means a course equally diverging from south and west, or south 45° west, and when used in a deed a different meaning cannot be given to it by parol testimony. The exceptions relating to this question are sustained.

The circuit judge charged the jury: "If, when this deed was made, these people did nothing more than to make that contract, and if since that time the line has been established by mutual consent of the parties, then it is your duty to find for the defendants; but if, at the time the deed was made, they went out and marked out the line upon the ground which was called for in that deed throughout, and they agreed that should be the line—that is, if both of

them agreed to it, the grantor and grantee in that deed—then they are bound by it. If they didn't do that at the time that deed was made as a part of the contract which they entered into, then neither one of them could afterwards fix that line without the consent of the other, but would be bound to go by the courses and distances called for in the deed." The defendant insists that the charge of the circuit judge was in accordance with the following language used in *Wright v. Willoughby*, 79 S. C. 442, 60 S. E. 973: "While this was the true construction of the deed, the evidence as to location of lines by the surveyors, under any agreement or understanding of the parties, was competent to show settlement of any dispute about the line by the adoption of an agreed line different from that which we have shown Braveboy or the other plaintiff was entitled to insist on under the terms of the deed." There can be no doubt that an agreement acquiesced in by the parties fixing a disputed line is binding; but this principle does not apply here, because, even according to the testimony offered by the plaintiff, at the time the alleged agreed line was laid off, the deed had not been made, and there was not and could not have been any dispute about the boundaries. On the contrary, conceding the line to have been run as testified by plaintiff's witnesses, the failure to make the lines so actually run correspond with the courses and distances given in the deed was only an error, and, in case of such variance as already shown, the written conveyance must prevail.

Inasmuch as the circuit judge refused to grant a new trial for the correction of the errors made by him, he was in error. The exceptions relating to this question are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial had.

**TAYLOR v. ATLANTIC COAST LINE R. CO.**  
(Supreme Court of South Carolina. Nov. 24, 1908.)

**1. PLEADING (§ 243\*)—AMENDMENTS—ALLOWANCE OF AMENDMENTS.**

Amendments, curing and making complete a faulty and incomplete statement of a cause of action, are properly allowed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 643-651; Dec. Dig. § 243.\*]

**2. PLEADING (§ 248\*)—AMENDMENTS—ALLOWANCE OF AMENDMENTS.**

An amendment alleging negligence, where the original complaint charged wantonness and recklessness, sets up a new cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 693, 694; Dec. Dig. § 248.\*]

**3. APPEAL AND ERROR (§ 1201\*)—DISPOSITION OF CAUSE—PROCEEDINGS IN LOWER COURT—AMENDMENTS.**

Where a cause has been sent back by the Supreme Court to the circuit court for a new

trial, the power of the circuit judge to grant amendments to the pleadings before the new trial is the same as if there had never been a trial, and is not affected by the fact that it is more difficult to convince the judge that it would be in furtherance of justice to allow an amendment raising new issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4679; Dec. Dig. § 1201.\*]

**4. PLEADING (§ 239\*)—AMENDMENTS—POWER TO ALLOW.**

Under the provisions of Code Civ. Proc. 1902, § 194, authorizing the court to amend any pleading by correcting a mistake in the name of the party, or in any other respect, the power to allow such amendment is unlimited, except by the obligation imposed by the section on the court to see that the amendment is in furtherance of justice, and that such terms are imposed as may be just.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 626-635; Dec. Dig. § 239.\*]

**5. PLEADING (§ 248\*)—AMENDMENTS—ALLOWANCE OF AMENDMENTS.**

The power to allow amendments to a pleading by correcting a mistake in the name of a party, or in any other respect, as authorized by Code Civ. Proc. 1902, § 194, is conditioned on proof of a bona fide mistake in setting forth plaintiff's rights and defendant's invasion of them; and, where plaintiff makes the mistake of supposing one of his rights to have been invaded by defendant in one transaction, or a series of transactions relating to the same subject, and discovers that another and different right was in fact invaded, the court may, before trial, when it appears to be in furtherance of justice, grant an amendment, though it changes the cause of action or inserts another cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 686; Dec. Dig. § 248.\*]

**6. PLEADING (§ 245\*)—AMENDMENTS—POWER TO ALLOW.**

The limitation of the power of the court to allow amendments, as authorized by Code Civ. Proc. 1902, § 194, to conform the pleadings to the facts proved, that the amendment shall not change substantially the claim or defense, is by its terms applicable only to amendments proposed while the court is hearing the evidence, or after it has heard it, and not before trial.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 245.\*]

**7. APPEAL AND ERROR (§ 1201\*)—REVERSAL—AMENDMENTS—ALLOWANCE OF AMENDMENTS.**

Where the original complaint was for punitive damages alone, under the allegation that defendant as a carrier wantonly and recklessly violated its duty to plaintiff, a passenger, the allowance of an amendment by the circuit court, after the Supreme Court had sent the case back for a new trial, and before the new trial, so as to charge as negligent the acts and omissions of defendant, described in the original complaint as wanton and reckless, was proper.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4679; Dec. Dig. § 1201.\*]

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Colleton County; D. E. Hydrick, Judge.

Action by Emily Taylor against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. Huger Fitz Simons, for appellant. J. G. Padgett, for respondent.

WOODS, J. The plaintiff at the trial in the circuit court on her original complaint recovered a verdict of \$10,000. On appeal the judgment was set aside, and a new trial ordered. The nature of the act and the circumstances out of which the suit arose are set forth in detail in the former opinion. 78 S. C. 552, 59 S. E. 641. It is only necessary to say here that the original complaint was for punitive damages alone, under the allegation that the defendant, as a common carrier, wantonly and recklessly violated its duty to the plaintiff, as a passenger on its railroad, by not protecting her from indignities alleged to have been inflicted upon her at Green Pond, the station at which she left defendant's car, by a crowd of noisy and drunken negroes. The Supreme Court held there was no evidence of wanton or reckless violation of duty, and that the circuit court for that reason should have granted the motion for a new trial. The Supreme Court further held that the circuit court, in charging that a carrier is bound to exercise the highest degree of care to protect a passenger, and that the relation of carrier and passenger continues after the passenger has left the train at his destination, until he has had a reasonable time to get away, should have charged further that, when the injury complained of results from the acts of strangers on the station premises, "knowledge of the existence of the danger or circumstances from which the danger may have been reasonably anticipated is necessary to fix the liability of the carrier for damages sustained in consequence of failure to guard against it." For these errors a new trial was ordered. Thereafter the plaintiff moved in the circuit court to amend her complaint in several particulars. The proposed amendments which were allowed by Judge Hydrick appear in italics in the amended complaints printed in the record. The effect of the amendments was to insert allegations that the wrongs suffered by plaintiff were inflicted while she was leaving the cars and station of defendant, and before she had a reasonable time to leave; that defendant knew the danger to which the plaintiff would be exposed from the crowd of negroes; that its conductor promised her the protection of an escort, but the agent of defendant at Green Pond, who was provided as her escort, made no effort to protect her; and that the defendant's alleged breaches of duty were negligent, as well as wanton and reckless. The defendant insists the amendment should not have been allowed, because the original complaint failed to state facts constituting a cause of action, and therefore there was nothing by which to amend. It requires no discussion to show that, under the case of *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873, on which defendant relies, the amendments, except that as to the charge of negligence, were allowed to cure and make complete a faulty and incomplete statement of a cause of action.

The important point in the appeal is made

by the objection that amending the complaint so as to charge as negligent the acts and omissions of defendant, described in the original complaint as wanton and reckless, was stating a new cause of action by amendment, and that the Code of Procedure does not allow an amendment which goes to the extent of bringing in a new cause of action. It is well settled that the amendment alleging negligence, where in the original complaint wantonness and recklessness had been charged, sets up a new cause of action. *Machen v. Tel. Co.*, 72 S. C. 256, 51 S. E. 697; *Baldwin v. Cable Co.*, 78 S. C. 419, 59 S. E. 67. There is as little doubt that, when the cause was sent back from this court to the circuit court for a new trial, the power of the circuit judge to grant amendments before the new trial was the same as if there had never been a trial. *Hall v. Woodward*, 80 S. C. 575, 9 S. E. 684; *Pickett v. Ry. Co.*, 74 S. C. 236, 54 S. E. 875. The power to allow amendments at this stage of the case is not affected by the fact that it is, as it should be, more difficult to convince a judge that it would be in furtherance of justice to allow an amendment raising new issues, after the parties had been subjected to the expense and delay of a trial in the circuit court and on appeal in the Supreme Court. The question then is whether the circuit court had the power, under section 194 of the Code of Procedure, to allow an amendment setting forth a new cause of action. The cases in this state are irreconcilable, and there is a great contrariety of opinion on the subject in other jurisdictions. A review of the cases was recently made by Mr. Justice Jones in *Knight v. Aetna Cotton Mills*, 80 S. C. 213, 61 S. E. 396, and further analysis would not be profitable. The important matter is to state a fixed rule on which the courts and the bar may rely. Section 194, Code Civ. Proc. 1902, provides: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved." Under this section the power of the court to allow amendment, "by correcting a mistake in the name of a party or a mistake in any other respect," is unlimited, except by the obligation imposed by the statute on the court to see that the amendment is in furtherance of justice, and that such terms are imposed as may be just. This power is conditioned on proof of a bona fide mistake in setting forth the plaintiff's rights and the defendant's invasion of them. Unless the amendment proposed relates to the same transaction or the same subject as the original complaint, then it is manifest the plaintiff cannot claim to

have made a mistake in the matter to which his pleading relates. When, however, the plaintiff makes the mistake of supposing one of his rights has been invaded by the defendant in one transaction, or a series of transactions relating to the same subject, and discovers another and different right was in fact invaded, it is within the power of the court when it appears to be in furtherance of justice, to grant the amendment, though in strictness the amendment amounts to a change of the cause of action, or the insertion of another cause of action.

The limitation of the power of amendment to conform the pleadings to the facts proved that the amendment shall not change substantially the claim or defense is by its terms applicable only to amendments proposed while the court is hearing the evidence, or after it has heard it, and not before trial.

The judgment of this court is that the judgment of the circuit court be affirmed.

JONES, J. (dissenting). I am unable to concur in the view that section 194 of the Code permits the insertion of a new and distinct cause of action by amendment. It is contended that the amendment allowed falls within the third class named in said section "correcting a mistake in the name of a party or a mistake in any other respect." In the first place the record fails to disclose that the amendatory matter was omitted from the original pleading as the result of a bona fide mistake. In the second place, it is straining the language quoted to make it cover the insertion of allegations of a new and distinct cause of action. It would seem that the meaning of the language is simply to correct a mistake in the name of a party, and in other respects relevant to the cause of action originally attempted to be stated. This court has repeatedly decided that section 194 does not allow the insertion of a new cause of action by way of amendment. *Ruberg v. Brown*, 50 S. C. 398, 27 S. E. 873; *Proctor v. Railway*, 64 S. C. 491, 42 S. E. 427; *Sutton v. Catawba Power Co.*, 70 S. C. 270, 49 S. E. 863; *Pickett v. Railway*, 74 S. C. 350, 54 S. E. 375; *Mfg. Co. v. Iron Works*, 75 S. C. 350, 55 S. E. 768. The case of *Proctor v. Railway*, supra, expressly decides the very point involved that a complaint alleging a willful tort cannot be so amended as to allege also a cause of action based on mere negligence.

# GERMAN AMERICAN INS. CO. et al. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Nov. 24, 1908.)

## 1. APPEAL AND ERROR (§ 1180\*)—DISPOSITION OF CASE ON APPEAL—GENERAL REVERSAL—EFFECT.

A general reversal of a judgment on appeal, because of the refusal to direct a verdict

and the refusal to grant a new trial in an action instituted before the adoption of Sup. Ct. Rule 27 (56 S. E. v) providing that, when an appeal is sustained on the ground that a verdict should have been directed because of the failure of the evidence, the reversal has the same effect as if a verdict had been returned as directed, operated to send the case back for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4626; Dec. Dig. § 1180.\*]

## 2. APPEAL AND ERROR (§ 1201\*)—GENERAL REVERSAL—DISPOSITION OF CASE AFTER REMAND.

The circuit court may, after an action has been sent back to it for new trial, permit an amendment setting up a new cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4677-4679; Dec. Dig. § 1201.\*]

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Fairfield County; John S. Wilson, Judge. Action by the German American Insurance Company and others against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See 77 S. C. 467, 58 S. E. 337.

Abney & Muller, for appellant. Miller & Whaley and J. E. McDonald, for respondents.

WOODS, J. The plaintiff German American Insurance Company under the principle of subrogation seeks to recover of the defendant the sum of \$1,560.84, the amount of insurance paid by it to the other plaintiffs, the owners of cotton destroyed by fire on the defendant's platform. The vital allegation in the original complaint, on which the liability of the defendant depended, was that the cotton was placed on the platform with the knowledge and consent of the defendant, and there destroyed by fire communicated by sparks from its locomotive engine. The plaintiff German American Insurance Company recovered in the circuit court, but on appeal the judgment was reversed, on the ground that the cotton was placed on the platform under a valid contract, made between the owner and defendant railroad company, exempting the railroad company from liability in these words: "This cotton is deposited on premises of the Southern Railway Company, and the same remain upon the premises of this company without its consent and at your sole risk until tendered and accepted for shipment. W. B. Creight, Agent." By judgment of the Supreme Court the judgment of the circuit court was reversed. This judgment of the Supreme Court rested on exceptions alleging error in the refusal of the circuit court to direct a verdict for the defendant, and the refusal to grant a new trial. Thereafter the defendant made a motion in the circuit court for an order dismissing the complaint and granting leave to enter up judgment for costs against the plaintiffs. The plaintiffs opposed this motion, and moved for leave to amend their complaint by incor-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

porating into it the statement of another cause of action, the vital allegation of which was that the communication of fire from the locomotive engine to the cotton was due to the negligence of the defendant. The defendant's motion to dismiss the complaint was refused, and the plaintiffs' motion to amend was granted. The action was instituted before the adoption of Rule 27 (56 S. E. v), and therefore the general reversal of the judgment of the circuit court on an appeal alleging error in the refusal to direct a verdict, and also the refusal to grant a new trial, did not have the same effect as if the verdict had been directed by the circuit court, but its effect was to send the case back for a new trial. *Lewis v. Hinson*, 64 S. C. 571, 43 S. E. 15; *Wilson v. Virginia-Carolina C. Co.*, 78 S. C. 381, 58 S. E. 1019. The point that the circuit court had no power to allow an amendment setting up a new cause of action has been decided against the contention of the defendant in the recent case of *Taylor v. A. C. L. R. R. Co.*, 62 S. E. 1113.

The judgment of this court is that the judgment of the circuit court be affirmed.

#### STATE v. SOUTHERN RY. et al.

(Supreme Court of South Carolina. Nov. 24, 1908.)

##### 1. ATTORNEY GENERAL (§ 7\*)—STATUTORY PROCEEDINGS—AUTHORITY TO CONTROL.

Act Feb. 22, 1904 (24 St. at Large, p. 665), directing the Attorney General to institute proceedings to test the validity of the lease of the Southern Railway—Carolina Division, to the Southern Railway Company, and requiring the prosecution of such action with all reasonable dispatch, gave to the Attorney General entire freedom of choice as to the nature of the action he would bring, and conferred on him authority to move for the dismissal of an action brought by his predecessor, and to bring another in a different form or on a different theory.

[Ed. Note.—For other cases, see Attorney General, Dec. Dig. § 7.\*]

##### 2. DISMISSAL AND NONSUIT (§ 15\*)—RIGHT TO DISMISS—DISCRETION—STATUTES.

Under Code Civ. Proc. 1902, § 453, providing that generally, in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, an application by plaintiff to discontinue an action, whether at law or in equity, is addressed to the discretion of the court.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 31; Dec. Dig. § 15.\*]

##### 3. DISMISSAL AND NONSUIT (§ 15\*)—ORDER—CONSTRUCTION.

Where the Attorney General stated no reason for a motion to discontinue an action by the state, and did not deny facts showing that such discontinuance would be exceedingly prejudicial to defendant, and the court's order recited that it was the court's opinion that the Attorney General had the right to discontinue on payment of costs, it was not granted in the exercise of discretion, and was therefore error.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 31; Dec. Dig. § 15.\*]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by the state against the Southern Railway and others. From an order granting leave to the Attorney General to discontinue the action, defendants appeal. Reversed without prejudice.

B. L. Abney, A. I. Smythe, and D. S. Henderson, for appellants. J. Fraser Lyon, Atty. Gen., and G. Duncan Bellinger, for the State.

WOODS, J. The defendants appeal from an order granting leave to the Attorney General to discontinue this action instituted in behalf of the state, as directed by the act of the General Assembly of 22d February, 1904 (24 St. at Large, p. 665). The questions to be decided are: First, did the statute under which the action was brought require the Attorney General to carry the pending cause forward to a final determination of the issues? Second, did the circuit judge have the power in his discretion to refuse the motion to discontinue? Third, did the circuit judge fail to exercise his discretion and grant the order on the ground that the Attorney General had the absolute right to discontinue beyond the control of the court?

The first question presents small difficulty. The Attorney General, it is true, is under a strong mandate of the General Assembly, expressed in the act of 1904, to use all reasonable dispatch in bringing the issues referred to in that act to judicial decision. But the statute gives him entire freedom as to the precise nature of the action he shall bring. Certainly there is nothing in the statute indicating a purpose to prevent his discontinuing an action improperly brought, or to restrict in any manner his full control of the conduct of litigation. Nothing but the most explicit legislative expression should induce the court to hold that it was the intention of the General Assembly to embarrass the Attorney General by denying to him the power and responsibility of conducting the litigation according to his judgment. The power to move to discontinue the pending action and to institute another, not being denied in the act, is to be implied as an incident of the general control of the litigation contemplated.

The second question is one of legal principle, not dependent on the facts of the case. The rule has been long established by a number of cases that motions to discontinue in equity causes are addressed to the discretion of the court, and will be refused when a discontinuance would work prejudice to the defendant. *Bethia v. McKay*, Cheves, Eq. 93; *Muldrow v. Du Bose*, 2 Hill, Eq. 375; *Bank v. Rose*, 1 Strob. Eq. 257; *Ancker v. Levy*, 3 Strob. Eq. 210; *Adger v. Pringle*, 11 S. C. 547; *Latimer v. Sullivan*, 37 S. C. 120, 15 S. E. 798. The rule was otherwise with respect to actions at law, and the plaintiff could discon-

tinue or take a nonsuit at his pleasure, even after notice of discontinuance filed by the defendant. *Usher v. Sibley*, 2 Brev. 32; *Johnson v. Basquere*, 1 Speers, 329; *Branham v. Brown*, 1 Bailey, 262. In *Bethia v. McKay*, supra, Chancellor Harper, for the court, expressed dissatisfaction with this technical distinction between the practice at common law and in equity, but said it had been too long established to be disturbed. The reason for dissatisfaction with a rule that one man should be allowed to draw another into litigation and drop him out at pleasure, without a decision of the issue tendered, is much stronger now since costs have been practically abolished, and the penalty of having to pay them no longer deters plaintiffs from seeking unfair discontinuances. We think, however, the Code of Civil Procedure of 1902, adopted since the decision of the cases last cited, not only allows, but requires, that the artificial distinction should be abolished, and that the rule of practice in equity making discontinuance depend on the discretion of the court should be applied to legal actions. Section 453 provides: "Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail." Accordingly, in *Inman v. Hodges*, 80 S. C. 455, 61 S. E. 958, which was a legal action on an overdraft, when plaintiffs insisted on their right to discontinue, although the defendants had set up a counterclaim, the court held the motion to be addressed to the discretion of the court. This conclusion that it was within the discretion of the circuit court to grant or refuse the motion for leave to discontinue, without respect to the nature of the action, makes unnecessary consideration of the elaborately argued question whether this action should be regarded legal or equitable.

It is next to be determined whether the record shows the circuit court granted leave to discontinue on the ground that it had no discretion to do otherwise. All the judicial power with which a tribunal is invested by law enters into and supports its judgments. Hence, when a court makes an order which it was within its discretion to grant or refuse, the strong presumption is that the power of discretion was exercised. To overcome this presumption the record must affirmatively show that the order was granted, because of an erroneous conclusion that the court was without discretionary power to refuse it. The order now under review was thus expressed: "This case comes before the court on motion of the Attorney General to withdraw his complaint herein and discontinue these proceedings. After hearing argument on both sides, it being the opinion of the court that the Attorney General has the right and authority to discontinue such proceedings, and that an order to that effect should be granted upon payment of costs, it is order-

ed and adjudged that the clerk of this court do within fifteen days tax the proper costs and disbursements in these proceedings, and that, upon the payment of the plaintiff of the costs and disbursements so taxed, the plaintiff have leave to withdraw the summons and complaint and discontinue this action, without prejudice." The order then rests on the finding "that the Attorney General had the right and authority to discontinue such proceedings." It would be difficult to use language more strongly implying lack of power by the court to exercise any control, and the right of the Attorney General to discontinue as a matter of course. To remove all possibility of doubt, however, it is important to consider the history of the cause and the facts appearing in the record to ascertain if there is any ground upon which the court could have rested the order in the exercise of its discretion. The absence of any such ground would throw strong light on the language of the order, and remove any doubt that the order was granted because in the view of the court there was no discretion to refuse it.

The two main purposes for which the action was brought on behalf of the state by Hon. U. X. Gunter, Attorney General, a predecessor of the present Attorney General, were, first, to have annulled the agreement for consolidation made by the Asheville & Spartanburg Railroad Company and the South Carolina & Georgia Railroad Extension Company, under which agreement the railroads named were, as the complaint alleges, consolidated and merged on 23d June, 1902, into one corporation called Southern Railway—Carolina Division; and, second, to have annulled a lease executed on 30th June, 1902, by Southern Railway—Carolina Division, to Southern Railway Company. Both the consolidation and lease were undertaken and carried into practical effect in strict conformity with an act of the General Assembly passed on the 19th day of February, 1902 (23 St. at Large, p. 1152). The pivotal issue in the cause was, whether this act of the General Assembly was unconstitutional in that it contemplated the consolidation of competing railroads and a lease of the consolidated railroad to a competing railroad. The section of the Constitution relied on provides: "No railroad, or other transportation company, and no telegraph or other transmitting corporation, or the lessees, purchasers or managers of any such corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or other transportation, telegraph or other transmitting company owning or having under its control a parallel or competing line; and the question whether railroads or other transportation, telegraph or other transmitting companies are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil causes." Article 9, § 7. The

answers are very full, but it is only necessary to say here that they deny that any of the railroads embraced in the consolidation or in the lease were lines competing with each other within the meaning of the Constitution. Upon the decision of this issue of fact as to whether there had been a consolidation and a lease of railroads competing with each other, depended affairs of great moment both to the state and to the corporation involved. The state was concerned because its people had ordained that the union of competing railroads was detrimental to their interests and should not be allowed, and it was further concerned that the railroads involved should be relieved of uncertainty as to their legal status, to the end that they might have no excuse in such uncertainty for not rendering efficient service at the least cost to the people of the state. The defendant railroad companies were vitally concerned because the uncertainty as to their corporate status and corporate rights would of necessity produce doubt and distrust of their corporate securities, and prevent the Southern Railway Company, whose lease is attacked, from undertaking development and improvement. But the importance to the railroads concerned of a speedy decision of the issues was made still more urgent by the fact that numerous suits had been instituted against them under section 2210 of the Civil Code of 1902, which provides: "Any railroad company owning, leasing or operating competing railroad lines within this state in violation of law shall be subject to a penalty of one hundred dollars for every day that such competing lines are owned, leased or operated, such penalty to be recovered in any court of competent jurisdiction in any county through which either of such competing lines may pass, by any citizen thereof who may sue for the same, one-half of such penalty to go to the party suing therefor and the other half to the state: Provided, that the provisions of this chapter shall be without prejudice to any remedy which the state may be entitled to in its own behalf." In view of these things, there was no room for the court to doubt that the defendants were vitally interested in a speedy trial of the issues tendered, and would be materially prejudiced by discontinuance of the action. In deciding the motion for discontinuance, not only was the court bound to give these interests of the defendants consideration under the general principles of law, but a very strong obligation was placed on the circuit court, and on this court as well, to keep in view the rights of the defendants, by the special enactment of the General Assembly that there should be a speedy trial in the interest of the defendants as well as the state.

The act of 1904, directing the Attorney General to bring a test action, not only recites the precise conditions which we have set out as a reason for requiring the action

to be brought forthwith, but it especially enacts: "That any and all proceedings instituted by the Attorney General under or in pursuance of the terms of this act, shall have precedence in any and all courts of this state, over any and all other cases then upon the calendars of the said courts for trial therein, and the final decision therein shall be had and rendered at the earliest practicable moment." Indeed, the statute shows in almost every line the legislative recognition of the great importance to the people and the railroads of the speedy decision of the issues, and of the legislative intention to discharge a public duty by requiring the Attorney General to bring the test action not only in justice to the people, but also to save the railroad companies from the loss produced by the uncertainty as to their legal status and rights. Further, it conferred on both parties—the state and the railroad companies—in language which could not be misunderstood, the right to demand of each other and to ask of the courts a trial of the issues at the earliest practicable moment. In addition to all this the cause had so far progressed towards a decision of the important issues to which we have adverted that counsel had entered into a stipulation that it should be tried during the year 1907. The issues had been framed for trial; references had been held to take testimony in Aiken, Camden, Kershaw, and Orangeburg; and the venue had been changed from the county of Kershaw to the county of Richland. Presumably, the defendants had incurred considerable expense in these proceedings. The motion for discontinuance was made without previous notice, and when the defendants were present with their witnesses ready for trial. When all the peculiar circumstances are considered, it would be difficult to state a case showing more strongly that a discontinuance would work hardship to defendants.

Notwithstanding all this, there might have been good ground for allowing the discontinuance in the exercise of reasonable discretion, for the interest of the state as well as the defendants was to be considered. Indeed, the general rule is that the plaintiff has the right to let fall his action, unless the defendant can show plainly that the discontinuance would work material injury to him. But when the defendant, assuming that burden, plainly shows material injury to himself, then it is plain the plaintiff, in order to bring into exercise the discretion of the court in his behalf, ought to show that some injury would result to him from a trial of the action. So in this case, notwithstanding the great importance to the defendants of a speedy trial of the cause, the court might well have granted the motion upon a showing that a trial of the case would be prejudicial to the state. But the record is entirely devoid of such showing. On the contrary, the motion seems to have been made

on the theory that the Attorney General had an absolute right to discontinue, beyond the control of the discretion of the court. We do not doubt that it ought to be assumed the Attorney General had some reason for the discontinuance, and that his intention was to respect the enactments of the General Assembly and bring the issues referred to in the statute to trial in some other way.

But these reasons were not presented to the court, nor was there any showing that any change was desired in the action by making new parties or inserting new allegations, or raising new issues or the same issues in a different form that could not have been affected by amendment. The defendants were not bound, and still less could the court hold itself bound, by the opinions or conclusions of the Attorney General, as to the sufficiency of his reasons. On the contrary, the question whether the reasons for the discontinuance were of force sufficient to countervail the strong grounds presented by the defendants against the discontinuance was a question for the court to decide in the exercise of its discretion. As these reasons were not presented to the court, the case, as it comes to this court, is this: The plaintiff moves to discontinue without stating any reason; the defendants oppose the motion, showing beyond all doubt that the speedy decision of the issues tendered by the plaintiff is of great importance to them; that the statute under which the action was brought specially provides that they shall have a speedy decision; and that a discontinuance of the action will be seriously prejudicial to them. Not only is this proof of the defendants uncontroverted, but nothing whatever is presented to the court tending to show that a discontinuance is essential to the protection of the interests of the state, or that its interests would suffer any detriment whatever from a trial of the issues as made by the pleadings. This being the case, there was no support for the order in the discretion of the court. Taking this fact in connection with the language of the order, there is no escape from the conclusion that the circuit court did not exercise its discretion, but granted the motion on the ground that it had no power to refuse it.

The judgment of this court is that the judgment of the circuit court be reversed, without prejudice to the right of the Attorney General to renew the motion to discontinue, addressed to the discretion of the circuit court.

#### COLUMBIA, N. & L. R. CO. v. LAURENS COTTON MILLS.

(Supreme Court of South Carolina. Nov. 26, 1908.)

On petition for rehearing. Petition dismissed. For former opinion, see 61 S. E. 1059.

Lyles & Lyles, for petitioner.

PER CURIAM. The court did not intend by its decree to limit the defendant's right of way as set forth in the petition. The whole extent of the right of way fixed by statute remains unaffected by the judgment, except in so far as it has been broken into by the lands actually covered by the structures of the defendant, described in the complaint. The litigation related solely to the land so occupied, and could not result in restricting or in any wise determining the rights of the plaintiff to any other land covered by its right of way of 100 feet on each side of the track.

The petition is therefore dismissed.

#### CRANE'S NEST COAL & COKE CO. v. VIRGINIA IRON, COAL & COKE CO.

(Supreme Court of Appeals of Virginia. Dec. 3, 1908.)

On petition for rehearing. Petition denied.

For former opinion, see 62 S. E. 954.

Ayers & Fulton, J. Norment Powell, and Bond & Bruce, for appellant. D. D. Hull, Jr., Vicars & Peery, and Bullitt & Kelly, for appellee.

PER CURIAM. There are two points made in the petition for rehearing which require an answer:

First. That the court did not consider all of the evidence in the record before it, but based its opinion upon the agreed facts in the ejectment suit, which appear as an exhibit in this record.

This is an error. All the evidence was considered. It is true the opinion refers especially to the agreed facts, because the evidence is there stated in a more convenient and accessible form, and that statement of facts in truth contains in great part the evidence upon which the controversy must turn. The whole record, however, was considered by the court.

The second point is that the opinion sets out the four grounds upon which the appellant claims that the decree ought to be reversed, but fails to pass upon the fourth ground, which is that "the contract from Horn to Litchfield and the deed from Horn to Greenway and Warner are void as to innocent purchasers under Meade (in which class the complainant and its vendors came) because (a) they were not recorded until after Horn conveyed to Meade, and (b) the description is not such as to give notice to third persons."

It is true that the opinion does not in terms traverse this position, but its whole scope and effect, from its statement of facts to its conclusion, controvert and reject the appellant's claim upon this point.

The appellant could only succeed by showing that there had been such a part performance of the contract on the part of those under whom it claims as to entitle it to come into a court of equity and demand its specific execution.

The court thought otherwise, for reasons set forth in the opinion, which are still deemed sufficient, and the petition to rehear is therefore denied.

Denied.

#### KAHLE v. PETERS, Mayor et al.

#### SCHOEW v. SAME.

(Supreme Court of Appeals of West Virginia. Oct. 6, 1908.)

For majority opinion, see 62 S. E. 691.

McWHORTER, J. (dissenting). I cannot concur in the opinion in this case, because I can have no doubt in my mind of the uncon-



stitutionality of the statute requiring a qualification for holding office in addition to that required by the Constitution, as is well shown in the dissenting opinion of Judge Brannon in the case referred to of *State v. McAllister*, 33 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. I do not see that I could add anything to the (to me) unanswerable argument contained in said dissenting opinion. The doctrine of stare decisis has no application when the constitutionality of a statute is involved. It may be said this court is bound by its own decisions, and this is true where there is no higher obligation resting upon the court; but we must not forget that the Constitution itself is higher authority than any decision of this court. As stated in the opinion: "After a question has been as thoroughly considered and decided as the one disposed of in *State v. McAllister*, supra, some stability should be attached to it, and it should not be overthrown for slight reasons." I fully agree with this proposition; but, if to my mind the decision was clearly and unquestionably in conflict with the provisions of the Constitution, it is my duty to do all I can to "overthrow" or overrule it, although others do not view it in the same light.

The reason for "overthrowing it" is not slight, but of the most serious character. I ascribe to all my colleagues the same conscientious desire to reach true conclusions as I take to myself. The only difference is we do not see alike. In *Ward v. County Court*, 51 W. Va. 102, 41 S. E. 154, I could not agree with the opinion, and wrote a note, which is found at page 106 of 51 W. Va., page 156 of 41 S. E., wherein I stated that I did not desire to dissent from the majority of the court, and could not concur, but simply acquiesced in the opinion because of the former "holdings of this court in sustaining the constitutionality of acts of the Legislature taking from the county court the superintendence and administration of the police affairs of their counties and committing the same to the municipal authorities of cities, towns, and villages, in so far as relates to the granting of license therein for the sale of intoxicating liquors." I have never been satisfied with that "acquiescence." Not having the shadow of a doubt of the unconstitutionality of those acts, my action should have been a positive dissent, as it is in this case, for the same reason; and this with all due respect to the opinion of my Brethren.

END OF CASES IN VOL. 62.

# INDEX.

## ABANDONMENT.

Of appeal or writ of error, see Appeal and Error, § 8.  
Of assignments of error, see Appeal and Error, § 19.  
Of railroad right of way, see Railroads, § 2.

## ABATEMENT.

Pleas in abatement, see Pleading, § 3.

## ABATEMENT AND REVIVAL.

Election of remedy, see Election of Remedies.  
Judgment as bar to another action, see Judgment, § 6.  
Pleas in abatement, see Pleading, § 3.  
Revival of judgment, see Judgment, § 10.  
Right of action by or against personal representative, see Executors and Administrators, § 8.

### § 1. Another action pending.

It is not error to strike a plea in abatement in an action on an unconditional written contract, based on the pendency of a suit on an open account between the same parties, after settlement, and where, in the absence of agreement as to costs, defendant became by law liable therefor.—*Graham v. Massengale Advertising Agency* (Ga. App.) 567.

The pendency of an action against a partnership in which a dissolution and accounting was sought by one partner against his codefendant, which issues had been referred by consent for the statement of an account between the partners, *held* ground for abatement of a second action between the partners alone for dissolution.—*Emry v. Chappell* (N. C.) 411.

\*It is ground for abatement of an action that a prior suit is pending in a court of competent jurisdiction in which the plaintiff can obtain all of the relief which he could in the second; and it is immaterial that there are other parties to the first suit, or that the parties occupy different position on the record.—*Emry v. Chappell* (N. C.) 411.

\*The pendency of another suit as a ground of abatement may be pleaded by way of answer, where it does not appear from the face of the complaint.—*Emry v. Chappell* (N. C.) 411.

### § 2. Waiver of grounds of abatement and time and manner of pleading in general.

§ 81. A plea that the suit against defendant as an individual was based upon a partnership liability *held* a dilatory plea, and must be filed under oath at the first term under the express provisions of Civ. Code 1895, § 5058.—*Bray v. Peace* (Ga.) 1025.

## ABUSE OF PROCESS.

See Process, § 2.

## ABUTTING OWNERS.

Assessments for expenses of public improvements, see Municipal Corporations, § 6.

\*Point annotated. See syllabus.

Compensation for taking of or injury to lands or easements for public use, see Eminent Domain, §§ 2, 4.  
Rights in streets in cities, see Municipal Corporations, §§ 6, 8, 9.

## ACCEPTANCE.

Of dedication, see Dedication, § 1.  
Of deed, see Deeds, § 1.  
Of goods sold in general, see Sales, § 3.  
Of lease, see Landlord and Tenant, § 2.

## ACCIDENT.

Cause of death, see Death, § 2.  
Cause of personal injuries, see Negligence, §§ 1, 2.

## ACCOMPLICES.

Testimony, see Criminal Law, § 12.

## ACCORD AND SATISFACTION.

See Compromise and Settlement; Payment; Release.

## ACCOUNT.

See Account, Action on; Account Stated.  
Copies of accounts alleged or annexed in pleading, see Pleading, § 7.  
Itemized statements of claims against county, see Counties, § 4.

*Accounting by particular classes of persons.*

See Executors and Administrators, § 9.  
Committee of lunatic, see Insane Persons, § 1.  
Trustee, see Trusts, §§ 3, 4.

### § 1. Proceedings and relief.

§ 17. Amendment of a bill for an account by asking to have a stated or settled account set up in bar, surcharged, or settled *held* allowable.—*Branner v. Branner's Adm'r* (Va.) 952.

## ACCOUNT, ACTION ON.

Copies of accounts alleged or annexed in pleading, see Pleading, § 7.  
Requests for instructions, see Trial, § 10.

§ 7. In an action on an account, evidence as to plaintiff's habit of drinking liquor excessively was admissible to show that plaintiff was not competent to transact business or to keep the account correctly.—*Davis v. Stephenson* (N. C.) 900.

## ACCOUNT STATED.

§ 6. When an account is rendered, a failure to object to it within reasonable time will be regarded as an admission of its correctness by the party charged.—*Davis v. Stephenson* (N. C.) 900.

§ 20. Whether an account rendered and kept by the debtor for reasonable time without objection to it thereby became an account stated

was for the jury.—*Davis v. Stephenson* (N. C.) 900.

§ 15. A suit to surcharge or falsify a settled account *held* not barred by laches.—*Branner v. Branner's Adm'r* (Va.) 952.

## ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see Evidence, § 6.

## ACTION.

Abatement, see Abatement and Revival.

Bar by former adjudication, see Judgment, § 6.

Election of remedy, see Election of Remedies.

Jurisdiction of courts, see Courts.

Limitation by statute, see Limitation of Actions.

Malicious actions, see Malicious Prosecution.

Pendency of action, see Abatement and Revival, § 1.

*Actions between parties in particular relations.*

See Landlord and Tenant, § 4; Master and Servant, §§ 2, 10-14.

Bailor and bailee, see Bailment.

Co-tenants, see Partition, §§ 1, 2.

Joint debtors, see Contribution.

*Actions by or against particular classes of persons.*

See Aliens, § 1; Carriers, §§ 2-13, 15; Corporations, § 3; Counties, § 5; Executors and Administrators, § 8; Husband and Wife, § 4; Infants, § 2; Master and Servant, § 15; Partnership, § 3; Principal and Agent, § 3; Receivers, § 1; States, § 1; Street Railroads, § 2.

Assignees, see Assignments, § 3.

Connecting carriers, see Carriers, § 10.

Devisees, see Wills, § 11.

Heirs or distributees, see Descent and Distribution, § 1.

Remaindermen, see Remainders.

Telegraph or Telephone company, see Telegraphs and Telephones, § 2.

*Actions relating to particular species of property or estates.*

Mineral lands, see Mines and Minerals, § 1.

*Particular causes or grounds of action.*

See Account Stated; Assault and Battery, § 1; Bills and Notes, § 3; Bonds, § 1; Conspiracy, § 1; Contribution; Death, § 2; Forceful Entry and Detainer, § 1; Fraud, § 2; Insurance, §§ 5, 6; Libel and Slander, § 2; Money Received; Negligence, § 4; Torts; Trespass; Trover and Conversion, § 1; Use and Occupation.

Abuse of process, see Process, § 2.

Alienation of affections, see Husband and Wife, § 5.

Bond of receiver, see Receivers, § 2.

Breach of contract, see Contracts, § 4; Sales, §§ 6, 7.

Breach of contract for transportation of passenger, see Carriers, § 15.

Breach of covenant, see Covenants, § 3.

Breach of warranty, see Sales, § 7.

Civil damages for sale of liquors, see Intoxicating Liquors, § 7.

Compensation of attorney, see Attorney and Client, § 2.

Compensation of broker, see Brokers, § 2.

Death of steamboat passenger, see Shipping, § 1.

Delay in delivery of goods shipped, see Carriers, § 6.

Discharge from employment, see Master and Servant, § 1.

Diversion of surface waters, see Waters and Water Courses, § 2.

Failure to deliver or misdelivery of goods shipped, see Carriers, § 5.

Failure to deliver telegram, see Telegraphs and Telephones, § 2.

Fire caused by electricity, see Electricity.

Fires caused by operation of railroad, see Railroads, § 9.

Injuries from defective bridge, see Bridges, § 1.

Injuries incident to construction of railroad, see Railroads, § 3.

Interference with employment, see Master and Servant, § 16.

Judgment in justice's court, see Justices of the Peace, § 2.

Loss of or injury to goods shipped, see Carriers, § 7.

Loss of or injury to live stock shipped, see Carriers, § 13.

Negligence of landlord, see Landlord and Tenant, § 4.

Penalties for violation of regulations by carrier, see Carriers, § 1.

Penalty for illegal sale of fertilizer, see Agriculture.

Personal injuries, see Carriers, § 16; Master and Servant, §§ 10-14; Railroads, §§ 7, 8; Street Railroads, § 2.

Price of goods, see Sales, § 6.

Recovery of goods delivered by seller, see Sales, § 6.

Recovery of money lost at gaming, see Gaming, § 1.

Services, see Master and Servant, § 2.

Taking of or injury to property in exercise of power of eminent domain, see Eminent Domain, § 4.

Wages, see Master and Servant, § 2.

Wrongful ejection of passenger, see Carriers, § 17.

### Particular forms of action.

See Account, Action on; Detinue; Ejectment; Replevin; Trespass, § 1; Trover and Conversion.

### Particular forms of special relief.

See Account; Divorce; Injunction; Partition, §§ 1, 2; Quieting Title; Specific Performance.

Abatement of nuisance occasioned by obstruction of street, see Municipal Corporations, § 8.

Alimony, see Divorce, § 1.

Cancellation of written instrument, see Cancellation of Instruments.

Confirmation of tax title, see Taxation, § 5.

Construction of will, see Wills, § 10.

Determination of adverse claims to real property, see Quieting Title.

Determination of right to use of way, see Easements, § 1.

Disbarment proceedings, see Attorney and Client, § 1.

Discharge of guardian, see Guardian and Ward, § 1.

Enforcement of liens after bankruptcy, see Bankruptcy, § 1.

Enforcement or foreclosure of lien, see Mechanics' Liens, § 1.

Establishment of boundaries, see Boundaries, § 2.

Establishment of lost instrument, see Lost Instruments.

Establishment of will, see Wills, § 3.

Foreclosure of mortgage, see Mortgages, § 5.

Redemption from mortgage, see Mortgages, § 6.

Reformation of written instrument, see Reformation of Instruments.

Removal of cloud on title, see Quieting Title.

Removal of obstruction of private way, see Easements, § 2.

Setting aside execution sale, see Execution, § 5.

Setting aside fraudulent conveyance, see Fraudulent Conveyances, § 3.

Setting aside will, see Wills, § 3.

Trial of tax title, see Taxation, § 5.

\*Point annotated. See syllabus.

*Particular proceedings in actions.*

See Appearance; Continuance; Costs; Damages; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; Parties; Pleading; Process; Removal of Causes; Trial; Venue.

Bill of particulars, see Pleading, § 7.

Nonsuit, see Trial, § 5.

Notice of action, see Process, § 1.

Revival of judgment, see Judgment, § 10.

Verdict, see Trial, § 13.

*Particular remedies in or incident to actions.*

See Attachment; Garnishment; Injunction; Receivers; Set-Off and Counterclaim.

Stay of proceedings, see Appeal and Error, § 5.

*Proceedings in exercise of special or limited jurisdictions.*

Courts of limited jurisdiction in general, see Courts, § 4.

Criminal prosecutions, see Criminal Law.

Suits in equity, see Equity.

Suits in justices' courts, see Justices of the Peace, § 2.

*Review of proceedings.*

See Appeal and Error; Certiorari; Equity, § 4; Exceptions, Bill of; Judgment, § 3; Justices of the Peace, § 3; New Trial.

**§ 1. Grounds and conditions precedent.**

§ 10. Where a statute confers a new right of action and contains a special limitation, but no saving clause, no explanation as to why suit was not brought within the specified time will avail.—Gulledge v. Seaboard Air Line Ry. (N. C.) 732.

**§ 2. Nature and form.**

\*A petition, in which it is uncertain whether it is brought ex contractu or ex delicto, will, in the absence of a special demurrer, be given that construction most favorable to plaintiff's case as laid.—Payton v. Gulf Line Ry. Co. (Ga. App.) 469.

**§ 3. Joinder, splitting, consolidation, and severance.**

\*Rights of a consignee, under Revisal 1905, § 2634, where a carrier fails to adjust a claim for loss of goods, stated.—B. F. D. Albritton & Co. v. Atlantic Coast Line R. R. (N. C.) 597.

§ 60. In slander against two persons jointly, where a demurrer to the complaint was sustained on the ground of misjoinder, plaintiff could have requested the court to divide the actions, and try them separately.—Rice v. McAdams (N. C.) 774.

**§ 4. Commencement, prosecution, and termination.**

\*An action is commenced when the summons served is delivered to the sheriff for service.—Emry v. Chappell (N. C.) 411.

**ACTION ON THE CASE.**

See Trespass, § 1.

**ADEMPMENT.**

Of legacy, see Wills, § 11.

**ADEQUATE REMEDY AT LAW.**

Effect on jurisdiction of equity, see Injunction, § 1.

Effect on jurisdiction of equity to restrain opening of highway, see Highways, § 1.

\*Point annotated. See syllabus.

**ADJOINING LANDOWNERS.**

See Boundaries.

Construction of contract for support of adjoining owner's wall, see Contracts, § 2.

Measure of damages for breach of contract to save adjoining owner harmless from loss by construction of wall, see Damages, § 4.

§ 4. Liability stated of a proprietor excavating on his own premises for damages to adjacent owner.—Contos v. Jamison (S. C.) 867.

**ADJUDICATION.**

Of courts in general, see Courts, § 2.

Operation and effect of former adjudication, see Judgment, §§ 6, 7.

**ADMINISTRATION.**

Of estate of decedent, see Executors and Administrators.

Of estate of ward, see Guardian and Ward, § 2.

Of trust property, see Trusts, § 3.

**ADMIRALTY.**

See Shipping.

**ADMISSIONS.**

As evidence in civil actions, see Evidence, § 6.

By demurrer, see Pleading, § 4.

In pleading, see Pleading, § 5.

**ADULTERY.**

\*A conviction for adultery held entirely without evidence to support it.—Thompson v. State (Ga. App.) 571.

**ADVANCEMENTS.**

Giving agricultural lien, see Agriculture.

**ADVANCES.**

By landlord to tenant, see Landlord and Tenant, § 5.

**ADVERSE CLAIM.**

To real property, see Quieting Title.

**ADVERSE POSSESSION.**

See Limitation of Actions.

As between husband and wife, see Husband and Wife, § 1.

Harmless error in rulings as to sufficiency of color of title, see Appeal and Error, § 14.

**§ 1. Nature and requisites.**

An ordinary's order awarding certain land to a widow for a year's support held unavailable as color of title.—Hawes v. Elam (Ga.) 227.

Where one having color of title conveyed the timber on the land to A. for 12 years, and thereafter conveyed the land to B., subject to the timber conveyance, and B. entered and remained in exclusive possession for 7 years, defendant in an action for trespass by the holder of the title from the state was entitled to plead such possession as establishing prescription in A.—Moore v. Ensign-Oscamp Co. (Ga.) 229.

§ 55. Where to secure a petition brought by the heirs at law of the obligee in a bond to cancel a void sheriff's deed, on a sale of the prop-

erty under an execution in favor of a third person and to set up that the mesne profits were sufficient to satisfy the debt of their ancestor, the petition should not be dismissed on the ground that the obligor had title by prescription, it being alleged that the obligee died within less than seven years after the sheriff's sale and that all but two of his heirs were minors.—*Buchan v. Williamson* (Ga.) 815.

§ 77. Executor's deed *held* good as color of title, without producing order of sale or testator's will.—*Dodge v. Cowart* (Ga.) 987.

§ 70. A deed executed prior to Code 1895 *held* not required to be recorded in order to operate as color of title, so that possession of a part of a tract of land would extend to the limits of the tract.—*Dodge v. Cowart* (Ga.) 987.

\*Essentials of a possession giving title to the land by limitations stated.—*Haddock v. Leary* (N. C.) 426.

A stated presumption in favor of one entering land under color of title, respecting his possession, *held* rebuttable.—*Haddock v. Leary* (N. C.) 426.

\*Where plaintiff claimed title to land by adverse possession under color of title, defendant could show that before limitations ran he agreed that a particular line should constitute a boundary.—*Haddock v. Leary* (N. C.) 426.

\*Elements of adverse possession stated.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

\*Limitations begin to run under a tax deed only from the date of the possession under the deed.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

\*Privity must be shown before possession can be tacked so as to constitute adverse possession.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

\*Where one claiming land by adverse possession sold trees thereon to defendant, and by a separate deed sold the surface to another, defendant *held* not entitled to tack the adverse possession of the trees thereafter to the other grantee's adverse possession of the land, so as to complete the 10-year statute of limitations.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

\*An instrument is sufficient to give color of title in adverse possession if it is regular on its face, and the grantee is ordinarily not required to go beyond the writing to determine whether it actually passes title or is void; a rightful title not being essential.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

\*A tax deed gives color of title, though informal or defective or even if absolutely void, unless the land is so insufficiently described as to render identification impossible.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

## § 2. Operation and effect.

§ 100. Civ. Code 1895, § 3586, *held* to apply to a tract of land, notwithstanding it was divided by a stream, and actual possession on but one side will be construed to extend to the boundaries of the tract.—*Dodge v. Cowart* (Ga.) 987.

\*A grantee who actually occupies part only of the land described in his deed must claim to the boundaries in order to acquire prescriptive title to the whole tract.—*Haddock v. Leary* (N. C.) 426.

\*Rule as to constructive possession of one entering land under claim of title by deed stated.—*Haddock v. Leary* (N. C.) 426.

§ 103. Where a junior claimant of land does not connect his title with that of the original

patentee, there is not such contiguity of seisin with respect to dissevered tracts as renders actual possession of one constructive possession of the other.—*Hot Springs Lumber & Mfg. Co. v. Sterrett* (Va.) 797.

## § 3. Pleading, evidence, trial, and review.

Where it becomes material to determine whether the possession of land by a person is in his own right, evidence is admissible that at the time such a person held a bond for title to the land.—*Wiggins v. Brewster* (Ga.) 40.

\*Evidence *held* insufficient to show title by adverse possession.—*Wiggins v. Brewster* (Ga.) 40.

\*As prescription necessarily involves good faith, it is a mixed question of law and fact for the jury.—*Moore v. Ensign-Oscamp Co.* (Ga.) 229.

§ 113. The report of commissioners in partition, found among an allottee's papers and restored to the records on proof of its genuineness, was properly admitted to show color of title to land sued for; all public records of the partition proceedings having been destroyed.—*Hill v. Lane* (N. C.) 1074.

§ 114. Evidence of possession in proof of adverse possession *held* sufficient.—*Sparkman v. Jones* (S. C.) 870.

## ADVERTISEMENT.

Publication of process, see Process, § 1.

## AFFIDAVITS.

See Depositions.

Ex parte affidavit of witness since deceased as evidence, see Evidence, § 12.

False affidavits by attorney as ground for his disbarment, see Attorney and Client, § 1.

*Particular proceedings or purposes.*

See Attachment, § 1; Garnishment, § 2.

New trial in criminal prosecution, see Criminal Law, § 28.

Pauper's affidavit, see Costs, § 2.

Verification of claims against county, see Counties, § 4.

Verification of petition for certiorari to correct errors of criminal court, see Criminal Law, § 4.

## AGENCY.

See Principal and Agent.

## AGREEMENT.

See Contracts.

## AGRICULTURE.

Fertilizers as constituting permanent improvements on land, see Ejectment, § 5.  
Harmless error in action for penalty for illegal sale of fertilizer, see Appeal and Error, § 18.

A demand *held* an advancement, so as to give the claimant an agricultural lien on the crop, with the right to enforce a mortgage on chattels.—*Windsor Bargain House v. Watson* (N. C.) 305.

A nonsuit in an action under Civ. Code 1902, § 1536, for penalty for sale of fertilizer, *held* properly refused, though the inspection tax was paid before the sale was complete.—*State v. Malony* (S. C.) 215.

\*Point annotated. See syllabus.

## ALIENATION.

Of affections, see Husband and Wife, § 5.

## ALIENS.

### § 1. Disabilities.

\*An alien, not an enemy, may maintain an action for personal injuries.—*Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 448.

## ALIMONY.

See Divorce, § 1.

Right to maintain suit for on foreign decree of divorce, see Divorce, § 3.

## ALLOWANCE.

Of claims against county, see Counties, § 4.

To children on divorce, see Divorce, § 2.

To surviving wife, husband, or children of decedent, see Executors and Administrators, § 4.

## ALTERATION.

Of geographical or political divisions, see Counties, § 1; Municipal Corporations, § 1; Schools and School Districts, § 1.

## ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

## AMBIGUITIES.

Construction of ambiguous deed, see Deeds, § 3.

## AMENDMENT.

Rejection of amended pleading as ground for new trial, see New Trial, § 1.

Review of discretionary rulings on amendment to pleading, see Appeal and Error, § 12.

Waiver in appellate court of error in rulings as refusing or permitting amendment to pleading, see Appeal and Error, § 19.

*In particular remedies or special jurisdictions.* See Parties, § 2; Trial, § 14.

*Of particular acts, instruments, or proceedings.* See Indictment and Information, § 5; Judgment, § 2.

Bill in suit for an account, see Account, § 1.

Decree for injunction, see Injunction, § 5.

Pleading in garnishment, see Garnishment, § 3.

Pleading in general, see Pleading, § 5.

Pleading in suit for slander, see Libel and Slander, § 2.

Verdict, see Trial, § 13.

## AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Justices of the Peace, § 1; Removal of Causes, § 2.

## ANCILLARY ADMINISTRATION.

See Executors and Administrators, § 10.

## ANIMALS.

Breach of warranty on sale of horse, see Sales, § 7.

Carriage of live stock, see Carriers, § 13.

Dog as property subject to execution, see Execution, § 1.

Injuries to, from defect in bridge, see Bridges, § 1.

Measure of damages for negligent injury of horses, see Damages, § 4.

Running at large in cities, see Municipal Corporations, § 7.

## ANNEXATION.

Of territory to municipal corporation, see Municipal Corporations, § 1.

## ANNULMENT.

Of will, see Wills, § 3.

## ANSWER.

In pleading, see Pleading, § 3.

## APOTHECARIES.

See Druggists.

## APPEAL AND ERROR.

See Certiorari; Exceptions, Bill of; New Trial. Appellate jurisdiction of particular courts, see Courts, § 5.

Costs, see Costs, § 3.

Review in criminal prosecutions, see Criminal Law, § 27.

Review in partition proceedings, see Partition, § 2.

Review in proceedings for discharge of guardian, see Guardian and Ward, § 1.

Review of proceedings of commissioners in partition, see Partition, § 2.

Review of proceedings of county boards, see Counties, § 4.

Review of proceedings of justices of the peace, see Justices of the Peace, § 3.

### § 1. Decisions reviewable.

A consent that a decree theretofore signed be vacated and re-signed *held* not to constitute such re-signed decree a consent decree so as to estop exceptions thereto.—*Potts v. Prior* (Ga.) 77.

§ 120. Under Civ. Code 1895, §§ 4454, 5852, an appeal *held* to lie to the superior court, though no issue of fact be involved, from a decision of the court of ordinary overruling objections to the application of an administrator or guardian for a discharge and granting such discharge.—*Maloy v. Maloy* (Ga.) 991.

§ 66. A direct bill of exceptions to a ruling made pendente lite, not assigning error upon any final judgment, cannot be considered.—*Jones v. Poole* (Ga. App.) 711.

### § 2. Right of review.

§ 154. Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial judge, he acquiesced in the judgment, and cannot assign it as error.—*Rice v. McAdams* (N. C.) 774.

\*An appellate court will not reverse a decree on the application of an appellant who is clearly shown by the record not to be aggrieved.—*Greenlee v. Steelsmith* (W. Va.) 459.

### § 3. Presentation and reservation in lower court of grounds of review.

\*An assignment that the court erred in not allowing questions to be answered will not be considered where it does not appear that the court was informed what answers were expected.—*McElwaney v. McDiarmid* (Ga.) 20.

A general exception to the final decree and a specific assignment of error on an antecedent ruling will give the reviewing court jurisdiction

\*Point annotated. See syllabus.

where the final decree is excepted to because of the antecedent ruling.—*Potts v. Prior* (Ga.) 77.

\*Grounds of motion for new trial *held* insufficient to require the Supreme Court to pass thereon.—*Sims v. Sims* (Ga.) 192.

§ 303. Grounds of motion for a new trial which are not certified will not be considered.—*Dodge v. Cowart* (Ga.) 987.

§ 294. Point that the court erred in directing a verdict because the evidence was conflicting *held* not presented for review.—*Arnold v. Ragan* (Ga. App.) 1052.

\*Under Supreme Court rule 27 (53 S. E. viii), exceptions to rulings on demurrer for want of facts or want of jurisdiction may be taken *ore tenus*, and exceptions to rulings may be made in the Supreme Court for the first time, or the court may take notice of such suggestions of its own motion.—*Ullery v. Guthrie* (N. C.) 552.

\*Under Revisal 1905, § 1542, an appeal is a sufficient exception to the judgment.—*Ullery v. Guthrie* (N. C.) 552.

\*The Supreme Court must notice, of its own motion, jurisdictional defects in actions before it.—*Harper v. Harper* (N. C.) 553.

§ 197. Defendant *held* not entitled to complain because plaintiff was allowed to prove that certain timber was of greater value than was alleged.—*Teal v. Templeton* (N. C.) 737.

§ 230. Where no issue of limitations was tendered nor the court requested to submit one, the objection to the court's failure to do so comes too late after verdict under Code, § 395, providing that issues must be made up before or during the trial.—*Rich v. Morisey* (N. C.) 762.

\*An exception to exclusion of evidence *held* not to point out any specific error.—*State v. Malony* (S. C.) 215.

\*If the presiding judge misstates the issues raised by the pleadings, a failure of counsel to call attention to the fact is a waiver of the right to raise the question on appeal.—*Jones v. Parker* (S. C.) 261.

\*Objections made to the testimony when depositions were taken, but not called to the attention of the court below, will be treated as waived on appeal.—*Thomas v. Boyd* (Va.) 346.

§ 273. Defendant on appeal by complainant from dismissal of the bill on exceptions to the commissioner's report *held* not entitled to complain of the commissioner's failure to make certain allowances; the report not having been excepted to an account thereof.—*Branner v. Branner's Adm'r* (Va.) 952.

#### § 4. Requisites and proceedings for transfer of cause.

\*Under Civ. Code 1895, § 4466, a bond on appeal from the court of ordinary should be made payable to the appellee, and not to the ordinary of the county.—*Mattox v. Embry* (Ga.) 202.

\*Where a bond on appeal from the court of ordinary properly ran to appellee, but was amended, to prevent a dismissal of the appeal, so as to run to the ordinary, the Supreme Court was authorized by Civ. Code 1895, § 5586, to permit a further amendment by striking such amendment.—*Mattox v. Embry* (Ga.) 202.

§ 384. A bond given to enter an appeal from the court of ordinary to the superior court *held* not invalid, because appellants and their sureties acknowledged themselves bound generally, instead of to appellee.—*Maloy v. Maloy* (Ga.) 991.

§ 384. A bond given to enter an appeal from the court of ordinary to the superior court *held* not invalid.—*Maloy v. Maloy* (Ga.) 991.

A decree, disallowing a committee's claim for support rendered incompetents, *held* interlocutory, from which the committee, though en-

titled to appeal within a year therefrom, under Code 1904, § 3454, was not required to do so until within a year after final decree.—*Hess v. Hess* (Va.) 273.

§ 5. **Supersedeas or stay of proceedings.**  
The Court of Appeals has the right to grant a supersedeas where necessary to the full exercise of its appellate jurisdiction.—*Yeates v. Roberson* (Ga. App.) 104.

#### § 6. Record and proceedings not in record.

The note of the presiding judge to bill of exception *held* conclusive, and under it an affirmance necessarily results.—*Raulerson v. Harvey* (Ga.) 19.

A bill of exceptions not signed, and appearing by the judge's certificate thereto not to have been tendered until more than 30 days after the date of the ruling excepted to, *held* insufficient to sustain a writ of error.—*Moore v. Griner* (Ga.) 222.

§ 713. Objections to the admission or the rejection of evidence appearing in the brief of evidence only cannot be considered.—*Cochran v. Bugg* (Ga.) 1048.

\*Grounds of a motion for new trial complaining of rulings on evidence will not be considered, where the objections urged in the court below are not set out.—*Fain & Stamps v. Ennis* (Ga. App.) 406.

§ 690. Exceptions to the admission of evidence *held* not in proper form where they do not set out the substance of the evidence objected to.—*Arnold v. Ragan* (Ga. App.) 1052.

Under Supreme Court rule No. 17 (53 S. E. vii), relating to docketing and dismissing an appeal by appellee where appellant fails to bring up and file a transcript within seven days before calling cases, a motion to docket and dismiss will be allowed though no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal.—*S. R. Fowle & Son v. Mitchell* (N. C.) 311.

§ 311. The record *held* to show that bills of exceptions were signed within the time prescribed by Acts 1908, p. 336, c. 225.—*Buena Vista Extract Co. v. Hickman* (Va.) 804.

§ 511. Under Acts 1908, p. 336, c. 225, the correct practice *held* to demand that a bill of exceptions not signed during the term shall show that it was signed within 30 days after the term, or such other time as may be agreed on by consent entered of record.—*Buena Vista Extract Co. v. Hickman* (Va.) 804.

§ 614. The record *held* to sufficiently certify the evidence on a writ of error.—*Milton's Adm'r v. Norfolk & W. Ry. Co.* (Va.) 960.

#### § 7. Assignment of errors.

\*An assignment that the court erred in admitting deeds, but not specifying the deeds referred to or the grounds of objection, *held* bad.—*McElwaney v. McDiarmid* (Ga.) 20.

\*An assignment of error on an excerpt from a charge, which is only a fragment of a sentence, that if the jury should find certain facts without stating their legal effect, and concluding with the word "etc.," is too indefinite.—*Boswell v. Gillen* (Ga.) 187.

\*An assignment of error *held* not well made, as the assignment should either be complete in itself or rendered so by an exhibit.—*Lay v. Nashville, C. & St. L. Ry. Co.* (Ga.) 189.

\*An assignment of error on the admission or rejection of evidence is not valid where it nowhere appears of whose evidence the complaint is made.—*Sims v. Sims* (Ga.) 192.

\*An assignment of error complaining of the admission or rejection of evidence *held* invalid

\*Point annotated. See syllabus.

where such evidence is not set out.—*Sims v. Sims* (Ga.) 192.

§ 728. An assignment of error on the admission of evidence *held* insufficient, where the evidence is not set out.—*Dodge v. Cowart* (Ga.) 987.

§ 728. An assignment of error upon a refusal to admit evidence cannot be considered where it fails to disclose what the evidence was.—*Cochran v. Bugg* (Ga.) 1048.

§ 728. An assignment of error upon the admission of evidence must show that it was admitted over a designated objection.—*Cochran v. Bugg* (Ga.) 1048.

\*An appeal is a sufficient assignment of error to a judgment.—*Ullery v. Guthrie* (N. C.) 552.

\*Under Revisal 1905, § 475, an assignment of error to a judgment on demurrer must specify the grounds of demurrer which will be relied on, on appeal.—*Ullery v. Guthrie* (N. C.) 552.

§ 730. Defendants' assignment of error "for errors in the charge" is sufficiently definite, where the jury were instructed to find for plaintiff upon the whole evidence.—*Woodriddle v. Brown* (N. C.) 1076.

### § 8. Dismissal, withdrawal, or abandonment.

Judgment adverse to petitioners was rendered January 31st. February 19th the bill of exceptions was mailed to the presiding judge at a county other than that of his residence, where he had been holding court; but the bill arrived at his residence February 20th, but was not delivered until the following day. *Held*, that the writ of error must be dismissed.—*Yow v. Sullivan* (Ga.) 639.

That the surety on an appeal bond is also surety on a certiorari bond in the same case *held* not ground on which a writ of error, issued on a bill of exceptions, may be dismissed.—*Bush v. Roberts* (Ga. App.) 92.

\*An appeal from an order dissolving an order restraining a city from cutting down a tree will be dismissed, on it appearing that pending the appeal, the tree has been cut down by the city authorities.—*Harrison v. Bryan* (N. C.) 305.

\*Appellee's right under Supreme Court rule 17 (53 S. E. vii) to a dismissal of the appeal, for noncompliance with rule 5 (53 S. E. v) *held* lost through delay.—*Foy v. Gray* (N. C.) 523.

§ 792. Where both plaintiff and defendant appealed, and a new trial was ordered on all the issues on plaintiff's appeal, defendant's appeal became unnecessary, and will be dismissed.—*Hawk v. Pine Lumber Co.* (N. C.) 754.

Certificate of the clerk of the trial court that the transcript contained a true copy of the record *held* a verity as to the clerk, and affidavits by him to show that the record did not contain all the evidence, which were taken without due written notice being given to the opposing party as required by Supreme Court of Appeals Rule I (57 S. E. xiv), will not be considered to impeach the record.—*Yellow Poplar Lumber Co. v. Thompson's Heirs*, (Va.) 358.

### § 9. Review—Scope and extent in general.

Where a petition is properly dismissed for misjoinder of parties, other grounds of demurrer will not be reviewed.—*Hearn v. Clare* (Ga.) 187.

Where a demurrer is improperly overruled, all that takes place in the trial subsequent thereto is nugatory.—*General Supply & Construction Co. v. Lawton* (Ga.) 293.

An order overruling or granting a new trial cannot be impeached by statements of the presiding judge not contained in the order.—*Mer-*

*chants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

The only question on review of order denying new trial is: Did the judge exercise his discretion?—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

A reviewing court cannot look beyond the order denying a new trial or the bill of exceptions to inquire whether the judge failed to exercise his discretion.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

§ 863. The court, on appeal from a judgment on the pleadings for plaintiff, must treat the allegations in the answer as true.—*Kuker v. Snow* (N. C.) 909.

\*Where a motion for new trial involves a question of fact, the fact that the judge in overruling the same assigned an erroneous reason is not ground for reversal, unless it further appears that but for such reason a new trial would have been granted.—*Trimmier v. Atlantic & C. A. L. Ry. Co.* (S. C.) 209.

§ 843. The Supreme Court of Appeals will not pass upon a moot question.—*Roanoke Ry. & Electric Co. v. Young* (Va.) 961.

### § 10. — Parties entitled to allege error.

Plaintiff *held* estopped by an amendment of her petition to object on appeal that the court construed defendant's answer as setting up and relying on a receipt.—*Austin v. Collier* (Ga.) 196.

§ 882. A party cannot complain on appeal of testimony admitted without objection; similar testimony having been elicited by himself on cross-examination.—*Laney v. Hutton & Bourbonnias* (N. C.) 1082.

### § 11. — Presumptions.

The trial judge will be presumed to have exercised his discretion in granting or refusing a new trial.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

§ 928. Where it is stated in the record that the court called the attention of the jury to an issue, it must be assumed, on appeal, that the instruction on such issue was correct when it is not set out in the case.—*Davis v. Stephenson* (N. C.) 900.

§ 928. Correct instructions are presumed to have been given, where the charge is not in the record.—*Hill v. Lane* (N. C.) 1074.

### § 12. — Discretion of lower court.

\*Notwithstanding a trial judge may, under Civ. Code 1895, § 5331, direct a verdict the Supreme Court will in no case overrule a refusal to do so.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

Where a motion for new trial is heard by the successor of the trial judge, he has not that discretion with relation to motion for a new trial with which the appellate court is reluctant to interfere.—*Monahan v. National Realty Co.* (Ga. App.) 127.

That a trial judge gives expression orally to disapproval of a verdict does not indicate that there was no exercise of discretion on a motion for new trial.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

§ 970. The discretion of the trial judge as to order of examination of witnesses will not be interfered with, except for manifest abuse.—*Minchew v. Nahunta Lumber Co.* (Ga. App.) 716.

§ 971. The allowance of leading questions will not be reviewed, except in a case of manifest abuse.—*Minchew v. Nahunta Lumber Co.* (Ga. App.) 716.

Refusal to allow amendment of complaint, being strictly in the discretion of the judge,

\*Point annotated. See syllabus.



*held* not reviewable.—*Coleman v. Coleman* (N. C.) 415.

Unless the Supreme Court is convinced that one of the parties have been placed at a disadvantage by the overruling of a motion to make pleadings more definite, its ruling will not be disturbed.—*Hughes v. Orangeburg Mfg. Co.* (S. C.) 404.

§ 979. The granting or refusing a new trial on the ground that the verdict is excessive *held* within the discretion of the circuit court.—*Hall v. Northwestern R. Co.* (S. C.) 848.

\*A ruling allowing a witness to testify as an expert in the exercise of the trial court's discretion will not be reversed on appeal, unless it clearly appears that he was not qualified.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

### § 13. — Questions of fact, verdicts, and findings.

The Supreme Court will not interfere with the trial court's discretion in refusing to set aside a verdict on conflicting evidence.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

§ 1001. Where, in an action for death, there is some evidence to support the verdict, a new trial will not be granted.—*South Georgia Ry. Co. v. Niles* (Ga.) 1042.

Doubt on any question of fact in the mind of an appellate court must be resolved in favor of the verdict.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

\*A verdict for injury to an employé cannot be set aside as excessive unless manifestly the result of prejudice, bias, or corrupt motive.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

\*Where the case involved only one question of fact, and the verdict has been approved by the trial court, the court on appeal cannot interfere.—*Cowart v. Powell* (Ga. App.) 664.

\*A verdict approved by the trial judge will not be interfered with on appeal.—*Hercules Mfg. Co. v. Robinson* (Ga. App.) 672.

§ 1004. Under Civ. Code 1895, § 4739, where an affidavit of illegality has been dismissed for insufficiency, a verdict assessing damages for the delay at less than 25 per cent. will not be disturbed.—*Jordan v. Farmers' & Merchants' Bank* (Ga. App.) 1024.

\*A ruling sustaining a referee's findings is conclusive, except as to findings without any evidence to support them.—*Foy v. Gray* (N. C.) 523.

§ 1008. In a suit to enjoin the collection of taxes in territory annexed to a city, a finding of the trial court as to the boundaries of the annexed territory, and that they embraced plaintiff's property, *held* conclusive on appeal.—*Luttrell v. City of Fayetteville* (N. C.) 758.

§ 1008. The finding of fact as to the sickness of a witness justifying the admission of testimony given at a former trial is conclusive on appeal.—*Smith v. Moore* (N. C.) 892.

§ 1008. The Supreme Court, on appeal from a judgment dissolving an injunction restraining a school committee from changing the school site and rebuilding a schoolhouse, is not bound by the facts found by the trial judge, but may review the evidence.—*Venable v. School Committee of Pilot Mountain* (N. C.) 902.

§ 1001. Where the evidence in support of a fact, though slight, was fit for the consideration of the jury, a verdict will not be disturbed on appeal.—*Henderson-Snyder Co. v. Polk* (N. C.) 964.

\*On appeal from the probate court to the circuit court on probate of a will, the issue of a will or no will being legal in its nature, the

circuit court's findings of fact are not reviewable by the Supreme Court.—*Thames v. Rouse* (S. C.) 254.

\*A finding of fact, having some evidence to support it, *held* not reviewable.—*Catlett v. Charleston & W. C. Ry. Co.* (S. C.) 315.

\*On defendant's appeal in an action for intestate's death by being struck by defendant's train, in deciding whether the evidence is sufficient to show negligence, certain testimony *held* not to be considered.—*Thompson v. Seaboard Air Line Ry.* (S. C.) 396.

§ 1002. Where the evidence is such that reasonable men may fairly differ as to whether there was negligence or not, the verdict will not be disturbed on appeal.—*Chesapeake & O. Ry. Co. v. Williams* (Va.) 796.

§ 999. The appellate court will not disturb a verdict unless satisfied that the evidence is plainly insufficient to sustain it.—*Chesapeake & O. Ry. Co. v. Williams* (Va.) 796.

§ 1001. A verdict is conclusive on all the controverted questions supported by sufficient evidence to require submission to a jury.—*McIntyre v. Smyth* (Va.) 930.

### § 14. — Harmless error in general.

\*Where plaintiff could not recover on the allegations of negligence alleged, a mere inaccuracy in the charge will not work a reversal of the judgment denying a new trial.—*McCoy v. Central of Georgia Ry. Co.* (Ga.) 297.

\*Submission of issue on plea in abatement and on the merits together *held* not reversible error, where the verdict is restricted to a finding on the plea in abatement.—*Wood v. United States Fidelity & Guaranty Co.* (Ga. App.) 97.

A party cannot complain that the jury found less damages against him than they should have found.—*Johnson v. Perkins* (Ga. App.) 152.

If a defendant, in an action against several for an assault and battery, is liable, he is not prejudiced because the verdict is against him only, and in favor of his codefendants, where there was no issue as to the rights of the defendants among themselves.—*Jones v. Parker* (S. C.) 261.

\*New trial must be granted on reversing judgment for improperly submitting the question of punitive damages, where it cannot be said that the verdict excluded such damages.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

§ 1033. Where the body of plaintiff's husband was delivered for dissection, because of defendant's delay in delivering a telegram, evidence that many bodies were so delivered, according to state law, was not prejudicial to defendant.—*Martin v. Western Union Telegraph Co.* (S. C.) 833.

§ 1061. A refusal to grant a nonsuit on the ground that plaintiff, having alleged an express contract, had failed to prove it, *held* not reversible error where defendant afterwards supplied the lacking evidence by introducing the contract.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

\*Error in holding that a void tax deed was not sufficient color of title to support adverse possession was harmless, where the evidence showed that the one claiming thereunder had not held possession for the entire statutory period.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

§ 1035. The granting of relief to the surety of a special receiver appointed in vendor's lien proceedings, on his petition in such proceedings against a purchaser of the receivership property from such receiver, *held* not prejudicial to the purchaser, even if the surety's remedy was properly by an original bill.—*Bowman v. Liskey* (Va.) 942.

\*Point annotated. See syllabus.

**§ 15. — Harmless error in rulings on pleadings.**

Error, after fully allowing an amendment to an answer, in striking the amendment after the term had expired, *held* not to authorize the grant of a new trial, where defendant could not have been harmed.—*Albany Phosphate Co. v. Hugger Bros.* (Ga. App.) 533.

An order refusing a motion to strike out portions of an answer as frivolous, irrelevant, and redundant *held* not reversible error.—*McCandless v. Mobley* (S. C.) 260.

\*Any error in overruling a demurrer to particular counts of a declaration is cured by an instruction directing the jury not to consider such counts.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

**§ 16. — Harmless error in admission of evidence.**

\*Even if certain evidence was incompetent its admission *held* harmless, where its purpose was to show a fact of which there was other undisputed evidence.—*Brinkley v. Bell* (Ga.) 67.

\*Under Civ. Code 1895, § 4961, failure to deny that plaintiff's intestate was killed by defendant's locomotive *held* an admission of that fact rendering the question of the competency of evidence to establish that fact immaterial.—*Alabama Great Southern R. Co. v. Hardy* (Ga.) 71.

\*In an action for injury to a locomotive fireman, the admission of certain evidence *held* not to require a new trial.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

Where material evidence was erroneously admitted which might have seriously affected the decision of the court, the judgment will be reversed for a new trial.—*Town of Pelham v. Pelham Telephone Co.* (Ga.) 186.

§ 1050. The admission of hearsay evidence will not require a new trial, where it could not have affected the verdict.—*South Georgia Ry. Co. v. Niles* (Ga.) 1042.

§ 1050. The admission of immaterial evidence *held* not reversible error.—*Averett v. Walker* (Ga.) 1046.

\*Minor errors in the admission or rejection of testimony do not warrant a reversal.—*Fain & Stamps v. Ennis* (Ga. App.) 466.

\*Where the verdict is a finding in favor of a plea so that a finding in its favor precludes inquiry into other defenses asserted, alleged errors in rulings on testimony offered in support of other pleas are immaterial.—*Southland Knitting Mills v. Tennille Yarn Mills* (Ga. App.) 532.

\*Error, if any, in the admission of certain evidence, *held* harmless, in view of the character of such evidence and the other evidence in the case.—*Edward Bros. v. Erwin* (N. C.) 545.

§ 1050. In an action to set aside a deed for fraud of the grantee, the admission of declarations of plaintiff to defendant that, if he had a deed, he got it by fraud, *held* not prejudicial error.—*Smith v. Moore* (N. C.) 892.

§§ 1050, 1051. In a suit to set aside a deed for the fraud of the grantee, since deceased, testimony of plaintiff *held* nonprejudicial, even if within Revisal 1905, § 1631, as a communication or transaction with a deceased grantee.—*Smith v. Moore* (N. C.) 892.

\*A ruling against admission of a letter in evidence *held* harmless, in view of testimony of witness.—*State v. Malony* (S. C.) 215.

\*Refusal to strike out hearsay testimony *held* harmless.—*Mason v. Apalache Mills* (S. C.) 399.

§ 1053. Admission of evidence by plaintiff contradictory of a written contract before the

contract was introduced *held* harmless when, after the subsequent introduction of the contract, the court charged so as to make the evidence valueless to plaintiff.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 1050. The admission, in an action against a carrier of a bill of lading without proper foundation, *held* harmless, where the carrier actually received and delivered the freight under the bill.—*Rutland v. Southern Ry. Co.* (S. C.) 865.

§ 1050. Where testimony objected to had previously been admitted without objection and had some relevancy, its admission was not error.—*Contos v. Jamison* (S. C.) 867.

§ 1050. Admission of evidence on a disputed issue *held* not harmless.—*Blue Ridge Light & Power Co. v. Price* (Va.) 938.

§ 1058. Where the trial court refused to permit the stenographic notes of the testimony of a witness on a former trial to be read in evidence, but permitted the stenographer to give the testimony by using his notes to refresh his memory, the exclusion of the stenographic notes was not prejudicial.—*Roanoke Ry. & Electric Co. v. Young* (Va.) 961.

§ 1058. The error in refusing to permit a party to propound questions to a witness is not prejudicial, when the questions are subsequently asked the witness and answered without objection.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

**§ 17. — Harmless error in exclusion of evidence.**

\*Exclusion of evidence *held* harmless where facts otherwise appeared.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

§ 1057. The exclusion of evidence of insolvency of a mortgagor at his death *held* not prejudicial where the administrator's final account was in evidence, unimpeached, and clearly showed insolvency.—*Rich v. Morisey* (N. C.) 762.

§ 1057. Exclusion of evidence as to a matter shown by subsequent uncontradicted testimony was harmless.—*John F. Davis & Son v. Thornburg* (N. C.) 1088.

**§ 18. — Harmless error in instructions to jury.**

\*Instruction in action on note *held* not ground of reversal under the evidence.—*Ford v. Parker* (Ga.) 526.

\*Error in an instruction, in that it inaptly stated the law, *held* harmless.—*Fain & Stamps v. Ennis* (Ga. App.) 466.

§ 1068. The failure to submit an issue whether a defendant, purchasing from an heir two years after the death of the ancestor, was protected by limitations because without notice of an indebtedness of the estate, was not prejudicial to defendant where the jury found that he had no notice of any such debt.—*Rich v. Morisey* (N. C.) 762.

§ 1064. Where there was no contradictory testimony, and no inferences to be drawn from it contrary to the legal conclusion stated by the court in its instructions, errors in the instructions were harmless.—*Bray v. Staples* (N. C.) 780.

\*Refusal of court to construe contract of sale of fertilizer *held* prejudicial in action, under Civ. Code 1902, § 1536, for penalty for sale.—*State v. Malony* (S. C.) 215.

§ 1068. A plaintiff, not entitled to recover in any view of the case, is not prejudiced by an erroneous instruction.—*Taylor v. Baltimore & O. R. Co.* (Va.) 798.

**§ 19. — Error waived in appellate court.**

§ 1078. Assignments of error, not insisted upon in the argument or brief, will be considered

\*Point annotated. See syllabus.

as abandoned.—*Jordan v. Farmers' & Merchants' Bank* (Ga. App.) 1024.

§ 1078. Under Sup. Ct. Rule 34 (27 S. E. ix), exceptions not brought forward in appellant's brief are abandoned.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

§ 1078. An assignment of error not referred to in the brief is to be regarded as abandoned.—*Smith v. Moore* (N. C.) 892.

§ 1078. Exceptions not discussed in the party's brief on appeal are considered abandoned.—*Condor v. Secrest* (N. C.) 921.

§ 1075. Error in refusal to permit filing of an amended answer is properly abandoned, on plaintiff conceding the sufficiency of the original answer to put in issue the matter in the amendment.—*Smith v. Lurty* (Va.) 789.

## § 20. — Decisions of intermediate courts.

§ 1092. Under Revisal 1905, § 607, relating to the docketing and dismissal of appeals by appellee, and section 608, requiring the clerk of the appellate court to docket an appeal from a justice's court at the ensuing term, the superior court's refusal to allow an appeal to be docketed *held*, under the circumstances, not reviewable.—*McClintock v. Life Ins. Co. of Virginia* (N. C.) 775.

§ 1094. The Supreme Court may not review findings of fact by the circuit court on appeal from a magistrate's court.—*Lewis v. Cooley* (S. C.) 868.

## § 21. — Subsequent appeals.

§ 1097. The decision of the Supreme Court on appeal is the law of the case on a subsequent trial.—*Barkley v. South Atlantic Waste Co.* (N. C.) 1073.

## § 22. Determination and disposition of cause.—Affirmance.

The Supreme Court will not pass on questions, where it affirmatively appears that, if the judgment were reversed, plaintiff in error would derive no benefit.—*Baird v. City of Atlanta* (Ga.) 525.

Plaintiff sued to enjoin a city from executing a contract, and it appeared on the call of the case on appeal that the contract had been duly canceled by the parties. *Held*, that the writ of error would be dismissed, without prejudice, at the cost of defendant in error.—*Baird v. City of Atlanta* (Ga.) 525.

## § 23. — Modification.

Where a permanent injunction was inadvertently granted on an interlocutory hearing on evidence authorizing a preliminary injunction, the order should be affirmed, with directions to amend by making the injunction interlocutory.—*City of Brunswick v. Williams* (Ga.) 230.

Facts in an action by a widow to recover a crop made by her husband *held* to warrant the Supreme Court in modifying and affirming the judgment, rather than ordering a new trial for error prejudicial to plaintiff.—*Sessoms v. Tayloe* (N. C.) 424.

§ 1153. Where the record affords certain proof by which an excessive verdict can be corrected, a final judgment for the correct amount may be entered on appeal.—*McIntyre v. Smyth* (Va.) 930.

§ 1151. On appeal from a judgment for damages to property of which plaintiff owned a fractional part, *held*, that the Supreme Court would modify the judgment by a calculation based on the true fractional interest of the plaintiff, instead of on an erroneous one employed by the jury.—*Aultman & Taylor Machinery Co. v. Gay* (Va.) 946.

## § 24. — Reversal.

§ 1177. Where, in an action for breach of contract, the questions of liability and of the amount of recovery were submitted in the same issue, the instruction as to the latter being incorrect, a new trial will be ordered on the entire issue.—*Wilkinson v. Dunbar* (N. C.) 748.

§ 1178. Though an error affected only a part of the issues, where the facts might be more fully developed on a new trial, and the questions more clearly presented, and injustice might be done unless a new trial was granted, a new trial will be ordered on all the issues.—*Hawk v. Pine Lumber Co.* (N. C.) 752.

§ 1170. Where all the essential facts upon which the parties' rights depend appear upon the pleadings or have been found by the jury, an appellate court will not upon a mere question of form set aside the judgment.—*Rich v. Morisey* (N. C.) 762.

§ 1178. Circumstances *held* to warrant a new trial on one issue only.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

An order overruling a demurrer to an answer, which did not purport to state a defense, *held* not ground for reversal.—*City of Columbia v. Melton* (S. C.) 245.

\*In an action for damages for and the abatement of a nuisance, the refusal to grant relief on a certain cause of action stated *held* not ground for reversal of the whole case, but to entitle plaintiff to a new trial on that cause of action only.—*Gray & Shealy v. Charleston & W. C. Ry. Co.* (S. C.) 442.

Though, in an action for damages to freight and the penalty under 24 St. at Large, p. 81, for failure to adjust the claim, judgment for plaintiff could not be sustained as to the penalty because the action was not brought as required by Code Civ. Proc. 1902, § 145, in the county where the penalty accrued, *held*, that it should be sustained as to the damages.—*L. D. Riley & Son v. Southern Ry. Co.* (S. C.) 509.

§ 1180. A general reversal of a judgment on specified grounds, in an action instituted before the adoption of Sup. Ct. Rule 27 (56 S. E. v), *held* to send the case back.—*German-American Ins. Co. v. Southern Ry. Co.* (S. C.) 1115.

## § 25. — Mandate and proceedings in lower court.

\*Rulings of the Supreme Court on appeal are binding on the second trial unless the facts were substantially different.—*Bank of Commerce v. New York Life Ins. Co.* (Ga.) 179.

\*Instructions approved on a prior appeal *held* properly given, where again authorized by the evidence on retrial.—*Austin v. Collier* (Ga.) 196.

\*It was not error on a retrial of a case, for the trial judge to construe the answer as it was construed by the Supreme Court on a prior appeal.—*Austin v. Collier* (Ga.) 196.

\*Portions of a plea *held* properly stricken on motion, where they had been held insufficient on a former writ of error.—*Dolvin v. American Harrow Co.* (Ga.) 198.

§ 1201. Where a cause has been sent back by the Supreme Court to the circuit court for a new trial, the power of the circuit court judge to grant amendments to the pleading before the trial is the same as if there had never been a trial.—*Taylor v. Atlantic Coast Line R. Co.* (S. C.) 1113.

§ 1201. The allowance of an amendment to the complaint, in an action by a passenger against the carrier, *held* proper.—*Taylor v. Atlantic Coast Line R. Co.* (S. C.) 1113.

§ 1201. The circuit court may, after an action has been sent back to it for new trial, permit an amendment setting up a new cause of

\*Point annotated. See syllabus.

action.—German-American Ins. Co. v. Southern Ry. Co. (S. C.) 1115.

§ 1195. A decision on appeal from an interlocutory order renders final the decision of the court below, so that a petition for review must be taken within one year after such decree as directed by Code 1904, § 3435.—N. M. Matthews & Co. v. Progress Distilling Co. (Va.) 924.

## APPEARANCE.

On appeal from justice's court, see Justices of the Peace, § 3.

To object to want of capacity of plaintiff to sue, see Parties, § 2.

§ 24. Under Civ. Code 1895, § 4981, a general appearance and pleading waives all defects in process or service of process.—Young v. Germania Savings Bank (Ga. App.) 999.

## APPLIANCES.

Liability of employer for defects, see Master and Servant, § 4.

## APPLICATION.

Of payment, see Payment, § 1.

## APPOINTMENT.

Of executor or administrator, see Executors and Administrators, § 1.

## ARBITRATION AND AWARD.

### § 1. Arbitrators and proceedings.

§ 39. An award, by one of two original arbitrators and a third arbitrator appointed by them, *held* properly set aside, because of the failure to give notice to the parties of a hearing before the third arbitrator.—Bray v. Staples (N. C.) 780.

### § 2. Award.

§ 76. The parties and their rights as to the subject-matter of an arbitration are not affected by an invalid award, or the judgment setting it aside, and they are relegated to their original status.—Bray v. Staples (N. C.) 780.

## ARCHITECTS.

Approval of performance of contract, see Contracts, § 4.

## ARGUMENT OF COUNSEL.

In civil actions, see Trial, § 4.

## ARMY AND NAVY.

Exemption of soldiers from license tax, see Licenses, § 1.

## ARRAIGNMENT.

See Criminal Law, § 5.

## ARREST.

Homicide in resisting arrest, see Homicide, § 2.

### § 1. On criminal charges.

\*An officer who discovers a person keeping liquor at his place of business may arrest him without a warrant.—Jenkins v. State (Ga. App.) 574.

§ 68. An officer cannot shoot one whom he is attempting to arrest for a violation of a municipal ordinance, though the offender cannot be otherwise taken.—Holmes v. State (Ga. App.) 716.

## ARREST OF JUDGMENT.

In civil actions, see Judgment, § 1.

In criminal prosecutions, see Criminal Law, § 26.

## ARSON.

\*Evidence examined, and *held* sufficient to warrant a conviction for burning a barn.—State v. Allen (N. C.) 597.

## ASSAULT AND BATTERY.

Applicability of instructions to case in action for assault, see Trial, § 9.

Assault with intent to kill, see Homicide, § 3.

Harmless error in action for, see Appeal and Error, § 14.

Sufficiency of instructions in action for, see Trial, § 8.

### § 1. Civil liability.

\*A charge as to the right of an owner to order out a person breaking into his house to levy under a distress warrant *held* not erroneous.—Jones v. Parker (S. C.) 261.

A charge on the rights of a person, where a levy is attempted to be unlawfully made under a distress warrant, *held* not erroneous.—Jones v. Parker (S. C.) 261.

A charge, in an action for assault and battery, *held* not to state an improper measure of damages when considered as a whole.—Jones v. Parker (S. C.) 261.

### § 2. Criminal responsibility.

It is no justification of an assault that prior thereto the person assaulted had committed an injury on the person or family of the defendant.—Jackson v. State (Ga. App.) 539.

\*One who shoots in the direction of another within range, intending only to frighten him, *held* guilty of an assault.—Edwards v. State (Ga. App.) 565.

An instruction that, to justify the parent in taking the part of his child, the child would have to be justified in what it was doing, *held* not reversible error, where immediately qualified by certain other statement.—Kimberly v. State (Ga. App.) 571.

Threats of personal violence are not necessarily opprobrious, so as to warrant a charge on such words as a justification.—Kimberly v. State (Ga. App.) 571.

## ASSESSMENT.

Of compensation for property taken for public use, see Eminent Domain, § 3.

Of damages, see Damages, § 6.

Of expenses of public improvements, see Highways, § 2; Municipal Corporations, § 6.

Of tax, see Taxation, § 3.

## ASSETS.

Of estate of decedent, see Executors and Administrators, § 2.

## ASSIGNMENT OF ERRORS.

See Appeal and Error, § 7; Criminal Law, § 27.

\*Point annotated. See syllabus.

## ASSIGNMENTS.

Fraud as to creditors, see *Fraudulent Conveyances*.

*Transfers of particular species of property, rights, or instruments.*

See Judgment, § 9; Licenses, § 2.

Bill of lading, see *Carriers*, § 3.

Corporate shares, see *Corporations*, § 1.

### § 1. Requisites and validity.

\*An executory contract for personal service, founded on personal trust or confidence, is not assignable.—*Epperson v. Epperson* (Va.) 344.

### § 2. Rights and liabilities of parties.

\*The assignee of a nonnegotiable obligation can take no rights which his assignor did not possess, and can generally make no defense he could not make.—*Selden v. Williams* (Va.) 380.

The rule that, where the original debtor in a nonnegotiable chose in action is sued by an assignee thereof, the defenses, legal and equitable, which he had at the assignment, or when notice of it was given, against the original creditor, avail him against the substituted creditor, applies to all forms of contract not negotiable and to all defenses which would have been valid between the debtor and the original creditor.—*Selden v. Williams* (Va.) 380.

### § 3. Actions.

In the absence of proof, it would not be presumed that a bank after disclaiming any interest in or right to a judgment on a note which had been assigned to it as collateral only for a debt, which was later paid, would attempt to assign the judgment.—*Selden v. Williams* (Va.) 380.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See *Bankruptcy*, § 1.

## ASSOCIATIONS.

Mutual benefit insurance associations, see *Insurance*, § 6.

## ASSUMPSIT, ACTION OF.

See *Account Stated*; *Money Received*; *Use and Occupation*.

## ASSUMPTION.

Of risk by employé, see *Master and Servant*, §§ 8, 13, 14.

## ATTACHMENT.

See *Execution*; *Garnishment*.

Amendment of judgment, see *Judgment*, § 2.

Amendment of pleading, see *Pleading*, § 5.

Effect of proceedings in bankruptcy, see *Bankruptcy*, § 1.

Election between attachment and other lien, see *Election of Remedies*.

Exemptions, see *Exemptions*; *Homestead*.

Restraining judicial sale in action instituted by, see *Judicial Sales*.

Validity of sale of land by attachment debtor as affecting rights of attachment creditor, see *Vendor and Purchaser*, § 3.

### § 1. Proceedings to procure.

\*In an attachment the initial affidavit may, under Civ. Code 1895, § 5122, be amended by adding one or more additional grounds of attachment.—*G. H. Dolvin & Co. v. Hicks* (Ga. App.) 95.

### § 2. Claims by third persons.

A claimant of attached property cannot rely on title acquired from a third person after levy of the attachment and the filing of the claim.—*Strickland v. Jones* (Ga.) 322.

Where an attachment was sued out under the fraudulent debtor's act, and levied on land as the property of defendant, which was claimed by his wife, whether the creditor's right of attachment was barred by limitations could not be raised on the trial of the claim case.—*Strickland v. Jones* (Ga.) 322.

## ATTENDANCE.

Of witness, see *Witnesses*, § 1.

## ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see *Trial*, § 4.

Attorneys as public officers, see *Attorney General*.

Attorneys in fact, see *Principal and Agent*.

Competency as witnesses, see *Witnesses*, § 2.

Counsel fees in suit for divorce, see *Divorce*, § 1.

Declarations by attorney as evidence, see *Evidence*, § 6.

### § 1. The office of attorney.

Knowingly presenting false and fictitious affidavits to the Supreme Court to obtain leave to move for a new trial, coupled with the attorney's bad reputation, and the fact that other disbarment proceedings had been taken against him, *held* sufficient ground for disbarment.—*In re Duncan* (S. C.) 406.

In disbarment proceedings for presenting false affidavits to the Supreme Court in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the evidence *held* to show that no affidavit was ever made by the alleged affiant.—*In re Duncan* (S. C.) 406.

In disbarment proceedings for presenting false affidavits in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the alleged affiant denying having made the affidavit, the evidence *held* to show that defendant's charge that the original affidavit was stolen by the prosecuting officers was false.—*In re Duncan* (S. C.) 406.

In disbarment proceedings against an attorney for presenting false affidavits in support of a motion for leave to apply for a new trial on the ground of newly discovered evidence, the alleged affidavits being that affiant committed the crime, instead of defendant's client, upon considering the evidence upon which the latter was convicted to determine the probable truth of the affidavit, which affiant denied making, the evidence *held* to sustain the conviction.—*In re Duncan* (S. C.) 406.

### § 2. Compensation and lien of attorney.

\*Where an attorney has taken a claim for collection for a contingent fee, and after judgment without his consent the client takes property in settlement of the judgment, he is liable for the full amount of the fee.—*Coker v. Oliver* (Ga. App.) 483.

Where an attorney takes a claim on a contingent fee, and recovers judgment, and his client without his consent takes property in settlement, in a suit to recover the fee, evidence as to the value of the property taken is immaterial.—*Coker v. Oliver* (Ga. App.) 483.

\*In an action by an attorney to recover for services, evidence *held* to sustain judgment for plaintiff.—*Coker v. Oliver* (Ga. App.) 483.

\*Point annotated. See syllabus.

## ATTORNEY GENERAL

Discretion of court as to dismissal of suit on motion by, see Dismissal and Nonsuit, § 1.

§ 7. Act Feb. 22, 1904 (24 St. at Large, p. 965), did not restrict the power of the Attorney General to move to discontinue an action under the statute brought by his predecessor and commence a new action for a similar purpose.—*State v. Southern Ry.* (S. C.) 1116.

## AUCTIONS AND AUCTIONEERS.

Chattel mortgage foreclosure sale at auction, see Chattel Mortgages, § 3.

## AUTHORITY.

Of agent, see Principal and Agent, §§ 2, 3.  
Of foreign administrator, see Executors and Administrators, § 10.  
Of justice of the peace, see Justices of the Peace, § 1.  
Of municipal officers to convey portion of street, see Municipal Corporations, § 5.  
Of railroad employes, see Railroads, § 1.

## AWARD.

See Arbitration and Award, § 2.

## BAILMENT.

See Carriers, §§ 2-12.

Embezzlement of larceny by bailee, see Embezzlement.

\*An unreasonable or impossible explanation of an injury to property while in the hands of bailee may be equivalent to an admission of liability.—*Johnson v. Perkins* (Ga. App.) 152.

\*Under Civ. Code 1895, § 2896, where injury to a horse left with a blacksmith to be shod was shown, the burden *held* to be on the blacksmith to show that the injury could not have been prevented by proper diligence.—*Johnson v. Perkins* (Ga. App.) 152.

\*Evidence *held* to raise a presumption of negligence against a blacksmith with whom a horse was left to be shod, authorizing a recovery unless rebutted.—*Johnson v. Perkins* (Ga. App.) 152.

\*Evidence, in an action against a blacksmith for the value of a horse injured while in his possession to be shod, *held* to authorize a finding that the death of the horse resulted from the injury, and not from a hard ride.—*Johnson v. Perkins* (Ga. App.) 152.

## BANKRUPTCY.

Discharge of surety by failure to prove claim against principal in bankruptcy, see Principal and Surety, § 2.

Estoppel to plead discharge in bankruptcy, see Estoppel, § 1.

### § 1. Assignment, administration, and distribution of bankrupt's estate.

§ 199. Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), making void liens created against a bankrupt within four months prior to the petition in bankruptcy, the insolvency must have existed when the lien was created.—*Jackson v. Valley Tie & Lumber Co.* (Va.) 964.

§ 200. Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), making void liens created against the bankrupt prior to the petition, the lien of an at-

tachment attaches with the levy, and not the judgment.—*Jackson v. Valley Tie & Lumber Co.* (Va.) 964.

§ 216. Under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), the burden of proving insolvency of a bankrupt prior to the petition and when a lien was created against him is on the person asserting the insolvency.—*Jackson v. Valley Tie & Lumber Co.* (Va.) 964.

§ 216. A party refusing to produce evidence and consenting to submit the case on the record *held* not entitled to amend in order to make the case he might have made under the first pleading.—*Jackson v. Valley Tie & Lumber Co.* (Va.) 964.

## BANKS AND BANKING.

Judicial notice that bank in discounting draft with bill of lading attached does not take over original contract of sale, see Evidence, § 1.

Right of bank to recover on warrants issued by ordinary of county to contractor for courthouse, see Counties, § 2.

### § 1. Banking corporations and associations.

\*Insolvent, defined.—*Livingstain v. Columbia Banking & Trust Co.* (S. C.) 249; *Ex parte Berger*, Id.

\*A depositor in an insolvent bank who, without knowledge of its insolvency, but on account of rumors as to its credit, withdrew his deposit, but on assurances by the officers returned the money and took drafts for the amount which were not paid, *held* entitled to be subrogated to the rights of the bank on which the drafts were drawn in collateral which it held.—*Livingstain v. Columbia Banking & Trust Co.* (S. C.) 249; *Ex parte Berger*, Id.

Money paid by a bank to a depositor in the usual course of business while the bank is a going concern, although in fact insolvent, is not impressed with a trust in favor of other creditors, where the depositor did not know the fact of insolvency, and was assured by the officers that the bank had money to pay all depositors, even though he was induced to withdraw the money by rumors of its embarrassment.—*Livingstain v. Columbia Banking & Trust Co.* (S. C.) 249; *Ex parte Berger*, Id.

§ 47. Counsel fees and expenses of receiver, in a suit by creditors against an insolvent bank, *held* part of stockholders' liability for deficit, but not so as to fees allowed for counsel of plaintiff in such suit.—*Buist v. Williams* (S. C.) 859.

§ 49. The stockholders of an insolvent bank *held* not estopped to assert that their liability for deficit does not cover fees allowed for counsel of plaintiff in the suit against the bank, though they appeared in opposition to allowance of the fees, where the decree was only for allowance thereof out of the fund "going to creditors."—*Buist v. Williams* (S. C.) 859.

§ 49. The stockholders of an insolvent bank not having been parties to the suit in which, through a receiver, the bank's assets were collected and distributed, *held* that, in a suit on their liability, they could attack his account.—*Buist v. Williams* (S. C.) 859.

## BAR.

Of action by former adjudication, see Judgment, § 6.

## BATTERY.

See Assault and Battery.

\*Point annotated. See syllabus.

## BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, § 6.

## BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, § 1.

Acceptance of, as waiver of right to appeal, see Appeal and Error, § 2.

## BEQUESTS.

See Wills.

## BEST AND SECONDARY EVIDENCE.

In civil actions, see Evidence, § 5.

In criminal prosecutions, see Criminal Law, § 10.

## BETTING.

See Gaming.

## BIAS.

Of witness, see Witnesses, § 2.

## BILL OF EXCEPTIONS.

See Exceptions, Bill of.

## BILL OF LADING.

See Carriers, § 3.

## BILL OF PARTICULARS.

See Pleading, § 7.

In criminal prosecutions, see Indictment and Information, § 3.

Review of discretionary rulings as to, see Criminal Law, § 27.

## BILL OF REVIEW.

See Equity, § 4.

## BILLS AND NOTES.

Assignment of judgment on note, see Judgment, § 9.

Competency of witnesses in action on note, see Witnesses, § 2.

Construction of charge as a whole, see Trial, § 12.

Discharge of surety on note, see Principal and Surety, § 2.

Good faith of bank taking cashier's check obtained by husband with funds of wife, see Husband and Wife, § 4.

Harmless error in action on note, see Appeal and Error, § 18.

Jurisdiction of city court of action on note, see Courts, § 4.

Jurisdiction of municipal court of claim for tort in action on note, see Courts, § 4.

Liability of wife's separate property for payment of note, see Husband and Wife, § 3.

Matters concluded by judgment in action on note, see Judgment, § 7.

Necessity and subject-matter of instructions in action on note, see Trial, § 7.

Parol or extrinsic evidence, see Evidence, § 10.

Province of court and jury in action on note, see Trial, § 6.

Reception of evidence in action on note, see Trial, § 3.

## § 1. Rights and liabilities on indorsement or transfer.

§ 339. Ordinarily, where commercial paper is offered in the usual course of business, inquiry need not be made as to the owner.—Third Nat. Bank v. Poe (Ga. App.) 826.

§ 346. A purchaser of commercial paper who has reasonable cause to believe that the apparent owner is not the true owner, and participates in the fraud, does not acquire a good title.—Third Nat. Bank v. Poe (Ga. App.) 826.

§ 363. A purchaser for value of commercial paper who takes from the apparent owner *held* to acquire a good title as against the undisclosed true owner.—Third Nat. Bank v. Poe (Ga. App.) 826.

§ 366. As against a bona fide purchaser, a married woman signing as apparent maker will not be allowed to show that she is a surety to invalidate the contract under Civ. Code, § 2488, but may show that she is a surety on the ground that she was discharged by holder's act.—Smith v. First Nat. Bank (Ga. App.) 826.

## § 2. Presentment, demand, notice, and protest.

\*An indorser in blank of a note before delivery *held*, under Revisal 1905, §§ 2212, 2213, 2219, 2239, an indorser, who, not being given notice of nonpayment and dishonor, is discharged.—J. W. Perry Co. v. Taylor Bros. (N. C.) 423.

## § 3. Actions.

So much of a plea as sought to allege that a note and contract sued on were not what they purported to be having been stricken, evidence to prove a meaning different from any therein expressed *held* properly excluded.—Dolvin v. American Harrow Co. (Ga.) 198.

\*In an action on a note given in settlement of a previous note, evidence that the defendant acknowledged owing his original note, and requested time for payment, *held* admissible.—Dolvin v. American Harrow Co. (Ga.) 198.

\*In an action on a note, an instruction *held* not objectionable as misleading and confusing.—Dolvin v. American Harrow Co. (Ga.) 198.

\*In an action on a note, certain instructions *held* not objectionable because not adjusted to the case.—Dolvin v. American Harrow Co. (Ga.) 198.

§ 484. A plea *held* valid as a plea of partial payment of the note sued on.—Jones v. Taylor (Ga. App.) 992.

§ 489. That the note produced at the trial was differently attested from the copy of the note attached to the petition was immaterial, where there was no plea of non est factum.—Boswell v. Johnson (Ga. App.) 1003.

§ 497. Under Revisal 1905, § 2201, defining a holder in due course of a negotiable instrument, and section 2208, placing the burden on a holder to show that he holds in due course where the title of one negotiating the instrument is shown to be defective, in case of fraud in procuring the note or other defect in the title of one negotiating it, one suing thereon must show that he holds in due course, as defined by section 2201.—American Nat. Bank v. Fountain (N. C.) 738.

§ 537. In an action by an indorsee of a promissory note, the defense being that it was procured by fraud, and evidence being offered to establish fraud, the good faith of plaintiff's purchase and the credibility of the evidence upon the issue were for the jury.—American Nat. Bank v. Fountain (N. C.) 738.

§ 537. The question of want or failure of consideration in an action by the purchaser of a draft against the acceptor is not one for the jury, where the evidence shows that plaintiff

\*Point annotated. See syllabus.

was a bona fide purchaser.—*Stouffer v. Erwin* (S. C.) 843.

## BOARDS.

County boards, see Counties, §§ 3, 4.  
Of education, see Schools and School Districts, § 1.  
Pharmaceutical boards, see Druggists.  
Registration boards, see Elections, § 2.

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see Bills and Notes, §§ 1, 3.  
Of goods, see Sales, § 4.  
Of lands, see Vendor and Purchaser, § 3.

## BONDS.

Acceptance of fund arising from judicial sale as estoppel against suit on forthcoming bond, see Estoppel, § 1.  
Ground for new trial in action on, see New Trial, § 1.  
Liquidated damages or penalties for breach, see Damages, § 3.  
Municipal bonds, see Municipal Corporations, § 9.  
Of school district, see Schools and School Districts, § 1.  
Sureties on bonds, see Principal and Surety.

*Bonds for performance of duties of trust or office.*

See Executors and Administrators, § 1; Receivers, § 2.

*Bonds in judicial proceedings.*

See Costs, § 2.  
Bonds in legal proceedings, see Appeal and Error, §§ 4, 5.  
Certiorari to justice of the peace, see Justices of the Peace, § 3.  
Review by certiorari of decision of city court, see Courts, § 4.

### § 1. Actions.

\*Petition on contractor's bond *held* good as against a general demurrer.—*Thomason v. Keeney* (Ga. App.) 470.

A general allegation of performance by obligee of conditions of the bond *held* unnecessary.—*Thomason v. Keeney* (Ga. App.) 470.

## BOUNDARIES.

Description in deed, see Deeds, § 1.  
Parol or extrinsic evidence as to, see Evidence, § 10.  
Proceedings between tenants in common, see Tenancy in Common, § 2.  
Special or local laws, see Statutes, § 2.

*Geographical or political divisions.*

See Counties, § 1; Municipal Corporations, § 1; Schools and School Districts, § 1.

### § 1. Description.

\*Deeds to land partly bounded by a railway right of way *held* to convey the fee to the center of the right of way.—*Foster v. Foster* (S. C.) 320.

§ 6. "Southwest course" defined.—*Holden v. Alexander* (S. C.) 1108.

### § 2. Evidence, ascertainment, and establishment.

\*Where a line has been located by an executed parol agreement between adjoining proprietors or established by seven years' acquiescence, under Civ. Code 1895, § 3247, the line thus established is binding on the grantees of such proprietors.—*Osteen v. Wynn* (Ga.) 37.

\*That a line may be established by acquiescence for seven years, under Civ. Code 1895, § 3247, it is not necessary that the acquiescence be manifested by a conventional agreement.—*Osteen v. Wynn* (Ga.) 37.

\*Where a boundary line is established by oral agreement, and possession be held to it, it is not necessary that the possession continue for 20 years.—*Osteen v. Wynn* (Ga.) 37.

\*A disputed boundary may be established by oral agreement, accompanied by actual possession or by acquiescence for seven years, as provided by Civ. Code 1895, § 3247.—*Osteen v. Wynn* (Ga.) 37.

Act Dec. 17, 1901 (Acts 1901, p. 39), in amendment of Civ. Code 1895, § 3249, *held* not complied with by an adjoining landowner by filing his protest to boundary lines, as run by the processioners and the surveyor, with the clerk of the superior court, rather than the ordinary.—*Moore v. Hood* (Ga.) 586.

§ 37. Evidence *held* sufficient to locate a lot conveyed by deed.—*Hanstein v. Ferrell* (N. C.) 1070.

§ 48. Recognition of, and acquiescence in, a line by adjoining owners as the division line *held* to be evidence of its being the true boundary.—*Hanstein v. Ferrell* (N. C.) 1070.

## BREACH.

Of condition, see Insurance, §§ 2, 3.  
Of contract, see Contracts, § 4; Sales, § 3.  
Of covenant, see Covenants, § 2.  
Of warranty, see Sales, §§ 5, 7.

## BREACH OF THE PEACE.

See Disturbance of Public Assemblage.

## BRIDGES.

Claims against county for bridge work, see Counties, § 4.

### § 1. Regulation and use for travel.

§ 44. Where a plank in a bridge gave way, causing injury to a horse, the driver was not guilty of negligence, though he had pulled the horse to one side of the bridge to avoid a hole on the other side.—*Sullivan v. City of Anderson* (S. C.) 862.

§ 46. In an action against a city for injuries to plaintiff's horse from a defective bridge, evidence *held* to show that defendant should have observed the defects, and made the requisite repairs.—*Sullivan v. City of Anderson* (S. C.) 862.

§ 46. In an action for injury to plaintiff's horse by a defective plank in a bridge, evidence *held* to show that the load on plaintiff's wagon was of no more than ordinary weight.—*Sullivan v. City of Anderson* (S. C.) 862.

## BRIEFS.

Of evidence on motion for new trial, see New Trial, § 2.  
Waiver of error in appellate court by failure to urge in brief, see Appeal and Error, § 19.

## BROKERS.

See Principal and Agent.  
Remedies of parties in gambling transactions, see Gaming, § 1.

### § 1. Compensation and lien.

\*A broker employed to sell real estate *held* to be entitled to commissions, though the owner

\*Point annotated. See syllabus.



permitted the purchaser to rescind.—*Bankers' Loan & Investment Co. v. Spindle (Va.)* 266.

## § 2. Actions for compensation.

A broker *held* only entitled to recover interest on contract commissions from the average date the installments thereof were payable.—*Bankers' Loan & Investment Co. v. Spindle (Va.)* 266.

## BUILDING CONTRACTS.

Measure of damages for breach, see *Damages*, § 4.

Performance of, see *Contracts*, § 4.

## BULK STOCK LAWS.

As denial of due process of law, see *Constitutional Law*, § 6.

As denial of equal protection of law, see *Constitutional Law*, § 5.

## BURDEN OF PROOF.

In civil actions, see *Evidence*, § 3.

In criminal prosecutions, see *Homicide*, § 4.

## BURIAL.

See *Dead Bodies*.

## BY-LAWS.

Of mutual benefit insurance association, see *Insurance*, § 6.

## CANCELLATION OF INSTRUMENTS.

See *Quieting Title*; *Reformation of Instruments*.

Grounds for cancellation of contracts for sale of realty, see *Vendor and Purchaser*, § 2.

Grounds for cancellation of contracts in general, see *Contracts*, § 3.

Harmless error, see *Appeal and Error*, § 16.

Setting aside fraudulent conveyances, see *Fraudulent Conveyances*, § 3.

### § 1. Right of action and defenses.

§ 31. Effect on the grantee's rights of a third person's fraud in procuring a conveyance stated.—*Beeson v. Smith (N. C.)* 888.

### § 2. Proceedings and relief.

\*Where the city of Savannah conveyed a part of a street to defendant, it is a necessary party to an application by a third party to cancel such deed.—*Kehoe v. Rourke (Ga.)* 185.

On petition to cancel deeds and mortgage on the ground of infancy, plaintiff *held* not entitled to show that, if she could not recover on that ground, she would nevertheless be entitled to relief because she had obtained a reconveyance from the last taker under the chain of conveyances attacked.—*Gaskins v. Davis (Ga.)* 581.

§ 51. In action to avoid a deed, an instruction defining undue influence *held* not objectionable as laying too much stress on the element of fraud.—*Myatt v. Myatt (N. C.)* 887.

§ 57. In an action to cancel a deed, procured through fraud or undue influence, a court may set it aside altogether, or only sub modo, and administer the relief required by justice.—*Beeson v. Smith (N. C.)* 888.

## CANDIDATES.

For office, see *Elections*, § 3.

\*Point annotated. See *syllabus*.

## CARRIERS.

Admissions by agent of carrier as evidence, see *Evidence*, § 6.

Applicability of instructions to case in action for failure to re-ice refrigerator car, see *Trial*, § 9.

As agent of consignee, see *Sales*, § 4.

Assumptions of facts in instructions, see *Trial*, § 6.

Carriage of passengers by vessels, see *Shipping*, § 1.

Claim for loss of shipment as best evidence in action for penalties, see *Evidence*, § 5.

Conclusiveness of judgment in action against connecting carrier, see *Judgment*, § 7.

Construction of charge to jury in action for injuries, see *Trial*, § 12.

Determination and disposition on appeal or writ of error in action for damages to freight, see *Appeal and Error*, § 24.

Direct or remote consequences of breach of contract of transportation, see *Damages*, § 2.

Documentary evidence in action for injuries to shipment of live stock, see *Evidence*, § 9.

Duplicity in indictment for offenses by carrier, see *Indictment and Information*, § 4.

Election between causes of action pleaded in action for injuries to passenger, see *Pleading*, § 8.

Harmless error in action on bill of lading, see *Appeal and Error*, § 16.

Hearsay evidence in action for injuries to shipment of live stock, see *Evidence*, § 8.

Joinder of causes of action against, see *Action*, § 3.

Jurisdiction of action for breach of public duty by, see *Justices of the Peace*, § 1.

Laws imposing penalty as denial of equal protection of law, see *Constitutional Law*, § 5.

Laws relating to penalties against as burden on interstate commerce, see *Commerce*, § 2.

Nominal damages for wrongful stoppage in transit of shipment of live stock, see *Damages*, § 1.

Opinion evidence in action for injuries to shipment of live stock, see *Evidence*, § 11.

Parol or extrinsic evidence affecting contract of transportation, see *Evidence*, § 10.

Res geste in action for injuries to passenger, see *Evidence*, § 4.

Restraining judicial sale of freight car, see *Judicial Sales*.

Subjects of interstate commerce regulations, see *Commerce*, § 1.

Undue prominence of particular matters in instructions, see *Trial*, § 8.

Validity of release for injuries to passenger, see *Release*, § 1.

Violation of Sunday laws, see *Sunday*.

### § 1. Control and regulation of common carriers.

§ 32. A refusal to issue through bills of lading or furnish cars to connecting carriers in respect to shipments of cotton seed *held* not in violation of rule 36 of the Railroad Commission of Georgia, requiring railroads to afford all persons equal facilities without unjust discrimination.—*Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga. App.)* 996.

§ 32. A refusal to deliver cars of cotton seed upon a warehouse side track as was done for other consignees *held* a violation of rule 36 of the Railroad Commission of Georgia.—*Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga. App.)* 996.

In an action against a carrier, based on *Revisal 1905*, § 2632, to recover the penalty for a failure to deliver goods shipped within a reasonable time, mere proof of nondelivery raises a presumption of negligence, and casts the burden on the defendant to prove loss without its default.—*Robertson v. Atlantic Coast Line R. Co. (N. C.)* 413.

Revisal 1905, § 2632, gives a right of action for a penalty from a carrier for a failure to deliver goods shipped within a reasonable time direct to "the party aggrieved," and does not permit such action on relation of the state.—*Robertson v. Atlantic Coast Line R. Co.* (N. C.) 413.

In an action for the statutory penalty for a carrier's failure to accept meat for shipment, the evidence held to show that the meat was not tendered for shipment.—*Cox v. Atlantic Coast Line R. Co.* (N. C.) 556.

Under Revisal 1905, §§ 2631, 2632, a carrier held to have incurred no penalty for not shipping goods by a certain train, even though the carrier's employé used discourteous language in refusing the shipment.—*Cox v. Atlantic Coast Line R. Co.* (N. C.) 556.

\*A consignee held entitled to recover a penalty under Revisal 1905, § 2634, where the carrier voluntarily pays a claim for lost goods after the time limited by the statute.—*B. F. D. Albritton & Co. v. Atlantic Coast Line R. Co.* (N. C.) 597.

\*Under Revisal 1905, § 2634, consignee held not to waive a penalty by receiving the amount of a claim against a carrier for lost goods.—*B. F. D. Albritton & Co. v. Atlantic Coast Line R. Co.* (N. C.) 597.

§ 20. In an action under Revisal 1905, § 2634, imposing a penalty for a carrier's failure to adjust a claim for loss of freight within a certain time, provided that, unless the consignee recover the full amount claimed, no penalty shall be allowed, the burden is on defendant to prove that the claim was not filed or that it was excessive.—*Rabon v. Atlantic Coast Line R. Co.* (N. C.) 743.

§ 20. Under Revisal 1905, § 2634, imposing a penalty for a carrier's failure to adjust a claim for loss of freight, provided that the claimant may not recover the penalty unless he recover the full amount of his claim, that the carrier voluntarily paid the claim for loss after judgment for plaintiff, and while an appeal therefrom was pending, did not prevent a recovery of the penalty.—*Rabon v. Atlantic Coast Line R. Co.* (N. C.) 743.

Where there is total loss of freight and settlement therefor, held, that 24 St. at Large, p. 671, providing a penalty for delay in transportation, gives the consignee no right of action.—*Macon v. Southern Ry. Co.* (S. C.) 6.

\*Act 1904 (Laws 1904, p. 671), prohibiting delay in transportation of freight by railroads in the state, subject to a penalty, held not to apply to a transportation partly out of the state; the delay being wholly out of the state.—*Hunter v. Charleston & W. C. Ry. Co.* (S. C.) 18.

Penalty for delay in transportation of freight held not recoverable under Act 1904 (Laws 1904, p. 671), without evidence that the delay was within the state.—*Frasler v. Charleston & W. C. Ry. Co.* (S. C.) 14.

## § 2. Carriage of goods—Delivery to carrier.

\*A common carrier is bound to receive all goods offered that he is able and accustomed to carry, and to transport such goods and deliver them pursuant to the carriage contract.—*Shellnut v. Central of Georgia Ry. Co.* (Ga.) 294.

Under rule 26 of the railroad commission and the common law, a tender of a car load of such commodities as under the rules of the commission are to be loaded by the shipper is not a good tender, where the car on which the goods were when offered for transportation was the car of another line and was in bad order.—*Central of Georgia Ry. Co. v. Cook & Lockett* (Ga. App.) 464.

Where a car load of staves was offered for shipment on the car of another railway, and the car was in a dangerous condition, it was, under the rules of the railroad commission, the duty of the shipper, or of the railroad company offering the car for further shipment, to load such staves on another car.—*Central of Georgia Ry. Co. v. Cook & Lockett* (Ga. App.) 464.

## § 3. — Bills of lading, shipping receipts, and special contracts.

Bill of lading is only prima facie evidence of the receipt of the goods, and if the bill is issued before the goods are tendered it does not become effective until the goods are offered in such condition that carrier should receive them.—*Central of Georgia Ry. Co. v. Cook & Lockett* (Ga. App.) 464.

\*The holder of a draft, who takes an attached bill of lading by assignment as security for the amount advanced on the draft, becomes the owner of the goods, as against the acceptor, to an extent sufficient to protect his claim.—*Mason v. Nelson* (N. C.) 625.

\*Where a bank for a valuable consideration takes an assignment of a bill of lading with draft attached, the consignee of the goods takes subject to the rights of the bank.—*Mason v. Nelson* (N. C.) 625.

\*The fact that a buyer of goods under a contract of warranty is compelled to pay the draft for the price before he can examine the goods held not to make buyer of the draft with bill of lading attached liable for the breach of the warranty.—*Mason v. Nelson* (N. C.) 625.

\*Buyer of a draft for the price of goods with bill of lading attached held not liable for breach of warranty in the sale of the goods.—*Mason v. Nelson* (N. C.) 625.

## § 4. — Custody and control of goods.

§ 72. Under shipment of iron to the seller's order, "notify" the purchaser, title held not to pass, and the purchaser required to look to the seller, not the carrier, for damage for delay.—*Asheboro Wheelbarrow & Mfg. Co. v. Southern Ry. Co.* (N. C.) 1091.

## § 5. — Transportation and delivery by carrier.

\*Where a shipper's possession is apparently rightful, the carrier is not liable to the true owner for conversion, unless the latter intervenes before the goods are delivered and demands them, or gives notice of his right to the property, etc.—*Shellnut v. Central of Georgia Ry. Co.* (Ga.) 294.

A shipper of goods to be sold by the consignee for his benefit may maintain an action for their value against the carrier where they were not delivered, and recover the penalty for unreasonable delay in delivery allowed by Revisal 1905, § 2632.—*Robertson v. Atlantic Coast Line R. Co.* (N. C.) 413.

Rule respecting notice to be given by a carrier of goods on their arrival, as affected by Corporation Commission rule 1, stated.—*Poythress v. Durham & S. Ry. Co.* (N. C.) 515.

A railroad company's liability for destruction of goods held to be that of a carrier and not of a warehouseman, where it held them as carrier when it wrongfully refused to allow plaintiff to take them.—*Cattett v. Charleston & W. C. Ry. Co.* (S. C.) 315.

## § 6. — Delay in transportation or delivery.

\*Where goods have a market value, the measure of damages for failure to deliver is usually the difference between the market value at the

\*Point annotated. See syllabus.

proper time of delivery and that when they were delivered, except when they were ordered for a special purpose known to the carrier, when it is responsible for all damages attributable to the delay.—*Harper Furniture Co. v. Southern Express Co.* (N. C.) 145.

\*In an action for damages for wrongful delay in delivering goods by an express company, facts *held* sufficient to give defendant notice that damages beyond the ordinary amount might reasonably be expected in case of delay in delivery.—*Harper Furniture Co. v. Southern Express Co.* (N. C.) 145.

\*In an action against an express company to recover for wrongful delay in delivering goods, the evidence *held* sufficient to take the question of the amount of damages for delay in delivery to the jury.—*Harper Furniture Co. v. Southern Express Co.* (N. C.) 145.

In an action by a seller to recover the value of goods against a carrier, whether under the contract of sale the goods were to be actually delivered to the buyer, or whether they were to be delivered free on board cars, *held* to be for the jury.—*Acme Paper Box Factory v. Atlantic Coast Line R. Co.* (N. C.) 557.

§ 105. Damages because plant was idle *held* not recoverable on delay in a shipment of iron, where there was nothing to indicate the use to which the iron was to be put, or of any special damage.—*Asheboro Wheelbarrow & Mfg. Co. v. Southern Ry. Co.* (N. C.) 1091.

§ 105. Carrier *held* not liable for delay in shipment of buggies for the difference between the price the owner might have obtained by sales in the usual course of his business, had the buggies arrived in due time, and the price realized at a forced sale due to a lack of storage capacity when the buggies arrived.—*Rutland v. Southern Ry. Co.* (S. C.) 865.

§ 105. Measure of damages for delay in a shipment of buggies declared.—*Rutland v. Southern Ry. Co.* (S. C.) 865.

§ 105. Special damages for delay in delivering goods are recoverable only on showing notice of special circumstances at the time of shipment.—*Kolb v. Southern Ry. Co.* (S. C.) 872.

§ 105. That a carrier was notified that gin machinery delayed in transportation was badly needed was insufficient to charge it with notice that the consignee had special need for the machinery.—*Kolb v. Southern Ry. Co.* (S. C.) 872.

#### § 7. — Loss of or injury to goods.

\*In an action against a railroad for failure to deliver a parcel deposited in its parcel room, plaintiff need not show that its loss was due to the company's negligence.—*Terry v. Southern Ry. Co.* (S. C.) 249.

Plaintiff, under his complaint for injury to shipment through failure to re-ice car, *held* entitled to show schedule time for car in connection with delay, as showing necessity for more re-icing.—*Geraty v. Atlantic Coast Line R. Co.* (S. C.) 444.

Time-table printed a year before the shipment in question *held* admissible against a carrier, in the absence of evidence of change.—*Geraty v. Atlantic Coast Line R. Co.* (S. C.) 444.

#### § 8. — Carrier as warehouseman.

Rule as to what constitutes reasonable time in which a consignee of goods must remove them, as affecting the carrier's liability for their loss, stated.—*Poythress v. Durham & S. Ry. Co.* (N. C.) 515.

\*Rule as to when a carrier of goods becomes a warehouseman stated.—*Poythress v. Durham & S. Ry. Co.* (N. C.) 515.

#### § 9. — Limitation of liability.

\*A carrier by special contract can limit the liability which the law imposes upon it, but not

to the extent of exempting it from its own negligence.—*Brannon & Potts v. Atlanta & W. P. R. Co.* (Ga. App.) 468.

A carrier *held* to have acted as a warehouseman in receiving goods in its parcel room for safe-keeping, and to have a right to limit its liability to \$10 in case of loss of the goods.—*Terry v. Southern Ry. Co.* (S. C.) 249.

\*Clauses in bill of lading exempting carrier from liability for delay in transportation *held* not to relieve from obligation to re-ice refrigerator car shipment.—*Geraty v. Atlantic Coast Line R. Co.* (S. C.) 444.

#### § 10. — Connecting carriers.

§ 187. In an action for injury to a shipment of corn received from another carrier at destination in bad order, where plaintiff did not show a through contract of carriage and there was no evidence as to who furnished the car, a nonsuit was properly ordered.—*Brooke v. Nashville, C. & St. L. Ry. Co.* (Ga. App.) 1002.

#### § 11. — Charges and liens.

\*At common law a connecting carrier *held* not bound to comply with the contract fixed by the initial carrier, unless the latter acted with authority as his agent.—*Reynolds & Craft v. Seaboard Air Line Ry.* (S. C.) 445.

#### § 12. — Discrimination and overcharge.

A connecting carrier, a party to contract of through shipment made by the initial carrier with authority, is bound to pay back to the shipper any excess of freight charges received.—*Reynolds & Craft v. Seaboard Air Line Ry.* (S. C.) 445.

Under 24 St. at Large, p. 1, a connecting carrier *held* a party to a contract of through shipment, and liable to the shipper for exacting excessive freight charges.—*Reynolds & Craft v. Seaboard Air Line Ry.* (S. C.) 445.

#### § 13. Carriage of live stock.

\*That a contract for the shipment of an animal provides that the shipper shall unload the stock does not affect the duty of the carrier to have a safe place at which to unload the stock, unless the unsafe condition was known to the shipper and he took the risk of injury.—*Brannon & Potts v. Atlanta & W. P. R. Co.* (Ga. App.) 468.

\*A carrier is liable for injuries sustained by animals shipped while being unloaded, in consequence of insufficient facilities used by it.—*Brannon & Potts v. Atlanta & W. P. R. Co.* (Ga. App.) 468.

\*A petition in an action against a railroad company to recover for the value of a mule shipped *held* to state a cause of action.—*Brannon & Potts v. Atlanta & W. P. R. Co.* (Ga. App.) 468.

\*A general allegation that a carrier had received a shipment in good order, but delivered it in a damaged condition, *held* sufficient to put the carrier on its defense.—*Brannon & Potts v. Atlanta & W. P. R. Co.* (Ga. App.) 468.

Effect of proof of injury to a live stock shipment while in the carrier's possession stated.—*Jones v. Atlantic Coast Line R. Co.* (N. C.) 521.

Facts *held* to rebut the presumption of negligence on the part of a carrier arising from the fact of injury to live stock while in its possession.—*Jones v. Atlantic Coast Line R. Co.* (N. C.) 521.

\*In an action against a carrier for loss of live stock, evidence *held* sufficient to sustain a finding that injury to an animal occurred while in possession of the carrier.—*Jones-Laue Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

\*Proof that live stock was injured while in the possession and under the care of a carrier receiving it for transportation is sufficient to

\*Point annotated. See syllabus.

take the case to the jury.—*Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

\*A stipulation in a contract of carriage *held* not to avail the carrier, where the property was injured while in its custody and before delivery to the shipper.—*Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

\*A stipulation in a shipping contract that in consideration of a lower rate granted him the shipper will give notice in writing of his claim before the property is removed from the place of destination is reasonable.—*Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

\*A stipulation in a contract for the shipment of property *held* reasonable and valid.—*Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

\*A stipulation in a shipping contract that in case of loss or damage the carrier shall not be liable beyond an agreed value *held* valid.—*Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. C.) 701.

§ 218. Where a carrier contracts for exemption from certain of its common-law liabilities, and then, without necessity due to unforeseen emergencies, materially deviates from the route agreed on, the special exemptions in the contract terminate and the common-law liability attaches; the contract for exemptions applying only to the agreed route.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 228. Evidence as to railroad rates *held* admissible in an action against a carrier, though contradictory of plaintiff's written contract of shipment, where defendant had not introduced the written contract.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 228. Under a contract exempting a carrier from liability except for negligence, the burden is on the carrier to show that loss or damage did not result from its negligence.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 229. The measure of damages for the injury to mules by a carrier during transportation *held* to be the difference between their market value at destination uninjured by the carrier and their value there as injured.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 230. Evidence *held* to warrant a charge on waiver by a carrier of a written notice of claim for injuries to stock shipped.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 14. Carriage of passengers—*Relation between carrier and passenger.*

§ 245. In an action for injuries to a passenger, a petition failing to state where plaintiff purchased his ticket, and when and where he became a passenger, is subject to special demurrer.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

That, when one becomes a passenger by the purchase of a ticket, he remains such till he reaches his destination, *held* not the law without qualification.—*Du Bose v. Atlantic Coast Line R. Co.* (S. C.) 255.

§ 15. — *Performance of contract of transportation.*

A railway company, which has sold a passenger a ticket on a certain train, commits a breach of public duty by causing the train to leave from the station yards without coming to the depot.—*Payton v. Gulf Line Ry. Co.* (Ga. App.) 469.

§ 276. Evidence *held* to show that a railway ticket agent was negligent in failing to notify another agent to deliver a ticket to plaintiff, for which her agent had paid.—*Reeves v. Seaboard Air Line Ry.* (N. C.) 1078.

§ 276. Evidence *held* to show that a railway ticket agent was authorized to receive money

for a ticket reading from another station to his.—*Reeves v. Seaboard Air Line Ry.* (N. C.) 1078.

§ 284. Facts *held* to show a cause of action against a carrier for breach of an agent's agreement to notify another agent to deliver a ticket.—*Reeves v. Seaboard Air Line Ry.* (N. C.) 1078.

For delay of passenger in missing a train at a connecting point, *held* she could recover, if it was due to the carrier's negligence.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

\*A carrier *held* ordinarily to be under the duty to run on schedule time and make connections.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

Evidence *held* not to show willful or wanton breach of duty by carrier, authorizing punitive damages to passenger.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

Evidence *held* not to conclusively overcome presumption of negligence of carrier in failing to make schedule connections.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

A carrier having failed to make schedule time, to the damage of a passenger, *held* there is a presumption of negligence, imposing the burden of proof on the carrier.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

\*A passenger *held* entitled to damages for nervous breakdown directly due to the carrier's negligence.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

§ 16. — *Personal injuries.*

\*Allegations in an action against a street railway company for injury sustained by a passenger because of the overcrowded condition of the car *held* to state a cause of action.—*Worthington v. Georgia Ry. & Electric Co.* (Ga.) 525.

\*Degree of care due a person riding on conductor's invitation declared.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

\*A permit to ride on freight engines at the party's own risk *held* not to cover an injury not due to any risk of riding on the engine.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

§ 314. A petition in an action for injuries to a passenger *held* not subject to a special demurrer because failing to state the position of plaintiff before he went out on the platform.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 314. In an action for injuries to a passenger, the petition is subject to special demurrer where it fails to aver how far the train was from the station when plaintiff went out on the platform to alight.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 314. A petition in an action for injuries from a train, which fails to aver how far the train was from the station when plaintiff was thrown to the ground from the platform, was subject to special demurrer.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 314. An allegation in a complaint for injuries to a passenger that in matters and things herein related plaintiff was in the exercise of reasonable care, and was free from fault, is not demurrable.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 314. An allegation in a petition for injuries to plaintiff that his fall was due wholly to defendant's negligence is subject to special demurrer in failing to allege wherein the negligence consisted.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 316. The presumption of negligence created by Civ. Code 1895, § 2321, against a railroad company, *held* not to arise unless the proximate

\*Point annotated. See syllabus.

cause of the damage was the operation of its locomotives, cars or other machinery, or the act of some employé.—*Smith v. Atlantic Coast Line R. Co.* (Ga. App.) 1020.

§ 316. The word "running," as used in Civ. Code 1895, § 2321, creating a presumption of negligence against a railroad company where damage is done by the running of its locomotives, cars, or machinery, defined.—*Smith v. Atlantic Coast Line R. Co.* (Ga. App.) 1020.

§ 320. Evidence in an action for injuries to an intending passenger *held* sufficient to require a submission of his case to the jury.—*Smith v. Atlantic Coast Line R. Co.* (Ga. App.) 1020.

Instruction as to a passenger becoming a trespasser to whom the carrier owes duty only as a trespasser *held* correct, considered with reference to certain evidence in the case.—*Du Bose v. Atlantic Coast Line R. Co.* (S. C.) 255.

\*Modification of instruction as to duty of carrier to furnish "equal facilities" to passengers to board trains from either side of train *held* proper.—*Du Bose v. Atlantic Coast Line R. Co.* (S. C.) 255.

\*The slightest neglect against which human prudence and foresight might have guarded, and by reason of which an injury may have been occasioned, renders a carrier liable for an injury to a passenger.—*Roanoke Ry. & Electric Co. v. Sterrett* (Va.) 385.

Where an accident arises from a hidden defect, which a thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, a carrier is not liable for an injury to a passenger resulting therefrom.—*Roanoke Ry. & Electric Co. v. Sterrett* (Va.) 385.

\*The presumption of a carrier's negligence *held* not to arise from the mere fact of an accident to a passenger, but to depend upon the nature of the accident, which must be such as does not usually happen to passengers when due care is exercised by the carrier.—*Roanoke Ry. & Electric Co. v. Sterrett* (Va.) 385.

Evidence *held* to sustain the theory that the collapse of a bridge was caused by a hidden defect in the weld of a cord which supported the entire structure, which defect could not have been detected by the utmost scrutiny.—*Roanoke Ry. & Electric Co. v. Sterrett* (Va.) 385.

\*A requested charge on the burden of proof in an action by a passenger against a carrier for an injury resulting from a collapse of a railroad bridge *held* properly modified by the court.—*Roanoke Ry. & Electric Co. v. Sterrett* (Va.) 385.

§ 320. Evidence *held* to authorize submission of the question of a street car having stopped to receive passengers when plaintiff attempted to board it.—*Blue Ridge Light & Power Co. v. Price* (Va.) 938.

#### § 17. — Ejection of passengers and intruders.

Evidence *held* not to show unlawful eviction or willful disregard of a passenger's rights by a carrier, so as to authorize punitive damages.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

#### § 18. — Palace cars and sleeping cars.

\*The carrier *held* not liable for failure of Pullman car porter to make up berth.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

### CARRYING WEAPONS.

See Weapons.

\*Point annotated. See syllabus.

### CATTLE.

Prohibition against running at large in cities, see *Municipal Corporations*, § 7.

### CAUSE OF ACTION.

See Action; Malicious Prosecution, § 1.

### CAVEATS.

To probate of will, see *Wills*, § 3.

### CERTAINTY.

In pleading, see *Pleading*, § 1.  
Of contract within statute of frauds, see *Frauds*, Statute of, § 4.

### CERTIFICATE.

Of architect as to performance of contract, see *Contracts*, § 4.  
Of officer to deposition, see *Depositions*.  
Of record for purpose of review, see *Appeal and Error*, §§ 6, 8.  
Right of court of appeals to certify questions settled by Supreme Court, see *Courts*, § 5.  
To bill of exceptions, in criminal prosecution, see *Criminal Law*, § 27.

### CERTIORARI.

Review by certiorari of decision of city court, see *Courts*, § 4.  
Review by certiorari of preliminary trial, see *Criminal Law*, § 4.  
Review of proceedings before justices of the peace, see *Justices of the Peace*, § 3.

§ 1. **Proceedings and determination.**  
Exception in petition for certiorari to refusal of continuance *held* to present nothing for review, where it appeared that no motion for continuance had been made.—*Atlantic Coast Line R. Co. v. A. Cohn & Co.* (Ga. App.) 572.

### CHALLENGE.

To juror, see *Jury*, § 3.

### CHANCERY.

See Equity.

### CHANGE OF VENUE.

Of civil actions, see *Venue*, § 2.

### CHARACTER.

Of accused in criminal prosecutions, see *Criminal Law*, § 8.  
Of adverse possession, see *Adverse Possession*, § 1.  
Of witness, see *Witnesses*, § 4.

### CHARGE.

By carrier, see *Carriers*, § 11.  
To jury in civil actions, see *Trial*, §§ 6-12.  
To jury in criminal prosecutions, see *Criminal Law*, § 22.

### CHARTER.

See *Municipal Corporations*, §§ 4, 7-9.

## CHattel Mortgages.

Evidence of statement of mortgagor and senior mortgagee conspiring to have mortgaged property sold at undervaluation in fraud of junior mortgagee, see Evidence, § 6.  
Mortgage lien on goods sold, see Sales, § 6.

### § 1. Requisites and validity.

§ 6. An instrument held on its face to be a sale of personalty effecting an absolute transfer of the chattels described.—*Leak v. Bank of Wadesboro* (N. C.) 733.

### § 2. Construction and operation.

\*A purchaser of mortgaged chattels from the mortgagor before the mortgage was recorded held entitled to the property as against the mortgagee, though the latter was not negligent in recording the mortgage.—*Taylor v. F. T. Mills & Son* (N. C.) 556.

### § 3. Foreclosure.

§ 262. A sale of mortgaged chattels at auction held a sale to the highest bidder, so that any agreement to stifle competition is a fraud.—*Henderson-Snyder Co. v. Polk* (N. C.) 904.

## CHEAT.

See False Pretenses; Fraud.

## CHILDREN.

See Guardian and Ward; Infants; Parent and Child.

Care required as to in general, see Negligence, § 1.

## CHOSE IN ACTION.

Assignment, see Assignments.

## CITATION.

See Process.

## CITIES.

See Municipal Corporations.

## CITIZENS.

See Aliens.

Equal protection of laws, see Constitutional Law, § 5.

Privileges and immunities, see Constitutional Law, § 4.

## CIVIL DAMAGE LAWS.

See Intoxicating Liquors, § 7.

## CIVIL RIGHTS.

See Constitutional Law, §§ 4, 5.

## CLAIM AND DELIVERY.

See Replevin.

## CLAIMS.

Against county, see Counties, § 4.

Against estate of decedent, see Executors and Administrators, § 5.

To property levied on, see Attachment, § 2; Execution, § 4.

\*Point annotated. See syllabus.

## CLERKS OF COURTS.

§ 66. Under Revisal 1905, §§ 610, 611, 612, 717, held that, where partition proceedings begun before a superior clerk were transferred to the judge in term, he was required to dispose of it on the merits, and could not merely reverse the clerk's action and remand the case, though there were irregularities in the clerk's proceedings.—*Little v. Duncan* (N. C.) 770.

## CLOUD ON TITLE.

See Quieting Title.

## CODICIL.

See Wills, § 7.

To will as affecting right of executor to possession, see Executors and Administrators, § 3.

## CODIFICATION.

Of statute, see Statutes, § 4.

## COLLATERAL AGREEMENT.

Parol evidence, see Evidence, § 10.

## COLLATERAL ATTACK.

On decision of county commissioners, see Counties, § 4.

On judgment, see Judgment, § 5.

## COLLATERAL UNDERTAKING.

See Frauds, Statute of, § 1.

## COLLECTION.

Of costs, see Costs, § 4.

Of estate of decedent, see Executors and Administrators, § 3.

Of taxes, see Taxation, § 4.

## COLLEGES AND UNIVERSITIES.

Licenses to graduate of, under pharmacy statute, see Druggists.

## COLOR OF TITLE.

Harmless error in rulings as to sufficiency of to sustain adverse possession, see Appeal and Error, § 14.

Insufficiency to support action for forcible entry and detainer, see Forcible Entry and Detainer, § 1.

To sustain adverse possession, see Adverse Possession.

## COMBINATIONS.

See Conspiracy.

## COMITY.

Affecting foreign decree of divorce, see Divorce, § 3.

Between courts, see Courts, § 6.

## COMMERCE.

Carriage of goods and passengers, see Carriers; Shipping.

§ 1. Subjects of regulation.

§ 33. That the owner of merchandise offered for transportation from one point to another in

the state intends to have it further transported by a second carrier into another state *held* not to make such first transportation interstate commerce, so as to deprive it of the protection of rule 36 of the Railroad Commission of Georgia. —Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga. App.) 996.

§ 33. Consignee's intention as to the future disposition of his property by shipping it over another line under a new bill of lading into another state cannot change an intrastate shipment to an interstate shipment, so as to deprive it of the protection of rule 36 of the Railroad Commission of Georgia. —Augusta Brokerage Co. v. Central of Georgia Ry. Co. (Ga. App.) 996.

#### § 2. Means and methods of regulation.

That a creditor of a foreign railroad may, by levy and sale of an empty and idle freight car of the debtor, incidentally affect future interstate commerce, will not render such proceeding illegal. —Southern Ry. Co. v. Brown (Ga.) 177.

\*Civ. Code 1895, § 2222, requiring an engineer to check his locomotive at a crossing, *held* not, as to a railroad doing an interstate business, in violation of Const. U. S. art. 1, § 8, but a valid exercise of the police power. —Southern Ry. Co. v. Grizzle (Ga.) 177.

\*Under the Wilson act (Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3179]), Pen. Code 1895, § 428, prohibiting the solicitation of orders for intoxicating liquors in a prohibition county, *held* not void as regulation of interstate commerce. —Rose v. State (Ga. App.) 117; R. M. Rose Co. v. Same, Id.

Revisal 1905, § 2634, subjecting a carrier to a penalty for failure to adjust a loss within the prescribed time, *held* not to impose an unlawful burden on interstate commerce, in violation of Const. U. S. art. 1, § 8. —Raleigh Iron Works v. Southern Ry. Co. (N. C.) 595.

Revisal 1905, § 2644, providing for a penalty for failure by a carrier to refund an overcharge, *held* not to impose an unlawful burden on interstate commerce, contrary to Const. U. S. art. 1, § 8. —Raleigh Iron Works v. Southern Ry. Co. (N. C.) 595.

Act 1903 (24 St. at Large, p. 81), providing a penalty for failure to adjust claim for loss of freight *held*, so far as relating to the facts of the case, not to violate the interstate commerce clause of the federal Constitution. —Colleton Mercantile & Mfg. Co. v. Atlantic Coast Line R. Co. (S. C.) 6.

### COMMISSION.

To take testimony, see Depositions.

### COMMISSIONERS.

Action against state dispensary commissioners as action against state, see States, § 1.  
County commissioners, see Counties, § 4.  
In partition, see Partition, § 2.  
Of schools, see Schools and School Districts, § 1.  
Presumptions as to recording report of commissioners in partition, see Records.

### COMMISSIONS.

Of broker, see Brokers, § 1.  
Of trustee, see Trusts, § 4.

### COMMITTEE.

Guardianship of insane persons, see Insane Persons, § 1.

### COMMON CARRIERS.

See Carriers.

### COMMON DRUNKARDS.

See Drunkards.

### COMMON LAW.

Competency of witnesses to will, see Wills, § 2.  
Following decisions of another state as to, see Courts, § 2.  
Jurisdiction of city court, see Courts, § 4.  
Presumptions as to, see Evidence, § 2.  
Right of action for death under, see Death, § 2.  
Right of parent to recover for injuries to child, see Parent and Child.

### COMMON SCHOOLS.

See Schools and School Districts, § 1.

### COMMON SOURCE.

Title from, in ejectment, see Ejectment, § 1.

### COMPENSATION.

For property taken for public use, see Eminent Domain, § 2.  
Of particular classes of officers or other persons. See Brokers, § 1.  
Attorney, see Attorney and Client, § 2.  
Servant, see Master and Servant, § 2.  
Trustee, see Trusts, § 4.

### COMPETENCY.

Of evidence in civil actions, see Evidence, § 4.  
Of evidence in criminal prosecutions, see Criminal Law, § 9.  
Of experts as witnesses, see Evidence, § 11.  
Of jurors, see Jury, § 2.  
Of witnesses in general, see Witnesses, § 2.

### COMPLAINT.

In civil actions, see Pleading, § 2.  
In criminal prosecutions, see Criminal Law, § 4;  
Indictment and Information.

### COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

### COMPROMISE AND SETTLEMENT.

See Payment; Release.  
Compromise as consideration of contract, see Contracts, § 1.  
Settlement with wife on divorce as affecting allowance to children, see Divorce, § 2.  
Specific performance of compromise agreement, see Specific Performance, § 4.

The rule that no consent between attorneys or parties, if denied, will be enforced if not in writing, does not apply to an oral agreement and compromise of a pending suit. —Boswell v. Gillen (Ga.) 187.

An agreement of compromise need not be in writing. —Boswell v. Gillen (Ga.) 187.

\*The settlement of doubtful issues in a pending suit is a sufficient consideration for an agreement of compromise. —Boswell v. Gillen (Ga.) 187.

\*Point annotated. See syllabus.

\*Where an agreement for the compromise of a pending cause is made by the parties, and whereby one of the parties is to do certain acts, such agreement on performance or offer to perform puts an end to the subject-matter of the controversy.—*Boswell v. Gillen* (Ga.) 187.

\*In a claim case agreement on compromise may be pleaded in bar of a further prosecution of the case.—*Boswell v. Gillen* (Ga.) 187.

## COMPUTATION.

Of period of limitation, see *Limitation of Actions*, § 1.

## CONCEALED WEAPONS.

See *Weapons*.

## CONCLUSION.

In pleading, see *Pleading*, § 1.

Of witness, see *Evidence*, § 11.

## CONCURRENT JURISDICTION.

Of courts, see *Courts*, § 6.

## CONDEMNATION.

Taking property for public use, see *Eminent Domain*.

## CONDITIONS.

Conditional bill of sale as documentary evidence, see *Evidence*, § 9.

*In contracts and conveyances.*

See *Contracts*, § 2; *Deeds*, § 3; *Wills*, § 8.

Insurance policies, see *Insurance*, §§ 2, 3.

*Precedent to actions or other proceedings.*

See *Action*, § 1.

## CONFESSION.

Admissibility in evidence, see *Criminal Law*, § 13.

## CONFIDENTIAL RELATIONS.

Disclosure of communications, see *Witnesses*, § 2.

## CONFIRMATION.

Of conveyance by municipal corporation, see *Municipal Corporations*, § 5.

Of tax title, see *Taxation*, § 5.

## CONFLICT OF LAWS.

*Liabilities for torts.*

See *Death*, § 2; *Negligence*, § 1; *Torts*.

Liability of master for injuries to servant, see *Master and Servant*, § 3.

*Remedies, and jurisdiction and procedure.*

Conflicting jurisdiction of courts, see *Courts*, § 6.

## CONNECTING CARRIERS.

See *Carriers*, § 10.

## CONSENT.

To rescission of contract, see *Contracts*, § 3.

\*Point annotated. See *syllabus*.

## CONSIDERATION.

Of contract in general, see *Contracts*, § 1.

*Of particular classes of contracts.*

See *Fraudulent Conveyances*, § 1; *Sales*, § 4.

Compromise agreement, see *Compromise and Settlement*.

## CONSPIRACY.

Burden of proof to show conspiracy to slander, see *Libel and Slander*, § 2.

Declarations by conspirator as evidence, see *Evidence*, § 6.

Restraining by injunction, see *Injunction*, § 2.

§ 1. *Civil liability.*

§ 22. In an action against two defendants for slander, alleging a conspiracy between them to defame plaintiff, unless the jury believe by the greater weight of the evidence that a conspiracy or combination was formed by defendants to speak the slanderous words alleged, the jury should find for defendants.—*Rice v. McAdams* (N. C.) 774.

## CONSTITUTION.

Of mutual benefit insurance association, see *Insurance*, § 6.

## CONSTITUTIONAL LAW.

*Provisions relating to particular subjects.*

See *Courts*, § 2; *Criminal Law*, §§ 3, 19; *Elections*, § 1; *Eminent Domain*, §§ 1, 2; *Habeas Corpus*, § 1; *Jury*, § 1; *Municipal Corporations*, § 4; *Schools and School Districts*, § 1; *Street Railroads*, § 1; *Taxation*, § 1; *Wills*, § 10.

Enactment and validity of statutes, see *Statutes*, § 1.

Instructions to jury, see *Trial*, § 6.

Regulation of druggists, see *Druggists*.

Special or local laws, see *Statutes*, § 2.

Subjects and titles of statutes, see *Statutes*, § 3.

§ 1. *Construction, operation, and enforcement of constitutional provisions.*

§ 46. A court will abstain from passing on the constitutionality of acts of the Legislature, if there be any other ground on which to rest its decision.—*McGill v. Osborne* (Ga.) 811.

\*Where two constructions may be given a statute, one making it within the Legislature's power, and another not, it will be presumed that the Legislature intended to do that which it had the right to do.—*Louisville & N. R. Co. v. Interstate R. Co.* (Va.) 369.

§ 42. A nonregistered pharmacist prosecuted under Code Va. 1904, c. 78, §§ 1754–1766, held not entitled to complain of the provision giving the state board of pharmacy the sole right to institute prosecutions under the chapter.—*Bertram v. Commonwealth* (Va.) 969.

§ 2. *Vested rights.*

§ 107. A party can acquire no vested right in an adjudication of the Supreme Court construing a limitation in a suit to which he is not a party.—*Gulledge v. Seaboard Air Line Ry.* (N. C.) 732.

§ 3. *Obligation of contracts.*

\*Where a Constitution or statute has received a construction by the courts of last resort, and contracts have been made, and rights acquired in accordance therewith, a subsequent decision changing the construction cannot invalidate rights acquired under the contracts.—*Mason v. Nelson* (N. C.) 625.



§ 119. The compulsory annexation of territory to municipalities, so as to subject the property in the annexed territory to taxation, involves no contract between the state and the citizens of the annexed territory.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

Where a town contracted for the furnishing of light and water for public use, and later retroactive statute limited the power of the town, *held*, that the latter statute was void as to such prior contract as impairing the obligation of contracts.—*Welch Water, Light & Power Co. v. Town of Welch* (W. Va.) 497.

#### § 4. Privileges or immunities, and class legislation.

Act approved August 17, 1903 (Acts 1903, p. 92), *held* not in violation of Const. U. S. Amend. 14, as abridging the privileges or immunities of citizens.—*Jaques & Tinsley Co. v. Carstarphen Warehouse Co.* (Ga.) 82.

#### § 5. Equal protection of laws.

Act approved August 17, 1903 (Acts 1903, p. 92), regulating the sale of a stock of goods in bulk, *held* not a denial of the equal protection of the laws in violation of Const. U. S. Amend. 14.—*Jaques & Tinsley Co. v. Carstarphen Warehouse Co.* (Ga.) 82.

Revisal 1905, § 2634, subjecting carrier to penalty for failure to adjust claim for loss within prescribed time, *held* not to deny the carrier the equal protection of the law, in violation of Const. U. S. Amend. 14.—*Raleigh Iron Works v. Southern Ry. Co.* (N. C.) 595.

Revisal 1905, § 2644, subjecting carrier to a penalty for failure to refund an overcharge within the time prescribed, *held* not to deny the carrier the equal protection of the law in violation of Const. U. S. Amend. 14.—*Raleigh Iron Works v. Southern Ry. Co.* (N. C.) 595.

#### § 6. Due process of law.

Act approved August 17, 1903 (Acts 1903, p. 92), regulating the sale of a stock of goods in bulk, *held* not violative of Const. art. 1, § 1, par. 3, or Const. U. S. Amend. 14, as not due process of law.—*Jaques & Tinsley Co. v. Carstarphen Warehouse Co.* (Ga.) 82.

§ 290. A notice which will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of a special assessment before it becomes a fixed charge on his property is sufficient, as against the objection that property is taken without due process of law.—*City of Kinston v. Loftin* (N. C.) 1069.

§ 290. An owner sued for a special assessment, as authorized by Priv. Laws 1905, p. 874, c. 338, *held* not entitled to complain of the judgment against him on the ground that it was a taking of property without due process of law.—*City of Kinston v. Loftin* (N. C.) 1069.

### CONSTRUCTIVE POSSESSION.

By adverse claimant, see Adverse Possession, § 2.

### CONSTRUCTIVE TRUSTS.

See Trusts, § 1.

### CONTEMPT.

Violation of injunction, see Injunction, § 6.

### CONTEST.

Of election, see Elections, § 4.

### CONTINGENT FEES.

Of attorney, see Attorney and Client, § 2.

### CONTINUANCE.

In criminal prosecution, see Criminal Law, § 16. In justice's court, see Justices of the Peace, § 2.

Review of discretionary rulings on motion for in criminal prosecution, see Criminal Law, § 27.

\*The court is not bound to suspend a trial to enable a litigant to procure additional evidence.—*Boswell v. Gillen* (Ga.) 187.

### CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Applicability of instructions to case in action on, see Trial, § 9.

Assessment of damages in action for breach, see Damages, § 6.

Assignment, see Assignments.

Cancellation, see Cancellation of Instruments. Damages for breach, see Damages, § 4.

Determination and disposition of cause on appeal or writ of error in action to enjoin execution of contract, see Appeal and Error, § 22.

Determination and disposition on appeal or writ of error of action for breach, see Appeal and Error, § 24.

Direct or remote consequences of breach, see Damages, § 2.

Evidence of damages in action for breach, see Damages, § 6.

Execution on Sunday, see Sunday.

Harmless error in action on, see Appeal and Error, § 18.

Impairing obligation, see Constitutional Law, § 3.

Liquidated damages or penalties, see Damages, § 3.

Nature and form of action, see Action, § 2.

Nonliability of parents on contract of child, see Parent and Child.

Operation and effect of customs or usages, see Customs and Usages.

Operation and effect of gaming laws, see Gaming, § 1.

Operation and effect of usury laws, see Usury, § 1.

Opinion evidence in action for breach, see Evidence, § 11.

Parol or extrinsic evidence, see Evidence, § 10.

Pendency of other action ground for abatement of action on, see Abatement and Revival, § 1.

Pleading damages in action for breach, see Damages, § 6.

Reformation, see Reformation of Instruments. Specific performance, see Specific Performance.

#### Contracts of particular classes of persons.

See Carriers, § 3; Counties, § 2; Husband and Wife, § 2; Master and Servant; Schools and School Districts, § 1.

Railroad employé, see Railroads, § 1.

#### Contracts relating to particular subjects.

Transportation of goods, see Carriers, § 3. Transportation of passengers, see Carriers, § 15.

#### Particular classes of express contracts.

See Bailment; Bonds; Covenants; Deeds; Exchange of Property; Insurance; Partnership; Sales.

Agency, see Principal and Agent.

Bills of lading, see Carriers, § 3.

Employment, see Master and Servant.

Leases, see Landlord and Tenant.

Sales of realty, see Vendor and Purchaser.

Suretyship, see Principal and Surety.

#### Particular classes of implied contracts.

See Account Stated; Contribution; Money Received; Use and Occupation.

\*Point annotated. See syllabus.

**Particular modes of discharging contracts.**

See Compromise and Settlement; Payment; Release.

**§ 1. Requisites and validity.**

The execution of a contract cannot be shown by the mere statement of an attesting witness that "this is the contract."—Alabama Const. Co. v. Continental Car & Equipment Co. (Ga.) 160.

§ 68. The compromise of a bona fide dispute is not binding if the party in whose favor executed gives up no claim, and furnishes no other consideration.—Red Cypress Lumber Co. v. Beall (Ga. App.) 1056.

§ 32. Though it was agreed that a contract to sell timber should be reduced to writing, failure to do so did not invalidate the contract, merely affecting the mode of proving it.—Teal v. Templeton (N. C.) 737.

§ 92. One held to have had sufficient mental capacity to contract with his sister to give her his property in consideration of care for him.—Reed v. Reed (Va.) 792.

**§ 2. Construction and operation.**

A contract which required the construction of a continuous foundation wall to support an adjoining owner's wall was breached when piers were built, even if they were sufficient to support the wall.—Candler Inv. Co. v. Cox (Ga. App.) 479; Cox v. Candler Inv. Co., Id.

Contract held to require the erection of a continuous foundation wall to support the property and wall of an adjoining owner, and was not complied with by the erection merely of piers.—Candler Inv. Co. v. Cox (Ga. App.) 479; Cox v. Candler Inv. Co., Id.

§ 168. Every contract is enforceable to the extent, not only of its express terms, but also of its connotations.—Brown v. Rome Mach. & Foundry Co. (Ga. App.) 720.

Where plaintiff gave negotiable notes for certain patent rights under a collateral agreement that the transaction was not closed until defendant had trained plaintiff's sons in selling the articles, plaintiff may recover the amount paid on the notes, where defendant negotiated them before performing such agreement.—Hughes v. Crooker (N. C.) 429.

\*Where the language of a contract is free from ambiguity, its construction is for the court.—Gay v. Roanoke R. & Lumber Co. (N. C.) 436.

§ 147. Courts held required to construe contracts so as to effectuate the purpose and intention of the parties.—Cuthbertson v. Morgan (N. C.) 744.

Where two persons obligated themselves to support their parents in consideration of the conveyance of land to the obligors, their contract was entire and when breached by one of the obligors, was wholly gone.—Epperson v. Epperson (Va.) 344.

**§ 3. Rescission and abandonment.**

§ 253. A contract cannot be abrogated without mutual consent.—Starling v. State (Ga. App.) 993.

**§ 4. Performance or breach.**

§ 337. Where a petition shows a breach of a contract between defendant and the plaintiffs, and damage had resulted to the latter, a general demurrer to the petition was properly overruled.—Southern Granite Co. v. Venable Bros. (Ga.) 1038.

Where a building contract does not otherwise prescribe, the architect's certificate need not follow any particular form.—Albany Phosphate Co. v. Hugger Bros. (Ga. App.) 533.

In an action for wrongfully negotiating a note alleged to have been given for patent rights un-

der a collateral agreement that the transaction was incomplete until defendant trained plaintiff's sons in selling the articles, evidence held to show the collateral agreement and its breach as alleged.—Hughes v. Crooker (N. C.) 429.

\*A defendant recommending to plaintiff a sales agent, pursuant to an agreement so to do, held not liable for the loss by the dishonesty of the agent recommended.—John Slaughter Co. v. Standard Sewing Mach. Co. (N. C.) 599.

\*A plaintiff may not declare on one contract and, without amendment, recover on another.—Sumrell & McCoy v. International Salt Co. (N. C.) 619.

Under a construction contract making a certified final estimate of the chief engineer a condition precedent to a right of action by contractors, held, that a contractor could not hire a stranger to the contract, and, upon his final estimate of the work done, bring suit on the contract.—Johnston & Grommett Bros. v. Buwn & Monteiro (Va.) 341.

**CONTRADICTION.**

Of record, see Appeal and Error, § 6.  
Of witness, see Witnesses, § 4.

**CONTRIBUTION.**

\*A right to contribution can arise only after payment by one of the debtors.—Eureka Lumber Co. v. Satchwell (N. C.) 810.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, § 3.

As questions for jury, see Negligence, § 4.  
Of person injured by defective bridge, see Bridges, § 1.

Of person injured by operation of railroad, see Railroads, §§ 7-8.

Of servant, see Master and Servant, §§ 9, 12-14.

**CONVERSION.**

Of partnership realty into personalty, see Partnership, § 2.

Wrongful conversion of personal property, see Trover and Conversion.

§ 19. Where testator directed his executors to sell real estate, there was an equitable conversion which took place at the death of testator, so that the beneficiaries took the proceeds as personalty.—Haywood v. Wachovia Loan & Trust Co. (N. C.) 915.

**CONVEYANCES.**

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, § 1.

Conveyances by or to particular classes of persons.

See Executors and Administrators, § 7; Husband and Wife, § 2; Infants, § 1; Insane Persons, § 3.

Co-tenants, see Tenancy in Common, § 2.

Devises, see Wills, § 11.

Married women, see Husband and Wife, § 3.

Conveyances of particular species of, or estates or interests in, property.

See Easements, § 1; Mines and Minerals, § 1.

Separate property of married women, see Husband and Wife, § 3.

Particular classes of conveyances.

See Assignments; Chattel Mortgages; Deeds; Mortgages.

\*Point annotated. See syllabus.

## CORPORATIONS.

Injunction affecting, see Injunction, § 2.  
 Liability for injuries caused by negligence in general, see Negligence, § 1.  
 Mandamus, see Mandamus, § 2.

### Particular classes of corporations.

See Municipal Corporations; Railroads; Street Railroads.

Banks, see Banks and Banking, § 1.  
 Telegraph and telephone companies, see Telegraphs and Telephones.  
 Water companies, see Waters and Water Courses, § 3.

### § 1. Capital, stock, and dividends.

§ 121. A seller in a contract for the sale of corporate stock *held* not entitled to enforce a sale of certain other stock without alleging and proving a certain fact.—*Kuker v. Snow* (N. C.) 909.

§ 121. Before a seller in a contract for the sale of corporate stock was entitled to final judgment directing the sale of other stock, a disputed question *held* necessary to be settled by a jury.—*Kuker v. Snow* (N. C.) 909.

### § 2. Members and stockholders.

The internal management of a corporation will not be interfered with by the court at the instance of a minority stockholder, unless the majority stockholders are acting *ultra vires*, or a strong case of mismanagement or fraud is shown.—*Bartow Lumber Co. v. Enwright* (Ga.) 233.

### § 3. Civil actions.

Persons are not parties to a litigation by reason of the fact that one of the parties thereto is a corporation of which they are stockholders.—*Hearn v. Clare* (Ga.) 187.

\*An instruction on ratification of acts of plaintiff's agent *held* proper.—*Dolvin v. American Harrow Co.* (Ga.) 198.

Defendant having pleaded that the agent of plaintiff corporation had authority in the premises, the court properly permitted the corporation's officers to testify to the contrary.—*Dolvin v. American Harrow Co.* (Ga.) 198.

\*The words "Valdosta Foundry & Machine Company" are sufficient as against a special demurrer on the ground that there is no party plaintiff.—*Charles v. Valdosta Foundry & Machine Co.* (Ga. App.) 493.

§ 514. Corporate name connotes corporate entity; this being applicable to both civil and criminal cases.—*Minchew v. Nahunta Lumber Co.* (Ga. App.) 716.

\*A foreman acting under the superintendent of a corporation is neither an "officer" nor "a managing or local agent" of the corporation on whom service of summons on the corporation can be made.—*Simmons v. Defiance Box Co.* (N. C.) 435.

### § 4. Insolvency and receivers.

Where, on petition, the assets of a corporation have been placed in the hands of a receiver, no one can have a hearing of his petition in aid of the original petition asking for injunction or removal of the receivers before being made a party to such litigation, under Civ. Code 1895, § 4903.—*Hearn v. Clare* (Ga.) 187.

Amendatory petition *held* properly dismissed for misjoinder of parties.—*Hearn v. Clare* (Ga.) 187.

Facts *held* insufficient to justify the appointment of a receiver for a solvent sawmill corporation to manufacture a quantity of logs on hand contrary to the business judgment of the corporation's directors representing a majority of the stock.—*Bartow Lumber Co. v. Enwright* (Ga.) 233.

\*Point annotated. See syllabus.

## CORRECTION.

Of irregularities and errors at trial, see Trial, § 14.  
 Of judgment, see Judgment, § 2.

## CORROBORATION.

Of testimony of accomplices, see Criminal Law, § 12.

## COSTS.

Compelling municipal officers to audit accounts for costs in criminal prosecutions, see Municipal Corporations, § 4.

In action against executor or administrator, see Executors and Administrators, § 8.

In partition, see Partition, § 2.

Liability of county to be sued for costs in extradition proceedings, see Counties, § 5.

Payment on appeal, see Appeal and Error, § 4.

### § 1. Nature, grounds, and extent of right in general.

Costs below follow the result of the final judgment; and, where plaintiff had judgment below, costs of two former trials were properly taxed against defendant.—*Smith v. Cashie & C. R. & Lumber Co.* (N. C.) 416.

\*Rule respecting taxation of costs in equity cases stated.—*Cauthen v. Cauthen* (S. C.) 319.

\*In a suit for partition, and to establish a claim against the common estate, on judgment for plaintiff, the chancellor *held* not to have abused his discretion in taxing the costs against the estate rather than against defendants' interest therein.—*Cauthen v. Cauthen* (S. C.) 319.

### § 2. Security for payment.

§ 132. A plaintiff may sue in forma pauperis under Revisal 1905, § 451, by showing a good cause of action, and making affidavit that he cannot give the bond or make deposit required by section 450, while a defendant before answering without filing a defense bond must, under section 454, make affidavit that he is not worth the amount of the undertaking in any property, and cannot give the bond.—*Rich v. Morisey* (N. C.) 762.

§ 132. While a dismissal of an action in forma pauperis on motion to "dispauper" does not estop plaintiff from bringing a second action, the fact of dismissal should be considered when he again applies to sue in forma pauperis.—*Rich v. Morisey* (N. C.) 762.

### § 3. On appeal or error, and on new trial or motion therefor.

§ 260. Where a writ of error is dismissed, damages for delay *held* not recoverable.—*Jones v. Poole* (Ga. App.) 711.

Under Code, § 540, defendant *held* entitled to have the costs of the transcript and certificate on two successful appeals deducted from the costs taxed against it on final judgment for plaintiff.—*Smith v. Cashie & C. R. & Lumber Co.* (N. C.) 416.

\*Even in equity cases, costs and disbursements in the Supreme Court are taxed against the losing party on appeal, and the circuit judge or chancellor has no power or discretion to make a contrary direction.—*Cauthen v. Cauthen* (S. C.) 319.

### § 4. Payment and remedies for collection.

Where plaintiff has dismissed a suit, he must, before bringing a second suit, either pay the costs of the former suit or file a pauper affidavit, or a plea in abatement on that ground should be sustained.—*McLaurin v. Fields* (Ga. App.) 114.

That a clerk of a city court agreed to consider as paid the costs of the suit which was dismissed, and to release plaintiff from all liability for costs, *held* not a compliance with Civ. Code 1895, § 5043, requiring payment of costs as prerequisite to the filing of a second suit.—*McLaurin v. Fields* (Ga. App.) 114.

## CO-TENANCY.

See Tenancy in Common.

## COUNCIL.

See Municipal Corporations, §§ 3, 8.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTIES.

See Municipal Corporations.

Effect of record of deed in original county prior to organization of new county, see Deeds, § 2.

Exercise of power of eminent domain in laying out highway, see Eminent Domain, § 3.

Jurisdiction over guardian and ward as affected by formation of new county, see Guardian and Ward, § 1.

Mandamus to compel carrying out result of county line election, see Mandamus, §§ 1-3.

Mandamus to compel inclusion of claims in estimate submitted as basis for tax rate, see Mandamus, § 3.

Mandamus to compel levy of county tax, see Mandamus, § 2.

Mandamus to compel payment of claims against county, see Mandamus, § 2.

Special or local laws for change of boundaries, see Statutes, § 2.

### § 1. Creation, alteration, existence, and political functions.

Under Acts 1905, pp. 48, 49, §§ 5, 10, and Acts 1906, p. 60, establishing Tift county from territory formerly belonging to Berrien county, Tift county *held* not entitled to recover from Berrien county any portion of the taxes for 1905 collected by Berrien county from the residents of that portion of Berrien county transferred to Tift county.—*Tift County v. Berrien County* (Ga.) 204.

### § 2. Property, contracts, and liabilities.

Under Pol. Code 1895, § 343, where it does not appear that either the contract between an ordinary and a contractor for a courthouse, or an order given by the contractor to a bank on the ordinary for warrants issued to the contractor and which order was accepted by the ordinary in writing, were entered on the minutes of the ordinary, *held*, that the bank could not recover.—*Jones v. Bank of Cumming* (Ga.) 68.

### § 3. Fiscal management, public debt, securities, and taxation.

§ 191. "Ordinary county expenses," within Civ. Code 1902, § 799, *held* to be those incurred for the current fiscal year.—*State v. Goodwin* (S. C.) 1100.

§ 192. Civ. Code 1902, § 799, providing for an estimate by a county board of the amount necessary to pay county expenses, includes past indebtedness and all claims legally approved to the date of the estimate.—*State v. Goodwin* (S. C.) 1100.

### § 4. Claims against county.

A county board of commissioners in considering a claim against the county acts in a judicial capacity and exercises exclusive original jurisdiction; and its judgment can be reviewed only on appeal by the circuit court, which can

act only on the evidence received by the board.—*Cunningham v. Clarendon County* (S. C.) 212.

On an appeal from the judgment of a county board of commissioners on a claim against the county, the minutes of the board may be taken by the circuit court in lieu of the formal return provided for by statute where no objection is made.—*Cunningham v. Clarendon County* (S. C.) 212.

§ 201. Under Civ. Code 1902, § 806, proper itemization of claims against a county is necessary to confer jurisdiction on the county board to audit and allow them.—*State v. Goodwin* (S. C.) 1100.

§ 201. Under Civ. Code 1902, §§ 806, 1354, a claim against a county for bridge work amounting to over \$10 is not sufficiently itemized, unless the contract for the work is so referred to that it may be identified.—*State v. Goodwin* (S. C.) 1100.

§ 201. A claim against a county is not "made out in items," within Civ. Code 1902, §§ 806, 808, unless it indicates the year in which it arose.—*State v. Goodwin* (S. C.) 1100.

§ 201. To "itemize an account" against a county, as required by Civ. Code 1902, § 806, is to state in detail the particulars thereof.—*State v. Goodwin* (S. C.) 1100.

§ 201. A claim against a county for lumber sold *held* not defective for want of sufficient itemization as to the date of the sale.—*State v. Goodwin* (S. C.) 1100.

§ 202. Verification of a claim against a county *held* a substantial compliance with Civ. Code 1902, § 806.—*State v. Goodwin* (S. C.) 1100.

§ 206. An adjudication by a county board, with reference to a claim of which the board had jurisdiction, cannot be attacked except in a direct proceeding.—*State v. Goodwin* (S. C.) 1100.

§ 206. Act 1905 (24 St. at Large, p. 1109) *held* not to authorize a commission appointed thereunder to pass on the merits of claims against Greenville county.—*State v. Goodwin* (S. C.) 1100.

§ 206. Allowance of a claim against a county by the county board constitutes an adjudication that the claim does not rest on a contract in excess of the tax levied or the amount appropriated for that particular purpose, in violation of Civ. Code 1902, § 806.—*State v. Goodwin* (S. C.) 1100.

### § 5. Actions.

Under Pol. Code 1895, § 343, and Code 1868, § 527, a petition in an action against a county, founded on contract, is not good unless it affirmatively appears that the contract was entered upon the minutes of the authorities in charge of its financial affairs.—*James v. Douglas County* (Ga.) 185.

§ 208. Under Pol. Code 1895, § 341, an assignee of a claim for expenses incurred by the assignor in going to Texas and returning under requisition for a prisoner who had fled from the state after conviction in the county of F., could not maintain suit against the county for such expenses.—*Fleming v. Floyd County* (Ga.) 814.

§ 222. On application to enjoin the county from taking land for a public road, answer *held* not subject to the objection that it was not the answer of the county.—*Hutchinson v. Lowndes County* (Ga.) 1048.

## COURTS.

Acquiring vested rights by decisions, see Constitutional Law, § 2.

Clerks, see Clerks of Courts.

Enforcement in state court of foreign statute giving action for wrongful death, see Death, § 2.

\*Point annotated. See syllabus.

Inquiry by, into advisability of changing street grade, see Municipal Corporations, § 8.  
Judges, see Judges.  
Jurisdiction of criminal prosecutions, see Criminal Law, § 2.  
Jurisdiction of prosecutions for offense against liquor laws, see Intoxicating Liquors, § 5.  
Justices' courts, see Justices of the Peace.  
Merger of offenses affecting jurisdiction of city court, see Criminal Law, § 1.  
Province of court and jury, see Trial, § 6.  
Removal of action from state court to United States court, see Removal of Causes.  
Review of decisions, see Appeal and Error.  
Right to trial by jury, see Jury, § 1.

### § 1. Nature, extent, and exercise of jurisdiction in general.

An order authorizing the sale by a trustee of the equitable estate of minors *held* not void because the record did not affirmatively show service on the minors.—Peavy v. Dure (Ga.) 47.

\*A statute *held* not a penal statute, so as not to be enforced by the courts of another state, merely because it only awards punitive damages.—Southern Ry. Co. v. Decker (Ga. App.) 678.

\*The courts will not enforce a foreign law which is solely penal, or which contravenes the public policy of the state.—Southern Ry. Co. v. Decker (Ga. App.) 678.

### § 2. Establishment, organization, and procedure in general.

While the courts will follow the decisions of a sister state in construing the statutes thereof, they are not bound by their interpretation of the common law.—Lay v. Nashville, C. & St. L. Ry. Co. (Ga.) 189.

\*Courts will determine for themselves whether the statute of another state, as construed by its highest courts, is penal or violative of the public policy of the state.—Southern Ry. Co. v. Decker (Ga. App.) 678.

Supreme Court Rule 21 (53 S. E. vii), requiring a summary of exceptions to be put in the record before hearing on appeal, is reasonable and just.—Uillery v. Guthrie (N. C.) 552.

\*General laws of business, established to promote commercial intercourse, are framed on the assumption that men will act honestly, and such laws should not be interfered with, because in exceptional instances a wrong may be possible.—Mason v. Nelson (N. C.) 625.

\*The rule of stare decisis is founded on public policy, and it does not require a court to adhere to a decision, clearly erroneous, which injuriously affects a general business law.—Mason v. Nelson (N. C.) 625.

\*A decision *held* not to have become the accepted law, and the Supreme Court may overrule it.—Mason v. Nelson (N. C.) 625.

\*An erroneous decision or mercantile law may be overruled; and, when done so, the general rule that a decision overruling a former decision is retrospective applies.—Mason v. Nelson (N. C.) 625.

\*The fact that a contract was made while a Supreme Court decision, expressing the rule governing such contracts, prevailed does not prevent the court, in a suit on the contract, from overruling such decision.—Mason v. Nelson (N. C.) 625.

\*A decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation.—Mason v. Nelson (N. C.) 625.

§ 89. A judicial decision is to be considered as authority only in connection with the facts on which it was decided.—American Nat. Bank v. Fountain (N. C.) 738.

§ 41. Under Const. art. 4, § 12, Laws 1907, p. 1258, c. 860, creating the recorder's court of a county, *held* valid.—State v. Shine (N. C.) 1080.

§ 90. Where a majority of the court concurred in the result only, the expressions in the opinion are not controlling authority.—State v. Goodwin (S. C.) 1100.

### § 3. Courts of general original jurisdiction.

§ 129. Under Civ. Code 1895, § 5842, the superior courts have exclusive jurisdiction in equity cases.—Geer v. Cowart (Ga. App.) 1054.

### § 4. Courts of limited or inferior jurisdiction.

\*Under act of 1902 (Acts 1902, p. 105), the execution, filing, and approval of a certiorari bond *held* required to affirmatively appear in the application for certiorari.—Condon v. Town of Jesup (Ga. App.) 677.

\*Certiorari bond approved by the judge of a municipal court, instead of the clerk, *held* not a sufficient compliance with act of 1902 (Acts 1902, p. 105).—Condon v. Town of Jesup (Ga. App.) 677.

§ 188. The city court of Atlanta *held* a court of general common-law jurisdiction.—Young v. Germania Savings Bank (Ga. App.) 999.

§ 188. A suit which states that defendant is indebted to plaintiff on 77 notes, for \$10 each, and prays judgment for principal and interest "of said notes," is within the jurisdiction of the city court of Atlanta, though only one note is attached as an exhibit.—Young v. Germania Savings Bank (Ga. App.) 999.

§ 188. The city court of Atlanta has jurisdiction of a suit based on notes given for the price of land and praying a general judgment, with a lien on the land.—Young v. Germania Savings Bank (Ga. App.) 999.

§ 188. The city court is without jurisdiction in equity, and in a suit on a note, where defendants claim damages for a tort not connected with the note, the plea is properly stricken.—Geer v. Cowart (Ga. App.) 1054.

### § 5. Courts of appellate jurisdiction.

On habeas corpus setting up as a ground of discharge that Acts 1896, p. 44, § 3, providing that, where the justices of the Supreme Court are evenly divided, the judgment of the court below shall stand affirmed, is in violation of Const. U. S. Amend. 14, the constitutionality of that act *held* not necessary to a determination of the case so as to require its certification to the Supreme Court.—Yeates v. Robertson (Ga. App.) 104.

\*Where the constitutional question involved has been passed on either by the Supreme Court of the state or of the United States, such question will not be certified by the Court of Appeals.—Rose v. State (Ga. App.) 117; R. M. Rose Co. v. Same, Id.

Where the objections to the constitutionality of Act Aug. 15, 1903 (Acts 1903, p. 90), making criminal the fraudulent obtaining of money under a labor contract, have been settled by the Supreme Court, the Court of Appeals will not certify such questions.—Young v. State (Ga. App.) 538.

### § 6. Concurrent and conflicting jurisdiction, and comity.

\*Georgia courts will not exclude Alabama suitors, so long as the courts of that state do not exclude Georgia suitors.—Southern Ry. Co. v. Decker (Ga. App.) 678.

\*Civ. Code 1895, § 1817, opening the courts of Georgia to residents of other states which afford Georgia citizens the same privilege, does not require that the courts of such other states shall afford citizens any remedy addi-

\*Point annotated. See syllabus.

tional to what they do their own.—Southern Ry. Co. v. Decker (Ga. App.) 678.

## COVENANTS.

### § 1. Construction and operation.

\*Under the express provisions of Civ. Code 1895, § 3615, a general warranty covers a known defect in the title.—Taylor v. Allen (Ga.) 291.

Covenants of title do not apply to land not included in the deed.—White & Corbitt v. W. W. Stewart & Co. (Ga.) 590.

\*Where a deed conveyed the right, title, and interest in certain premises, the covenants are limited to the interest which the grantor has in the property.—White & Corbitt v. W. W. Stewart & Co. (Ga.) 590.

§ 46. Covenant of warranty *held* not to extend to all the lands embraced in the deed, but limited to a certain number of acres.—Folk v. Graham (S. C.) 1106.

### § 2. Performance or breach.

\*A purchaser *held* not entitled to set up an incumbrance as a breach of warranty, unless he has been evicted or has extinguished the incumbrance.—Brown v. Thompson (S. C.) 440.

### § 3. Actions for breach.

\*In an action for breach of warranty of title, the measure of damages is only the purchase money, with interest.—Taylor v. Allen (Ga.) 291.

\*Where in ejectment, defendants warrantor of title was vouched in, a judgment for plaintiff was conclusive on the warrantor as to all defenses which were or might have been pleaded to defeat the ejectment suit.—Taylor v. Allen (Ga.) 291.

\*In an action on a general warranty against the claim of all persons, an eviction or equivalent disturbance by an outstanding paramount title must be alleged.—White & Corbitt v. W. W. Stewart & Co. (Ga.) 590.

\*A grantee acquiring the better title can only compel the grantor to refund the amount paid for such better title.—Brown v. Thompson (S. C.) 440.

\*A purchaser in a deed of conveyance calling for perfect title *held* entitled to deduct from the purchase money the sum paid for the acquisition of an outstanding title.—Brown v. Thompson (S. C.) 440.

§ 130. In an action for breach of a covenant of warranty, recovery *held* limited to the difference between the number of acres held and the number warranted.—Folk v. Graham (S. C.) 1106.

§ 130. In an action for breach of a covenant of warranty, recovery *held* limited to the purchase price of the land.—Folk v. Graham (S. C.) 1106.

## COVERTURE.

See Husband and Wife.

## CREDIBILITY.

Of witness, see Witnesses, § 4.

## CREDITORS.

See Bankruptcy; Fraudulent Conveyances.

Of testator, see Wills, § 11.

Remedies against surety, see Principal and Surety, § 3.

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see Fraudulent Conveyances, § 3.

\*Point annotated. See syllabus.

## CRIMINAL LAW.

Arrest of accused, see Arrest, § 1.

Conviction of offense included in that charged, see Indictment and Information, § 7.

Grand jury, see Grand Jury.

Indictment, information, or complaint, see Indictment and Information.

Mandamus to compel municipal officers to audit accounts for costs in criminal prosecutions, see Municipal Corporations, § 4.

Restraining criminal acts by injunction, see Injunction, § 2.

Right of court of appeals to certify questions settled by Supreme Court under act making it criminal to obtain money under labor contract, see Courts, § 5.

Special or local laws for punishment of crime, see Statutes, § 2.

Termination of prosecution, see Malicious Prosecution, § 2.

### Particular offenses.

See Adultery; Arson; Assault and Battery, § 2; Disturbance of Public Assemblage; Embezzlement; False Pretenses; Gaming, § 2; Homicide; Incest; Larceny; Negligence, § 5; Obscenity; Obstructing Justice; Perjury; Prostitution; Receiving Stolen Goods; Weapons.

Against liquor laws, see Intoxicating Liquors, §§ 4, 5.

Against Sunday laws, see Sunday.

Drunkenness on highway, see Drunkards.

Fraudulent obtaining of money from employer, see Master and Servant, § 2.

### § 1. Nature and elements of crime and defenses in general.

A state may punish for a crime committed through the mails without impinging the right of the national government to control the mails.—Rose v. State (Ga. App.) 117; R. M. Rose Co. v. Same, *Id.*

\*To constitute a crime, there must be either the joint operation of act and intention or criminal negligence.—Carbo v. State (Ga. App.) 140.

A conviction for willfully riding or driving the horse of another cannot be sustained, where a sale of the animal is effected; the transaction on the part of accused being thus ratified by the owner.—Sanders v. State (Ga. App.) 567.

§ 30. Where defendant was convicted in a city court on an indictment for pointing a pistol at another, and the evidence showed the consummated act of shooting at another or assault with intent to kill, the court was without jurisdiction.—Eberhart v. State (Ga. App.) 730.

\*A person is presumed to intend what he does, or that which is the immediate or necessary consequences of his acts.—State v. Abbott (W. Va.) 693.

### § 2. Jurisdiction.

Confinement in jail under sentence of a superior court *held* not a bar to defendant being tried on an indictment in a city court.—Coleman v. State (Ga. App.) 487.

Entry on the minutes of a city court of an order of the judge of the superior court directing the transfer of indictments for misdemeanors to such city court *held* sufficient to give the city court jurisdiction.—Coleman v. State (Ga. App.) 487.

The offense of abandoning a crop without cause before paying advances, in violation of Revisal 1905, § 3366, *held* within the final jurisdiction of a justice of the peace.—State v. Wilkes (N. C.) 430.

### § 3. Former jeopardy.

\*Under Const. 1877, art. 1, § 1, par. 8, *held*, that Const. U. S. Amend. 5, declaring that no person shall be twice put in jeopardy, cannot be pleaded in bar of a second trial, where the first

has been set aside on defendant's own motion.—*Yeates v. Roberson* (Ga. App.) 104.

§ 200. Evidence of an acquittal on a charge of keeping intoxicating liquor for sale held irrelevant on a trial for selling intoxicating liquor.—*Taylor v. State* (Ga. App.) 1048.

In determining whether a conviction for murder in the second degree acquitted accused of murder in the first degree, which crime, if any, the evidence tended to show, Code 1904, §§ 4040, 4041, 3662, should be construed together.—*Burton v. Commonwealth* (Va.) 376.

**§ 4. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.**

It is error to refuse a certiorari properly verified, where the finding is unwarranted by the evidence.—*Hood v. State* (Ga. App.) 570.

A petition for certiorari to correct errors of the criminal court of Atlanta is properly verified by an affidavit in the form contained in Civ. Code 1895, § 4638; the affidavit provided in Pen. Code 1895, § 785, not referring to writs of certiorari to review errors of the criminal court of Atlanta.—*Hood v. State* (Ga. App.) 570.

§ 211. An affidavit charging defendant with an assault to murder may furnish the basis for an accusation in a city court charging defendant with the offense of stabbing.—*Howell v. State* (Ga. App.) 1000.

§ 218. The word "felonious," in a warrant charging accused with unlawfully, willfully, and feloniously retailing spirituous liquor, held superfluous, in view of Revisal 1905, § 3291.—*State v. Shine* (N. C.) 1080.

§ 218. The words "guilty of a second offense," in a warrant charging accused with retailing spirituous liquor, may be treated as surplusage.—*State v. Shine* (N. C.) 1080.

§ 220. Under Revisal 1905, § 1468, the superior court, on appeal from a conviction of a violation of Laws 1905, p. 495, c. 497, § 12, held authorized to permit an amendment to the warrant, so long as sufficient matter remains on which to proceed to judgment, within Revisal 1905, § 3254.—*State v. Shine* (N. C.) 1080.

**§ 5. Arraignment and pleas, and nolle prosequi or discontinuance.**

\*In a criminal prosecution, defendant's plea of not guilty puts in issue every material allegation in the indictment.—*Phillips v. State* (Ga.) 239.

A demurrer held properly sustained to a plea of former jeopardy.—*Veasy v. State* (Ga. App.) 561.

§ 295. The burden of proof under a special plea of former jeopardy is on the defendant.—*Mance v. State* (Ga. App.) 1053.

§ 297. Where defendant is acquitted of an offense, and within the period of limitations is accused of a crime of the same character, and files a plea of former jeopardy, and a verdict was rendered against the plea, the state on the trial of the case in chief cannot rely on any transaction which might have been adjudicated on the former prosecution.—*Mance v. State* (Ga. App.) 1053.

\*Held within the trial court's discretion to refuse to strike a plea of not guilty entered at a prior term.—*State v. Khoury* (N. C.) 638.

\*Refusal to allow withdrawal of plea of guilty of murder in the first degree and entry of plea of not guilty held not an abuse of discretion.—*State v. Stevenson* (W. Va.) 688.

**§ 6. Evidence—Judicial notice, presumptions, and burden of proof.**

\*The courts take judicial knowledge that lager beer is an intoxicating malt liquor.—*Cripe v. State* (Ga. App.) 567.

\*A person is presumed to have an ordinary capacity for hearing.—*Holcombe v. State* (Ga. App.) 647.

\*The law presumes soundness both as to mental and bodily functions.—*Holcombe v. State* (Ga. App.) 647.

\*There is a general presumption that ordinary human faculties are possessed by every individual.—*Holcombe v. State* (Ga. App.) 647.

§ 304. Judicial notice may be taken that an ordinary beer, containing such a percentage of alcohol as may produce intoxication, is an intoxicating liquor.—*O'Connell v. State* (Ga. App.) 1007.

§ 304. Judicial notice may be taken that whisky is a spirituous, alcoholic, and intoxicating liquor.—*O'Connell v. State* (Ga. App.) 1007.

\*One charged with crime is presumed to be innocent until his guilt is established by the evidence beyond every reasonable doubt.—*O'Donnell v. Commonwealth* (Va.) 373.

\*In a criminal case, where a fact is susceptible of an interpretation consistent with the innocence of accused, the jury cannot arbitrarily adopt that interpretation which incriminated him.—*Burton v. Commonwealth* (Va.) 376.

**§ 7. — Facts in issue and relevant to issues, and res gestæ.**

§ 305. Where a homicide being admitted the material question was whether it was willful or accidental, certain evidence held properly admitted as a part of the res gestæ.—*Arnold v. State* (Ga.) 806.

Evidence that defendant was seen in the company of another to whose connection with the crime the circumstances point held admissible.—*Eaker v. State* (Ga. App.) 99; *Barton v. Same*, Id.

\*Matters without prima facie relevancy may become relevant by being interwoven into a conversation which is relevant.—*Holcombe v. State* (Ga. App.) 647.

**§ 8. — Other offenses, and character of accused.**

§ 376. A witness to show defendant's good character will not be permitted to testify as to particular instances or special traits.—*Arnold v. State* (Ga.) 806.

Evidence held permissible though tending to indicate complicity in another crime.—*Eaker v. State* (Ga. App.) 99; *Barton v. Same*, Id.

\*On trial for obtaining money on a fraudulent promise to perform a contract of service, evidence that three years before defendant had pleaded guilty to a similar charge held inadmissible.—*Clarke v. State* (Ga. App.) 633.

**§ 9. — Materiality and competency in general.**

\*That evidence against a defendant was obtained through an illegal search of his house will not render it incompetent.—*Rogers v. State* (Ga. App.) 96.

\*An officer may, without warrant, arrest a suspected felon and subject him to reasonable search, and evidence so obtained is not inadmissible.—*Eaker v. State* (Ga. App.) 99; *Barton v. Same*, Id.

\*To render evidence inadmissible on the ground that defendant was compelled to produce it against himself, it must appear that such compulsion was used as to rob him of volition in the matter.—*Eaker v. State* (Ga. App.) 99; *Barton v. Same*, Id.

\*A defendant, being separately tried, cannot object to evidence as obtained by an illegal search and seizure of another, jointly indicted with him.—*Jones v. State* (Ga. App.) 482.

§ 394. Evidence that a person charged with selling liquor was in possession of quantities of

\*Point annotated. See syllabus.

liquors, etc., *held* admissible, though obtained by illegal search and seizure.—Taylor v. State (Ga. App.) 1048.

**§ 10. — Best and secondary, and demonstrative evidence.**

\* 400. Parol evidence of the contents of a written contract *held* inadmissible where it appears that the writing is accessible.—Starling v. State (Ga. App.) 993.

**§ 11. — Opinion evidence.**

\*A witness, though not an expert, may testify as to whether a person was within hearing distance of a remark.—Holcombe v. State (Ga. App.) 647.

\*Persons who had had more or less opportunity to form an opinion as to accused's mental condition were properly allowed to express an opinion on the subject.—State v. Khoury (N. C.) 638.

**§ 12. — Testimony of accomplices and co-defendants.**

\*A person who buys spirituous liquor is not in law an accomplice of the person who sells it.—Gamble v. State (Ga. App.) 544.

In misdemeanors, under Pen. Code 1895, § 991, the testimony of an accomplice need not be corroborated.—Gamble v. State (Ga. App.) 544.

**§ 13. — Confessions.**

\*A voluntary confession *held* not inadmissible merely because it was made pending an illegal arrest.—Ivey v. State (Ga. App.) 565.

**§ 14. — Evidence at preliminary examination or at former trial.**

The contents of a writing, which has been lost or destroyed, or has become inaccessible, may be proved by a properly authenticated copy in the brief of evidence, approved by the trial judge upon a former trial between the same parties.—Crawford v. State (Ga. App.) 501.

**§ 15. — Weight and sufficiency.**

\*Where one of two witnesses, having equal facilities for seeing or hearing a thing, swears that it occurred, and the other that it did not, the testimony of neither is negative. Civ. Code 1895, § 5165.—Hunter v. State (Ga. App.) 466.

The weight of the testimony in a criminal case *held* for the jury.—Hunter v. State (Ga. App.) 466.

\*Proof that the alleged offense was committed in a designated town or city will not establish the venue of a court whose jurisdiction is co-extensive with the county.—Stringfield v. State (Ga. App.) 569.

§ 552. Where the evidence for the state was circumstantial, and not inconsistent with a reasonable hypothesis of innocence, a conviction was unauthorized.—Long v. State (Ga. App.) 711.

§ 549. Where the only evidence as to whether defendant was present and did the act charged rests on hearsay, the conviction will be set aside.—Morris v. State (Ga. App.) 711.

§ 565. In proving the allegations of an indictment, the state is not restricted to direct proof of the date of the offense.—Taylor v. State (Ga. App.) 1048.

§ 552. In proving the allegations of an indictment, the state *held* not confined to direct proof of the offense.—Taylor v. State (Ga. App.) 1048.

\*Reasonable doubt *held* not a vague or uncertain doubt; and what the jury believe as men they should believe as jurors.—State v. Abbott (W. Va.) 693.

\*Reasonable doubt defined.—State v. Abbott (W. Va.) 693.

\*Point annotated. See syllabus.

**§§ 16, 17. Time of trial and continuance.**

An application to continue a motion for new trial to enable the movant to obtain an affidavit is addressed to the discretion of the presiding judge.—Tinsley v. State (Ga. App.) 93.

\*The credibility of witnesses on a motion for continuance is for the trial judge.—Kimberly v. State (Ga. App.) 571.

\*A continuance may properly be denied, notwithstanding all the statutory requirements have apparently been complied with, where the real purpose is merely to secure delay.—Kimberly v. State (Ga. App.) 571.

\*Where the showing for a continuance because of the absence of a witness did not comply with Pen. Code 1895, § 962, it was properly overruled.—Turner v. State (Ga. App.) 663.

§ 594. Denial of a continuance for absent witness *held* error.—Howell v. State (Ga. App.) 1000.

**§ 18. Trial—Preliminary proceedings.**

\*A trial court *held* not to have abused its discretion by proceeding to trial, notwithstanding a suggestion of accused's insanity.—State v. Khoury (N. C.) 638.

**§ 19. — Course and conduct of trial in general.**

\*Remark of trial judge *held* not to relate to the credit or weight of defendant's statement.—Bass v. State (Ga. App.) 540.

\*The presiding judge cannot, over the objections of the defendant, order the courtroom cleared of every one not connected with the case, and prejudice to the defendant from such an order will be presumed (Const. art. 1, § 1; Civ. Code 1895, § 5296).—Tilton v. State (Ga. App.) 651.

\*Under Code 1906, § 4567, *held*, that it was prejudicial error, after plea of guilty and before judgment, to examine witnesses in defendant's absence.—State v. Stevenson (W. Va.) 688.

**§ 20. — Reception of evidence.**

§ 670. Where evidence, some of which is admissible and some not, is offered as a whole, a new trial will not be granted because of its rejection.—Arnold v. State (Ga.) 806.

\*Statement of defendant charged with a crime *held* to properly include a statement of certain facts.—Woodall v. State (Ga. App.) 485.

\*The right of a defendant to make such statement as he may deem proper is not restricted by the rules of evidence.—Woodall v. State (Ga. App.) 485.

\*Defendant's right to make statements *held* personal, and his counsel without right to question him; but the judge may in his discretion permit counsel to make suggestions.—Bass v. State (Ga. App.) 540.

§ 673. Where it is sought to be proved that defendant has more than once committed the same offense, *held*, that instruction as to the effect of such proof should, upon request, be given.—Taylor v. State (Ga. App.) 1048.

**§ 21. — Province of court and jury in general.**

\*In a prosecution for homicide, an instruction that defendant indicated that it was physically impossible for him to have committed the crime because he was not present at the time of the homicide *held* error.—Phillips v. State (Ga.) 239.

Merchandising establishments, stores, restaurants, soft drink dispensaries, etc., are judicially recognized as places of business and the court may so inform the jury.—Bashinski v. State (Ga. App.) 577.



The court may, without invading the province of the jury, define to them what a place of business is within the prohibitory law, if he leaves to the jury the determination of whether the particular place in question is within the definition.—*Bashinski v. State* (Ga. App.) 577.

\*It is reversible error to charge without qualification that the jury are to believe positive testimony in preference to negative; the weight thereof being for the jury.—*Peak v. State* (Ga. App.) 665.

§ 734. A charge *held* erroneous, as, though the truth of the allegations in an accusation is for the jury, their materiality is for the court.—*Holt v. State* (Ga. App.) 992.

\*Whether evidence against accused be strong or weak, it should be submitted to the jury, if it be not merely conjectural, but reasonably tends to establish his guilt.—*State v. Dobbins* (N. C.) 635.

§§ 763, 764. Instruction in a prosecution of a railway company for permitting a train to run on Sunday *held* error, as invading the jury's province.—*State v. Atlantic Coast Line R. Co.* (N. C.) 755.

## § 22. — Necessity, requisites, and sufficiency of instructions.

In a prosecution for murder, the court *held* not to have erred in using the word "homicide" in an instruction on alibi.—*Phillips v. State* (Ga.) 239.

§ 785. A charge on the subject of impeachment of witnesses *held* not open to objection.—*Arnold v. State* (Ga.) 806.

§ 789. A charge on reasonable doubt *held* not open to the objection that it was calculated to impress the jury that they must have a sufficient reason for doubting defendant's guilt.—*Arnold v. State* (Ga.) 806.

§ 814. Where there was no evidence that decedent assaulted defendant to prevent defendant from committing adultery with decedent's wife, it was error to give the state the benefit of the law applicable to that theory.—*Yopp v. State* (Ga.) 1036.

\*An alleged erroneous instruction is not to be viewed apart from the context.—*Tinsley v. State* (Ga. App.) 93.

\*A new trial will not be granted for minor inaccuracies in the charge, where by the whole charge the apparent errors are dissipated.—*Crawford v. State* (Ga. App.) 501.

\*Where the witnesses of the state testified that defendant drew his pistol and had it in his hand, and defendant's witnesses testified that they did not see him have any pistol, instruction as to positive and negative testimony *held* erroneous.—*Daniel v. State* (Ga. App.) 539.

\*Requested charge, though containing correct abstract principle, *held* properly refused, where it might be misleading in its application to the facts.—*Hagood v. State* (Ga. App.) 641.

\*Omission to charge upon the effect of proof of good character *held* not reversible error.—*Hagood v. State* (Ga. App.) 641.

\*Where all the testimony is positive, it is error to instruct on the comparative weight of positive and negative testimony.—*Peak v. State* (Ga. App.) 665.

\*Charge that, even if defendant had produced certain witnesses, he could not compel them to incriminate themselves, *held* erroneously refused.—*Williams v. State* (Ga. App.) 671.

§ 814. It is error to charge that defendant admits an essential element of the state's case which he has not in fact admitted.—*Bendross v. State* (Ga. App.) 723.

§ 772. A crime is defined by the allegations in an accusation, but it is the court's duty to explain the definition.—*Holt v. State* (Ga. App.) 992.

§ 784. Where guilt is dependent wholly upon circumstantial evidence, *held* not to give instruction in relation thereto.—*Holt v. State* (Ga. App.) 992.

\*An instruction *held* not misleading as containing an expression of the opinion of the court, or as calculated to cast suspicion on the testimony of accused.—*State v. Dixon* (N. C.) 615.

\*An instruction *held* not misleading as withdrawing from the jury the consideration of the evidence of accused.—*State v. Dixon* (N. C.) 615.

\*Though a court is required, on request, to reduce to writing the charge as to the law of the case, it is permissible for the judge to read his notes of evidence to the jury.—*State v. Dixon* (N. C.) 615.

\*No particular formula is required in charging upon reasonable doubt.—*State v. Dobbins* (N. C.) 635.

\*Though a trial judge must put his entire charge in writing when so requested, it is not reversible error to state the contentions of the parties orally, or to supplement slight omissions.—*State v. Khoury* (N. C.) 638.

In a murder prosecution, where there was no evidence to show that defendants fired the fatal shots, or assisted in so doing, an instruction based on that assumption was properly refused.—*Burton v. Commonwealth* (Va.) 376.

## § 23. — Requests for instructions.

Assignments of error based on a refusal to charge in accordance with requests orally presented by counsel cannot be considered.—*Coleman v. State* (Ga. App.) 487.

\*Requested charges, covered by the charge of the court, are properly refused.—*Crawford v. State* (Ga. App.) 501; *Hagood v. State* (Ga. App.) 641; *Holcombe v. State* (Ga. App.) 647.

Failure to instruct as to the methods by which a witness may be impeached will not require grant of a new trial, where no written request therefor was made.—*Roberson v. State* (Ga. App.) 539.

\*Where, on a trial for a violation of Pen. Code 1895, § 194, the court charged that the evidence must show a fraudulent conversion, *held* not necessary to charge that the conversion must have been made with intent to steal.—*Hagood v. State* (Ga. App.) 641.

§ 824. Where it is sought to be proved that a defendant has more than once illegally sold liquor, *held* not the duty of the court, in the absence of a request, to instruct as to failure of proof as to certain of the sales alleged.—*Taylor v. State* (Ga. App.) 1048.

\*A charge on reasonable doubt, in a trial for keeping liquor for illegal sale, *held* sufficiently responsive to a request and properly given.—*State v. Dobbins* (N. C.) 635.

## § 24. — Custody, conduct, and deliberations of jury.

\*It is not error to confine an instruction to the specific point suggested by the jury's inquiry, made after they have been charged.—*Kimberly v. State* (Ga. App.) 571.

## § 25. — Verdict.

\*It is discretionary with a trial judge what weight he will attach to the jury's recommendation that defendant be punished as for a misdemeanor.—*Coppage v. State* (Ga. App.) 113.

§ 878. Where there is sufficient evidence to sustain a verdict on either of two counts, the

\*Point annotated. See syllabus.

general verdict of guilty is not contrary to law.—Howell v. State (Ga. App.) 1001.

**§ 26. Motions for new trial and in arrest.**

§ 941. Newly discovered evidence, purely cumulative, *held* not ground for new trial.—Young v. State (Ga.) 707.

§ 918. Remark by court in admitting evidence *held* not an expression of opinion as to the weight which the jury should give the evidence.—Young v. State (Ga.) 707.

§ 923. Notwithstanding Act Aug. 15, 1903 (Acts 1903, p. 83), disqualifying a juror who has served at one term to serve at a succeeding term, if he does so serve without challenge, it is not cause for a new trial after verdict.—Morris v. State (Ga.) 806.

An affidavit for a new trial because of disqualification of a juror, not entitled in the cause, *held* imperfect.—Eaker v. State (Ga. App.) 99; Barton v. Same, *Id.*

A juror cannot impeach his verdict by showing his disqualification because of relationship.—Eaker v. State (Ga. App.) 99; Barton v. Same, *Id.*

On a motion for a new trial because of disqualification of juror, the disqualification at the time of trial must appear.—Eaker v. State (Ga. App.) 99; Barton v. Same, *Id.*

\*Newly discovered impeaching evidence *held* not ground for new trial.—Coppage v. State (Ga. App.) 113.

The admission of testimony favorable to the defendant affords no ground for new trial.—Fouraker v. State (Ga. App.) 116.

\*To require a new trial for improper remarks of the judge, it must appear that the remarks were both improper and prejudicial.—Crawford v. State (Ga. App.) 501.

\*A motion for new trial is properly overruled, where it does not appear but that ordinary diligence would have secured the alleged newly discovered evidence.—Williams v. State (Ga. App.) 525.

\*A motion in arrest of judgment does not lie for errors in overruling motion for a continuance or in allowing separation of the jury.—Williams v. State (Ga. App.) 525.

\*It is not error to refuse a new trial for newly discovered impeaching evidence.—Williams v. State (Ga. App.) 525.

\*The overruling of a demurrer is not a proper ground of motion for a new trial.—Williams v. State (Ga. App.) 525.

Where no error of law was claimed, and the evidence authorized the verdict, a motion for a new trial was properly overruled.—Marshall v. State (Ga. App.) 539.

Judgment dismissing motion for new trial, because the opposite party was not served as required by original rule nisi, afterwards extended, *held* error.—Johnson v. State (Ga. App.) 540.

\*Where a verdict of conviction is entirely without evidence to support it, it is contrary to law, and a new trial should have been granted.—Thompson v. State (Ga. App.) 571.

\*When newly discovered evidence is adduced from witnesses properly vouched for, and there was no want of diligence, and it may probably cause a different result, it is error to refuse a new trial.—Grow v. State (Ga. App.) 669.

\*Newly discovered evidence tending to establish the truth of a material contention is not merely cumulative when it relates to a particu-

lar fact concerning which no witnesses have testified.—Grow v. State (Ga. App.) 669.

\*Newly discovered evidence *held* not merely cumulative and impeaching, but to go to the substantial justice of the case.—Orr v. State (Ga. App.) 676.

\*Whether ordinary diligence was used to procure evidence at the trial *held* to be determined by comparing the conduct under consideration with that of an ordinary man under similar circumstances.—Orr v. State (Ga. App.) 676.

\*Misconduct of prosecuting witness *held* ground for new trial.—Griffin v. State (Ga. App.) 685.

§ 970. Where one of the counts of the accusation was good, a motion in arrest of judgment was properly overruled.—Howell v. State (Ga. App.) 1000.

§ 935. The circumstantial evidence not being inconsistent with a reasonable hypothesis of innocence, and being insufficient to establish beyond a reasonable doubt an intent to steal, a new trial should have been granted.—Wilson v. State (Ga. App.) 1003.

§ 918. A new trial will not be granted because the trial judge asked questions of witnesses, unless prejudice resulted.—O'Connell v. State (Ga. App.) 1007.

§ 918. To authorize a new trial, where evidence warrants the verdict, not only error, but injury, must be shown.—Taylor v. State (Ga. App.) 1048.

**§ 27. Appeal and error, and certiorari.**

§ 1124. Grounds of motion for new trial, complaining of the allowance of certain questions, *held* to present no proper assignment of error, where it did not appear what answers were elicited by such questions.—Morris v. State (Ga.) 806.

\*An erroneous instruction is not ground for reversal if the verdict shows that the finding of the jury was not affected thereby.—Tinsley v. State (Ga. App.) 93.

\*The trial court's discretion in fixing punishment cannot be interfered with where within statutory limits.—Coppage v. State (Ga. App.) 113.

Grounds of motion for new trial should be complete within themselves.—Fouraker v. State (Ga. App.) 116.

\*Where a ground of motion for new trial for newly discovered evidence is filed, and a counter showing is made, a reviewing court will not, except for abuse of discretion, reverse the finding of the trial judge.—Fouraker v. State (Ga. App.) 116.

\*Assignments of error, which do not direct the attention of the court to the specific error complained of, will not be considered.—Crawford v. State (Ga. App.) 501.

\*Abuse of court's discretion or prejudice to defendant *held* not to appear from the fact that an indictment was introduced in evidence bearing a former verdict of guilty without concealment from the jury of the former verdict.—Crawford v. State (Ga. App.) 501.

The Court of Appeals is without jurisdiction to set aside a verdict of guilty, as contrary to law for lack of evidence, where there is any evidence authorizing it.—Lester v. State (Ga. App.) 508.

\*An objection to the overruling of a demurrer must be preserved by exceptions pendente lite, unless the main bill of exceptions containing this assignment of error be certified within 20

\*Point annotated. See syllabus.

days after the demurrer is overruled.—*Williams v. State* (Ga. App.) 525.

Where the verdict is supported by the evidence, and there is no error of law assigned, a refusal of a new trial will be affirmed.—*Jackson v. State* (Ga. App.) 538.

\*Though the violation of a penal statute was not flagrant, and the accusation not strongly supported by the evidence, there being some evidence in support of the verdict, the Court of Appeals cannot interfere.—*Roberson v. State* (Ga. App.) 539.

Ground of motion for new trial, alleging error in admitting dying declaration, *held* without merit, where not setting out the statement admitted.—*Pyle v. State* (Ga. App.) 540.

\*A conviction will not be set aside for errors as to evidence on which the jury plainly did not act.—*Pyle v. State* (Ga. App.) 540.

The refusal of a continuance will not be controlled, except for manifest abuse of the trial court's discretion.—*Kimberly v. State* (Ga. App.) 571.

\*Error in neglecting to give requested charge *held* not reversible under the evidence.—*Holcombe v. State* (Ga. App.) 647.

\*An assignment of error to remarks of the solicitor, without showing objection made at the time, or some motion refused, will not be considered on error.—*Clarke v. State* (Ga. App.) 663.

§ 1159. Where the evidence is circumstantial, and is not legally sufficient to support the conviction, it will be reversed.—*Wright v. State* (Ga. App.) 712.

§ 1092. A certificate to a bill of exceptions in the usual form prescribed by the Code *held* sufficient and a writ of error will not be dismissed because the certificate to the bill does not specify the whole or any part of the record.—*Starling v. State* (Ga. App.) 993.

§ 1091. It is not ordinarily necessary to otherwise entitle a bill of exceptions than to state in beginning the bill the names of the parties.—*Starling v. State* (Ga. App.) 993.

§ 1088. A bill of exceptions *held* not required to show that defendant has been sentenced where no error is assigned thereon.—*Starling v. State* (Ga. App.) 993.

§ 1059. An exception to the judgment overruling a motion for a new trial *held* sufficient which assigns error upon that judgment.—*Starling v. State* (Ga. App.) 993.

§ 1147. A sentence cannot be reviewed unless it exceeds the statutory limit.—*Taylor v. State* (Ga. App.) 1048.

§ 1128. The Supreme Court cannot refer to matters not stated in the record.—*State v. Atlantic Coast Line R. Co.* (N. C.) 755.

§ 1172. An instruction that a motive proven against one accused of murder is a "strong" circumstance pointing to guilt, and that failure to prove one is a "strong" circumstance in his favor, was not prejudicial error.—*State v. Stratford* (N. C.) 882.

§ 1172. The propriety of a charge in a criminal case, that if the jury believed the evidence they should render a verdict of guilty, stated.—*State v. Seaboard Air Line Ry.* (N. C.) 1088.

§ 1167. Where on a former trial accused was fully informed of the particular occurrence charged against him, and obtained the entire case of the prosecution at the trial, the acceptance of an insufficient bill of particulars on the second trial would not be prejudicial.—*State v. Seaboard Air Line Ry.* (N. C.) 1088.

§ 1149. The requiring of a bill of particulars in a criminal case under Revisal 1905, § 3244, as well as the proper compliance with an order

therefor, rests in the discretion of the court, and its action will not be disturbed on appeal in the absence of abuse.—*State v. Seaboard Air Line Ry.* (N. C.) 1088.

## § 28. Punishment and prevention of crime.

The amendment of the charter of the city of Macon, approved August 17, 1907 (Acts 1907, p. 786), *held* to authorize the imposition of any one of three punishments for violation of ordinances, but not the imposition of cumulative punishments.—*Callaway v. Mims* (Ga. App.) 654.

## CROPS.

See Agriculture.

Determination and disposition of cause on appeal or writ of error in action to recover a crop, see Appeal and Error, § 23.

Jurisdiction of offense of abandoning crops, see Criminal Law, § 2.

Lien of landlord, see Landlord and Tenant, § 5.

Measure of damages for loss of, from breach of irrigation contract, see Damages, § 4.

Recovery of as improvements in ejectment, see Ejectment, § 5.

Right to as between administrator of tenant and landlord, see Executors and Administrators, § 4.

## CROSS-EXAMINATION.

See Witnesses, § 3.

## CRUELTY.

Ground for divorce, see Divorce, § 1.

## CUL DE SAC.

See Highways, § 1.

## CUMULATIVE PUNISHMENT.

See Criminal Law, § 28.

## CURTESY.

Limitations of action by heirs as affected by existence of estate by curtesy, see Limitation of Actions, § 1.

## CUSTODY.

Of child, see Divorce, § 2; Guardian and Ward, § 2.

Of goods in course of transportation, see Carriers, § 4.

## CUSTOMS AND USAGES.

If a part of a custom would be valid if it stood alone, it will be invalid when another part of the entire custom of which it forms a part was invalid.—*Deadwyler & Co. v. Karow & Forrer* (Ga.) 172.

\*A custom which contravenes a positive statute is invalid.—*Deadwyler & Co. v. Karow & Forrer* (Ga.) 172.

§ 19. Evidence as to the custom of defendant telegraph company in delivering messages outside free-delivery limits was properly excluded, in the absence of knowledge or notice of the custom to the addressee of a delayed message.—*Martin v. Western Union Telegraph Co.* (S. C.) 833.

\*Point annotated. See syllabus.

**DAMAGES.**

Compensation for property taken for public use, see Eminent Domain, § 2.  
Harmless error in instructions on, see Appeal and Error, § 14.

*Damages for particular injuries.*

See Death, § 2; Trespass, § 1.  
Breach by buyer of contract for sale of goods, see Sales, § 6.  
Breach by seller of contract for sale of goods, see Sales, § 7.  
Breach of contract for transportation of passenger, see Carriers, § 15.  
Breach of covenant, see Covenants, § 3.  
Delay in delivery of goods shipped, see Carriers, § 6.  
Injuries caused by acts of servant, see Master and Servant, § 15.  
Injuries caused by operation of railroad, see Railroads, § 7.  
Injuries caused by public improvements, see Municipal Corporations, § 6.  
Injuries from fire caused by operation of railroad, see Railroads, § 9.  
Loss of or injury to shipment of live stock, see Carriers, § 13.

*Recovery in particular actions or proceedings.*  
See Ejectment, § 5; Replevin, § 4.

**§ 1. Nominal damages.**

\*Purchasers of a car load of horses and mules held entitled to at least nominal damages for a wrongful stoppage thereof in transitu.—Edward Bros. v. Erwin (N. C.) 545.

**§ 2. Grounds and subjects of compensatory damages.**

\*Measure of damages for breach of contract declared.—Albany Phosphate Co. v. Hugger Bros. (Ga. App.) 533.

\*Recovery for breach of contract is usually limited to the ordinary consequences of the breach, unless both parties at the time contemplated some special injury in addition to the ordinary consequences, when compensation is recoverable for such injury.—Harper Furniture Co. v. Southern Express Co. (N. C.) 145.

In an action against a carrier for delay in delivering machinery, the prospective profits of a furniture factory during the period of delay held properly excluded.—Harper Furniture Co. v. Southern Express Co. (N. C.) 145.

§ 28. Where there has been an absolute breach of an entire contract, all damages, both present and prospective, suffered by the injured party, may, and usually must, be recovered in one action.—Wilkinson v. Dunbar (N. C.) 748.

§ 28. In an action for breach of a contract to pay at a certain rate for cutting and hauling timber, recovery of prospective, as well as present, damages held proper.—Wilkinson v. Dunbar (N. C.) 748.

§ 40. Rules as to recovery for loss of profits, in an action for breach of contract, stated.—Wilkinson v. Dunbar (N. C.) 748.

§ 26. A personal injury is not presumed to have ended at the time of suit therefor.—Rushing v. Seaboard Air Line Ry. Co. (N. C.) 890.

§ 26. Grounds of damages for negligent injury stated.—Rushing v. Seaboard Air Line Ry. Co. (N. C.) 890.

\*Mental anguish or suffering as used in the statute authorizing recovery of damages therefor defined.—Johnson v. Western Union Telegraph Co. (S. C.) 244.

§ 62. It is the duty of the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage.—Sullivan v. City of Anderson (S. C.) 862.

§ 44. Where the owner of property, injured by the negligence of another, incurs proper expense to minimize the damage, the wrongdoer is liable therefor, though the effort to reduce the loss was unsuccessful.—Sullivan v. City of Anderson (S. C.) 862.

**§ 3. Liquidated damages and penalties.**  
\*Prima facie the sum named in a bond is a penalty, and not liquidated damages.—City of Brunswick v. Aetna Indemnity Co. (Ga. App.) 475.

\*A construction which holds a stipulated sum to be a penalty, rather than liquidated damages, is favored in a doubtful case.—City of Brunswick v. Aetna Indemnity Co. (Ga. App.) 475.

\*Stipulation held to be construed as a penalty.—City of Brunswick v. Aetna Indemnity Co. (Ga. App.) 475.

**§ 4. Measure of damages.**

Measure of damages for breach of a contract to save an adjoining owner harmless from any loss arising from the construction of a wall under the adjoining owner's wall declared.—Candler Inv. Co. v. Cox (Ga. App.) 479; Cox v. Candler Inv. Co., Id.

\*Measure of damages for breach by a builder of stipulation to erect a building within the time specified declared.—Albany Phosphate Co. v. Hugger Bros. (Ga. App.) 533.

§ 120. There can be but one recovery for present and prospective damages arising from breach of an entire contract, based on the values as they existed at the time of breach, but, in fixing the amount of a present recovery for prospective damages, allowance should be made on account of fluctuations likely to occur.—Wilkinson v. Dunbar (N. C.) 748.

§ 120. On a breach of an agreement to pay a certain sum for cutting and hauling timber, where the contract would have required some years after the breach for complete performance, the proper measure of the prospective damages arising after the breach was the present value of the difference between the contract price and the cost of performance.—Wilkinson v. Dunbar (N. C.) 748.

§ 120. In an action for present and prospective damages, arising from defendant's breach of his contract to pay plaintiff so much for cutting and delivering timber, held error to admit testimony of the increased cost of logging after the breach.—Hawk v. Pine Lumber Co. (N. C.) 752.

§ 95. Damages for negligent personal injury include actual expense for nursing, medical services, also loss of time and earning capacity, and mental and physical suffering.—Rushing v. Seaboard Air Line Ry. Co. (N. C.) 890.

\*Measure of damages for the interruption of an established manufacturing plant and for preventing the establishment of a new business, determined.—Standard Supply Co. v. Carter & Harris (S. C.) 150.

\*Damages for the temporary deprivation of specific property due to a breach of contract held not restricted to the rental value of the property.—Standard Supply Co. v. Carter & Harris (S. C.) 150.

\*Damages for the wrongful deprivation of the use of specific property are measured by the rental value of the property.—Standard Supply Co. v. Carter & Harris (S. C.) 150.

§ 113. The measure of damages for negligent injury to a horse stated.—Sullivan v. City of Anderson (S. C.) 862.

**§ 5. Inadequate and excessive damages.**

Verdict for personal injuries held not so excessive as to authorize an interference with

\*Point annotated. See syllabus.

trial court's discretion in refusing to set the same aside.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

\*A verdict of \$12,250 for an employé who lost a leg held not excessive.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

#### § 6. Pleading, evidence, and assessment.

\*It is not indispensable to an ascertainment of the diminished capacity of an employé to earn money that the jury should have before them the standard mortality tables.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

\*The designation of a conventional amount will not be held to liquidate the damages, where it was not the intention of the parties that the obligor should escape further liability by paying that amount.—*City of Brunswick v. Aetna Indemnity Co.* (Ga. App.) 475.

\*Where plaintiff sues for special damages for breach of contract, he is limited to the special damages alleged, and there can be no recovery for general or nominal damages.—*Christopolos Café Co. v. Phillips* (Ga. App.) 562.

In an action to recover for breach of contract to build a counter and a refrigerator for a specified sum, to be completed on a named date, certain damages for delay held not contemplated by defendant as the result of a breach of contract.—*Christopolos Café Co. v. Phillips* (Ga. App.) 562.

§ 143. A petition in an action for injuries to plaintiff, alleging that his ankle was shattered, and certain enumerated injuries ensued, is not subject to special demurrer.—*Charleston & W. C. Ry. Co. v. Boyd* (Ga. App.) 714.

§ 157. Though a plaintiff may make out a case showing a right to general damages, yet if he has sued for special damages only, and they are not recoverable, a verdict in his favor is unauthorized.—*Red Cypress Lumber Co. v. Beall* (Ga. App.) 1056.

§ 184. In an action for damages, while plaintiff must prove the amount of his loss, absolute certainty is not essential, and substantial damages may be recovered though plaintiff only shows his loss proximately; but both the cause and the amount of the loss must be shown with reasonable certainty.—*Wilkinson v. Dunbar* (N. C.) 748.

§ 175. In an action for present and prospective damages arising from breach of an entire contract, evidence of changes in the market values or the cost of materials, etc., after the breach, is inadmissible; the recovery being based on the values at the time of the breach.—*Wilkinson v. Dunbar* (N. C.) 748.

§ 218. In an action for present and prospective damages, arising from a breach of defendant's contract to pay so much for cutting and delivering timber, the contract requiring several years to complete after the time of breach, an instruction to find the cost of logging at the time the logs were to be delivered in determining the prospective damages, in connection with evidence improperly admitted as to fluctuations in the cost of logging after the breach, held erroneous.—*Hawk v. Pine Lumber Co.* (N. C.) 752.

§ 173. To establish decreased earning capacity, plaintiff could show what wages he received before injury and at the time of trial.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

\*Where, in an action against a railroad company for the death of an employé through the alleged negligence of defendant, there was no evidence of willfulness or wantonness, it was reversible error to refuse a request to charge that vindictive or punitive damages could not be recovered.—*Trimmier v. Atlantic & C. A. L. Ry. Co.* (S. C.) 209.

## DEAD BODIES.

\*A husband is entitled to the dead body of his wife for burial, and in the condition in which death leaves it; but a slight incision by the attendant surgeon to ascertain the cause of death, and in obedience to a city ordinance that a certificate of burial may be obtained held not to infringe this right.—*Rushing v. Medical College of Georgia* (Ga. App.) 503.

## DEATH.

Applicability of instructions to case in action for, see *Trial*, § 9.

Assessment of damages in action for, see *Damages*, § 6.

Caused by operation of railroad, see *Railroads*, §§ 5-8.

General verdict in action for death, see *Trial*, § 18.

Harmless error in action for, see *Appeal and Error*, § 16.

Liability for death of passenger on steamboat, see *Shipping*, § 1.

Liability for failure to deliver death message, see *Telegraphs and Telephones*, § 2.

Liability of master for death of servant, see *Master and Servant*, §§ 4, 8-14.

Of adverse claimant affecting running of limitations, see *Adverse Possession*, § 1.

Opinion evidence in action for, see *Evidence*, § 11.

Relevancy of evidence in action for, see *Evidence*, § 4.

Review of verdict in action for, see *Appeal and Error*, § 13.

Right of parent to recover for loss of services of child between time of injury and death, see *Parent and Child*.

Sufficiency of instructions in action for, see *Trial*, § 8.

### § 1. Evidence of death and of survivorship.

\*The reported death of the children of an heir, together with their complete disappearance for more than 20 years, was sufficient prima facie evidence of their death, in a partition suit between other heirs and the co-tenant of their ancestor.—*Vaughn v. Lanford* (S. C.) 316.

### § 2. Actions for causing death.

§ 18. In an action for the death of a brakeman by his mother, the petition held not subject to general demurrer.—*South Georgia Ry. Co. v. Niles* (Ga.) 1042.

\*Code Ala. 1896, § 27, giving a right of action for negligent death, held not a penal statute, which would not be enforced by the courts of another state.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

\*Code Ala. 1896, § 27, giving a right of action for negligent death, held not violative of the public policy of Georgia.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

\*The courts will enforce foreign statutes giving a right of action for wrongful death, though the elements of damage be variant from what is deemed adequate in the state of the forum.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

\*Code Ala. 1907, § 6115, providing that suits under Code Ala. 1896, § 27, giving a right of action for negligent death, shall be brought only within the courts of that state, held not binding on Georgia courts.—*Southern Ry. Co. v. Decker* (Ga. App.) 678.

§ 39. Under Revisal 1905, § 59, held, that where a foreign administrator who had commenced an action for negligent death thereafter qualified as a domestic administrator, and became a party to the action by amendment, but not until after a year from decedent's death, the

\*Point annotated. See syllabus.

action by him as domestic administrator was barred.—Hall v. Southern Ry. Co. (N. C.) 899.

§ 31. A foreign administrator *held* not entitled to sue in the state for the negligent death therein of his intestate by virtue of Revisal 1905, § 59.—Hall v. Southern Ry. Co. (N. C.) 899.

\*In a statutory action for wrongful death, it is not essential that the person for whose benefit it is brought should have been dependent on the deceased or that he should have suffered pecuniary loss, and, the amount of the recovery being his absolute property, his life expectancy is not an element of damages to be considered.—Trimmier v. Atlantic & C. A. L. Ry. Co. (S. C.) 209.

\*The time fixed for the commencement of an action for wrongful death under Revisal 1905, N. C., § 59, *held* a part of the right, so that no action under such section could be maintained in Virginia after the expiration of that time.—Dowell v. Cox (Va.) 272.

\*The law of the state where decedent was alleged to have been wrongfully killed *held* to govern, certainly as to the extent of the remedy, in an action for wrongful death.—Dowell v. Cox (Va.) 272.

\*Code 1904, § 2902, *held* not to give a parent a right of action for the loss of services of his son between the time of the latter's death and the time when he would have reached his majority.—Stevenson v. W. M. Ritter Lumber Co. (Va.) 351.

\*The principles preventing the parent from recovering for loss of his son's service after death stated, and plaintiff *held* not entitled to recover for such services between the time of the son's death and his majority.—Stevenson v. W. M. Ritter Lumber Co. (Va.) 351.

In an action for the death of plaintiff's minor son, the cause of action alleged by the declaration *held* to be for the loss of services from the son's death until he reached his majority, and not for his wrongful hiring against plaintiff's will, or for loss of services between the time of the injury and death.—Stevenson v. W. M. Ritter Lumber Co. (Va.) 351.

\*At common law no action could be maintained for the death by wrongful act, either by a husband or father for loss of services of wife or children, a master for the loss of his servant, or a personal representative suing in the right of his decedent.—Stevenson v. W. M. Ritter Lumber Co. (Va.) 351.

## DEBTOR AND CREDITOR.

See Bankruptcy: Fraudulent Conveyances.

## DECEDENTS.

Declarations against interest, see Evidence, § 7. Estates, see Descent and Distribution; Executors and Administrators. Testimony as to transactions with persons since deceased, see Witnesses, § 2.

## DECEIT.

See Fraud.

## DECLARATION.

In pleading, see Pleading, § 2.

## DECLARATIONS.

As evidence in civil actions, see Evidence, § 7. Dying declarations, see Homicide, § 4.

\*Point annotated. See syllabus.

## DECREE.

In equity, see Equity, § 3.

## DEDICATION.

§ 1. *Nature and requisites.*

County road authorities *held* entitled to accept a dedication for a public road and open a new road over it without complying with Civ. Code 1895, § 520 et seq.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

Dedication of land for a public road by the owner and acceptance by the public authorities may be shown by acts of the parties without an expressed acceptance.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

## DEEDS.

Admissions by grantor, see Evidence, § 6.

As color of title, see Adverse Possession, § 1.

As evidence in ejectment, see Ejectment, § 3.

Cancellation, see Cancellation of Instruments.

Covenants in deeds, see Covenants.

Creation of remainder estate by, see Remainders.

Deed or mortgage, see Mortgages, § 1.

Harmless error in action to set aside, see Appeal and Error, § 16.

Harmless error in rulings as to sufficiency of

as color of title to sustain adverse possession,

see Appeal and Error, § 14.

In fraud of creditors, see Fraudulent Conveyances.

In trust, see Trusts, § 1.

Parol or extrinsic evidence, see Evidence, § 10.

Reformation, see Reformation of Instruments.

Replevin to recover deed, see Replevin, § 1.

Venue of action to gain possession of deed, see Venue, § 1.

*Deeds by or to particular classes of persons.*

See Executors and Administrators, §§ 3, 7,

Husband and Wife, § 2; Infants, § 1; In-

sane Persons, § 3.

Married women, see Husband and Wife, § 3.

*Deeds of particular species of, or estates or*

*interest in, property.*

See Easements, § 1; Mines and Minerals, § 1.

Separate property of married women, see

Husband and Wife, § 3.

*Particular classes of deeds.*

Tax deeds, see Taxation, § 5.

Trust deeds, see Mortgages.

§ 1. *Requisites and validity.*

A forged deed cannot convey title to grantee, or persons holding under him, nor will the good faith of a subsequent holder make such deed good.—Sapp v. Cline (Ga.) 529.

§ 38. A deed conveying land of an irregular shape, which describes the land as containing an exact number of acres, bounded on the west, south, and east by well-defined boundaries and on the north by the land of the grantor, is not void for uncertainty.—Moody v. Vondereau (Ga.) 821.

§ 38. When a boundary in a deed is the land of a named person, the description of this particular boundary *held* sufficient, though the title of such third person may be defective.—Moody v. Vondereau (Ga.) 821.

§ 72. Moral turpitude and improper motive *held* unessential to undue influence over a grantor.—Myatt v. Myatt (N. C.) 887.

§ 72. Deeds procured by undue influence or fraud in the treaty or bargain are voidable, and not void.—Beeson v. Smith (N. C.) 888.

§ 66. What constitutes delivery of a deed is a mixed question of law and fact.—Smith v. Moore (N. C.) 892.

§ 64. For a delivery there must not only be a parting with control of the deed by the grantor, with intention that it shall operate as a conveyance of the land, but there must also be an acceptance either by the grantee or by some one for him.—*Smith v. Moore* (N. C.) 892.

§ 56. It is essential to the delivery of a deed that it pass out of the control of the grantor, and into the actual or constructive control of the grantee.—*Smith v. Moore* (N. C.) 892.

§ 31. Under the express provisions of Revisal 1905, § 1588, a limitation by deed to the heirs of a living person is construed to be to the children of the person, if a contrary intention do not appear in the deed.—*Condor v. Secrest* (N. C.) 921.

## § 2. Recording and registration.

Recording of deed in original county prior to election of officers and perfection of organization of new county, which included the land within its boundaries, *held* a lawful recordation.—*Sapp v. Cline* (Ga.) 529.

\*Recording of deed *held* not necessary to vest title against all but creditors of, and purchasers for, value from the grantor.—*Warren v. Williford* (N. C.) 697.

## § 3. Construction and operation.

\*A description of land located in a county laid off by government survey into square lots, as all of the named lot except 50 acres in the southeast corner, *held* sufficiently definite.—*Osteen v. Wynn* (Ga.) 37.

\*Where a deed conveys several lots by number and all of a named lot except 50 acres in the southeast corner, followed by the words "known as the Wooldridge Plantation," the particular description prevails.—*Osteen v. Wynn* (Ga.) 37.

\*Deed *held* to show intent to convey as administrator, though the maker did not add his title as administrator to his signature.—*Sapp v. Cline* (Ga.) 529.

§ 129. In partition a deed of a married woman's interest to her and her husband and her heirs *held* not to convey a fee to the husband, under Revisal 1905, § 946.—*Sprinkle v. Spainhour* (N. C.) 910.

§ 105. While the habendum of a deed cannot introduce one who is a stranger to the premises to take as grantee, one not named in the premises may take an estate in remainder by limitation in the habendum, where that appears to be the intention of the parties gleaned from the deed as a whole.—*Condor v. Secrest* (N. C.) 921.

§ 95. In construing deeds, the intention of the parties will be gathered from the whole instrument, and every word given effect, except that, when the law has given to words a definite meaning, they will be given effect according to their legal signification.—*Condor v. Secrest* (N. C.) 921.

§ 110. Construction of deed offered in evidence *held* for the court.—*Falk v. Graham* (S. C.) 1106.

§ 90. If the intention of a deed requires a transposition of words, such transposition will be made.—*Folk v. Graham* (S. C.) 1106.

Where a deed of land conveyed in consideration of a contract for support, and a stipulation for the avoidance of the agreement in case of failure to perform the contract embraced in a separate instrument form parts of one transaction, the stipulation for avoidance constitutes a defeasance.—*Epperson v. Epperson* (Va.) 344.

While courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles, they will not hesitate to give effect to the intention of the parties when the condition of defeasance is clear and explicit.—*Epperson v. Epperson* (Va.) 344.

\*An ambiguous deed will be construed most strongly against the grantor.—*South & W. Ry. Co. v. Mann* (Va.) 354.

\*A deed to a railroad of land for a right of way, providing that the company was to remove any of grantor's houses and buildings at his own expense, the evidence being conflicting as to whether the provision included dwelling houses, construed in favor of the company.—*South & W. Ry. Co. v. Mann* (Va.) 354.

\*A deed of land to defendant for a right of way construed as to the land conveyed.—*South & W. Ry. Co. v. Mann* (Va.) 354.

## § 4. Pleading and evidence.

\*Evidence *held* insufficient to show that a deed, one of defendant's muniments of title, was forged.—*Wiggins v. Brewster* (Ga.) 40.

On an issue of whether a deed was delivered, witness *held* properly permitted to testify to certain facts as to the best of his recollection.—*Brinkley v. Bell* (Ga.) 67.

§ 194. Delivery of deed to the proper recording officer *held* prima facie evidence of delivery to the grantee.—*Sparkman v. Jones* (S. C.) 870.

## DEFAMATION.

See Libel and Slander.

## DEFEASANCE.

Condition in deed as, see Deeds, § 3.

## DELAY.

Damages for delay as costs on appeal, see Costs, § 3.

In delivery of message, see Telegraphs and Telephones, § 2.

In transportation or delivery of goods by carrier, see Carriers, § 6.

## DELIVERY.

Of deed, see Deeds, §§ 1, 4.

Of goods by carrier, see Carriers, § 5.

Of goods sold, see Sales, §§ 3, 4, 6.

Of goods to carrier, see Carriers, §§ 2-12.

Of lease, see Landlord and Tenant, § 2.

Of property taken in replevin, see Replevin, § 2.

Of telegraph message, see Telegraphs and Telephones, § 2.

## DEMAND.

For payment of bill or note, see Bills and Notes, § 2.

## DEMURRER.

In pleading, see Pleading, § 4.

Review of judgment on as dependent on assignment of errors, see Appeal and Error, § 7.

Review of rulings on appeal or writ of error as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.

Right to review of judgment on, see Appeal and Error, § 2.

To evidence, see Trial, § 5.

## DEPOSITIONS.

See Witnesses.

\*Depositions sued out under Civ. Code 1895, § 5316, executed and returned to the court, as prescribed by section 5317, *held* not inadmissible

\*Point annotated. See syllabus.

because not signed by the witness, or because the commissioner's certificate thereto does not show that he was a sworn officer.—*Brinkley v. Bell* (Ga.) 67.

## DESCENT AND DISTRIBUTION.

See Executors and Administrators; Homestead, § 2; Wills.

Evidence of death of children of heirs, see Death, § 1.

Property and interests undisposed of by will, see Wills, § 11.

§ 1. **Rights and liabilities of heirs and distributees.**

§ 90. *Held* petition in an action of complaint for land, properly dismissed on demurrer.—*Buchan v. Williamson* (Ga.) 819.

## DESCRIPTION.

Names of individuals, see Names.

Of devisees or legatees in will, see Wills, § 5.

Of parties in action, see Parties, § 1.

Of parties in deed, see Deeds, § 1.

Of property conveyed, see Boundaries, § 1; Deeds, §§ 1, 3.

Of property devised or bequeathed, see Wills, § 6.

Of property levied on, see Execution, § 3.

## DESERTION.

Ground for divorce, see Divorce, § 1.

## DETINUE.

See Replevin.

Rule respecting relief which may be granted in an action for the possession of personalty of the value thereof stated.—*Sessoms v. Tayloe* (N. C.) 424.

## DEVISES.

See Wills.

## DILATORY PLEAS.

See Pleading, § 3.

## DILIGENCE.

In procuring evidence affecting right to new trial, see Criminal Law, § 26; New Trial, § 1. Of party asking relief, see Specific Performance, § 3.

## DIRECTING VERDICT.

In civil actions, see Trial, § 5.

## DISABILITIES.

Effect on limitation, see Limitation of Actions, § 1.

Of aliens, see Aliens, § 1.

## DISBARMENT.

Of attorney, see Attorney and Client, § 1.

## DISCHARGE.

From employment, see Master and Servant, § 1.

Of guardian, see Guardian and Ward, § 1.

Of servant, see Master and Servant, § 1.

\*Point annotated. See syllabus.

*From indebtedness, obligation, or liability.*

See Compromise and Settlement; Release.

Liability as surety, see Principal and Surety, § 2.

## DISCLAIMER.

In ejectment, see Ejectment, § 3.

## DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, § 1.

## DISCRETION OF COURT.

As to custody of children on divorce, see Divorce, § 2.

As to proceeding with trial on suggestion of accused's insanity, see Criminal Law, § 18.

As to statements by accused, see Criminal Law, § 20.

Conduct of trial, see Trial, § 1.

Continuance in criminal prosecution, see Criminal Law, § 17.

Cross-examination of witness, see Witnesses, § 3.

Discontinuance of action, see Dismissal and Nonsuit, § 1.

Granting alimony, see Divorce, § 1.

Granting or refusing new trial, see New Trial, § 1.

Granting specific performance, see Specific Performance, § 1.

Presumptions as to on appeal or writ of error, see Appeal and Error, § 11.

Reception of evidence at trial, see Trial, § 3.

Reopening case for further evidence, see Trial, § 3.

Review of discretionary rulings in criminal prosecutions, see Criminal Law, § 27.

Review of discretionary rulings of trial court in refusing to set aside a verdict, see Appeal and Error, § 13.

Review in civil actions, see Appeal and Error, § 12.

Scope and extent of review in general of discretionary rulings of court, see Appeal and Error, § 9.

Special interrogatories and findings, see Trial, § 13.

Striking out pleas in criminal prosecutions, see Criminal Law, § 5.

Taxation of costs, see Costs, §§ 1, 3.

Withdrawal of pleas in criminal prosecution, see Criminal Law, § 5.

## DISCRIMINATION.

By carrier, see Carriers, §§ 1, 12.

## DISMISSAL AND NONSUIT.

At trial, see Trial, § 5.

Conclusiveness of judgment of dismissal, see Judgment, § 7.

Dismissal as to one codefendant as barring action against another, see Judgment, § 6.

Harmless error, see Appeal and Error, § 14.

Payment of costs of dismissal as condition precedent to second suit, see Costs, § 4.

Review of on appeal or writ of error of discretionary rulings as to direction of verdict, see Appeal and Error, § 12.

Right of attorney general to dismiss action, see Attorney General.

Waiver of motion for nonsuit, see Trial, § 14.

*In particular actions or proceedings.*

See Partition, § 2.

Appeal or writ of error, see Appeal and Error, § 8.

By heirs or distributees, see Descent and Distribution, § 1.



**§ 1. Voluntary.**

§ 15. Under Code Civ. Proc. 1902, § 453, a motion to discontinue an action is addressed to the discretion of the trial court.—State v. Southern Ry. (S. C.) 1116.

§ 15. An order permitting the discontinuance of an action by Attorney General *held* not granted in the exercise of the court's discretion, and was therefore error.—State v. Southern Ry. (S. C.) 1116.

**DISORDERLY CONDUCT.**

See Disturbance of Public Assemblage.

**DISPENSARIES.**

See Intoxicating Liquors, §§ 2, 7.

**DISQUALIFICATION.**

From jury service, see Jury, § 2.

**DISSOLUTION.**

Of corporation, see Banks and Banking, § 1.  
Of partnership, see Partnership, § 4.  
Of school districts, see Schools and School Districts, § 1.

**DISTRESS.**

For rent, see Landlord and Tenant, § 5.

**DISTRIBUTION.**

Of estate of decedent, see Descent and Distribution; Executors and Administrators, § 6.  
Of proceeds of foreclosure, see Mortgages, § 5.

**DISTRICT AND PROSECUTING ATTORNEYS.**

Argument and conduct in criminal prosecution, see Criminal Law, § 27.

**DISTURBANCE OF PUBLIC ASSEMBLAGE.**

A minister, preaching from a pulpit under a bona fide claim of right to do so, *held* not guilty of disturbing divine worship, because another was thereby prevented from occupying the same pulpit.—Woodall v. State (Ga. App.) 485.

Evidence *held* to show one guilty of disturbing divine worship.—Coleman v. State (Ga. App.) 487.

A defendant, charged with disturbing the public worship, is guilty of violation of Pen. Code 1895, § 418, if he disturbs any member of the congregation between the beginning of the assemblage and its final dispersing.—Daniel v. State (Ga. App.) 567.

**DITCHES.**

See Drains.

**DIVERSION.**

Of surface waters, see Waters and Water Courses, § 2.  
Of water course, see Waters and Water Courses, § 1.

**DIVORCE.****§ 1. Alimony, allowances, and disposition of property.**

\*In a suit by a husband for divorce on the ground of desertion and cruelty, no abuse of discretion in granting temporary alimony and counsel fees *held* shown, though the husband expressed a desire to have his wife return.—Woodruff v. Woodruff (Ga.) 326.

§ 223. The evidence being conflicting as to whether the wife voluntarily quit the husband or was forced to leave him, it was not an abuse of discretion to allow alimony and counsel fees to the wife.—Aiken v. Aiken (Ga.) 820.

§ 237. A husband may be decreed to pay permanent alimony, though he may not have property, if he has earning capacity.—Johnson v. Johnson (Ga.) 1044.

§ 215. An allowance of \$150 as temporary alimony *held* proper.—Kiser v. Kiser (Va.) 936.

§ 240. A decree in a divorce action for permanent alimony which covered the wife's dower right in certain real estate *held* correct, although divorce was not granted.—Kiser v. Kiser (Va.) 936.

**§ 2. Custody and support of children.**

§ 289. Civ. Code 1895, § 2452, *held* to contemplate that the judge, and not the jury, in an action of divorce shall dispose of the children.—Johnson v. Johnson (Ga.) 1044.

§ 306. Notwithstanding the wife may have barred herself by a settlement from permanent alimony, such settlement *held* not to bar an allowance to the children.—Johnson v. Johnson (Ga.) 1044.

§ 308. Under Civ. Code 1895, § 2462, *held* that a settlement, whereby a wife has barred herself of the right to demand permanent alimony, but in which no provision is made for a child, cannot be considered in estimating the allowance to such child.—Johnson v. Johnson (Ga.) 1044.

§ 308. Award of alimony to child of the full amount of the husband's earning capacity *held* excessive.—Johnson v. Johnson (Ga.) 1044.

§ 312. The discretion of a judge, in awarding the custody of a child, cannot be reviewed, where there is no exception to the decree.—Johnson v. Johnson (Ga.) 1044.

**§ 3. Operation and effect of divorce, and rights of divorced persons.**

\*Decree of divorce in the Kansas court on notice by publication on the wife in Georgia, who allowed the husband to obtain a decree on the faith of which he contracted a subsequent marriage, *held* valid on the ground of comity.—Joyner v. Joyner (Ga.) 182.

\*A husband and wife being domiciled in Georgia, the husband acquired a domicile in Kansas and obtained a divorce on constructive service on the wife, who remained in Georgia. *Held*, that the Kansas judgment was not entitled to obligatory enforcement in Georgia by virtue of Civ. Code 1895, § 5237.—Joyner v. Joyner (Ga.) 182.

Where, after a decree for a husband in divorce in Kansas after service by publication on his wife in Georgia, the wife sued for alimony in Georgia on personal service, the suit cannot be maintained.—Joyner v. Joyner (Ga.) 182.

**DOCKETS.**

Of appeal from justice's court, see Justices of the Peace, § 3.  
Of causes for trial, see Trial, § 1.

\*Point annotated. See syllabus.

**DOCUMENTS.**

As evidence in civil actions, see Evidence, § 9.

**DOGS.**

As property subject to execution, see Execution, § 1.

**DOWER.**

Dower interest as not exception in levy of execution, see Execution, § 3.  
Former judgment as bar of action for, see Judgment, § 6.

**DRAINS.****§ 1. Establishment and maintenance.**

\*A supplementary petition in proceedings under the drainage act (Revisal 1905, §§ 3983-4028) may be amended.—Staton v. Staton (N. C.) 596.

\*A judgment in a proceeding under the drainage act (Revisal 1905, §§ 3983-4028) for the right to drain into a canal *held* not a final judgment, but that supplementary proceedings may be brought.—Staton v. Staton (N. C.) 596.

\*It is not necessary to keep a proceeding under the drainage act (Revisal 1905, §§ 3983-4028) on the docket; but proceedings may be brought forward on notice to the parties on supplementary petition filed.—Staton v. Staton (N. C.) 596.

\*A supplementary petition in proceedings under the drainage act (Revisal 1905, §§ 3983-4028) *held* not uncertain.—Staton v. Staton (N. C.) 596.

**DRUGGISTS.**

Partial invalidity of statute, see Statutes, § 1.  
Persons entitled to allege unconstitutionality of statutes relating to, see Constitutional Law, § 1.

\*"Reputable college," as used in a pharmacy statute, defined.—State v. Matthews (S. C.) 695.

\*The state board of pharmaceutical examiners *held* without discretion to refuse a license to a graduate of a reputable college of pharmacy.—State v. Matthews (S. C.) 695.

§ 2. Code Va. 1904, c. 78, §§ 1754-1766, regulating the practice of pharmacy, is a reasonable exercise of the police power enacted in the interest of public health and safety.—Bertram v. Commonwealth (Va.) 969.

**DRUNKARDS.**

Contributory negligence of intoxicated person, see Negligence, § 3.

Evidence that defendant was drunk "upon the public streets" named in a certain city is sufficient evidence that defendant was intoxicated on a public street or highway.—Stringfield v. State (Ga. App.) 569.

**DUE PROCESS OF LAW.**

See Constitutional Law, § 6.

**DUPLICITY.**

In indictment, see Indictment and Information, § 4.

**DYING DECLARATIONS.**

See Homicide, § 4.

**EASEMENTS.**

Public easements, see Dedication; Highways.

**§ 1. Creation, existence, and termination.**

\*In an action wherein plaintiff claimed a right of way, certain evidence *held* not erroneously excluded.—McElwaney v. McDiarmid (Ga.) 20.

\*Under Civ. Code 1895, § 3068, an easement may be lost or forfeited by the owner without an "absolute refusal" to exercise his privileges thereunder.—McElwaney v. McDiarmid (Ga.) 20.

\*Deed *held* to pass the fee to the whole of the premises described, but to create an easement appurtenant to the remaining part of the tract by virtue of which a road was to remain open.—McElwaney v. McDiarmid (Ga.) 20.

§ 17. A grantor who describes the premises conveyed as bounded by a street or way *held* estopped to deny grantee's right to use the same.—Schreck v. Blun (Ga.) 705.

§ 17. A grantee's right to use a street or way delineated on a plat referred to by the description in his deed *held* not affected by the fact that at the time of the grant grantor was maintaining a gate thereon.—Schreck v. Blun (Ga.) 705.

**§ 2. Extent of right, use, and obstruction.**

Applicants to have obstructions removed from a private way *held* not entitled to a judgment by proof that the way had been in use for more than a year and that it had been obstructed without giving the notice required by Pol. Code 1895, § 673.—Fraleigh v. Nabors (Ga.) 527.

**EJECTION.**

Of passenger, see Carriers, § 17.

**EJECTMENT.**

Collateral attack on judgment, see Judgment, § 5.

Competency of witnesses, see Witnesses, § 2.

Fraud on creditors in conveyance, under which plaintiff claims title as a defense, see Fraudulent Conveyances, § 2.

**§ 1. Right of action and defenses.**

\*Plaintiff in ejectment, or in a statutory complaint for land, must recover on the strength of his own title.—Fullbright v. Neely (Ga.) 188.

\*Title given by a mortgage *held* to support ejectment.—Warren v. Williford (N. C.) 697.

\*Plaintiff in ejectment *held* not required to prove title from the state, where both parties claim through the same person, defendant by a tax deed.—Warren v. Williford (N. C.) 697.

**§ 2. Jurisdiction, parties, process, and incidental proceedings.**

Facts *held* not to entitle one to maintain a statutory complaint for land.—Fullbright v. Neely (Ga.) 188.

**§ 3. Pleading and evidence.**

Parties to a proceeding for partition and to deeds made thereunder *held* not entitled to recover from a purchaser the part set aside to one of their number by simply showing the death of the party who had sold, without showing that he left no children surviving him.—Watkins v. Gilmore (Ga.) 32; Gilmore v. Watkins, Id.

It was no sufficient objection to the admission of a deed in evidence that an order of the ordinary attached thereto, confirming the deed, was detached when it was offered only to show that, if he did know thereof, that he refused to accept it.—Brinkley v. Bell (Ga.) 67.

\*Point annotated. See syllabus.

Certain evidence *held* inadmissible to establish that a grantor did not know of the existence of a deed under which plaintiffs claimed title, or that, if he did not know thereof, that he refused to accept it.—*Brinkley v. Bell* (Ga.) 67.

Where the issue of the genuineness of a deed was by consent tried together with the other issues, the burden of proving its genuineness *held* to be on defendant, as if that issue had been tried alone.—*Sapp v. Cline* (Ga.) 529.

§ 71. Defendant in ejectment, who was the grantor to the other defendants with covenants of general warranty, was entitled to file a disclaimer and escape costs, if he was without interest in the land.—*Wright v. Johnson* (Va.) 948.

§ 71. In ejectment it was not error to permit one of the defendants to withdraw a plea of not guilty inadvertently filed by counsel of the other defendants, and to permit him to file a disclaimer.—*Wright v. Johnson* (Va.) 948.

#### § 4. Trial, judgment, enforcement of judgment, and review.

On a complaint for land, *held* error to charge that, if the jury found for defendant, the form of their verdict should be: "We, the jury, find the land sued for to be the land of the defendant."—*Fullbright v. Neely* (Ga.) 188.

Effect of Code 1904, § 862, as amended by Act Dec. 12, 1903 (Acts 1902-4, p. 693, c. 452), relating to land sold for taxes, stated, entitling successful plaintiffs in ejectment to writs of possession and fieri facias, regardless of the statute.—*Harvey v. Hoffman* (Va.) 371.

#### § 5. Damages, mesne profits, improvements, and taxes.

§ 148. Under Revisal, § 852, the claim of one sued for land for improvements may be disposed of at the same time as the question of title.—*Faison v. Kelly* (N. C.) 1086.

§ 148. In the circumstances defendant's claim for improvements on the land sued for *held* properly submitted to the jury.—*Faison v. Kelly* (N. C.) 1086.

§ 147. The burden is on a defendant, in an action for land claiming for improvements, to show that they were made in good faith when he believed and had good reason to believe that he owned the land.—*Faison v. Kelly* (N. C.) 1086.

§ 142. Under Code 1904, § 2760, a person making improvements on land belonging to his wife and in which he held but a life estate could not recover therefor.—*Wright v. Johnson* (Va.) 948.

§ 141. Crops of wheat and potatoes and fertilizer used therewith *held* not permanent improvements for which recovery could be had under Code 1904, § 2760.—*Wright v. Johnson* (Va.) 948.

### ELECTION.

Between causes of action pleaded, see Pleading, § 8.

### ELECTION OF REMEDIES.

§ 3. No error *held* to have been committed in refusing to compel an election between an attachment and a lien, under Civ. Code, 1895, § 2800, for articles furnished a sawmill.—*Consignees' Favorite Box Co. v. Speer* (Ga. App.) 1000.

### ELECTIONS.

To determine annexation of territory to municipal corporations, see Municipal Corporations, § 1.

Validity of statutes relating to, see Statutes, § 1.

\*Point annotated. See syllabus.

#### § 1. Qualifications of voters.

Though Const. art. 5, § 1, providing that the state and county poll tax combined shall not exceed \$2, does not apply, as to such limitation, to special school districts, *held* not to make it possible, by the levy of an exorbitant poll tax, to deprive a citizen in a special district of the right to vote (Const. art. 6, § 4).—*Perry v. Commissioners of Franklin County* (N. C.) 608.

#### § 2. Registration of voters.

Pol. Code 1895, § 51, requiring boards of county registrars to be bipartisan, is complied with where the members of the board are not of one political party.—*Lowrey v. Cheatham* (Ga.) 226.

#### § 3. Nominations and primary elections.

A candidate at a primary election, *held* to have complied with Act March 6, 1905 (Laws 1905, p. 949) § 2, and the rules of the Democratic Party in filing his pledge and statement of expenses.—*Moore v. Griffin* (S. C.) 545.

#### § 4. Contests.

A petition to contest a dispensary election *held* demurrable for failure to allege that the persons claimed to have been prevented from voting offered to vote at the precincts where, under the law, they were entitled to vote.—*Lowrey v. Cheatham* (Ga.) 226.

A petition for the contest of a dispensary election, charging that voters were intimidated from qualifying themselves to vote, *held* demurrable for failure to allege the names and numbers of the persons so intimidated and deterred.—*Lowrey v. Cheatham* (Ga.) 226.

### ELECTRICITY.

Electric companies as employers, see Master and Servant, § 9.

§ 19. In an action against a telephone company for damage to a store by fire caused by the negligent maintenance of defendant's wires, the evidence *held* to sustain a verdict for plaintiff.—*Staunton Mut. Telephone Co. v. Buchanan* (Va.) 928.

### EMBEZZLEMENT.

\*Under an indictment for embezzlement, in violation of Pen. Code 1895, § 194, *held* not required to allege or prove a demand.—*Hagood v. State* (Ga. App.) 641.

\*To intrust an agent with bills for collection is to intrust him with the money collected, within the embezzlement statute (Pen. Code 1895, § 194).—*Hagood v. State* (Ga. App.) 641.

\*Indictment charging fraudulent conversion of several sums of money, in violation of Pen. Code 1895, § 194, *held* supported by proof of the fraudulent conversion of one or more of such sums.—*Hagood v. State* (Ga. App.) 641.

### EMINENT DOMAIN.

Estoppel to enjoin condemnation proceedings, see Estoppel, § 1.

Public improvements by municipalities, see Municipal Corporations, § 6.

Removal of condemnation proceedings to federal court, see Removal of Causes, § 1.

#### § 1. Nature, extent, and delegation of power.

A street and suburban railway incorporated pursuant to Civ. Code 1895, § 2180, has the power to condemn outside the limits of an incorporated town or city.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co.* (Ga.) 52.

\*A party having the right to condemn can only take such property as is useful, needful, and necessary for public purposes.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

\*The right to condemn land includes the right to take such quantity as may be reasonably necessary.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

A street and suburban railway has a large discretion in the location of its route, and, unless abused, it will not be controlled by the courts.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

\*To take from a railroad company the exclusive right to the use of its property, or any part thereof, and limit its use therein to a particular purpose, and give another railroad company an equal or joint right in the use of it for that purpose, is a "taking" within the meaning of Const. 1902, §§ 58, 160 (Code 1904, pp. ccxxii, ccviii).—*Louisville & N. R. Co. v. Interstate R. Co. (Va.)* 869.

## § 2. Compensation.

§ 82. An abutting owner *held* not entitled to compensation for the removal of shade trees from a street for the preservation of sewers laid therein.—*Rosenthal v. City of Goldsboro (N. C.)* 905.

Code 1887, § 1097 (Code 1904, p. 657), *held* not to deprive a railway company with which another company seeks to connect of the right to compensation if its property is taken in making the connection.—*Louisville & N. R. Co. v. Interstate R. Co. (Va.)* 869.

\*Land of a railway company with which company another company seeks to connect, to be used in constructing the connecting track, *held* not subject to taking without compensation; Code 1904, § 1294d, cl. 37, being subordinate, and not repugnant, to Const. 1902, § 58 (Code 1904, p. ccxxii).—*Louisville & N. R. Co. v. Interstate R. Co. (Va.)* 869.

\*Under a rule stated, a railway company being entitled to compensation for property taken by another company in connecting with it *held* entitled to payment in money.—*Louisville & N. R. Co. v. Interstate R. Co. (Va.)* 869.

\*An abutting property owner *held* not entitled to damages because the authorized location of a street railway company nearer his property than the center of the street would make such property less desirable and comfortable as a residence.—*Wagner v. Bristol Belt Line Ry. Co. (Va.)* 391.

\*The rule that a street railway line does not constitute an additional servitude *held* not altered by Const. 1902, art. 4, § 38 (Code 1904, p. ccxxii), prohibiting damage of private property for public use without just compensation.—*Wagner v. Bristol Belt Line Ry. Co. (Va.)* 391.

## § 3. Proceedings to take property and assess compensation.

Where proceedings are taken by a county to condemn a right of way for a road in pursuance of an alteration, and the old road passed near the residence located on the land, while the new road passed through the same tract, and the old road was to be abandoned in assessing the damages, such abandonment and the results on ingress to and egress from the residence should be considered in determining whether the market value of the land would be diminished.—*Mallory v. Morgan County (Ga.)* 179.

## § 4. Remedies of owners of property.

\*Where an effort is made to take more land than is necessary for public purposes, the owner thereof has the right to have the taking of such land as is not necessary enjoined.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

\*"Street cars" defined.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

In an action to restrain a street and suburban railway from condemning a right of way through a particular part of plaintiff's property, evidence on the issue of whether the railway had acted in bad faith in the selection of its route *held* erroneously excluded.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

In an action to enjoin a street and suburban railway from condemning a right of way across a particular part of plaintiff's premises, evidence of attempt to purchase *held* properly received.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (Ga.)* 52.

§ 289. Rule as to necessary parties in an action against a railway company for trespass upon land in constructing and operating a road over it stated.—*Porter v. Aberdeen & R. F. R. R. (N. C.)* 741.

§ 309. Remedy of a landowner where a railway company occupies his land stated.—*Porter v. Aberdeen & R. F. R. R. (N. C.)* 741.

## EMPLOYÉS.

See Master and Servant.

## ENCROACHMENT.

On highways, see Highways, § 3.

## ENTICEMENT.

Of husband or wife, see Husband and Wife, § 5.

## ENTRY.

Of judgment, see Appeal and Error, § 1.  
Re-entry by landlord, see Landlord and Tenant, § 6.

## ENTRY, WRIT OF.

See Ejectment.

## EQUITABLE CONVERSION.

See Conversion.

## EQUITABLE ESTOPPEL.

See Estoppel, § 1.

## EQUITY.

Amendment of bill for an account, see Account, § 1.

Equitable conversion, see Conversion.

Equitable estoppel, see Estoppel, § 1.

Equitable set-off, see Set-Off and Counterclaim.

Jurisdiction of municipal court, see Courts, § 4.

Jurisdiction of particular courts in general, see Courts, § 3.

Laches affecting action to surcharge or falsify settled account, see Account Stated.

Relief against judgment, see Judgment, § 4.

Taxation of costs in equity, see Costs, § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See Account; Cancellation of Instruments; Fraudulent Conveyances; Injunction; Quiet-  
ing Title; Partition, §§ 1, 2; Receivers; Reformation of Instruments; Specific Performance; Trusts.

\*Point annotated. See syllabus.

Actions to construe wills, see Wills, § 10.  
Adjustment of claims to property levied on, see Execution, § 4.  
Foreclosure of mechanic's lien, see Mechanics' Liens, § 1.  
To enjoin unauthorized tax, see Taxation, § 4.

### § 1. Jurisdiction, principles, and maxims.

§ 31. If the principal defendant is a nonresident, yet, if he is within the jurisdiction of the court and is personally served, the action will not be dismissed.—*Roland v. Roland* (Ga.) 1042.

§ 66. The counter equity which the court will enforce, under the rule that he who seeks equity must do equity, must grow out of the transaction in respect of which equitable relief is invoked.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 24. The law will, when possible, so construe an instrument as to avoid forfeitures, and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroy the rights of the parties.—*Cuthbertson v. Morgan* (N. C.) 744.

A proceeding *held* to be in the nature of a suit for specific performance, and for injunctive relief against irreparable injury, within the jurisdiction of a court of equity.—*Epperson v. Epperson* (Va.) 344.

### § 2. Parties and process.

A necessary party in an equity suit omitted may be admitted on his own initiative without formal amendment; no injustice being done thereby.—*Epperson v. Epperson* (Va.) 344.

### § 3. Decree and enforcement thereof.

\*Where the principal question involved in the pleadings and decided by the court was the construction of a contract for support executed by codefendants and the necessary result of the decision of that issue between plaintiff and defendants was to affect the rights of defendants among themselves a decree might be rendered between the codefendants without cross-pleadings.—*Epperson v. Epperson* (Va.) 344.

§ 415. It is no objection to a decree that the reasons for the decisions are recited therein.—*Jackson v. Valley Tie & Lumber Co.* (Va.) 964.

### § 4. Bill of review.

\*Where, on the first hearing of a suit, it was held on appeal that there was no evidence at all on a certain issue, a bill of review founded on after-discovered evidence on that issue should not be refused on the ground that the evidence is cumulative.—*Durbin v. Roanoke Bldg. Co.* (Va.) 339.

\*A bill of review founded on newly discovered evidence, *held* to entitle complainant to a rehearing.—*Durbin v. Roanoke Bldg. Co.* (Va.) 339.

## ERROR, WRIT OF.

See Appeal and Error.

## ESTABLISHMENT.

Of boundaries, see Boundaries, § 2.  
Of counties, see Counties, § 1.  
Of courts, see Courts, § 2.  
Of drains, see Drains, § 1.  
Of highways, see Highways, § 1.  
Of lost instruments, see Lost Instruments.  
Of railroads, see Railroads, § 3; Street Railroads, § 1.  
Of telegraphs or telephones, see Telegraphs and Telephones, § 1.  
Of will, see Wills, § 3.

## ESTATES.

Created by deed, see Deeds, § 3.  
Created by sale under power, see Powers, § 2.  
Created by will, see Wills, § 6.  
Decedents' estates, see Descent and Distribution; Executors and Administrators.  
Trusts, see Trusts, § 2.

### Particular estates.

See Life Estates; Remainders; Reversions.  
Estates for years, see Landlord and Tenant.  
Tenancy in common, see Tenancy in Common.

## ESTATES TAIL

Creation by will, see Wills, § 7.

## ESTOPPEL

By holding out as partner, see Partnership, § 1.  
By judgment, see Judgment, §§ 6, 7.  
Of bank stockholders to assert nonliability, see Banks and Banking, § 1.  
Of judgment debtor to defend as against assignee of judgment, see Judgment, § 9.  
To allege error on appeal or writ of error, see Appeal and Error, § 10.  
To avoid or forfeit insurance policy, see Insurance, § 3.  
To claim right of redemption in land devised, see Wills, § 11.  
To deny agency, see Principal and Agent, § 3.  
To deny right to use way, see Easements, § 1.  
To except to judgment on appeal or writ of error, see Appeal and Error, § 1.  
To object to pleadings, see Pleading, § 10.  
To take appeal, see Appeal and Error, § 2.

### § 1. Equitable estoppel.

Testator devised property to his wife for life, with remainder for life to such of his children as were living at the wife's death and to the children of such as might have died, remainder in fee to testator's grandchildren. On the death of the wife, the life tenants, being all of age, applied to the probate court for partition, which was made, and deeds in accordance therewith were executed. Parties to a partition, who had each accepted and gone into possession under deeds made thereunder, doing likewise, *held* estopped to claim the land sold by one of the parties from the purchaser.—*Watkins v. Gilmore* (Ga.) 32; *Gilmore v. Watkins*, Id.

Under Civ. Code 1895, § 5152, property owner *held* not estopped to enjoin the condemnation of a right of way through a particular part of its premises.—*Piedmont Cotton Mills v. Georgia Ry. & Electric Co.* (Ga.) 52.

On a complaint for land, an application by a defendant to be appointed guardian of the land as the property of plaintiff's grantor, and an order appointing him, and authorizing him to rent the same, *held* admissible, and the court to have committed no error in charging on estoppel as arising therefrom.—*Fullbright v. Neely* (Ga.) 188.

§ 83. Where one induces another to buy land as the property of a third person, he is estopped from asserting his title as against such third person.—*Tune v. Beeland* (Ga.) 976.

§ 119. Where the facts relied on to establish an estoppel do not unequivocally show an estoppel in pais, the jury should determine whether an estoppel is established.—*Tune v. Beeland* (Ga.) 976.

§ 68. Where plaintiff presented a claim in bankruptcy against defendant, and it was dismissed as not a provable debt, on subsequent action by plaintiff to recover the same, defendant was estopped to assume a contrary position.

\*Point annotated. See syllabus.

tion and plead a discharge as a defense.—*Haber-Blum-Block Hat Co. v. Friesleben* (Ga. App.) 712.

§ 115. A plea of estoppel *held* not broad enough to include the admission of certain evidence.—*Alston v. French & Morton* (Ga. App.) 713.

§ 115. Estoppels must be proved as pleaded.—*Alston v. French & Morton* (Ga. App.) 713.

§ 115. Allegations of estoppel *held* not supported by the evidence.—*Alston v. French & Morton* (Ga. App.) 713.

§ 92. One who fails to sue under a forthcoming bond until he has claimed the fund arising from the sale under judicial process of the property, the production of which the forthcoming bond secured, is confined to his election.—*Barnes v. Vandiver* (Ga. App.) 994.

§ 55. A married woman holding the equity of redemption in land *held* not estopped to assert it as against one who purchased part of the land after a nonsuit had been entered in a former action by her to redeem.—*Rich v. Morisey* (N. C.) 762.

\*It is unnecessary to plead estoppel in an action to recover land, and defendant could introduce evidence of estoppel under a general denial and have the issue submitted to the jury.—*Scarborough v. Woodley* (S. C.) 405.

\*In an action to recover land, plaintiffs' conduct when defendant purchased and had the land surveyed *held* insufficient as an estoppel to plaintiffs' claim.—*Scarborough v. Woodley* (S. C.) 405.

§ 98. Acts of a person *held* to estop him and one in possession of land by his permission to assert title.—*Sparkman v. Jones* (S. C.) 870.

## EVIDENCE.

See Depositions; Witnesses.

Admissibility of evidence under pleading, see Pleading, § 9.

Applicability of instructions to evidence, see Trial, § 9.

Burden of proof under plea of former jeopardy, see Criminal Law, § 5.

Newly discovered evidence ground for new trial in prosecution for homicide, see Homicide, § 6.

Questions of fact for jury, see Trial, § 5.

Reception at trial, see Criminal Law, § 20; Trial, § 3.

Ruling on evidence as ground for new trial in civil actions, see New Trial, § 1.

Rulings on evidence as ground for new trial in criminal prosecution, see Criminal Law, § 26.

Verdict or findings contrary to evidence, see New Trial, § 1.

### *As to particular facts or issues.*

See Adverse Possession, § 3; Boundaries, § 2; Damages, § 6; Death, § 1; Deeds, § 4; Estoppel, § 1; Fraudulent Conveyances, § 3; Judgment, § 11; Statutes, § 6.

Agency, see Principal and Agent, § 1.

Authority of agent, see Principal and Agent, § 3.

Connivance at adultery, see Adultery.

Construction of contract of sale, see Sales, § 2.

Defense of statute of limitations, see Limitation of Actions, § 2.

Delivery and acceptance of lease, see Landlord and Tenant, § 2.

Disturbance of worship, see Disturbance of Public Assemblage.

Enactment of ordinance, see Municipal Corporations, § 3.

Existence of custom, see Customs and Usages.

Existence of highway, see Highways, § 1.

Existence of trust, see Trusts, § 1.

Forgery of deed, see Deeds, § 4.

Former existence of lost instrument, see Lost Instruments.

Fraud in conveyance from principal to agent, see Principal and Agent, § 2.

Fraud in gifts between husband and wife, see Husband and Wife, § 2.

Hostile character of possession, see Adverse Possession, § 1.

Notice of ownership of mineral rights, see Mines and Minerals, § 1.

Reasonableness of water rates, see Waters and Water Courses, § 3.

Recording of instruments or papers, see Records.

Tenancy, see Landlord and Tenant, § 1.

Testacy, see Wills, § 4.

Testamentary capacity, see Wills, § 1.

Title to goods sold, see Sales, § 4.

Warranty of goods sold, see Sales, § 5.

### *In actions by or against particular classes of persons.*

See Corporations, § 3; Landlord and Tenant, § 4; Street Railroads, § 2.

Assignees, see Assignments, § 3.

Between bailor and bailee, see Bailment.

Telegraph company, see Telegraphs and Telephones, § 2.

### *In particular civil actions or proceedings.*

See Ejectment, §§ 3, 5; Libel and Slander, § 2;

Negligence, § 4; Partition, § 2; Quieting Title, § 2; Reformation of Instruments, § 2;

Replevin, § 3; Specific Performance, § 4;

Trespass, § 1.

Accounting by executor or administrator, see Executors and Administrators, § 9.

Action on account, see Account, Action on.

Condemnation proceedings, see Eminent Domain, § 4.

Disbarment proceedings, see Attorney and Client, § 1.

For abuse of process, see Process, § 2.

For breach of contract, see Contracts, § 4.

For breach of contract for transportation of passenger, see Carriers, § 15.

For breach of covenant, see Covenants, § 3.

For compensation of attorney, see Attorney and Client, § 2.

For fires caused by operation of railroad, see Railroads, § 9.

For injuries caused by defective bridge, see Bridges, § 1.

For injuries from fire caused by electricity, see Electricity.

For loss of or injury to goods shipped, see Carriers, § 7.

For loss of or injury to shipment of live stock, see Carriers, § 13.

For negligence of landlord, see Landlord and Tenant, § 4.

For nondelivery of telegram, see Telegraphs and Telephones, § 2.

For penalties for violation of regulations by carriers, see Carriers, § 1.

For personal injuries, see Carriers, § 16; Master and Servant, § 12; Railroads, §§ 7, 8; Street Railroads, § 2.

For price of goods, see Sales, § 6.

For removal of obstruction of private way, see Easements, § 2.

For wrongful discharge of servant, see Master and Servant, § 1.

For wrongful ejection of passenger, see Carriers, § 17.

On bill or note, see Bills and Notes, § 3.

On insurance policy, see Insurance, § 5.

On receiver's bond, see Receivers, § 2.

Probate proceedings, see Wills, § 3.

To determine right to use way, see Easements, § 1.

To establish lost instrument, see Lost Instruments.

To redeem from mortgage, see Mortgages, § 6.

To restrain street railroad from condemning right of way, see Eminent Domain, § 4.

To set aside lien as against bankrupt, see Bankruptcy, § 1.

\*Point annotated. See syllabus.

*In criminal prosecutions.*

See Adultery; Arson; Criminal Law, §§ 6-15; False Pretenses; Gaming, § 2; Homicide, § 4; Larceny, § 2; Perjury, § 1; Receiving Stolen Goods.

Carrying weapons, see Weapons.

For drunkenness on public highway, see Drunkards.

For offense against liquor laws, see Intoxicating Liquors, § 5.

*Review and procedure thereon in appellate courts.*

Conclusiveness of finding as to sickness of witness justifying admission of testimony at former trial, see Appeal and Error, § 13.

Harmless error in rulings on, see Appeal and Error, §§ 14, 16, 17; Criminal Law, § 27.

Parties entitled to allege error as to admission of an appeal or writ of error, see Appeal and Error, § 10.

Review of discretionary rulings on, see Criminal Law, § 27.

Review of questions of fact, see Appeal and Error, § 13.

Review of rulings on as dependent on assignments of error, see Appeal and Error, § 7.

Review of rulings on as dependent on record on appeal or error, see Appeal and Error, § 6.

Review of rulings on as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.

Review on appeal or writ of error of discretionary rulings as to testimony of expert witness, see Appeal and Error, § 12.

**§ 1. Judicial notice.**

\*The court, in the absence of proof to the contrary, will assume that a bank, discounting a draft for the price of goods, with bill of lading attached, does not intend to take over the original contract of sale.—*Mason v. Nelson* (N. C.) 625.

\*Where the duties due a servant by his master are statutory, and facts are alleged from which those duties arise, the court will take judicial notice of the statute.—*Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 446.

**§ 2. Presumptions.**

In an action for personal injuries in Alabama where no statute is pleaded or shown, it will be presumed that the common law is in force.—*Lay v. Nashville, C. & St. L. Ry. Co.* (Ga.) 189.

The common law of the forum held to govern, in the absence of evidence of the law of the state where the injury occurred.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

§ 63. Every man is presumed sane until evidence to the contrary is produced.—*Hopkins v. Wampler* (Va.) 926.

§ 60. The law never presumes fraud, but the presumption is in favor of innocence and honesty.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

**§ 3. Burden of proof.**

§ 94. The burden of ultimately establishing the case held not to shift, but the burden of going forward and producing evidence shifts, depending on the state of the evidence.—*Cox v. Aberdeen & A. R. Co.* (N. C.) 884.

**§ 4. Relevancy, materiality, and competency in general.**

\*In an action wherein plaintiff claimed right of way, certain evidence held erroneously excluded.—*McElwaney v. McDiarmid* (Ga.) 20.

If evidence is admissible on defendant's behalf for any purpose, the fact that its effect on plaintiff's case may be serious will not make its admission erroneous as irrelevant.—*McCommons v. Williams* (Ga.) 230; *Williams v. McCommons*, Id.

\*Under Civ. Code 1895, § 5248, providing that a notice to produce dispenses with proof as against the party giving notice, identification of book of ordinances called for held sufficient without further identification by the clerk of the municipality.—*Stone v. Town of Tallulah Falls* (Ga.) 592.

\*A conversation held a part of the res gestæ.—*Douglass v. Southern Ry. Co.* (S. C.) 15.

§ 118. Declarations accompanying an act and explanatory thereof are admissible as part of the res gestæ.—*Puryear v. Ould* (S. C.) 863.

§ 121. In an action for unearned salary under a contract of employment, declarations by the employer's manager when he discharged plaintiff held admissible.—*Puryear v. Ould* (S. C.) 863.

§ 120. Where plaintiff relied on a contract of employment for a definite term, the employer could not show the nature of contracts with other employes.—*Puryear v. Ould* (S. C.) 863.

In an action for death of a motorman by jumping from the motor as it was descending a grade, evidence as to how other companies operated similar motors was inadmissible.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

§ 123. A conversation held not part of the res gestæ of an accident to a passenger boarding a street car.—*Blue Ridge Light & Power Co. v. Price* (Va.) 988.

§ 122. In an action on a life policy, stipulating for a reduced liability on insured committing suicide, a letter written by insured to his wife on the morning of the day of his death held inadmissible.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

**§ 5. Best and secondary evidence.**

\*Evidence that witness had a family and had applied for a homestead was not subject to the objection that the application for the homestead was the best evidence.—*McLamb & Co. v. Lamberton* (Ga. App.) 107.

In claim and delivery for tobacco alleged to have been sold to plaintiffs, evidence that plaintiffs had insured the tobacco might be proved, without putting the policy in evidence.—*Andrews v. Grimes* (N. C.) 519.

§ 171. In an action under Revisal 1905, § 2634, for the penalty for failure to adjust and pay a claim for loss of freight, plaintiff, having already filed and recovered his claim for loss of the goods, could testify to that fact without producing the notice itself.—*Rabon v. Atlantic Coast Line R. Co.* (N. C.) 743.

§ 185. Statement as to proper persons on whom to make demand for production of a letter to make oral proof of contents of letter admissible.—*Rheinstein Dry Goods Co. v. McDougall* (N. C.) 1065.

**§ 6. Admissions.**

\*Statements by a predecessor in title to property over which an easement is claimed, made while he owned the same, recognizing the easement, held admissible to show the existence thereof.—*McElwaney v. McDiarmid* (Ga.) 20.

§ 263. Part of a paragraph of the complaint held properly excluded, where the paragraph was so constructed that the part not offered in evidence was necessary to explain that offered.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

§ 253. Substantially the same rule applies in criminal and civil cases as to the admissibility of acts and declarations of one conspirator as original evidence against each member of the conspiracy.—*Henderson-Snyder Co. v. Polk* (N. C.) 904.

\*Point annotated. See syllabus.

§ 253. Where two or more persons combine for the prosecution of any illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ*, may be given in evidence against the other.—Henderson-Snyder Co. v. Polk (N. C.) 904.

§ 253. The acts and declarations of a mortgagor in furtherance of a common design to defeat the rights of a junior mortgagee *held* admissible against the senior mortgagee.—Henderson-Snyder Co. v. Polk (N. C.) 904.

§ 260. Evidence *held* to show a common purpose of a chattel mortgagor and the senior mortgagee to make a sham sale of the chattels to defeat the rights of the junior mortgagee authorizing the admission in evidence of the acts and declarations of the mortgagor in furtherance of the common design.—Henderson-Snyder Co. v. Polk (N. C.) 904.

§ 208. A portion of a paragraph of the answer containing an admission of a distinct and separate fact is admissible in evidence without introducing explanatory matter which does not modify or alter the admission.—Wade v. McLean Contracting Co. (N. C.) 918.

§ 235. Declarations by the attorney of the drawer of a bill of exchange are not admissible against the transferee of the bill.—Stouffer v. Erwin (S. C.) 843.

§ 242. Declarations of a claim agent made while attempting to adjust a claim *held* binding on the carrier.—Rutland v. Southern Ry. Co. (S. C.) 865.

\*Evidence of verbal admissions *held* to be received with great caution, especially when made to and proved by persons having no interest in the subject of the conversation.—Garrett v. Rutherford (Va.) 389.

§ 244. Declaration of the motorman after an accident to a passenger on a street car *held* not admissible against the carrier.—Blue Ridge Light & Power Co. v. Price (Va.) 938.

#### § 7. Declarations.

\*On a complaint for land, declaration by defendant that the purchase by him of the dower interest made his title complete *held* inadmissible in his behalf.—Fullbright v. Neely (Ga.) 188.

Declarations of a defendant in *fiel facias* in a claim case, as to his title, made after levy, are inadmissible.—Luke v. Cannon (Ga. App.) 110.

§ 273. When one is in possession of land, his acts and declarations qualifying and explaining such possession are competent as part of the *res gestæ*; that is, the fact of possession.—Smith v. Moore (N. C.) 892.

§ 276. In an action on a life policy, proof of a declaration of insured after the policy had become effective *held* inadmissible.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 276. Rule as to admissibility of declarations made by a person, against his interest stated.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

#### § 8. Hearsay.

\*Certain evidence *held* hearsay.—Fain & Stamps v. Ennis (Ga. App.) 466.

§ 315. In an action on an account against a wife, evidence of a statement by the husband that the account was his wife's account *held* hearsay.—Leake v. J. R. King Dry Goods Co. (Ga. App.) 729.

\*An expert *held* not authorized to give hearsay testimony.—Mason v. Apache Mills (S. C.) 399.

§ 317. In an action for injuries to mules during transportation, evidence as to declara-

tions of a person not plaintiff's agent as to how the ribs of one of the mules were fractured was inadmissible as hearsay.—Davis Bros. v. Blue Ridge Ry. Co. (S. C.) 856.

§ 314. Testimony *held* proper on an issue whether plaintiff was employed for a definite term, not being improper as hearsay.—Puryear v. Ould (S. C.) 863.

§ 317. Where plaintiff relied on a contract of employment as modified in an agreement with employer's manager, the employer could not show that the manager never reported the modification to him.—Puryear v. Ould (S. C.) 863.

§ 317. Evidence by others of the opinion of testatrix's family as to her mental condition is inadmissible, being hearsay.—Hopkins v. Wampler (Va.) 926.

#### § 9. Documentary evidence.

\*A conditional bill of sale, duly recorded, is admissible in evidence without preliminary proof of execution.—Charles v. Valdosta Foundry & Machine Co. (Ga. App.) 493.

\*In an action against a carrier for injury to a live stock shipment, a conductor's record *held* properly excluded.—Jones v. Atlantic Coast Line R. Co. (N. C.) 521.

\*Telegrams purporting to be in reply to other telegrams, *held* prima facie admissible.—Edward Bros. v. Erwin (N. C.) 545.

§ 357. Where defendant wrote plaintiff's agent a letter, *held*, it was competent for him to introduce a copy of it.—Rheinstein Dry Goods Co. v. McDougall (N. C.) 1065.

#### § 10. Parol or extrinsic evidence affecting writings.

Parol evidence *held* admissible to show that time was of the essence of a contract.—Alabama Const. Co. v. Continental Car & Equipment Co. (Ga.) 160.

\*Parol evidence, while inadmissible to contradict a written contract, may be received to supply omissions therein not inconsistent with the writing as authorized by Civ. Code 1895, § 5204.—McCommons v. Williams (Ga.) 230; Williams v. McCommons, Id.

\*The making of a written agreement, with a parol promise to give a counter agreement, violates the rule against supplementing a written agreement by parol evidence, and differs from the giving of a paper, to be delivered on the fulfillment of some condition, and not otherwise.—Smith v. Georgia R. & Banking Co. (Ga.) 673.

§ 431. Certain evidence *held* not improperly admitted over objection that it varied the written contract.—Averett v. Walker (Ga.) 1046.

\*Parol evidence is inadmissible to affect the terms of a contract, in the absence of either fraud, accident, or mistake.—Bush v. Roberts (Ga. App.) 92.

\*Parol evidence is admissible to identify the connection of a party with a written instrument.—McLamb & Co. v. Lambertson (Ga. App.) 107.

§ 423. A person signing an obligation as a joint maker may show by parol that he is surety only.—Smith v. First Nat. Bank (Ga. App.) 826.

§ 441. The maturity of a note cannot be extended by a parol agreement, made either contemporaneously with or antecedent thereto.—Jones v. Taylor (Ga. App.) 992.

§ 434. One who signs a written contract without reading it is bound by its stipulations, and cannot set up representations contradictory to the express language of the instrument.—Boswell v. Johnson (Ga. App.) 1003.

\*Point annotated. See syllabus.



§ 441. The express terms of a written instrument cannot be varied by any alleged parol contemporaneous agreement.—*Reams v. Thompson* (Ga. App.) 1014.

§ 445. Before a subsequent contract can change a previous written contract, it must possess the elements and formalities essential to a valid contract as to the particular subject-matter.—*Reams v. Thompson* (Ga. App.) 1014.

\*In a suit on a written guaranty defendant stockholders could not show by parol that when the instrument was signed it was understood they should not be personally liable.—*Basnight v. Southern Jobbing Co.* (N. C.) 420.

In an action for wrongfully negotiating notes executed by plaintiff in payment of patent rights, under a collateral agreement that defendant was to do certain things before the transaction was completed, parol evidence held admissible to show such agreement.—*Hughes v. Crooker* (N. C.) 429.

\*Oral evidence held inadmissible to vary a written contract.—*Walker v. Venters* (N. C.) 510.

\*Oral evidence held inadmissible to vary a written contract for the sale of goods.—*Dr. Shoop Family Medicine Co. v. J. A. Mizell & Co.* (N. C.) 511.

§ 442. Where a written contract with a carrier for shipment of stock was silent as to the route, parol evidence as to a separate agreement for a particular route was not incompetent as contradicting or varying the written contract.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

§ 441. Parol evidence held inadmissible to show an agreed line different from that described in the deed.—*Holden v. Alexander* (S. C.) 1108.

§ 441. Where an alleged agreed line was laid off prior to the execution of a deed describing the boundary, the boundary so described controlled, where it did not coincide with the agreed line.—*Holden v. Alexander* (S. C.) 1108.

\*Parol evidence is admissible when it is necessary in order to identify, explain, or define the subject-matter of a grant.—*South & W. Ry. Co. v. Mann* (Va.) 354.

#### § 11. Opinion evidence.

§ 568. The value of an article held peculiarly for the jury, and it is not absolutely bound by the opinions or estimates of witnesses.—*Minchew v. Nahunta Lumber Co.* (Ga. App.) 716.

§ 474. Any witness may give his opinion after having given the facts on which he bases it so as to enable the jury to determine the probative value thereof.—*Georgia Southern & F. Ry. Co. v. Walker* (Ga. App.) 720.

§ 501. The value of services may be proved by the opinion of a witness.—*Georgia Southern & F. Ry. Co. v. Walker* (Ga. App.) 720.

\*In an action for damages for defendant's failure to construct ditches sufficient to carry water under its roadbed, after stopping plaintiff's ditches, plaintiff could testify what his crops would have been in a certain year had defendant left the ditches open.—*Davenport v. Norfolk & S. R. Co.* (N. C.) 431.

\*In support of an alleged breach of warranty of a machine, experts who had used similar machines could testify that they would not do the work they were intended to perform.—*House Cold Tire Setter Co. v. Whitehurst* (N. C.) 523.

§ 498. In an action for breach of a contract to pay defendant so much per thousand feet for cutting and hauling timber, the testimony of witnesses as to the profits per thousand feet, held, in effect, an estimate of the difference between the cost of performance which they had

stated and the contract price, and admissible.—*Wilkinson v. Dunbar* (N. C.) 748.

§ 474. The rule as to the admission of opinion testimony by one having special knowledge of the facts stated, and on a claim for breach of contract to pay a certain sum for cutting and delivering timber, the opinion of experienced lumbermen, having personal observation and knowledge of the facts and conditions, as to the profits per thousand feet in doing the work held admissible.—*Wilkinson v. Dunbar* (N. C.) 748.

§ 474. Under a rule stated, questions calling for a nonexpert opinion as to one's sanity held properly excluded.—*Myatt v. Myatt* (N. C.) 887.

§ 574. There being evidence that a personal injury was permanent, it was improper to take as conclusive a doctor's opinion to the contrary.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

\*In an action for injuries to a traveler in attempting to avoid a collision at a railroad crossing, the admission in evidence of the opinion of witnesses that the crossing was not safe held not erroneous.—*Douglass v. Southern Ry. Co.* (S. C.) 15.

\*In an action for death of a person struck by a train at a railroad crossing, a question whether there would have been plenty of time to have gotten across if the train, as was supposed by deceased, had been a slower train, held properly excluded, as calling for a conclusion.—*Griskell v. Southern Ry. Co.* (S. C.) 205.

\*Opinions of witnesses, on an issue whether the interest of plaintiffs in partition had passed under a judicial sale, were properly excluded.—*Foster v. Foster* (S. C.) 320.

§ 471. Evidence that plaintiff's husband was well known in G., where a message announcing his death was directed to plaintiff, held not objectionable as an expression of an opinion.—*Martin v. Western Union Telegraph Co.* (S. C.) 833.

§ 543. In an action for injuries to mules during transportation, stock dealers held competent witnesses as to the impairment of the mules' value.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

A witness held not qualified to testify as to the ordinary custom touching the grade that ordinary traction and sprocket motors are run on.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

\*Expert testimony held admissible to establish the center line of a railroad right of way granted to defendant, and to determine what width of ground on each side of the line was necessary to construct the road.—*South & W. Ry. Co. v. Mann* (Va.) 854.

§ 478. A nonexpert witness may give his opinion of a testator's sanity if he states the facts and circumstances within his personal knowledge upon which his opinion is based.—*Hopkins v. Wampler* (Va.) 926.

§ 474. That witnesses did not have sufficient opportunity of observing testatrix to enable them to give a reliable opinion as to her sanity went only to the weight of their testimony.—*Hopkins v. Wampler* (Va.) 926.

§ 474. Nonexpert opinions held admissible.—*Blue Ridge Light & Power Co. v. Price* (Va.) 938.

§ 472. In an action on a life policy, certain evidence of the agent procuring the policy held an opinion on a point in issue.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

#### § 12. Evidence at former trial or in other proceeding.

A rule of law under which the testimony of a witness, since deceased, at the former trial on

\*Point annotated. See syllabus.

the same issue between substantially the same parties, may be proved, does not authorize the admission in evidence of an *ex parte* affidavit by a witness, since deceased, for use on an application for an interlocutory injunction.—*Fender v. Ramsey & Phillips* (Ga.) 527.

§ 581. Where testimony given at former trial is offered on ground of sickness of the witness, the court should find the facts as to the character of the sickness, and whether it was practicable to have taken the deposition of witness.—*Smith v. Moore* (N. C.) 892.

§ 581. A doctor's certificate that a witness was too unwell to attend court *held* insufficient to justify the admission of her testimony given at a former trial.—*Smith v. Moore* (N. C.) 892.

### § 13. Weight and sufficiency.

§ 588. Where a party who has considerable property nevertheless files a pauper affidavit, such circumstance may be considered as affecting his credibility as a witness.—*Leake v. J. R. King Dry Goods Co.* (Ga. App.) 729.

## EXAMINATION.

Of person accused of crime, see Criminal Law, § 4.

Of witnesses in general, see Witnesses, § 3.

## EXCAVATIONS.

Liability of adjoining landowner for damages caused by, see Adjoining Landowners.

## EXCEPTIONS.

Necessity for purpose of review, see Appeal and Error, § 3; Criminal Law, § 27

Taking exceptions at trial, see Trial, §§ 3, 11.

## EXCEPTIONS, BILL OF.

Defects in grounds for dismissal of appeal or writ of error, see Appeal and Error, § 8.

Form and contents of in criminal prosecution, see Criminal Law, § 27.

Necessity for purpose of review, see Appeal and Error, § 6; Criminal Law, § 27

### § 1. Nature, form, and contents in general.

§ 8. Exceptions and assignments of error *held* sufficient.—*Duggan v. Monk* (Ga. App.) 1017.

### § 2. Settlement, signing, and filing.

§ 45. Though where, in correcting a bill of exceptions, there are erasures or interlineations, such portions of the bill should be rewritten, or the fact that the erasures or interlineations were made by the judge noted, yet the dismissal of a writ of error was not required therefor.—*Stewart v. Mundy* (Ga.) 986.

## EXCESSIVE DAMAGES.

See Damages, § 5.

## EXCHANGE OF PROPERTY.

Exchange of street by municipal corporation for other land for use as street, see Municipal Corporations, § 5.

\*Material, false representations as to existing conditions are usually fraudulent as distinguished from guaranties for the future which are mere warranties.—*Fudge v. Kelly* (Ga. App.) 96.

\*Mere breach of warranty will not authorize a rescission of a horse swap.—*Fudge v. Kelly* (Ga. App.) 96.

## EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

## EXECUTION.

See Attachment; Garnishment; Judicial Sales.

Exemptions, see Exemptions; Homestead.

Of contracts, see Contracts, § 1.

Validity, execution, and return affecting dormancy of judgment, see Judgment, § 10.

### § 1. Property subject to execution.

§ 38. Since Act Dec. 17, 1894 (Acts 1894, p. 100; Civ. Code 1895, §§ 5432, 5433), after a deed to secure a debt and bond to reconvey on payment, the grantor has not a leviable interest until redemption has been made either by him or a judgment creditor desiring to subject the property.—*Buchan v. Williamson* (Ga.) 815.

§ 20. A dog is such property as to be subject to levy and sale for the debts of his owner.—*Vaughn v. Nelson* (Ga. App.) 708.

### § 2. Issuance, form, and requisites of writ.

§ 102. A judgment defendant *held* to have waived the irregularity in the issuance of an execution arising from the failure to give him notice, as required by Revisal 1905, § 620.—*McKeithen v. Blue* (N. C.) 769.

§ 102. Where a judgment defendant waived the irregularity in the issuance of an execution arising from the failure to give him notice as required by Revisal 1905, § 620, he could not repudiate the waiver without establishing the fact of payment of the judgment, or some other meritorious defense.—*McKeithen v. Blue* (N. C.) 769.

### § 3. Lien, levy or extent, and custody of property.

Description of land in an execution levy, advertisement of sale, and sheriff's deed *held* sufficient, and that the widow's dower was not excepted; the only exception being the dower interest or life estate of the widow in the dower land.—*Hawkins v. Johnson* (Ga.) 285.

### § 4. Claims by third persons.

§ 201. Where, in a claim case, the plaintiff in *fi. fa.* fails to make out a *prima facie* case, and claimant introduces no evidence, the presiding judge should dismiss the levy, rather than direct a verdict for the claimant.—*Stewart v. Mundy* (Ga.) 986.

§ 188. Where the same question must be litigated by plaintiff in execution with each of the claimants of lots levied on, and afterwards, if the claimants seek an adjustment among themselves, equity may adjust all the controversies in one proceeding.—*Chamblee v. Atlanta Brewing & Ice Co.* (Ga.) 1032; *Morris v. Same, Id.*

### § 5. Sale.

§ 256. Where land is conveyed to secure a debt and a bond to reconvey executed and the land is sold on execution for a debt of the grantor, a petition in an action by the heirs of the obligee in the bond to set aside the sheriff's deed is not a proceeding to set aside a judgment after such time as would bar such proceeding, the attack on the judgment being on the ground that it was void.—*Buchan v. Williamson* (Ga.) 815.

§ 275. Under Revisal 1905, §§ 619, 620, the issuance of an execution after three years with-

\*Point annotated. See syllabus.

out notice to judgment defendant *held* irregularly issued.—McKeithen v. Blue (N. C.) 769.

### § 6. Return.

\*A sheriff's return on final process cannot be attacked by parol, except under a traverse thereof based on a legal ground, by a party to the cause on which such return is made.—Hawkins v. Johnson (Ga.) 285.

## EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Construction and operation of judgment affecting compensation of, see Judgment, § 6.

Construction of deed by party conveying as administrator, see Deeds, § 3.

Executor's deed as color of title, see Adverse Possession, § 1.

Order awarding land to widow as color of title, see Adverse Possession, § 1.

Review on appeal or writ of error of decision overruling objections to application of administrator for discharge, see Appeal and Error, § 1.

Right of foreign administrator to sue for wrongful death of intestate, see Death, § 2.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, § 2.

### § 1. Appointment, qualification, and tenure.

\*One of the next of kin, who had conveyed his interest as security for a debt overdue and unpaid, *held* not thereby deprived of his right to vote in the selection of an administrator under Civ. Code 1895, § 3367, par. 3.—Mattox v. Embry (Ga.) 202.

\*The children of one of deceased's next of kin *held* only entitled to represent one share in voting on the selection of a stranger to administer the estate.—Mattox v. Embry (Ga.) 202.

\*The guardian of a minor next of kin *held* entitled to express a choice in selecting a stranger to administer intestate's estate.—Mattox v. Embry (Ga.) 202.

\*A stranger selected by next of kin to administer an estate, under Civ. Code 1895, § 3367, pars. 3, 6, *held* entitled to appointment as a matter of law, if under no legal disability and of good moral character.—Mattox v. Embry (Ga.) 202.

\*Under Civ. Code 1895, § 3367, pars. 3, 6, a majority of the intestate's next of kin, related in equal degree, may select a stranger to administer the estate; none of the next of kin having applied for administration.—Mattox v. Embry (Ga.) 202.

In the absence of statute, when a will has been admitted to probate according to the laws of the state, the executor may maintain ejectment for the land in such state, without taking out letters testamentary therein.—Glascock v. Gray (N. C.) 433.

\*A bond will not be required of an executor, where it does not appear that he is wasting or misapplying the assets, and there is no well-grounded apprehension that a devastavit will be committed.—In re Knowles' Estate (N. C.) 549.

\*An executor will not be removed because of insolvency, where such condition existed when the will was executed and was known to testator, unless it appears that he is wasting or misapplying the assets.—In re Knowles' Estate (N. C.) 549.

### § 2. Assets, appraisal, and inventory.

A devisee may take possession of land devised to him after the will is admitted to probate in the state where the land is situated, whether the executor qualifies or not.—Glascock v. Gray (N. C.) 433.

### § 3. Collection and management of estate.

Codicil *held* not to entitle testatrix's personal representatives to retain possession of the estate as against life tenant.—Thomas v. Owens (Ga.) 218.

Will *held* not to create any estate in personal representatives so as to entitle them to retain possession as against the legatee for life of the income from the entire estate.—Thomas v. Owens (Ga.) 218.

§ 145. A deed *held* to show intent to convey as executrix, though the maker did not add her title as such to her signature.—Dodge v. Cowart (Ga.) 987.

§ 138. An executor, to whom the residuary estate is devised in trust to receive, hold, and reinvest, has by implication power to sell real estate.—Powell v. Woodcock (N. C.) 1071.

### § 4. Allowances to surviving wife, husband, or children.

§ 196. Where a caveat was interposed by heirs at law, not including the widow, and a year's support was set apart to her, and by reason of the appeal the estate was kept together for longer than 12 months, under Civ. Code 1895, § 3466, the widow was entitled to have a second year's support assigned to her.—Edenfield v. Edenfield (Ga.) 980.

As between the administrator of a tenant and the landlord, who claim a crop made by decedent, the widow is not interested in the crop further than the recovery of so much as will give her her year's support.—Sessoms v. Tayloe (N. C.) 424.

### § 5. Allowance and payment of claims.

§ 261. Under the express provision of Civ. Code 1895, § 3424, in the administration of an estate debts due by decedent as guardian rank in priority over debts due on judgments obtained during the lifetime of decedent.—W. A. Doody Co. v. Green (Ga.) 984.

### § 6. Distribution of estate.

An ordinary's order awarding 300 acres of land to decedent's widow for a year's support *held* fatally defective for uncertainty.—Hawes v. Elam (Ga.) 227.

### § 7. Sales and conveyances under order of court.

Lapse of time *held* not to raise a presumption in favor of the regularity of an administrator's sale.—Sapp v. Cline (Ga.) 529.

An administrator's deed *held* erroneously admitted in evidence as a muniment of title, without evidence to show that the land was sold at public sale.—Sapp v. Cline (Ga.) 529.

Where there was an order authorizing a sale of decedent's lands, a deed is not void for the reason that it does not recite such order.—Sapp v. Cline (Ga.) 529.

§ 349. Under Civ. Code 1895, § 3358, an order granted to the administrator to sell land for the payment of debts *held* prima facie evidence of the administrator's right to recover the land from the purchaser of an heir of intestate.—Cochran v. Bugg (Ga.) 1048.

### § 8. Actions.

A petition in a suit to recover an undivided interest in certain lands, alleging that the land had been set apart as a year's support for the widow and the minor children, and that thereafter the widow sold the land, *held* to state no cause of action as against those deriving title from his vendee.—Corbin v. Shiver (Ga.) 186.

In an action by remaindermen of personal property against executors charging misconduct, they are properly charged with costs, on failing to sustain the charges.—In re Knowles' Estate (N. C.) 549.

\*Point annotated. See syllabus.

**§ 9. Accounting and settlement.**

§ 506. The final account of an administrator duly verified and filed *held prima facie* correct.—Rich v. Morisey (N. C.) 762.

**§ 10. Foreign and ancillary administration.**

\*Under Revisal 1905, § 28, a foreign executor *held* without authority to convey land situate in North Carolina, without first qualifying as executor in North Carolina.—Glascock v. Gray (N. C.) 438.

**EXEMPTIONS.**

See Homestead.

From service as juror, see Jury, § 2.

**§ 1. Nature and extent.**

§ 48. In garnishment, evidence *held* to authorize a finding that the person whose wages were sought to be garnished was a laborer, so as to exempt the same.—McAdams v. Ellis (Ga. App.) 1001.

§ 48. A stenographer *held* a laborer, whose wages are exempt from garnishment.—Cohen v. Aldrich (Ga. App.) 1015.

§ 29. One who had fled the state as a fugitive from justice *held* not a resident thereof, so as to be entitled to exemptions under Const. art. 10, § 1.—Cromer v. Self (N. C.) 885.

**EXPERT TESTIMONY.**

In civil actions, see Evidence, § 11.

In criminal prosecutions, see Criminal Law, § 11.

Review of discretionary rulings on, see Appeal and Error, § 12.

**EXPLOSIVES.**

Storing of dynamite as nuisance, see Nuisance, § 1.

§ 8. In an action for injuries resulting from the explosion of dynamite stored in a building on a railroad right of way, caused by plaintiff's companion shooting into it, the wrongful act of plaintiff's companion *held* the proximate cause of his injury, even if defendants were negligent in so storing the dynamite.—Fanning v. J. G. White & Co. (N. C.) 734.

**EX POST FACTO LAWS.**

Retroactive operation of statutes, see Statutes, § 5.

**EXTRADITION.**

Liability of county to action for costs, see Counties, § 5.

**FACTORS.**

See Brokers; Principal and Agent.

**FALSE IMPRISONMENT.**

See Malicious Prosecution.

**FALSE PRETENSES.**

Affecting validity of release, see Release, § 1.

\*One may be defrauded by representations, the truth or falsity of which has not been investigated.—Crawford v. State (Ga. App.) 501.

\*Where one, either by false representations or fraudulent concealment, has been induced to

purchase to his damage, the seller's belief that he is giving full value to the purchaser *held* immaterial.—Crawford v. State (Ga. App.) 501.

\*It is not a defense to a charge of being a common cheat and swindler by false representations that the person defrauded did not exercise reasonable diligence.—Crawford v. State (Ga. App.) 501.

That, instead of being charged with the offense of being a cheat and swindler, one is charged by accusation with "cheating and swindling," will not authorize the accusation to be quashed.—Crawford v. State (Ga. App.) 501.

\*An allegation, in an accusation for being a common cheat and swindler, that representations were fraudulent, *held* a sufficient statement that they were made with intent to defraud.—Crawford v. State (Ga. App.) 501.

To support a conviction for swindling, it must appear that the one defrauded was so defrauded because of his reliance upon the statements made to him.—Laster v. State (Ga. App.) 508.

To warrant a conviction for swindling, the evidence must establish beyond any other reasonable hypothesis that defendant acted with fraudulent intent.—Laster v. State (Ga. App.) 508.

**FALSE SWEARING.**

See Perjury.

**FEDERAL QUESTIONS.**

Ground for removal of cause, see Removal of Causes, § 1.

**FEEES.**

Of attorney, see Attorney and Client, § 2.

Payment on appeal, see Appeal and Error, § 4.

**FEE SIMPLE.**

Creation of by sale under power, see Powers, § 2.

Creation of fee-simple estate by will, see Wills, § 7.

**FELLOW SERVANTS.**

See Master and Servant, §§ 7, 12.

**FERTILIZERS.**

As permanent improvements on land, see Ejectment, § 5.

Sale of, see Agriculture.

**FILING.**

Criminal information or complaint, see Indictment and Information, § 2.

Indictment or presentment, see Indictment and Information, § 1.

Record on appeal or writ of error, see Appeal and Error, § 6.

**FINAL JUDGMENT.**

Appealability, see Appeal and Error, § 1.

**FINDINGS.**

Review on appeal or writ of error, see Appeal and Error, § 13.

Setting aside, see New Trial, § 1.

Special findings by jury, see Trial, § 13.

\*Point annotated. See syllabus.

## FIRE INSURANCE.

See Insurance.

## FIRES.

See Arson.

Caused by electricity, see Electricity.

Caused by operation of railroad, see Railroads, § 9.

Destruction of goods sold, see Sales, § 4.

Liability of principal for negligent act of agent in setting fire, see Principal and Agent, § 3.

Sufficiency of instructions in action for injuries caused by, see Trial, § 8.

## FORCIBLE ENTRY AND DETAINER.

§ 1. Civil Liability.

§ 8. Color of title without possession is insufficient to sustain an action of unlawful detainer.—Hot Springs Lumber & Mfg. Co. v. Sterrett (Va.) 197.

## FORECLOSURE.

Of lien, see Mechanics' Liens, § 1.

Of mortgage, see Chattel Mortgages, § 3; Mortgages, §§ 4, 5.

## FOREIGN ADMINISTRATION.

See Executors and Administrators, § 10.

## FOREIGN COURTS.

See Courts, § 6.

## FORFEITURES.

Of easement, see Easements, § 1.

Of railroad right of way, see Railroads, § 2.

Relief in equity against, see Equity, § 1.

## FORGERY.

Affecting validity of deed, see Deeds, §§ 1, 4.

## FORMA PAUPERIS.

Conclusiveness of judgment on motion to dispauper, see Judgment, § 7.

## FORMER ADJUDICATION.

See Judgment, §§ 6, 7.

## FORMER JEOPARDY.

Bar to prosecution, see Criminal Law, § 3.

Demurrer to plea of, see Criminal Law, § 5.

## FORMS OF ACTION.

See Action, § 2; Detinue; Ejectment; Replevin; Trespass, § 1; Trover and Conversion.

## FORNICATION.

See Incest; Prostitution.

## FRAUD.

See False Pretenses; Fraudulent Conveyances.

Direct or collateral nature of attack on judgment on ground of fraud, see Judgment, § 5.

Presumption in favor of honesty, see Evidence, § 2.

*By particular classes of persons, or persons in particular relations.*

See Husband and Wife, § 2; Principal and Agent, § 2.

Servant, see Master and Servant, § 2.

*In particular classes of conveyances, contracts, transactions, or proceedings.*

See Deeds, § 1; Exchange of Property; Release, § 1; Sales, § 1.

Gifts between husband and wife, see Husband and Wife, § 2.

*Particular remedies.*

Equitable relief against judgment, see Judgment, § 4.

Vacation of judgment, see Judgment, § 3.

§ 1. Deception constituting fraud, and liability therefor.

§ 3. Elements of actual fraud declared.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

§ 13. The averment of the existence of a material fact, recklessly or positively, by a party consciously ignorant whether it is true or false, held actionable fraud.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

§ 13. Misrepresentation held fraudulent, though made innocently, if made by a person who ought to have known the truth.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

§ 23. Misrepresentation of fact peculiarly within the knowledge of the person making it held fraudulent.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

§ 2. Actions.

§ 64. Where there is doubt as to whether declarations were intended and received as mere expressions of opinion, or as statements of fact, the question held for the jury.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

§ 64. Whether a certain representation by life insurance agent to induce the taking out of a policy was intended as a statement of fact held for the jury.—Whitehurst v. Life Ins. Co. of Virginia (N. C.) 1067.

## FRAUDS, STATUTE OF.

Construction of charge as to as a whole, see Trial, § 12.

§ 1. Promises to answer for debt, default, or miscarriage of another.

\*An agreement to pay an account for another to prevent his prosecution must, under Civ. Code 1895, § 2693, be in writing.—Bush v. Roberts (Ga. App.) 92.

§ 2. Real property and estates and interests therein.

Under petition for specific performance, held, that the agreement sued on was a contract for the sale of land, and, not being in writing, was not enforceable, under Civ. Code 1895, § 2693, par. 4.—Gillis v. Wade (Ga.) 524.

§ 71. In an action on a written contract, a plea setting up that plaintiff, after its execution, agreed to accept another as purchaser of the land in question in place of defendant, is bad, where the alleged agreement was by parol.—Reams v. Thompson (Ga. App.) 1014.

If the calls of a deed are sufficiently definite to be located by extrinsic evidence, that location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed.—Haddock v. Leary (N. C.) 426.

§ 58. A buyer of timber, having accepted it, cannot refuse to pay for it on the ground that the contract of sale should have been in writing.—Teal v. Templeton (N. C.) 737.

\*Point annotated. See syllabus.

§ 58. A lease for three years or less need not be written.—*Teal v. Templeton* (N. C.) 737.

§ 74. A verbal contract *held* to be one for the sale of land within the statute of frauds (Code, § 2840).—*Hoover v. Baugh* (Va.) 968.

### § 3. Requisites and sufficiency of writing.

\*A writing, signed by an owner of land, acknowledging receipt of a part of the price, but not stating the amount of the price, fails to comply with the statute of frauds.—*Kinderland v. Kirk* (Ga.) 582.

### § 4. Operation and effect of statute.

\*Where partial payment, accompanied by possession, is relied on to take a parol contract out of the statute of frauds, the possession of the vendee must be actual and with vendor's consent.—*Kinderland v. Kirk* (Ga.) 582.

§ 125. An agreement by decedent *held* sufficiently definite, within the rule that parol agreements to sell land can only be enforced when definite.—*Reed v. Reed* (Va.) 792.

§ 129. Evidence *held* to show that defendant's acts in caring for decedent were done pursuant to decedent's parol agreement to give her his property.—*Reed v. Reed* (Va.) 792.

§ 129. Evidence *held* to show that decedent's parol agreement to give his property to his sister in consideration of her care had been so far executed by her that a refusal of full execution would be a fraud upon her.—*Reed v. Reed* (Va.) 792.

## FRAUDULENT CONVEYANCES.

Bulk stock laws as denial of due process of law, see Constitutional Law, § 6.

Bulk stock laws as denial of the equal protection of laws, see Constitutional Law, § 5.

### § 1. Transfers and transactions invalid.

In an action to set aside a fraudulent conveyance from husband to wife, the court properly permitted the jury to consider the fact that the debt alleged to have been paid by the conveyance was barred by limitations.—*Strickland v. Jones* (Ga.) 322.

### § 2. Rights and liabilities of parties and purchasers.

§ 174. In ejectment, where plaintiff relies on a deed from defendant to A. and a deed from A. to plaintiff, an amendment to the answer alleging that the deed to A. was without consideration other than to place the title in him until payment of a certain creditor, *held* properly rejected.—*Tune v. Beeland* (Ga.) 976.

§ 174. The court will not set aside a conveyance made to hinder, delay, or defraud creditors, at the instance of the grantor.—*Tune v. Beeland* (Ga.) 976.

§ 174. A grantor in a deed given to delay creditors will not be allowed to set up that it was so given, and that plaintiff in acquiring title from the grantee therein knew of such fact.—*Tune v. Beeland* (Ga.) 976.

### § 3. Remedies of creditors and purchasers.

A verdict, finding that a conveyance of property from husband to wife was fraudulent as to the husband's creditors, *held* not contrary to the evidence.—*Strickland v. Jones* (Ga.) 322.

\*In a suit to set aside an alleged fraudulent conveyance by a husband to wife, the burden was on the wife to prove the fairness of the whole transaction.—*Strickland v. Jones* (Ga.) 322.

A verdict against claimant in attachment of land conveyed to her by her husband, which conveyance was attacked as fraudulent, *held* not to be set aside, as contrary to evidence, after a

verdict finding the property subject to levy.—*Strickland v. Jones* (Ga.) 322.

In an action to set aside a fraudulent conveyance from husband to wife, an instruction *held* not objectionable as placing on the wife the burden of showing absence of her husband's fraudulent intent, and for failure to charge that his fraud, unknown to her, would not invalidate the conveyance.—*Strickland v. Jones* (Ga.) 322.

## FREEHOLDERS.

As members of council, see Municipal Corporations, § 4.

## FREIGHT.

See Carriers, § 11.

## FUGITIVE FROM JUSTICE.

Right to exemptions, see Exemptions, § 1.

## GAMING.

### § 1. Gambling contracts and transactions.

§ 26. Under Code 1904, § 3837, relating to the construction of gambling laws, *held*, that section 2837 providing for the recovery of money lost at gaming must be construed as including stock gambling, though the latter section was first introduced into 1 Rev. Code 1819, c. 147, § 3, when stock gambling was unknown.—*McIntyre v. Smyth* (Va.) 930.

§ 50. In an action under Code 1904, § 2837, to recover money lost at gaming, an instruction using the word "paid," instead of "lost," *held* not misleading.—*McIntyre v. Smyth* (Va.) 930.

§ 50. In an action against a broker for margins and profits, a requested instruction for defendant *held* properly modified by the court.—*McIntyre v. Smyth* (Va.) 930.

### § 2. Criminal responsibility.

\*Possession of either cards or money may authorize the inference that a person present at an unlawful game was engaged therein.—*Griffin v. State* (Ga. App.) 685.

## GARNISHMENT.

See Attachment; Execution.

Exemptions, see Exemptions, § 1.

### § 1. Persons and property subject to garnishment.

A purchaser of a stock of goods in bulk, who failed to comply with Acts 1903, p. 92, *held* liable in garnishment to a creditor of the seller for the value of the goods, though he had disposed thereof before service of garnishment summons.—*Jagues & Tinsley Co. v. Carstarphen Warehouse Co.* (Ga.) 82.

§ 52. Amount due constable, embraced in collections made by him which were held for him by the justice of the peace, *held* subject to garnishment.—*Sparks v. Bloodworth* (Ga.) 989.

### § 2. Proceedings to procure.

\*A debt due by a resident to a nonresident may be reached by garnishment on a tax execution issued by a tax collector for a special tax due by such nonresident.—*A. B. Baxter & Co. v. Andrews* (Ga.) 42.

\*A debt due by a resident to a nonresident may be reached by garnishment on a tax execution, though the debt may be payable in the state where the creditor of the garnishee resided.—*A. B. Baxter & Co. v. Andrews* (Ga.) 42.

\*Point annotated. See syllabus.

Under Civ. Code 1895, § 4708, *held* that an affidavit for garnishment may state the amount actually claimed, irrespective of the amount specified in such action as due, and a bond in double such amount so stated in the affidavit is sufficient.—*Seaboard Air Line Ry. v. Hutchinson* (Ga. App.) 97.

### § 3. Proceedings to support or enforce.

Where the garnishment affidavit required by Civ. Code 1895, § 4708, states "the amount claimed to be due" as a sum less than that specified in the declaration, the declaration may be amended to conform to the affidavit.—*Seaboard Air Line Ry. v. Hutchinson* (Ga. App.) 97.

An amendment of the declaration by reducing the amount claimed to conform to the affidavit for garnishment relates back to the time of the filing of the original suit.—*Seaboard Air Line Ry. v. Hutchinson* (Ga. App.) 97.

## GOOD FAITH.

Of party asking equitable relief, see Specific Performance, § 3.

Of purchaser, see Bills and Notes, §§ 1, 3; Sales, § 4; Vendor and Purchaser, § 3.

## GRADE.

Of streets, see Municipal Corporations, § 6.

## GRAND JURY.

See Indictment and Information.

\*Act of 1903 (Acts 1903, p. 83) *held* not to disqualify grand jurors who had served at a regular term to act as such at an adjourned term of such regular term.—*Hall v. State* (Ga. App.) 539.

## GRANTS.

Of public lands, see Public Lands.

## GUARANTY.

See Principal and Surety.

Parol or extrinsic evidence in action on, see Evidence, § 10.

Requirements of statute of frauds, see Frauds, Statute of, § 1.

## GUARDIAN AND WARD.

Appointment as guardian as creating estoppel, see Estoppel, § 1.

Guardian ad litem of infant, see Infants, § 2.

Guardianship of insane persons, see Insane Persons, § 1.

Priority between debts due by decedent as guardian and other claims, see Executors and Administrators, § 5.

Right of guardian of minor next of kin to select administrator, see Executors and Administrators, § 1.

### § 1. Appointment, qualification, and tenure of guardian.

§ 8. Where the portion of a county in which a guardian and his ward are domiciled, and to the court of ordinary of which the guardian has been making his returns, is embraced in a new county under Act Aug. 21, 1905 (Acts 1905, p. 46), the guardian *held* to have an option under section 7 to change the jurisdiction to the new county; but, if he does not do so, jurisdiction remains as before.—*Maloy v. Maloy* (Ga.) 991.

### § 2. Custody and care of ward's person and estate.

\*The loss on a loan *held* that of a guardian, and not of the wards, where he placed their

funds in his personal fund, and made a loan, taking note and mortgage to himself as guardian.—*Duffy v. Williams* (N. C.) 611.

## HABEAS CORPUS.

Certification to Supreme Court of constitutionality of statute in habeas corpus proceedings, see Courts, § 5.

### § 1. Nature and grounds of remedy.

\*Const. U. S. Amend. 5, declaring that no person shall be subject for the same offense to be twice put in jeopardy, cannot be set up after conviction, by habeas corpus proceedings as a ground for discharge.—*Yeates v. Roberson* (Ga. App.) 104.

### § 2. Jurisdiction, proceedings, and relief.

In habeas corpus to take the custody of an infant from its father and award it to its maternal grandmother, evidence *held* insufficient to authorize the granting of the writ.—*Sloan v. Jones* (Ga.) 21.

\*Discretion of court should be governed by rules of law and be exercised in favor of the party having the legal right, unless the evidence shows that the interest of the child justifies the judge in awarding its custody to another.—*Sloan v. Jones* (Ga.) 21.

\*On habeas corpus proceedings against a father, if it is claimed that the custody of a child should be awarded to its maternal grandmother, the power should be exercised in favor of the father, unless he has forfeited the right or the welfare of the child requires otherwise.—*Sloan v. Jones* (Ga.) 21.

## HABITUAL DRUNKARDS.

See Drunkards.

## HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 14-18. In criminal prosecutions, see Criminal Law, § 27.

## HEALTH.

Regulating practice of pharmacy in interest of public health, see Druggists.

## HEALTH INSURANCE.

Notice and proof of illness, see Insurance, § 4.

## HEARING.

By arbitrators, see Arbitration and Award, § 1. In probate proceedings, see Wills, § 3.

## HEARSAY EVIDENCE.

Harmless error in rulings on, see Appeal and Error, § 16. In civil actions, see Evidence, § 8.

## HEIRS.

See Descent and Distribution.

## HIGHWAYS.

See Bridges; Municipal Corporations, § 8. Acceptance of dedication, see Dedication, § 1. Accidents at railroad crossings, see Railroads, § 7.

\*Point annotated. See syllabus.

Drunkenness on public highway, see Drunkards.  
 Equitable relief against judgment establishing road, see Judgment, § 4.  
 Exercise of power of eminent domain in laying out, see Eminent Domain, § 3.  
 Rights of telephone company in street, see Telegraphs or Telephones, § 1.

**§ 1. Establishment, alteration, and discontinuance.**

Entries in an alleged county road register of a certain county *held* inadmissible to establish the existence of a public road.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

Evidence *held* admissible on an issue as to the existence of a public road to show that the county commissioners intended to open the road as a public road.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

In an action for injuries by a defect in a public road, evidence that two county commissioners opened and laid out the road or that they showed the county superintendent of roads where they laid it out was admissible.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

On an issue as to existence of a county road, evidence that county hands worked the road after the injury *held* admissible.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

A cul-de-sac may be a public road.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

Dedication of land by the owner for public road and use thereof by the public as a traveled route without recognition thereof as a road by the county authorities does not make it a public road.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

§ 64. It is not erroneous to refuse to enjoin the county commissioners from continuing a proceeding to establish a public road, pursuant to Pol. Code 1895, §§ 520-522, in advance of the hearing provided for in section 321.—Hutchinson v. Lowndes County (Ga.) 1048.

§ 19. Pol. Code 1895, §§ 520-525, providing for the establishment of a new road or the alteration of an old road, *held* not repealed by Acts 1894, p. 95 (Civ. Code 1895, § 4657 et seq.), or by Acts 1900, p. 66.—Hutchinson v. Lowndes County (Ga.) 1048.

**§ 2. Taxes, assessments, and work on highways.**

Statement of right to custody, under Acts 1899, p. 782, c. 581, § 14, as amended by Acts 1906, p. 171, c. 161, § 1, of a township road fund.—Coleman v. Coleman (N. C.) 415.

**§ 3. Regulation and use for travel.**

A petition in an action for injuries by a defective bridge *held* not subject to a general demurrer.—Penick v. Morgan County (Ga.) 300; Morgan County v. Penick, Id.

§ 213. The liability of owners of a disabled traction engine on the side of a highway frightening a horse *held* to depend on the reasonableness of time for repairing and removing it, a question for the jury. Revisal 1905, § 2727.—John F. Davis & Son v. Thornburg (N. C.) 1088.

A private citizen *held* authorized to maintain a civil action for damages or abatement for obstruction of a public highway, on allegation and proof of direct and special damages.—Gray & Shealy v. Charleston & W. C. Ry. Co. (S. C.) 442.

**HOLIDAYS.**

See Sunday.

\*Point annotated. See syllabus.

**HOLOGRAPHIC WILLS.**

See Wills, § 2.

**HOMESTEAD.**

See Exemptions.

Application for, as best evidence, see Evidence, § 5.

Right of homestead claimant to show dormancy of judgment sought to be enforced against homestead, see Judgment, § 10.

**§ 1. Nature, acquisition, and extent.**

Under Civ. Code 1895, § 2829, where the only property allowed under a homestead exemption was personal property, a record thereof in the county of applicant's residence alone *held* sufficient.—McLamb & Co. v. Lambertson (Ga. App.) 107.

Neither an article of necessity furnished for the family, nor feed for horses set apart as a part of the homestead, *held* "material furnished for the benefit of the homestead," within the constitutional provision that homestead property may be sold for material furnished therefor.—McLamb & Co. v. Lambertson (Ga. App.) 107.

**§ 2. Rights of surviving husband, wife, children, or heirs.**

Where land set apart as a homestead under the Constitution of 1868 was deeded by the head of the family to secure a debt for money, and after the death of the grantor the widow, with several children, some of whom were minors, made crops on the land to discharge the debt, which was fully paid off, and the executor of the grantee on discharge of the debt deeded the land to the widow, she did not acquire by such deed title to the land or any interest therein as against the other heirs of her husband.—Darsey v. Darsey (Ga.) 20.

Where a widow, having no interest in the homestead other than that which she might have acquired as distributee of her husband's estate, devised the land to one of her children as sole legatee, he obtained no interest in the land as against the other heirs, except as to the special interest of the widow.—Darsey v. Darsey (Ga.) 20.

**HOMICIDE.**

Application of instructions to case, see Criminal Law, § 22.

Continuance, see Criminal Law, § 17.

Former jeopardy, see Criminal Law, § 3.

Province of court and jury in general, see Criminal Law, § 21.

Res gesta, see Criminal Law, § 7.

**§ 1. Murder.**

\*Murder defined.—State v. Abbott (W. Va.) 693.

\*To support a conviction of murder, it is not necessary that malice should exist in the heart of defendant against decedent, but it may be such as shows a heart regardless of social duty and fatally bent on mischief.—State v. Abbott (W. Va.) 693.

\*There is no particular period during which it is necessary that malice should have existed or defendant should have contemplated the homicide.—State v. Abbott (W. Va.) 693.

\*Murder in the first degree defined.—State v. Abbott (W. Va.) 693.

**§ 2. Manslaughter.**

Conviction of involuntary manslaughter cannot be had where the homicide is due to an independent cause in which defendant did not participate.—Carbo v. State (Ga. App.) 140.



§ 55. An illegal arrest may be resisted with as much force as is necessary.—*Holmes v. State* (Ga. App.) 716.

§ 55. A person who is attempting to avoid an illegal arrest by flight, and is shot at, may shoot if it reasonably appears to be necessary either to prevent his arrest, to save his life, or protect himself from serious bodily injury.—*Holmes v. State* (Ga. App.) 716.

§ 55. If a party whom it is attempted to illegally arrest would have been justified in killing the officer, he would also be justified in killing a citizen assisting the officer in the arrest.—*Holmes v. State* (Ga. App.) 716.

§ 31. Accused could not be convicted of manslaughter, where the evidence showed either death by suicide or a killing by premeditation.—*State v. Stratford* (N. C.) 882.

### § 3. Assault with intent to kill.

§ 87. To constitute an assault with intent to kill, malice and intent must appear.—*Crumley v. State* (Ga. App.) 1005.

### § 4. Evidence.

§ 250. Evidence on a trial for murder *held* to support a conviction.—*Young v. State* (Ga.) 707.

\*In a prosecution for assault with intent to kill, evidence *held* to sustain conviction.—*Fouraker v. State* (Ga. App.) 116.

\*Dying declarations *held* exceptions to the hearsay evidence rule.—*Pyle v. State* (Ga. App.) 540.

\*Rule governing admissibility of statements as dying declarations stated.—*Pyle v. State* (Ga. App.) 540.

\*Dying declarations having been introduced, *held* error to exclude evidence contradicting them.—*Pyle v. State* (Ga. App.) 540.

§ 230. If a long period intervenes between the threat and the act, and no attempt to do it is shown, and between the threat and the act a feeling of ill will is changed to a feeling of good will, the probative value of the threat would be negligible.—*Crumley v. State* (Ga. App.) 1005.

§ 230. The *res gestæ*, which show a shooting to have been accidental, are sufficient to overcome any inference of intentional shooting arising from proof of threats.—*Crumley v. State* (Ga. App.) 1005.

§ 233. Though a motive for murder need not be shown, where circumstantial evidence is relied upon the circumstances may be strengthened by proof of a motive.—*State v. Stratford* (N. C.) 882.

§ 166. Statements by one accused of murder, tending to show that he and decedent were in lewd intimacy with a woman also indicted for the murder, *held* admissible.—*State v. Stratford* (N. C.) 882.

§ 167. Threats made by accused two weeks before the homicide are admissible against him.—*State v. Stratford* (N. C.) 882.

\*In a murder prosecution, evidence *held* insufficient to sustain a verdict of voluntary manslaughter.—*Burton v. Commonwealth* (Va.) 376.

\*In a murder prosecution, certain evidence *held* inadequate to show motive.—*Burton v. Commonwealth* (Va.) 376.

\*Motive may be shown by circumstances in the absence of an express declaration showing it.—*Burton v. Commonwealth* (Va.) 376.

\*Malice *held* inferred from a premeditated killing.—*State v. Abbott* (W. Va.) 693.

\*Where a killing is proved, the burden of disproving malice *held* on defendant.—*State v. Abbott* (W. Va.) 693.

\*Where a homicide is proved, the presumption is that it is murder in the second degree.—*State v. Abbott* (W. Va.) 693.

### § 5. Trial.

\*Where some of the evidence and inferences fairly deducible therefrom tend to show voluntary manslaughter, a charge on that subject is demanded.—*Pyle v. State* (Ga. App.) 540.

\*A charge on dying declarations *held* erroneous, as giving undue emphasis to the weight which should be given such evidence.—*Pyle v. State* (Ga. App.) 540.

Under Code 1904, §§ 4040, 4041, the jury have some discretion, and may find accused guilty of a less offense than that charged and proved.—*Burton v. Commonwealth* (Va.) 376.

### § 6. New trial.

§ 319. Motion for new trial on the ground of newly discovered evidence *held* properly denied.—*Dillard v. State* (Ga.) 705.

## HUSBAND AND WIFE.

See Divorce.

Adultery, see Adultery.

Determination and disposition of cause on appeal or writ of error in action by widow, see Appeal and Error, § 23.

Estate created by deed of married woman, see Deeds, § 3.

Estoppel against married woman, see Estoppel, § 1.

Fraudulent conveyances between, see Fraudulent Conveyances, §§ 1, 3.

Gift to wife as not constituting resulting trust, see Trusts, § 1.

Hearsay evidence in action on account against wife, see Evidence, § 8.

Order awarding lands to widow as color of title, see Adverse Possession, § 1.

Partition of estate by entirety, see Partition, § 1.

Power of judge during vacation to allow sale by wife to husband, see Judges, § 1.

Right of husband to dead body of wife for burial, see Dead Bodies.

Right of wife as party to note to show that her contract is one of suretyship as against bona fide holder, see Bills and Notes, § 1.

Rights of survivor, see Executors and Administrators, § 4; Homestead, § 2.

Testamentary capacity of married woman, see Wills, § 1.

### § 1. Mutual rights, duties, and liabilities.

§ 16. A husband cannot hold, adversely to his wife, premises of which they are in joint occupancy as a family.—*Carpenter v. Booker* (Ga.) 983.

§ 14. A partition deed to husband and wife of the wife's interest as heir in certain lands *held* not to entitle the husband to retain the whole by survivorship.—*Sprinkle v. Spainhour* (N. C.) 910.

§ 14. Nature of an estate by the entirety at common law stated.—*Jones v. W. A. Smith & Co.* (N. C.) 1092.

§ 14. The nature, incidents, and properties of an estate by entirety *held* not changed by the constitutional provisions relating to married women.—*Jones v. W. A. Smith & Co.* (N. C.) 1092.

§ 14. The severance of timber from land owned by a husband and wife as tenants by entirety does not convert their estate in the timber or the lumber cut therefrom into a tenancy in common.—*Jones v. W. A. Smith & Co.* (N. C.) 1092.

\*Point annotated. See *syllabus*.

## § 2. Conveyances, contracts, and other transactions between husband and wife.

§ 48. A sale of land by a wife to her husband, not allowed by the superior court of her domicile, is invalid, under Civ. Code 1895, § 2490.—*Carpenter v. Booker* (Ga.) 983.

§ 49½. Under Civ. Code 1895, § 2491, a wife may give her property to her husband, and the burden of showing fraud or undue influence *held* to be upon her.—*Third Nat. Bank v. Poe* (Ga. App.) 826.

§ 84. A wife may borrow money or sell property to get money for her husband to pay his debts, notwithstanding the lender or purchaser knows her purpose.—*Third Nat. Bank v. Poe* (Ga. App.) 826.

§ 87. A wife may procure a third person to pay the debt of her husband, and will be bound by her contract to reimburse him.—*Third Nat. Bank v. Poe* (Ga. App.) 826.

§ 87. Where a married woman is sued as joint maker of a note, and pleads her marriage and suretyship, and the evidence shows that she signed the note as surety, a verdict against her is contrary to law, under Civ. Code 1895, § 2488.—*McDaniel v. Akridge* (Ga. App.) 1010.

§ 62. To estop a married woman from alleging a claim to land, there must have been some positive act of fraud or something done upon which one dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely, to his injury.—*Rich v. Morisey* (N. C.) 762.

## § 3. Wife's separate estate.

§ 156. Where a married woman borrows money to pay a debt of her husband and gives her note therefor, such contract is binding on her.—*Cline v. Milledgeville Banking Co.* (Ga.) 984.

§ 179. A married woman *held* to have the power to contract as to her separate estate, subject to certain limitations.—*Third Nat. Bank v. Poe* (Ga. App.) 826.

## § 4. Actions.

§ 229. Petition to cancel a deed by a wife to her husband *held* demurrable, where failing to allege that the deed was not confirmed by the Superior Court.—*Roland v. Roland* (Ga.) 1042.

§ 229. A mere general allegation, in a petition to cancel a deed by a wife to her husband, that she could not say whether such a deed was made, as she was acting under the fear and coercion of her husband, *held* demurrable.—*Roland v. Roland* (Ga.) 1042.

§ 207. A bank, in the absence of bad faith, *held* not liable to a wife for the amount of a cashier's check used to discharge a debt of her husband to the bank, though the bank had cause to suspect that she was instrumental in procuring it for her husband.—*Third Nat. Bank v. Poe* (Ga. App.) 826.

## § 5. Enticing and alienating.

The statute enlarging the rights of married women *held* not to destroy the rights of a husband to recover for injuries sustained by interference with his marital rights.—*Brame v. Clark* (N. C.) 418.

## IDEM SONANS.

See Names.

## IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, § 3.

## IMPEACHMENT.

Of award, see Arbitration and Award, § 2.

Of record, see Appeal and Error, § 6.

Of witness, see Witnesses, § 4.

## IMPLIED CONTRACTS.

See Account Stated; Contribution; Money Received; Use and Occupation.

## IMPRISONMENT.

See Arrest.

Habeas corpus, see Habeas Corpus.

## IMPROVEMENTS.

Adjustment as to on partition, see Partition, § 2.

Allowance or recovery of compensation, see Ejectment, § 5.

Liens, see Mechanics' Liens.

Public improvements, see Municipal Corporations, § 6.

Rights of mortgagee, see Mortgages, § 3.

## IMPUTED NEGLIGENCE.

See Negligence, § 3.

## INCEST.

§ 5. A man having carnal intercourse with a daughter of his half-sister commits incest with his "niece" in violation of Revisal 1905, § 3352.—*State v. Harris* (N. C.) 1090.

## INCOMPETENT PERSONS.

See Insane Persons.

## INCUMBRANCES.

On property devised or bequeathed, see Wills, § 11.

## INDEBTEDNESS.

Of testator, see Wills, § 11.

## INDECENCY.

See Obscenity.

## INDEMNITY.

See Principal and Surety.

## INDEPENDENT CONTRACTORS.

See Master and Servant, § 15.

## INDICTMENT AND INFORMATION.

See Grand Jury.

*For particular offenses.*

See Embezzlement; False Pretenses; Obscenity; Perjury, § 1.

Against Sunday laws, see Sunday.

### § 1. Necessity of indictment or presentment.

Under Pen. Code 1895, § 30, an accusation in a city court *held* not barred by limitations where an indictment had been returned within

\*Point annotated. See syllabus.

the time required and nolle pros'd for an informality.—Crawford v. State (Ga. App.) 501.

**§ 2. Filing and formal requisites of information or complaint.**

That the affidavit on which an accusation is based is defective *held* not ground for quashing the accusation, where the identity of the transaction is apparent.—Crawford v. State (Ga. App.) 501.

**§ 3. Requisites and sufficiency of accusation.**

The test by which the sufficiency of an accusation, as well as the particular offense charged, is to be determined, is the nature of the criminal act charged and the fullness with which it is set forth.—Crawford v. State (Ga. App.) 501.

§ 110. An accusation, setting forth the offense in the language of the Code so plainly that its nature would easily be understood, *held* sufficient.—Holt v. State (Ga. App.) 992.

§ 122. An affidavit charging defendant with resisting an officer *held* broad enough to support an accusation in the city court charging defendant with resisting an officer by assaulting him and beating him.—Howell v. State (Ga. App.) 1000.

§ 121. Purpose of bill of particulars in a criminal case stated.—State v. Seaboard Air Line Ry. (N. C.) 1088.

**§ 4. Joinder of parties, offenses, and counts, duplicity, and election.**

An indictment which charges in one count a violation of Pen. Code 1895, § 420, in running six freight trains on Sunday, *held* not demurrable as charging six distinct offenses.—Westfall v. State (Ga. App.) 558.

An accusation or indictment for violation of the act approved August 15, 1903 (Acts 1903, p. 90), may embrace in a single count various sums of money fraudulently procured on a contract to perform services; the various amounts making up the aggregate sum charged to have been fraudulently obtained.—Young v. State (Ga. App.) 558.

**§ 5. Amendment.**

The solicitor of a city court has the right to amend an accusation at any time prior to arraignment.—Crawford v. State (Ga. App.) 501.

Interlineations in an accusation will be presumed to have been made prior to its return in to court.—Crawford v. State (Ga. App.) 501.

**§ 6. Issues, proof, and variance.**

\*A conviction is authorized where the offense was committed on any day prior to the indictment which is within the statute of limitations.—Cripe v. State (Ga. App.) 567.

\*Where a defendant is indicted under two names, alleged by an alias, it is necessary only that the state should show that he is commonly known by either of them.—Jenkins v. State (Ga. App.) 574.

On trial for selling liquor without a license, the prosecuting attorney may, with permission of the court and without the consent of defendant, waive proof of the aggravation of a former conviction alleged in the indictment and try defendant for selling without a license.—State v. Doyle (W. Va.) 453.

**§ 7. Conviction of offense included in charge.**

On the trial of an indictment under Code 1906, § 95, for an illegal sale of liquor, where the unlawful sale as alleged is proven, and proof of former conviction waived, it is not error, though the indictment alleges a felony, to sentence the defendant on a verdict of "guilty of a misdemeanor as charged in the indictment."—State v. Doyle (W. Va.) 453.

\*Point annotated. See syllabus.

## INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 1.

## INFANTS.

See Guardian and Ward; Parent and Child.

Adverse possession affecting rights of infant, see Adverse Possession, § 1.

Care required as to children in general, see Negligence, § 1.

Creation of trusts for, see Trusts, § 1.

Custody and support on divorce of parents, see Divorce, § 2.

Habeas corpus to secure release of, see Habeas Corpus, § 2.

Presumption as to jurisdiction of court ordering sale by trustee of minors, see Courts, § 1.

**§ 1. Property and conveyances.**

Acts 1876, p. 103 (Civ. Code 1895, § 4987), *held* to require service on minors of an order granted at chambers authorizing their trustee to sell trust property.—Turner v. Barber (Ga.) 587.

**§ 2. Actions.**

§ 80. Under Revisal 1905, §§ 405, 1473, and Sup. Ct. Rules No. 16 (140 N. C. 683, 53 S. E. xiv), a judgment in a justice's court *held* not a nullity because plaintiff, an infant, appeared by next friend, appointed by the clerk of the superior court.—Houser v. W. R. Bonsal & Co. (N. C.) 776.

§ 80. The defect in the appointment of a next friend for an infant plaintiff in a justice's court *held* only an irregularity.—Houser v. W. R. Bonsal & Co. (N. C.) 776.

## INFERIOR COURTS.

See Courts, § 4.

## IN FORMA PAUPERIS.

Conclusiveness of judgment on motion to dispauper, see Judgment, § 7.

## INFORMATION.

Criminal accusation, see Indictment and Information.

## INHERITANCE.

See Descent and Distribution.

## INHERITANCE TAX.

Power of municipal corporation to impose, see Municipal Corporations, § 9.

## INJUNCTION.

Estoppel to enjoin condemnation proceedings, see Estoppel, § 1.

Evidence of witness at former trial, see Evidence, § 12.

Review on appeal or writ of error of findings of court in action to enjoin collection of tax, see Appeal and Error, § 13.

Relief against particular acts or proceedings. See Judicial Sales.

Appointment of receiver of corporation, see Corporations, § 4.

Collection of municipal taxes, see Municipal Corporations, § 9.

Establishment of highways, see Highways, § 1.

Obstruction of street, see Municipal Corporations, § 8.

Obstruction of water course, see Waters and Water Courses, § 1.

Taking of land by county for public road, see Counties, § 5.

Taking of unnecessary land in exercise of power of eminent domain, see Eminent Domain, § 4.

Unauthorized tax, see Taxation, § 4.

#### *Review of proceedings for injunction.*

Determination and disposition of cause on appeal in action to enjoin city from executing contract, see Appeal and Error, § 22.

Modification of decree on appeal or writ of error, see Appeal and Error, § 23.

#### **§ 1. Nature and grounds in general.**

In view of Civ. Code 1902, § 2435, one whose goods are distrained for rent *held* improperly granted relief by injunction, in the absence of a showing of obstacle to remedy by legal proceedings.—*Evans v. Mayes* (S. C.) 207; *Mayes v. Evans*, Id.

#### **§ 2. Subjects of protection and relief.**

A landlord has no right to enjoin an unauthorized interference with the employes of a lessee of real property while engaged in the service of their employer.—*Kehoe v. Rourke* (Ga.) 185.

Striking employes will not be enjoined from attempting by proper argument to persuade others not to take their places, so long as force or intimidation is not used, and the thoroughfares are not obstructed.—*Jones v. E. Van Winkle Gin & Machine Works* (Ga.) 236.

\*Picket patrols pending a strike will be enjoined where they resort to intimidation or coercion to prevent others from entering into, or remaining in, the service of their late employers. *Jones v. E. Van Winkle Gin & Machine Works* (Ga.) 236.

An injunction may be issued to restrain persons from preventing others by intimidation or other unlawful means from performing service or engaging in a lawful occupation, though the acts enjoined would be a crime.—*Jones v. E. Van Winkle Gin & Machine Works* (Ga.) 236.

§ 36. Under Revisal 1905, §§ 4116, 4121, 4124, relating to the power of the school board, their action cannot be restrained by courts in the absence of misconduct or violation of statute.—*Pickler v. Board of Education of Davie County* (N. C.) 902.

#### **§ 3. Actions for injunctions.**

A petition to enjoin a municipality and a city council from preventing the erection of a building *held* not brought to enjoin the institution of a prosecution for the violation of existing penal ordinances, or to inquire into their validity, etc.—*City of Brunswick v. Williams* (Ga.) 230.

#### **§ 4. Preliminary and interlocutory injunctions.**

§ 150. In a suit to enjoin the collection of taxes by a city from the residents of annexed territory, on hearing of a motion to continue a temporary injunction, it was proper to decide the case on the merits, and not merely the necessity of continuing the injunction, there being no question of fact involved.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

\*A temporary injunction order to return property *held* improper.—*Evans v. Mayes* (S. C.) 207; *Mayes v. Evans*, Id.

#### **§ 5. Writ, order or decree, service, and enforcement.**

Where a petition prayed for an ad interim injunction, and the decree rendered adjudged that the injunction prayed for be granted, and that defendants be enjoined on exception on the

ground that this was a final injunction which the judge could not grant on a preliminary hearing, the decree will be amended so as to show that it was to continue in force until the final hearing.—*Unity Cotton Mills v. Dunson* (Ga.) 179.

#### **§ 6. Violation and punishment.**

§ 231. A judgment of contempt for violation of an injunction will not be disturbed, where there is evidence to warrant it.—*Mormand v. Carlisle* (Ga.) 705.

## IN PAIS.

Estoppel, see Estoppel, § 1.

## INSANE PERSONS.

Discretion of court as to proceeding with trial on suggestion of accused's insanity, see Criminal Law, § 18.

Hearsay evidence as to sanity, see Evidence, § 8.

Opinion evidence as to insanity, see Evidence, § 11.

Opinion evidence as to mental capacity of accused, see Criminal Law, § 11.

Presumptions in favor of sanity, see Evidence, § 2.

Time for taking appeal from decree disallowing a committee's claim for support of incompetents, see Appeal and Error, § 4.

Validity of contract in general as affected by mental capacity, see Contracts, § 1.

#### **§ 1. Guardianship.**

In an action to compel an accounting by a committee of certain incompetents, an allowance of \$1,991.35 for their maintenance for three years *held* error.—*Hess v. Hess* (Va.) 273.

#### **§ 2. Custody and support.**

Under Code 1904, §§ 2604, 2605, the committee of certain incompetents *held* not entitled, without authority from the court first obtained, to charge the ward's interest in real estate with disbursements for their support, or to reimburse himself, after the death of two of them, therefor out of their interest in such real estate.—*Hess v. Hess* (Va.) 273.

A committee of certain incompetents *held* not authorized by testatrix's will to apply any portion of the corpus of their estate to their support.—*Hess v. Hess* (Va.) 273.

#### **§ 3. Property and conveyances.**

§ 60. Insane persons' deeds and contracts are voidable, and not void, especially when there has been no adjudication of insanity.—*Beeson v. Smith* (N. C.) 888.

## INSOLVENCY.

See Bankruptcy.

Insolvency as not ground for removal of executor or administrator, see Executors and Administrators, § 1.

Of bank, see Banks and Banking, § 1.

Of corporation, see Corporations, § 4.

## INSPECTION.

Of fertilizers, see Agriculture.

## INSTRUCTIONS.

In civil actions, see New Trial, § 1; Trial, §§ 6-12.

In criminal prosecutions, see Criminal Law, § 22; Homicide, § 5.

\*Point annotated. See syllabus.

## INSURANCE.

Agreement between buyer and seller of goods as to insurance, failure of seller to insure, see Sales, § 4.

Declarations against interest as evidence in action on policy, see Evidence, § 7.

Fraud of insurance agent as question for jury in general, see Fraud, § 2.

Implied authority of insurance agent to effect, see Principal and Agent, § 3.

Instructions as to weight and sufficiency of evidence, see Trial, § 8.

Opinion evidence in action on policy, see Evidence, § 11.

Province of court and jury in action on policy, see Trial, § 6.

Res gestæ in action on policy, see Evidence, § 4.

Sufficiency of instructions in action on policy, see Trial, § 8.

### § 1. The contract in general.

\*Policies of insurance will be liberally construed, and conditions, if ambiguous, will be viewed most strongly against the insurer.—Royal Union Life Ins. Co. v. McLendon (Ga. App.) 101.

§ 137. An insurer may accept in payment of the first premium the liability of a third person.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 137. A life policy held effective from the time of its delivery by a special agent responsible to the insurer for the premium, notwithstanding the stipulation that it should not be complete until payment of the first premium in cash.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 141. A stipulation in a life policy that it shall not be deemed complete until payment of the first premium in cash may be waived by an agent having power to execute and issue contracts for insurer.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 141. The stipulation in a life policy that it shall not be deemed complete until payment of the first premium in cash held waived.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

### § 2. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

\*Insured held not authorized, without avoiding policies issued to procure further insurance in excess of the largest amount permitted under either of the policies issued.—De Loach & Co. v. Aetna Ins. Co. (Ga. App.) 473.

"Other insurance" defined.—De Loach & Co. v. Aetna Ins. Co. (Ga. App.) 473.

\*Where an insurance policy provides that it shall be void on change in the interest, title, or possession of the property insured, and insured executes to a third person a bond for title, receives a part of the price, and delivered possession, a change of interest is effected.—Widincamp v. Phenix Ins. Co. of Brooklyn (Ga. App.) 478.

### § 3. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Statement of right under Civ. Code 1902, §§ 1816, 1817, to recover full amount of fire insurance, notwithstanding misrepresentation as to value.—McCarty v. Piedmont Mut. Ins. Co. (S. C.) 1.

The same doctrines of waiver and estoppel, arising out of knowledge and acts of agents, held to apply to mutual assessment companies as to old line insurance companies.—McCarty v. Piedmont Mut. Ins. Co. (S. C.) 1.

\*Statements and representations as to the future held not to constitute basis for waiver,

or estoppel to assert, conditions in a fire policy.—McCarty v. Piedmont Mut. Ins. Co. (S. C.) 1.

### § 4. Notice and proof of loss.

§ 539. Under a health indemnity policy on failure to give notice of sickness without excuse given, there can be no recovery.—Woodall v. Fidelity & Casualty Co. (Ga.) 808.

### § 5. Actions on policies.

Demurrer to a petition on a life insurance policy held properly overruled.—Royal Union Life Ins. Co. v. McLendon (Ga. App.) 101.

§ 665. A judgment for insured in an action on a fire policy based on a finding that insurer had waived the iron-safe clause affirmed by equally divided court.—Slawson v. Equitable Fire Ins. Co. (S. C.) 782.

§ 646. An insurance company, seeking to avoid the payment of a life policy on the ground that insured was guilty of material misrepresentations and fraud, held to have the burden of proving the misrepresentations and fraud.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 646. The burden of establishing the defense of suicide, in an action on a life policy, is on insurer.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 654. In an action on a life policy, not to become effective unless issued and the first premium paid during the good health of insured, evidence of the condition and habits of insured, subsequent to the time the policy became effective, is immaterial.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 665. The defense of suicide, in an action on a life policy, must be established by clear and satisfactory proof.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 669. In an action on a life policy, an instruction held misleading.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 669. An instruction, in an action on a life policy, held to correctly submit the issue of warranties in the application.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 669. In an action on a life policy an instruction relating to the waiver of the condition of prepayment of the first premium, held misleading.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 669. In an action on a life policy, an instruction held to properly submit the issue of suicide of insured.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

§ 669. An instruction, in an action on a life policy, held to properly submit the issue of misrepresentations in the application.—Life Ins. Co. of Virginia v. Hairston (Va.) 1057.

### § 6. Mutual benefit insurance.

§ 767. The relationship of uncle and nephew will not support an insurable interest.—W. A. Doody Co. v. Green (Ga.) 984.

§ 797. Where an uncle took out an insurance policy payable to his nephew, who was also his ward, and the company paid the same to the beneficiary, neither the creditors nor the administrator of the insured can recover of the beneficiary the excess after discharging the guardian's debt to the beneficiary.—W. A. Doody Co. v. Green (Ga.) 984.

Statement of remedy of a policy holder in a mutual insurance company in case of a loss, where only part of the members paid their assessment, in view of Civ. Code 1902, § 1912, the policy, and the constitution and by-laws of the company.—McTindall v. Piedmont Mutual Ins. Co. (S. C.) 213.

\*Point annotated. See syllabus.

**INTENT.**

As element of offense against liquor laws, see Intoxicating Liquors, § 4.  
Criminal, see Criminal Law, § 1.  
Of testator affecting construction of will, see Wills, § 4.

**INTEREST.**

See Usury.  
Disqualification as witness, see Witnesses, § 2.  
On commissions of brokers, see Brokers, § 2.

**INTERLOCUTORY INJUNCTION.**

See Injunction, § 4.

**INTERLOCUTORY JUDGMENT.**

Appealability, see Appeal and Error, § 1.

**INTERMEDIATE COURTS.**

Review of decisions of on appeal or writ of error, see Appeal and Error, § 1.

**INTERNATIONAL LAW.**

See Aliens.

**INTERROGATORIES.**

To jury, see Trial, § 13.  
To witnesses, see Depositions.

**INTERSTATE COMMERCE.**

Regulation, see Carriers, § 1; Commerce.

**INTERURBAN RAILROADS.**

Exercise of power of eminent domain, see Eminent Domain, §§ 1, 4.

**INTERVENTION.**

In attachment proceedings, see Attachment, § 2.

**INTESTACY.**

See Descent and Distribution.

**INTOXICATING LIQUORS.**

Admissibility of evidence wrongfully obtained, see Criminal Law, § 9.  
Authority to make arrest of person keeping liquors contrary to law, see Arrest, § 1.  
Contest of dispensary election, see Elections, § 4.  
Conviction of offense included in that charged in prosecution for offense against liquor laws, see Indictment and Information, § 7.  
Former jeopardy in prosecution for offense against liquor laws, see Criminal Law, § 3.  
Judicial notice of intoxicating quality of liquors, see Criminal Law, § 6.  
Liquor illegally kept as subject of larceny, see Larceny, § 1.  
Matters to be proved under indictment in prosecution for offense against liquor laws, see Indictment and Information, § 6.  
Preliminary warrant in prosecution for offense against liquor laws, see Criminal Law, § 4.  
Request for instructions in prosecution for offenses against liquor laws, see Criminal Law, § 23.

State dispensary commissioners as officers of state, see States, § 1.  
Testimony of accomplices in prosecution for offense against liquor law, see Criminal Law, § 12.

**§ 1. Power to control traffic.**

\*A state has the general power to regulate the business of soliciting orders for intoxicating liquor.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

\*Sale of intoxicating liquor held not to render seller amenable to a municipal ordinance imposing a license on the sale of "near beer."—*Burch v. City of Ocilla* (Ga. App.) 666.

**§ 2. Local option.**

\*Under Act Feb. 16, 1907 (25 St. at Large, p. 464), and Act Feb. 14, 1908 (25 St. at Large, p. 1279), dispensaries held lawfully established in the county created by the latter act.—*Amerker v. Taylor* (S. C.) 7.

\*In the absence of inconsistent legislation, when a new district is carved out of an old district, the local option law existing therein held to continue in the new district.—*Amerker v. Taylor* (S. C.) 7.

**§ 3. Regulations.**

Pen. Code 1895, § 428, prohibiting the soliciting of orders for intoxicating liquor in a prohibition county, held a police regulation necessary for the effective enforcement of the general prohibitory statute of 1907.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

Ordinance penalizing the maintenance of "blind tigers" held valid, notwithstanding provisions of the state prohibition act of 1907 (Acts 1907, p. 81) on the same general subject.—*Callaway v. Mims* (Ga. App.) 654.

\*An ordinance prohibiting the keeping of intoxicating liquors for illegal sale held valid, notwithstanding the provisions of the state prohibition act of 1907 (Acts 1907, p. 81) on the same general subject.—*Callaway v. Mims* (Ga. App.) 654.

An ordinance prohibiting the keeping of liquors for illegal sale held not invalid on the ground that it punishes mere intention.—*Callaway v. Mims* (Ga. App.) 654.

\*An ordinance providing that it shall be unlawful for any person to keep a blind tiger or keep liquors for illegal sale within the city is valid and enforceable, notwithstanding the provisions of the prohibition act of 1907 (Acts 1907, p. 81).—*Coggins v. City of Griffin* (Ga. App.) 659.

**§ 4. Offenses.**

\*Whether a solicitation is personal or by agent within Pen. Code 1895, § 428, prohibiting the solicitation of orders for intoxicating liquor, held not dependent on whether the means of solicitation are used by an agent or the principal himself.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

\*Pen. Code 1895, § 428, prohibiting the solicitation of orders for intoxicating liquor in a prohibition county, held not to restrict the meaning of the word "solicit" to personal solicitation only.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

A corporation is indictable for violation of Pen. Code 1895, § 428, prohibiting the solicitation of orders for intoxicating liquor in a prohibition county.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

\*The solicitation by mail of orders for intoxicating liquor held a personal solicitation within Pen. Code 1895, § 428.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, Id.

\*A place of business, within the prohibition law of 1907 (Acts 1907, p. 81, § 1), means a

\*Point annotated. See syllabus.

place devoted by the proprietor to the carrying on of some form of trade or commerce.—*Jenkins v. State* (Ga. App.) 574.

\*"At their place of business," in the prohibition statute of 1907 (Acts 1907, p. 81, § 1), defined.—*Jenkins v. State* (Ga. App.) 574.

\*If a person should make a common practice of selling liquor at a fixed place, that place would become his place of business; but a single sale, or even sporadic sales, will not convert the place where the sale occurs into a place of business within the prohibition act of 1907 (Acts 1907, p. 81).—*Bashinski v. State* (Ga. App.) 577.

\*A nearby room, which a person uses in connection with the business conducted in his regular place of business, is a part of his place of business within the prohibition statute (Acts 1907, p. 81).—*Bashinski v. State* (Ga. App.) 577.

\*Where the same premises are occupied as a place of business and for private use, the proprietor cannot lawfully keep intoxicating liquors there during any of the hours when the place is open for business.—*Land v. State* (Ga. App.) 665.

\*The rule that a principal is bound for the acts of his agent in the making of a sale of ardent spirits held an exception to the general rule that the doctrine of respondeat superior does not apply to criminal cases.—*O'Donnell v. Commonwealth* (Va.) 373.

\*Under Acts 1908, pp. 284, 286, c. 189, §§ 19, 27, prohibiting the sale of liquor to intoxicated persons, a barkeeper held criminally liable for a sale made by an agent.—*O'Donnell v. Commonwealth* (Va.) 373.

\*The word "intoxicated," in an indictment charging a violation of Acts 1908, p. 284, c. 189, § 19, defined.—*O'Donnell v. Commonwealth* (Va.) 373.

\*Intention held not a necessary element in the offense of an illegal sale of intoxicating liquor.—*O'Donnell v. Commonwealth* (Va.) 373.

#### § 5. Criminal prosecutions.

Courts of county where communication unlawfully soliciting an order for intoxicating liquor is received held to have jurisdiction of the offense.—*Rose v. State* (Ga. App.) 117; *R. M. Rose Co. v. Same*, *Id.*

In the absence of evidence to the contrary, it may be inferred that liquor, called for, delivered, and paid for as whisky, is whisky, and intoxicating.—*Barlow v. State* (Ga. App.) 574.

Evidence held to justify a finding that the rooms in which defendant kept liquors were "at his place of business," within the general prohibition statute of 1907 (Acts 1907, p. 81).—*Bashinski v. State* (Ga. App.) 577.

\*It is not necessary to show continuous keeping or frequent sales to convict under an ordinance making it unlawful to keep a blind tiger or keep liquors for illegal sale.—*Coggins v. City of Griffin* (Ga. App.) 659.

\*The keeping of liquor and the purpose of the keeping may be inferred from a single sale.—*Coggins v. City of Griffin* (Ga. App.) 659.

§ 236. That a person accused of selling intoxicating liquor is in possession of quantities of liquors, etc., held a circumstance which, in connection with others, will authorize a conviction.—*Taylor v. State* (Ga. App.) 1048.

\*In a prosecution for keeping intoxicating liquor for illegal sale, evidence held sufficient to go to the jury.—*State v. Dobbins* (N. C.) 635.

#### § 6. Searches, seizures, and forfeitures.

\*An officer, discovering a person keeping liquor at his place of business, may seize the liquor and use it as evidence.—*Jenkins v. State* (Ga. App.) 574.

#### § 7. Civil damage laws.

\*Civ. Code 1895, § 3871, giving the parent a right of action for the sale of liquor to his minor son, held to confer a civil right, entirely distinct from the penalty imposed by Pen. Code 1895, § 444.—*Fowler v. Rome Dispensary* (Ga. App.) 660.

\*To charge one with liability under Civ. Code 1895, § 3871, for a sale of liquor to plaintiff's minor son, it must appear that the sale was made by him or in his presence and with his consent.—*Fowler v. Rome Dispensary* (Ga. App.) 660.

\*The Rome Dispensary, created by Acts 1901, p. 620, held not suable under Civ. Code 1895, § 3871, giving a right of action to the parent against any person selling liquor to his minor son.—*Fowler v. Rome Dispensary* (Ga. App.) 660.

\*Petition against the Rome Dispensary (created by Acts 1901, p. 620), its commissioners and manager, claiming damages under Civ. Code 1895, § 3871, by a parent for the sale of liquor to his minor son, held subject to special demurrer.—*Fowler v. Rome Dispensary* (Ga. App.) 660.

### INTOXICATION.

Common or habitual drunkards, see Drunkards.

### IRREPARABLE INJURY.

As ground for relief in equity, see Equity, § 1.

### ISLANDS.

Disposal of lands of state, see Public Lands, § 1.

### ISSUES.

In civil actions, see Pleading, § 9.

In criminal prosecutions, see Indictment and Information, § 6.

### JAILS.

Confinement under sentence in superior court as not bar to trial under indictment in city court, see Criminal Law, § 2.

### JEOPARDY.

Former jeopardy bar to prosecution, see Criminal Law, § 3.

### JOINDER.

Of causes of action, see Action, § 3.

### JOINT TENANCY.

See Tenancy in Common.

### JUDGES.

See Courts; Justices of the Peace.

Improper remarks of judge as ground for new trial, see Criminal Law, § 26.

Power of judge at chambers to issue mandamus, see Mandamus, § 3.

Power of judge at chambers to order sale of trust property, see Trusts, § 3.

Remarks and conduct of judge at trial, see Criminal Law, § 19; Trial, § 2.

#### § 1. Rights, powers, duties, and liabilities.

§ 28. Under Civ. Code 1895, § 2490, the authority to allow a sale by a wife to her hus-

\*Point annotated. See syllabus.

band *held* conferred on the superior court, not upon the judge thereof in vacation.—*Roland v. Roland* (Ga.) 1042.

\*A regular judge, pending a trial before a special judge elected under Code 1906, § 4200, could not assume jurisdiction and pronounce judgment.—*State v. Stevenson* (W. Va.) 688.

## JUDGMENT.

Decisions of courts in general, see Courts, § 2. In justice's court, see Justices of the Peace, § 2. On pleadings, see Pleading, § 8. Sales under judgment, see Judicial Sales.

*In particular civil actions or proceedings.*

See Divorce, § 3; Injunction, § 5; Replevin, § 4; Specific Performance, § 4.

Decree in equity, see Equity, § 3.

Foreclosure, see Mortgages, § 5.

For improvement of drain, see Drains, § 1.

On appeal or writ of error, see Appeal and Error, §§ 6, 22-25.

Probate proceedings, see Wills, § 3.

To construe wills, see Wills, § 10.

To reform written instrument, see Reformation of Instruments, § 2.

Trial of right to property levied on, see Execution, § 4.

### *Review.*

See Appeal and Error.

### § 1. On trial of issues.

\*On a verdict against two defendants for a stated amount, "to be equally divided between them," where one half of the finding was written off, and judgment rendered for the other half jointly, the judgment should have been arrested and the verdict set aside.—*Glore v. Akin* (Ga.) 580.

§ 236. Under Code 1904, § 3395, authorizing judgment against one of several defendants, *held*, that a judgment against one and an order setting aside the verdict as to the other defendant was not objectionable.—*McIntyre v. Smyth* (Va.) 930.

### § 2. Amendment, correction, and review in same court.

§ 299. Amendment of judgment in attachment, by adding to it at a subsequent term a judgment in rem as to the property attached, will not be set aside on motion of defendant, on the ground that it was made at a subsequent term on the ex parte application of plaintiff.—*Scarborough v. Merchants' & Farmers' Bank* (Ga.) 1040.

### § 3. Opening or vacating.

§ 375. A motion may be filed to vacate a judgment for fraud or other irregularity, though the facts do not appear on the face of the record.—*Smith v. First Nat. Bank* (Ga. App.) 826.

Where there was no service of summons nor appearance by defendant, the judgment is void.—*Simmons v. Defiance Box Co.* (N. C.) 435.

Where it is sought to set aside a judgment for want of service of summons, a motion to correct the record to show that there was no service of summons nor appearance by defendant is the appropriate remedy.—*Simmons v. Defiance Box Co.* (N. C.) 435.

Cr. Code 1902, § 195, permitting relief from a judgment or order taken through mistake, inadvertence, surprise, or excusable neglect, should have a liberal construction in furtherance of justice.—*Jeter v. Knight* (S. C.) 259.

### § 4. Equitable relief.

A judgment procured by fraud can only be set aside by an independent action.—*Simmons v. Defiance Box Co.* (N. C.) 435.

\*Rule respecting attack upon judicial proceedings for irregularity respecting parties stated.—*Hargrove v. Wilson* (N. C.) 520.

Complainants *held* not guilty of such negligence or want of diligence in failing to ascertain that a road constructed through their land was an open road, and in failing to make defense to the application therefor as to prevent equity from granting relief from the judgment establishing the open road.—*Thomas v. Boyd* (Va.) 346.

To entitle a party to equitable relief against a default judgment, it must be shown defense was not made because of fraud, accident, surprise, or some adventitious circumstance beyond the party's control.—*Thomas v. Boyd* (Va.) 346.

### § 5. Collateral attack.

§ 522. Under the system empowering the courts to administer full relief in one action, when a party attacks a judgment, pleaded in bar as procured by fraud, it is a direct proceeding.—*Houser v. W. R. Bonsal & Co.* (N. C.) 776.

§ 518. In an action in the superior court for personal injuries negligently inflicted, a pleading attacking a judgment, set up in bar on the ground that same was procured by fraud, *held* a direct attack requiring the submission of the issue of fraud to the jury.—*Houser v. W. R. Bonsal & Co.* (N. C.) 776.

§ 495. In ejectment involving a decree in partition, *held*, that it would be presumed that the county court in which the partition proceedings were had, had jurisdiction of the subject-matter and parties.—*Wright v. Johnson* (Va.) 948.

### § 6. Merger and bar of causes of action and defenses.

Executor *held* not entitled to disregard the pendency of exceptions of legacies to a report of an auditor allowing certain compensation to the executor, and he was not entitled to have a decree directing payment of the compensation allowed.—*St. Amand v. Nunnally* (Ga.) 589.

Where a nonsuit was granted in an action of trespass, and plaintiff took an appeal, which was dismissed on motion of defendant, under court rule 17 (28 S. E. v), for failure to prosecute within the required time, the nonsuit and dismissal on appeal was not a bar to a subsequent action for the same trespass brought within a year.—*Eureka Lumber Co. v. Harrison* (N. C.) 413.

§ 567. An action for dower and for partition *held* barred by a preceding action for partition of the same property (Code Civ. Proc. 1902, § 144).—*Weathersbee v. Weathersbee* (S. C.) 838.

§ 585. A special plea that defendant was jointly liable with another, and that judgment was rendered for such other in a former action by plaintiff, so that the present suit was barred, *held* not to be a defense to the second count of the declaration, which charged defendant's negligence alone.—*Staunton Mut. Telephone Co. v. Buchanan* (Va.) 928.

§ 630. Plaintiff, after suing joint wrongdoers jointly, *held* entitled to dismiss or discontinue as to either and afterward take a nonsuit as to the other, without releasing the liability of either, or barring another action against either for the same cause.—*Staunton Mut. Telephone Co. v. Buchanan* (Va.) 928.

§ 630. A judgment against one of joint tortfeasors is not a bar to an action against the others until plaintiff is deemed to have received satisfaction for the wrong, or to have elected to rely upon one proceeding and abandon the others; and a former judgment for defendant's joint wrongdoer *held* not to bar a subsequent action against defendant for the same wrong.—*Staunton Mut. Telephone Co. v. Buchanan* (Va.) 928.

§ 630. In Virginia a recovery and judgment against one of joint wrongdoers bars a subse-

\*Point annotated. See syllabus.



quent action against the others, whether it is deemed a satisfaction of the claim, or a final election to proceed against that defendant alone.—*Staunton Mut. Telephone Co. v. Buchanan* (Va.) 928.

### § 7. Conclusiveness of adjudication.

Decree in a suit to subject trust property *held* conclusive of the right to have certain amount of proceeds resulting from the sale of trust property applied to payment of plaintiff's debt.—*Potts v. Prior* (Ga.) 77.

§ 685. A mortgagee *held* not bound by a judgment against the mortgagor in a suit begun after the mortgage was given, unless he is a party to the suit.—*Moody v. Vondereau* (Ga.) 821.

\*A dismissal of an action without taking proof, on the sole ground that the cause of action was barred by the judgment in a former suit, is improper where the complaint in the second suit contained a second cause of action not set up in the prior suit.—*Eureka Lumber Co. v. Harrison* (N. C.) 413.

\*The rule that the decision of a court of competent jurisdiction is conclusive *held* applicable either to the entire cause or to particular facts in issue.—*Southerland v. Atlantic Coast Line R. R.* (N. C.) 517.

\*A judgment based on an erroneous finding of fact is, until reversed, conclusive as to the matter necessarily adjudicated.—*Southerland v. Atlantic Coast Line R. R.* (N. C.) 517.

A connecting carrier, when sued for the penalty imposed by Revisal 1905, § 2034, *held* bound by the finding in a prior action that freight was lost by it, and not by the initial carrier.—*Southerland v. Atlantic Coast Line R. R.* (N. C.) 517.

\*The decision of a court of competent jurisdiction *held* conclusive on the questions involved as to the parties to the controversy and as to any title claimed under them.—*Southerland v. Atlantic Coast Line R. R.* (N. C.) 517.

§ 654. An order at a former term dismissing an action in forma pauperis, on motion to "dis-pauper," was not a judgment on the merits, and hence not res judicata of an application to sue as a pauper made three years later.—*Rich v. Morisey* (N. C.) 762.

§ 726. Judgment in an action on a note is conclusive that the maker's name was not forged.—*Greenwood Drug Co. v. Bromonia Co.* (S. C.) 840.

§ 713. A judgment against a purchaser for the purchase price of goods estops him from subsequently suing in tort for damages from fraud of the seller.—*Greenwood Drug Co. v. Bromonia Co.* (S. C.) 840.

§ 713. Judgment of foreclosure is conclusive on the question of fraud in the execution of the mortgage and prior payments thereon.—*Greenwood Drug Co. v. Bromonia Co.* (S. C.) 840.

### § 8. Lien.

§ 776. The judgment sued on *held* not to bind a former recovery by the judgment debtor of a money judgment.—*Mann v. Paddock* (Va.) 951.

### § 9. Assignment.

\*A judgment on a note *held* a nonnegotiable chose in action, which the assignee takes subject to all the equities of the debtor against the assignor existing at the date of the assignment, or arising after the assignment, and before notice to the debtor.—*Selden v. Williams* (Va.) 380.

Under Code 1904, §§ 3299, 3300, the makers of a note on which judgment had been recovered *held* not precluded from setting up certain equi-

ties in proceedings to enforce the judgment by the assignee thereof.—*Selden v. Williams* (Va.) 380.

A judgment debtor *held* not estopped to set up certain equities as a defense to an action to enforce the judgment by an assignee thereof.—*Selden v. Williams* (Va.) 380.

### § 10. Suspension, enforcement, and revival.

A bailiff of the county court, provided for by Civ. Code 1895, §§ 4189, 4190, is not an officer authorized to execute and return an execution issued from a justice's court, or to make an entry thereon that will arrest the running of the dormancy statute.—*Oliver v. James* (Ga.) 73.

\*Under Civ. Code 1895, § 3763, the time when a record on the execution docket of an entry on an execution was made must appear from the docket in order to arrest the running of the dormancy statute.—*Oliver v. James* (Ga.) 73.

Entries recorded on the civil issue docket, instead of the execution docket, will not arrest the running of the dormancy statute (Civ. Code 1895, § 3761).—*Oliver v. James* (Ga.) 73.

§ 853. Petition alleging that land was sold in 1907 under a judgment rendered in 1877, and that defendant obtained no title because judgment was dormant, *held* subject to demurrer.—*Wever v. Parker* (Ga.) 813.

§ 853. Civ. Code 1895, § 3761, requiring entries relating to the enforcement of judgments by execution after the expiration of seven years to be made, does not apply to judgments rendered prior to Act Gen. Assem. Oct. 15, 1885 (Acts 1884-85, p. 95).—*Wever v. Parker* (Ga.) 813.

§ 853. Entries on an execution issued on a judgment rendered in 1877 need not, under Civ. Code 1895, § 3761, be recorded on the execution docket to prevent the dormancy of such judgment.—*Wever v. Parker* (Ga.) 813.

§ 853. An execution not sent out of the clerk's office *held* not issued as required by the statute, and not to prevent the judgment from becoming dormant.—*McKeithen v. Blue* (N. C.) 769.

§ 863. A judgment defendant in a dormant judgment *held* entitled on rehearing of the home-stead appraisement to move either before the clerk or before the superior court that the judgment be adjudged dormant.—*McKeithen v. Blue* (N. C.) 769.

### § 11. Pleading and evidence of judgment as estoppel or defense.

§ 956. The burden of proving the defense of prior adjudication is on defendant who has pleaded it.—*Hawk v. Pine Lumber Co.* (N. C.) 754.

## JUDICIAL NOTICE.

In civil actions, see Evidence, § 1.

In criminal prosecutions, see Criminal Law, § G.

## JUDICIAL SALES.

See Execution, § 5.

Of property of decedent, see Executors and Administrators, § 7.

Where an attachment against a nonresident railroad is levied on a freight car standing idle in the state on the spur track of another road, which under a contract is in possession of such car; with right to use and send it beyond the state, it is not error to grant an injunction in favor of the company having such possession to prevent the sale of such car on plaintiff giving bond to return the car to the proper officer after its right to use the car has expired.—*Southern Ry. Co. v. Brown* (Ga.) 177.

\*Point annotated. See syllabus.

## JURISDICTION.

Amount in controversy, see Removal of Causes, § 2.

Effect of appearance, see Appearance.

Review of rulings on question of as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.

*Jurisdiction of particular actions or proceedings.*

See Habeas Corpus, § 2; Mandamus, § 3.

Criminal prosecutions, see Criminal Law, § 2.

For causing death, see Death, § 2.

Of prosecution for offense against liquor laws, see Intoxicating Liquors, § 5.

To construe will, see Wills, § 10.

*Special jurisdictions and jurisdictions of particular classes of courts.*

See Courts; Equity, § 1.

Justices' courts in civil cases, see Justices of the Peace, § 1.

## JURY.

See Grand Jury.

Custody and conduct, see Criminal Law, § 24. Disqualification of jurors as ground for new trial, see Criminal Law, § 26.

Harmless error in instructions to jury, see Appeal and Error, § 18.

Instructions in civil actions, see Trial, § 6.

Instructions in criminal prosecutions, see Criminal Law, § 22.

Questions for jury in civil actions, see Trial, § 5.

Questions for jury in criminal prosecutions, see Criminal Law, § 21.

Taking case or question from jury at trial, see Trial, § 5.

Verdict in civil actions, see Trial, § 13.

Verdict in criminal prosecutions, see Criminal Law, § 25.

### § 1. Right to trial by jury.

\*All questions of law and fact in mandamus having been submitted to the court without a jury, the writ was properly made absolute on the hearing.—*Mansou v. City of College Park* (Ga.) 278.

### § 2. Qualifications of jurors and exemptions.

\*The exemption of a person over 60 years from jury service is a privilege, but not a disqualification.—*Albany Phosphate Co. v. Hugger Bros.* (Ga. App.) 533.

### § 3. Competency of jurors, challenges, and objections.

\*Objections propter defectum to a juror are of no avail after verdict.—*Bush v. Roberts* (Ga. App.) 92.

\*A prisoner who does not raise the objection that an incomplete panel has been put upon him by challenge to the array, under Pen. Code 1895, § 972, cannot thereafter demand the filling of the panel.—*Ivey v. State* (Ga. App.) 565.

## JUSTICES OF THE PEACE.

Appointment by justice of guardian ad litem of infant, see Infants, § 2.

Criminal jurisdiction, see Criminal Law, § 2.

Garnishment of fund in hands of, see Garnishment, § 1.

Prohibition against proceedings of justice without jurisdiction, see Prohibition, § 1.

### § 1. Civil jurisdiction and authority.

A petition in an action against a carrier held to state a cause of action for damages arising from a breach of public duty, of which a jus-

tice court has no jurisdiction, under Civ. Code 1895, § 4068.—*Smith & Simpson Lumber Co. v. Louisville & N. R. Co.* (Ga. App.) 472; *Zuber v. Central of Georgia Ry. Co.* (Ga. App.) 473.

§ 44. Whether a cause of action in a justice court is for an amount greater than \$50 or not is to be determined by the summons and the cause of action attached thereto.—*Barnes v. Vandiver* (Ga. App.) 994.

§ 44. If, on appeal to the superior court from a justice's judgment for plaintiff, the sum demanded, as affecting the justice's jurisdiction, was doubtful, a remittitur of all above \$200 sustained the jurisdiction.—*Teal v. Templeton* (N. C.) 737.

§ 44. Where there is no written complaint, the sum demanded in the summons is the test of a justice's jurisdiction.—*Teal v. Templeton* (N. C.) 737.

§ 43. A justice has jurisdiction of causes of action for breach of contract, where the total sum demanded is \$200.—*Teal v. Templeton* (N. C.) 737.

§ 43. Justices of the peace held to possess jurisdiction of an action for personal injuries negligently inflicted, where the amount demanded is \$50 or less.—*Houser v. W. R. Bonsall & Co.* (N. C.) 776.

§ 31. Jurisdiction of a justice of the peace is statutory.—*Martin v. City of Richmond* (Va.) 800.

§ 36. The jurisdiction of the police justice of a city to impose a fine for digging up a street in violation of an ordinance is ousted, on defendant setting up a fee-simple ownership of the land on which the digging occurred.—*Martin v. City of Richmond* (Va.) 800.

### § 2. Procedure in civil cases.

That a magistrate has extrajudicially agreed to continue trial held not to require a continuance, especially where such agreement is made by a predecessor in office.—*Atlantic Coast Line R. Co. v. A. Cohn & Co.* (Ga. App.) 572.

One who absents himself from court on a promise made by the magistrate, when not actually presiding, that the cause will be continued, does so at his risk.—*Atlantic Coast Line R. Co. v. A. Cohn & Co.* (Ga. App.) 572.

§ 91. Strictness of pleading is not required in setting out the cause of action in a justice court.—*Minter & Radney v. Bush* (Ga. App.) 731.

\*Action, on a judgment of a justice, held barred after seven years, notwithstanding its docketing in the superior court, as authorized by Revisal 1905, § 1479.—*Oldham v. Rieger* (N. C.) 612.

\*Revisal 1905, § 87, held not to revive a judgment against a decedent's estate barred by limitations at his death.—*Oldham v. Rieger* (N. C.) 612.

§ 90. Defendant in a justice's court was not entitled to judgment on his counterclaim because no reply was filed, where the pleadings were oral.—*Teal v. Templeton* (N. C.) 737.

§ 122. A justice's judgment against nonresidents on a summons served less than 10 days before the return day, contrary to Revisal 1905, § 1451, is merely irregular, and, if no motion to set it aside is made, the irregularity is waived.—*Laney v. Hutton & Bourbonnias* (N. C.) 1082.

### § 3. Review of proceedings.

The allegations of a petition for certiorari, properly verified, are to be taken as true until the coming in of the answer.—*Bush v. Roberts* (Ga. App.) 92.

\*Point annotated. See syllabus.

On petition for certiorari, allegations of the petition are presumed to be true where the petition is verified.—*Bush v. Roberts* (Ga. App.) 92.

Under Civ. Code 1895, § 4644, where plaintiff in certiorari fails to cause written notice to be given the opposite party of the sanction of the writ, and the time and place of hearing, 10 days before the sitting of the court, certiorari is properly dismissed.—*McLeod v. Faircloth Bros.* (Ga. App.) 95.

\*After a verdict in a justice's court, certiorari is available to either party, irrespective of the character of the questions involved or the amount in controversy.—*Brown & Bigelow v. Parian Paint Co.* (Ga. App.) 95.

It is essential to a certiorari from a justice that the answer should show that there has been a final judgment, but this fact may appear either in the answer or in any way which will sufficiently verify it.—*Georgia Southern & F. Ry. Co. v. Goodman* (Ga. App.) 97.

\*Petitioner for certiorari in a civil case, on filing it with the clerk of the superior court, must file either pauper affidavit or the statutory certiorari bond, approved by the judicial officer before whom the case was tried, under Civ. Code 1895, § 4639.—*State v. Wynne* (Ga. App.) 499.

\*Where a bond in certiorari is not approved, a mere attestation was insufficient to authorize the clerk to issue the writ.—*State v. Wynne* (Ga. App.) 499.

\*No subsequent approval of a bond in certiorari will, after the issuance of the writ, cure the error.—*State v. Wynne* (Ga. App.) 499.

§ 210. A claimant of property levied on as that of another *held* liable on a certiorari bond only for the costs and the damages due to the interposition of his claim.—*Jeffries v. Luke* (Ga. App.) 719.

§ 189. A motion to docket and dismiss an appeal has the same effect as a motion to docket and affirm under Revisal 1905, § 607, permitting appellee, if appellant fails to docket his appeal from a justice as required by law, to have it docketed, and the judgment affirmed.—*McClintock v. Life Ins. Co. of Virginia* (N. C.) 775.

§ 161. Under Revisal 1905, § 608, providing that, when return is made on appeal from a justice, the clerk of the appellate court shall docket the case at the ensuing term, such appeal must be docketed at the ensuing term, if it is more than 10 days after judgment.—*McClintock v. Life Ins. Co. of Virginia* (N. C.) 775.

§ 161. An appearance, on appeal from a justice's judgment against nonresidents on a summons served less than 10 days before the return day, contrary to Revisal 1905, § 1451, is a waiver of the irregularity.—*Laney v. Hutton & Bourbonnias* (N. C.) 1082.

§ 174. If the summons and justice's return on appeal do not show a misjoinder of causes of action, an objection on the ground of misjoinder must be taken by answer, as required by Revisal 1905, § 477.—*Laney v. Hutton & Bourbonnias* (N. C.) 1082.

## JUSTIFICATION.

Of assault, see *Assault and Battery*, § 2.

## KNOWLEDGE.

Affecting competency of witness, see *Witnesses*, § 2.

\*Point annotated. See syllabus.

## LABOR UNIONS.

Interference with employment, see *Master and Servant*, § 18.

## LACHES.

Affecting particular rights, remedies, or proceedings.

See *Specific Performance*, § 4.

Motion for new trial, see *New Trial*, § 2.

Suit to surcharge or falsify a settled account, see *Account Stated*.

To recover mineral land, see *Mines and Minerals*, § 1.

## LANDLORD AND TENANT.

See *Use and Occupation*.

Negligence of lessor as imputed to lessee, see *Negligence*, § 3.

Oil leases, see *Mines and Minerals*, § 2.

Railroad leases, see *Railroads*, § 4.

Requirements of statute of frauds as to leases, see *Frauds, Statute of*, § 2.

Right of lessor to enjoin interference with employees of lessee, see *Injunction*, § 2.

Right of tenant to water supply as affected by nonpayment of water rent by landlord or former tenant, see *Waters and Water Courses*, § 3.

Right to crop as between administrator of tenant and landlord, see *Executors and Administrators*, § 4.

Right to enjoin distraint for rent as affected by adequacy of remedy at law, see *Injunction*, § 1.

§ 1. *Creation and existence of the relation.*

§ 18. Evidence *held* to show that the relation between the parties was not that of mortgagor and mortgagee, but of landlord and tenant.—*Lewis v. Cooley* (S. C.) 868.

§ 2. *Leases and agreements in general.*

§ 25. In an action to set aside a deed for the fraud of the grantee, where a lease was offered to show title under which plaintiff held possession, *held*, that the burden of proof that the lease was delivered was on defendants.—*Smith v. Moore* (N. C.) 892.

§ 25. Where an unregistered lease from a general agent to his principal was found among the agent's papers after his death, such possession of the lease as agent, in the absence of a showing that he was authorized to accept it, does not show a valid delivery.—*Smith v. Moore* (N. C.) 892.

§ 3. *Terms for years.*

§ 75. The collection of rents from a subtenant *held* an election by the landlord to treat the subtenant as his tenant.—*Hooks v. Bailey* (Ga. App.) 1054.

§ 75. That a landlord directed a subtenant to make needed repairs, and to deduct the cost from the rent, does not show that the landlord elected to treat the subtenant as his tenant.—*Hooks v. Bailey* (Ga. App.) 1054.

§ 4. *Premises, and enjoyment and use thereof.*

A landlord is liable for a defect of construction, causing injury to a guest of a tenant, the existence of which he knew, or ought to have known.—*Monahan v. National Realty Co.* (Ga. App.) 127.

A landlord is liable for defects in the original construction of a building whether he knows of them or not, and where he retains a qualified possession of the building he may be liable for injuries for failure to maintain it in proper re-

pair.—*Monahan v. National Realty Co.* (Ga. App.) 127.

In an action to recover for injuries from the defective construction of a building, evidence as to its condition at the time of the accident may be admissible to show that the construction was originally defective.—*Monahan v. National Realty Co.* (Ga. App.) 127.

\*Where injury caused by an appliance of a building results to one properly invited by a tenant into the building, the negligence is *prima facie* attributable to the landlord.—*Monahan v. National Realty Co.* (Ga. App.) 127.

#### § 5. Rent and advances.

\*Advancements for which a landlord's lien is created by Code, § 1754, defined.—*Windsor Bargain House v. Watson* (N. C.) 306.

If, under Revisal 1905, § 1998, the landlord may retain so much of a crop made on his land by decedent with his consent, but without reserved rent, as will compensate him for the use and occupation, *held*, that the remainder belongs to decedent's personal representative subject to stated claims.—*Sessoms v. Tayloe* (N. C.) 424.

Defendants, in an action to recover a crop made by decedent on their land with their consent, but without reserved rent, having offered no evidence of advances, were not entitled to hold any part of the crop therefor.—*Sessoms v. Tayloe* (N. C.) 424.

Though the relation of landlord and tenant existed between defendants and decedent, they could not claim any part of a crop made by him for rent, in the absence of proof of the value or amount of the rent.—*Sessoms v. Tayloe* (N. C.) 424.

One having a distress warrant properly issued for past rent must get peaceable possession of the property, and cannot break into the house for the purpose of levying.—*Jones v. Parker* (S. C.) 261.

#### § 6. Re-entry and recovery of possession by landlord.

Proceedings to dispossess *held* subject to motion to dismiss for insufficiency of affidavit.—*Hicks v. Beacham* (Ga.) 45.

§ 296. Defendant *held* to be in possession of land under a contract of purchase which made him the equitable owner and prevented ejectment in summary proceedings under Civ. Code 1902, § 2423.—*Lewis v. Cooley* (S. C.) 868.

### LANDS.

See Public Lands.

### LARCENY.

See Embezzlement; False Pretenses; Receiving Stolen Goods.

#### § 1. Offenses and responsibility therefor.

§ 5. Intoxicating liquors may be the subject of larceny, though not the subject of lawful sale.—*Mance v. State* (Ga. App.) 1053.

#### § 2. Prosecution and punishment.

\*On a trial for larceny, evidence *held* to justify a conviction.—*Taylor v. State* (Ga. App.) 482.

\*Possession of a stolen pistol *held*, of itself and in view of certain other evidence, not to authorize a conviction.—*Bryant v. State* (Ga. App.) 540.

§ 77. An instruction on the presumption the jury is authorized to draw from possession of stolen property is erroneous if it omits all reference to the fact that the possession was recent.—*Mance v. State* (Ga. App.) 1053.

\*Point annotated. See syllabus.

### LATERAL SUPPORT.

Right of adjoining landowner to, see *Adjoining Landowners*.

### LAW OF THE CASE.

Decision on appeal, see *Appeal and Error*, § 21.

### LEASES.

See *Landlord and Tenant*.

### LEGACIES.

See *Wills*.

### LEGISLATIVE POWER.

See *Municipal Corporations*, § 2.

### LETTERS.

As documentary evidence, see *Evidence*, § 9.  
Best and secondary evidence as to contents, see *Evidence*, § 5.

### LEVY.

Of distress warrant, see *Landlord and Tenant*, § 5.  
Of execution, see *Execution*, § 3.

### LEWDNESS.

See *Obscenity; Prostitution*.

### LIBEL AND SLANDER.

Conspiracy to slander, see *Conspiracy*, § 1.  
Necessity and subject-matter of instructions in general, see *Trial*, § 7.  
Severance of actions for, see *Action*, § 3.

#### § 1. Words and acts actionable, and liability therefor.

To charge one with having stolen the land of another is not actionable without alleging special damages.—*Jones v. Bush* (Ga.) 279.

To charge a physician with having stolen the land of a certain person does not charge a slander with reference to his profession, so as to be actionable without an allegation of special damage.—*Jones v. Bush* (Ga.) 279.

#### § 2. Actions.

Where a petition in slander alleged that defendant charged plaintiff with stealing of the land of another, it was not amendable so as merely to allege a charge of larceny generally, without mentioning any special matter taken.—*Jones v. Bush* (Ga.) 279.

§ 74. As a general rule, an action for slander may not be maintained jointly against two or more persons, in the absence of allegations showing a conspiracy.—*Rice v. McAdams* (N. C.) 774.

§ 101. In an action against two defendants for slander, alleging a conspiracy between them to defame plaintiff, the burden was on plaintiff to show a conspiracy.—*Rice v. McAdams* (N. C.) 774.

§ 101. Malice will be presumed from the use of words charging that plaintiff stole defendant's wheat.—*Rice v. McAdams* (N. C.) 774.

§ 101. In slander for uttering words actionable per se, the burden of justifying the charges and showing that they were true was on defendant.—*Rice v. McAdams* (N. C.) 774.

## LICENSES.

Care required as to licensees in general, see Negligence, § 1.  
Injuries to licensees, see Railroads, § 6.  
To graduate of college under pharmacy statute, see Druggists.

### § 1. For occupations and privileges.

\*Confederate veteran, having certificate granted under Pol. Code 1895, § 1642 et seq., as amended by Acts 1897, p. 24, and Van Epps' Code Supp. § 6146a, *held* not subject to a municipal license tax imposed upon the sale of "near beer."—*Burch v. City of Ocilla* (Ga. App.) 666.

### § 2. In respect of real property.

\*A license by a municipality cannot be transferred without the municipality's consent.—*Burch v. City of Ocilla* (Ga. App.) 666.

## LIENS.

Effect of proceedings in bankruptcy, see Bankruptcy, § 1.

Election between attachment and other lien, see Election of Remedies.

Of one co-tenant against another, see Tenancy in Common, § 1.

*Liens acquired by particular remedies or proceedings.*

See Execution, § 3; Judgment, § 8.

### Particular classes of liens.

See Mechanics' Liens.

Agricultural liens, see Agriculture.

Carriers' liens, see Carriers, § 11.

Landlord's lien for rent, see Landlord and Tenant, § 5.

Logging liens, see Logs and Logging.

Mortgage, see Chattel Mortgages, § 2; Mortgages, § 2.

Of broker, see Brokers, § 1.

Vendor's lien on goods sold, see Sales, § 6.

## LIFE ESTATES.

See Remainders.

Creation by will, see Wills, § 7.

Right of executor to possession as against life tenant, see Executors and Administrators, § 3.

\*Where remaindermen in personal property are permitted by the court to apply for a receiver thereof, if it shall appear that the life tenant and her joint executor of decedent are wasting the property, it is not necessary to require security from the life tenant for its preservation.—*In re Knowles' Estate* (N. C.) 549.

## LIFE INSURANCE.

See Insurance.

## LIMITATION OF ACTIONS.

See Adverse Possession.

Dormancy of judgments, see Judgment, § 10.

Review of rulings on limitations as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.

### Particular actions or proceedings.

See Ejectment, § 2; Partition, § 2; Specific Performance, § 4.

Actions in general, see Action, § 1.

Appeal, see Appeal and Error, § 4.

By remaindermen, see Remainders.

For causing death, see Death, § 2.

On judgment in justice's court, see Justices of the Peace, § 2.

To surcharge or falsify a settled account, see Account Stated.

### § 1. Computation of period of limitation.

§ 73. Decedent having been seised of land during coverture, her husband's estate by the curtesy for his life suspended limitations as a bar to her heirs during its continuance.—*Hill v. Lane* (N. C.) 1074.

### § 2. Pleading, evidence, trial, and review.

§ 144. A written acknowledgment of a firm debt by two of the partners *held* insufficient to toll the statute, under Code Civ. Proc. 1902, § 131.—*Bulcken v. Rhode* (S. C.) 786; *In re Rhode*, Id.

§ 146. Bookkeeper's entries, in the books of a firm, of charges for credits for interest payments on a firm loan *held* insufficient to toll the statute of limitations, under Code Civ. Proc. 1902, § 131.—*Bulcken v. Rhode* (S. C.) 786; *In re Rhode*, Id.

§ 144. Indorsements of interest payments on a firm note by one of the partners, after the note had been filed as a claim against the firm, from entries on the firm's ledger, *held* insufficient to toll the statute.—*Bulcken v. Rhode* (S. C.) 786; *In re Rhode*, Id.

\*Where a statute of limitations affects the right as well as the remedy, and it appears of record that the period of limitations has expired, the defense may be raised by demurrer.—*Dowell v. Cox* (Va.) 272.

## LIMITATION OF LIABILITY.

Of carrier, see Carriers, §§ 9, 13, 16.

## LIQUIDATED DAMAGES.

See Damages, § 3.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIS PENDENS.

Pendency of other action ground for abatement, see Abatement and Revival, § 1.

## LIVE STOCK.

Carriage of, see Carriers, § 13.

## LOCAL ACTIONS.

See Venue, § 1.

## LOCAL LAWS.

See Statutes, § 2.

## LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, § 2.

## LOGS AND LOGGING.

Assessment of damages for breach of contract to cut timber, see Damages, § 6.

Direct or remote consequences of breach of contract to cut timber, see Damages, § 2.

Measure of damages for breach of contract to cut timber, see Damages, § 4.

Opinion evidence in action for breach of contract to cut timber, see Evidence, § 11.

Partition of lumber rights, see Partition, § 1.

\*Point annotated. See syllabus.

Partition of rights in timber and timber lands, see Partition, § 2.  
 Partition of rights in trees, see Partition, § 1.  
 Removal of shade trees as ground for compensation, see Eminent Domain, § 2.  
 Requirements of statutes of frauds as to contract for sale of timber, see Frauds, Statute of, § 2.  
 Tenancy in entirety in timber, see Husband and Wife, § 1.  
 Validity of contract to sell timber, see Contracts, § 1.

§ 25. Where claimant's title accrued prior to the foreclosure of a lien for articles furnished a sawmill, and so far as appears he purchased in good faith and without notice, the property was not subject to the lien.—*Consignees' Favorite Box Co. v. Speer* (Ga. App.) 1000.

§ 3. Under certain agreement, the cutting and stacking of lumber held a delivery, so as to pass title.—*Consignees' Favorite Box Co. v. Speer* (Ga. App.) 1000.

§ 3. Where standing pine timber is owned by one person and the land by another, the turpentine and the right to box the trees held appurtenances of the timber, and not the land.—*Red Cypress Lumber Co. v. Beall* (Ga. App.) 1056.

§ 3. Where a landowner conveys standing timber unconditionally, grantee may use it for any ordinary purpose.—*Red Cypress Lumber Co. v. Beall* (Ga. App.) 1056.

§ 8. Where a landowner sells the timber thereon unconditionally, but subsequently contracts that vendee shall not work the timber for turpentine, the landowner held not entitled to sue in trespass, on violation of the contract, though he may have an action for breach of the contract.—*Red Cypress Lumber Co. v. Beall* (Ga. App.) 1056.

Though standing trees are real estate, they may be separated from the ownership of the surface, and, when so separated by conveyance or reservation, there is no presumption that they belong to the owner of the surface.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

## LOST INSTRUMENTS.

§ 8. To establish a lost instrument as a muniment of title, there must be conclusive proof of its former existence, loss and contents.—*Smith v. Lurty* (Va.) 789.

§ 8. Evidence in a suit to establish a lost deed held to show that defendant conveyed to his wife land claimed by her and that the deed was lost or destroyed.—*Smith v. Lurty* (Va.) 789.

§ 8. Degree of proof required in establishing loss of a paper in a suit to establish it stated.—*Smith v. Lurty* (Va.) 789.

## LUMBER.

See Logs and Logging.

## LUNATICS.

See Insane Persons.

## MACHINERY.

Liability of employer for defects, see Master and Servant, § 4.  
 Production and use of electricity, see Electricity.

## MAIL.

Solicitation of orders for liquor, see Intoxicating Liquors, § 4.

## MALICE.

Element of homicide, see Homicide, §§ 1, 4.

## MALICIOUS PROSECUTION.

General verdict, see Trial, § 13.

§ 1. Want of probable cause.

§ 24. A conviction held conclusive of probable cause, barring action for malicious prosecution.—*Smith v. Thomas* (N. C.) 772.

§ 2. Termination of prosecution.

\*In an action for malicious prosecution of a criminal case without probable cause, plaintiff must allege and prove a final determination of the prosecution in his favor.—*Brantley v. Rhodes-Haverty Furniture Co.* (Ga.) 222; *Rhodes-Haverty Furniture Co. v. Brantley*, Id.

Where plaintiff sued to enjoin interference with timber and for damages, defendant could not by cross-action recover damages against plaintiff on the ground that the suit was prosecuted without probable cause and damages had resulted.—*Fender v. Ramsey & Phillips* (Ga.) 527.

## MANDAMUS.

Right to jury trial on issues of fact, see Jury, § 1.

To compel furnishing water supply at reasonable rate, see Waters and Water Courses, § 3.  
 To municipal officers to compel auditing of accounts, see Municipal Corporations, § 4.  
 Transfer to trial docket, see Trial, § 1.

§ 1. Nature and grounds in general.

\*A municipality, its officers, and any of its citizens and taxpayers held to have such a common interest in the readjustment of county lines so as to place the municipality wholly in one county, under Acts 1906, p. 121, as to entitle them to join in mandamus to compel the ordinary of one of such counties to join in completing the work of readjustment.—*Manson v. City of College Park* (Ga.) 278.

\*Where a demand had been made on a county ordinary to join in a change of county lines, pursuant to an election under Acts 1906, p. 121, it was not necessary to present a petition requesting him to order the publication of the changed lines before mandamus would lie to compel him to do so.—*Manson v. City of College Park* (Ga.) 278.

§ 12. Mandamus will not lie to compel an officer to do an act which he has no legal power to perform.—*McGill v. Osborne* (Ga.) 811.

§ 2. Subjects and purposes of relief.

\*That an ordinary whose duty it was to hire out certain misdemeanor convicts, after hiring them out and collecting the hire, wrongfully disbursed the fund, will not prevent a mandamus absolute to compel him to pay an amount which it was the legal duty of the ordinary to pay from such hire.—*Hutcheson v. Manson* (Ga.) 189.

\*The duties of a county ordinary to carry out the result of a county line election held under Acts 1906, p. 121, to be ministerial so as to be enforceable by mandamus.—*Manson v. City of College Park* (Ga.) 278.

\*Rule as to when mandamus will lie stated.—*State v. Matthews* (S. C.) 695.

§ 133. Mandamus is an appropriate remedy to compel a public service water company to supply its customers with water, on compliance

\*Point annotated. See syllabus.

with its reasonable rules and regulations.—*Poole v. Paris Mountain Water Co. (S. C.) 874.*

§ 106. Under Civ. Code 1902, § 609, the issuance and payment of a check for past county indebtedness, for which no funds had been reported, cannot be compelled by mandamus.—*State v. Goodwin (S. C.) 1100.*

§ 112. Mandamus does not lie to compel a county board of supervisors to levy a tax not within the board's official duty or power.—*State v. Goodwin (S. C.) 1100.*

Where a town contracts for the furnishing of light and water for public use, having power to tax up to certain rate at the time, the courts will compel the town to impose taxes at a rate sufficient to meet such contract.—*Welch Water, Light & Power Co. v. Town of Welch (W. Va.) 497.*

### § 3. Jurisdiction, proceedings, and relief.

\*A petition for mandamus to compel a county ordinary to join in carrying out the result of an election to change county lines, under Acts 1906, p. 121, *held* not demurrable for failure to set out an order of the mayor and council of the city partly in both counties ordering the election.—*Manson v. City of College Park (Ga.) 278.*

Mandamus *held* not brought to enforce a "money demand," and so properly brought before the judge at chambers.—*Coleman v. Coleman (N. C.) 415.*

\*Where the state consents to the use of its name in mandamus instituted in the name of the petitioner, the pleadings will be amended.—*State v. Murray (S. C.) 593.*

§ 184. A writ, directing a county board to include certain allowed claims in its tax estimate, and denying such writ as to the claims not sufficiently itemized, *held* not to affect the board's right to attack the claims for fraud nor the petitioner's right to represent them.—*State v. Goodwin (S. C.) 1100.*

## MANDATE.

See Mandamus.

To lower court on decision on appeal or writ of error, see Appeal and Error, § 25.

## MANSLAUGHTER.

See Homicide, § 2.

## MANUFACTURES.

Measure of damages for interruption of manufacturing plant, see Damages, § 4.

## MARRIAGE.

See Divorce; Husband and Wife.

## MARRIED WOMEN.

See Husband and Wife.

Testamentary capacity, see Wills, § 1.

## MASTER AND SERVANT.

Applicability of instructions to case in action for injuries to servant, see Trial, § 9.

Assessment of damages in action for death of servant, see Damages, § 6.

Assignability of contract for services, see Assignments, § 1.

Construction of instructions, in action for injuries to servant, see Trial, § 12.

Demurrer to pleading in action for injuries to servant, see Pleading, § 4.

Evidence of contracts with other employes in action for wages, see Evidence, § 4.

Evidence of damages in action for injuries to servant, see Damages, § 6.

Evidence of other offenses in prosecution for obtaining money under contract to perform services, see Criminal Law, § 8.

Excessive damages for injuries to servant, see Damages, § 5.

Harmless error in action for injury to servant, see Appeal and Error, § 16.

Hearsay evidence in action for services, see Evidence, § 8.

Judicial notice of statutes prescribing duties of master, see Evidence, § 1.

Motions relating to pleading in action for injuries to servant, see Pleading, § 8.

Opinion evidence in action for services, see Evidence, § 11.

Pleading damages in action for injuries to servant, see Damages, § 6.

Province of court and jury in action for injuries to servant, see Trial, § 6.

Requests for instructions, in action for injuries to servant, see Trial, § 10.

Res gestae in action for services, see Evidence, § 4.

Review of verdict on appeal or writ of error in action for injuries to servant, see Appeal and Error, § 13.

Right of action for wrongful death of servant, see Death, § 2.

Right of court of appeals to certify questions settled by supreme court under act making it criminal to obtain money under labor contract, see Courts, § 5.

Right to restrain interference with employes, see Injunction, § 2.

Separate counts in pleading in action for injuries to servant, see Pleading, § 2.

Sufficiency of instructions in action for death of servant, see Trial, § 8.

### § 1. The relation.

§ 39. General demurrer to a petition, alleging that a contract for services had been made and broken by defendant, *held* properly overruled.—*Equitable Loan & Security Co. v. Knox (Ga.) 1030.*

§ 7. A contract of employment could be modified so as to make it for the year instead of by the month.—*Puryear v. Ould (S. C.) 863.*

§ 40. In an action for unearned salary under a contract of employment, any declaration to defendant's manager *held* inadmissible against plaintiff.—*Puryear v. Ould (S. C.) 863.*

§ 59. In an action on a contract of employment, plaintiff *held* entitled to show modification thereof.—*Puryear v. Ould (S. C.) 863.*

§ 1. A volunteer cannot charge a railroad with the duty of an employer.—*Taylor v. Baltimore & O. R. Co. (Va.) 798.*

§ 1. Certain facts *held* not to show the existence of the relation of master and servant between a railroad company and an individual.—*Taylor v. Baltimore & O. R. Co. (Va.) 798.*

### § 2. Services and compensation.

Act Aug. 15, 1903 (Acts 1903, p. 90), making criminal the fraudulent obtaining of money on a contract for services, *held* not to create a remedy for the collection of a debt, but to provide punishment for the fraud.—*Young v. State (Ga. App.) 558.*

Act Aug. 15, 1903 (Acts 1903, p. 90), making criminal the fraudulent obtaining of money under a labor contract, *held* not in violation of Rev. St. U. S. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715), prohibiting involuntary service or labor.—*Young v. State (Ga. App.) 558.*

\*Point annotated. See syllabus.

\*Where defendant was without intent to defraud prosecutor when he obtained the money from him on the promise to perform services, there can be no conviction for violation of the act of 1903 (Acts 1903, p. 90).—*Thompson v. State* (Ga. App.) 568.

§ 67. A contract for services made on Sunday held void and not to support a prosecution under Act Aug. 15, 1903 (Laws 1903, p. 90), for procuring money on a contract for services with intent to defraud.—*Bendross v. State* (Ga. App.) 728.

§ 67. Contract for services held too indefinite to be the basis of a prosecution under Act Aug. 15, 1903 (Acts 1903, p. 90), making punishable the procuring of money on a contract for services with intent to defraud.—*Starling v. State* (Ga. App.) 993.

**§ 3. Master's liability for injuries to servant—Nature and extent in general.**

In an action by a servant for injuries sustained in Alabama through the alleged negligence of a master, the rights of the parties, no statute of Alabama being pleaded, were dependent on the common law applicable to the case and embodied in Civ. Code 1895, §§ 2611, 2612.—*Lay v. Nashville, C. & St. L. Ry. Co.* (Ga.) 189.

One employed by a railroad in building and repairing bridges and depots held an employé of the company not only while engaged in building and repairing the bridges and trestles, but also while being moved in a car in the work of his employment.—*Southern Ry. Co. v. West* (Ga. App.) 141.

A servant who enters upon the premises of his master to violate the law is entitled to no higher degree of protection from the master than an outsider.—*Seaboard Air Line Ry. v. Chapman* (Ga. App.) 488.

Railroad company held to owe an intoxicated engineer, attempting to take charge of engine in violation of the North Carolina statute, that degree of care only due an intruder.—*Seaboard Air Line Ry. v. Chapman* (Ga. App.) 488.

Railroad company held not liable for injury to intoxicated engineer, attempting to take charge of engine in violation of the North Carolina statute.—*Seaboard Air Line Ry. v. Chapman* (Ga. App.) 488.

\*Recovery cannot be had against an employer for injury to an employé on account of defective machinery, unless the defect was the proximate cause of the injury.—*Williams' Adm'r v. Norton Coal Co.* (Va.) 342.

§ 97. A master is only required to anticipate and guard against such dangers to his servants as reasonable and prudent men would expect to occur.—*Wilson v. Southern Ry. Co.* (Va.) 972.

§ 97. In an action for injuries to plaintiff while assisting in unloading a rail car, facts held insufficient to show defendant's negligence.—*Wilson v. Southern Ry. Co.* (Va.) 972.

**§ 4. — Tools, machinery, appliances, and places for work.**

A master's duty to furnish safe place to work held but a phase of certain common-law doctrine.—*Seaboard Air Line Ry. v. Chapman* (Ga. App.) 488.

§ 102. The master's duty to use ordinary care to protect his servants held but a phase of a certain doctrine of the common law.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 122. A master impliedly warrants that he will keep the place of work and its appurtenances free from hidden dangers.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

\*In an action for the death of a conductor caused by the derailment of a car, evidence held

to show negligent failure to provide a reasonably safe track.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

\*A railroad company held required to maintain its tracks in a reasonably safe condition for its employes.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

§ 107. Duty of a railway company to provide lug hooks for the handling of timbers stated.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

§ 103. A master who delegated the construction of a scaffold on which his servants worked to another was responsible for the manner in which it was constructed.—*Barkley v. South Atlantic Waste Co.* (N. C.) 1073.

§ 124. A master is bound to inspect appliances at reasonable intervals which are liable to become defective.—*Cotton v. North Carolina R. R. Co.* (N. C.) 1093.

§ 101. A master is bound to use reasonable care in providing a safe place for the servant to work in.—*Cotton v. North Carolina R. R. Co.* (N. C.) 1093.

§ 102. A master's duty to furnish reasonably safe appliances is performed when he exercises ordinary prudence in the selection of machinery and appliances.—*Cotton v. North Carolina R. R. Co.* (N. C.) 1093.

\*In an action for injuries to a coal miner by the fall of a portion of the roof of a haulway, defendant held negligent in failing to make a proper inspection of the roof prior to the accident.—*Norton Coal Co. v. Murphy* (Va.) 268.

A master was not required to provide a motor with brakes sufficient to guard the motorman against his own negligence.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

\*It is negligence for a railway company to maintain a road under a bridge which is so low that its employes cannot perform their duties with reasonable safety while exercising ordinary care.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

\*Effect of Code 1904, § 1294-d, cl. 36, relating to the maintenance of overhead bridges by railroad companies, stated.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

§ 118. Failure of a mine owner to extend timbering over the place where decedent was working at the time he was struck by a falling stone and killed held not negligence.—*Hamilton's Adm'r v. Alleghany Ore & Iron Co.* (Va.) 957.

\*Stoppage for brief periods of the fan on the outside of a coal mine held not such evidence of negligence as would render the owner liable for injuries to a miner; such negligence, if any, being properly imputable to fellow servants of such miner.—*Squillace v. Tidewater Coal & Coke Co.* (W. Va.) 446.

**§ 5. — Methods of work, rules, and orders.**

§ 134. Master held required to organize and maintain a system whereby work can be done with reasonable safety.—*McDuffie v. Ocean S. S. Co.* (Ga. App.) 1008.

§ 145. Scope of railway rule requiring flagmen to go a given distance to the rear of his train when it is stopped at an unusual point, or is delayed at a regular stop, stated.—*Meacham v. Southern R. Co.* (N. C.) 879.

**§ 6. — Warning and instructing servant.**

\*A master held required to warn a servant of the dangers attending his work.—*Latimer v. General Electric Co.* (S. C.) 438.

\*The duty of defendant's mine foreman held to require that he should have informed decedent of the known dangerous condition of the

\*Point annotated. See syllabus.



mine roof where he assigned the latter to work.—*Norton Coal Co. v. Hank's Adm'r* (Va.) 335.

**§ 7. — Fellow servants.**

\*A teamster employed by defendant to assist in removing a boiler *held* a fellow servant with a locomotive engineer and fireman employed by defendant to operate about a furnace plant.—*Georgia Coal & Iron Co. v. Bradford* (Ga.) 193.

\*Employés of a common master, engaged in the furtherance of the general purpose of the business in which they are employed, *held* fellow servants, within Civ. Code 1895, § 2610.—*Georgia Coal & Iron Co. v. Bradford* (Ga.) 193.

§ 163. One of the nondelegable duties of a master is to furnish an adequacy of competent servants to do the work in hand.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 185. The giving of orders as to the method of work *held* a duty of the master, and to be distinguished from the giving of work signals.—*McDuffie v. Ocean S. S. Co.* (Ga. App.) 1008.

§ 185. Certain employé *held* the master's representative, and not a fellow servant.—*McDuffie v. Ocean S. S. Co.* (Ga. App.) 1008.

§ 185. Employé who performs nondelegable duty *held* not a fellow servant.—*McDuffie v. Ocean S. S. Co.* (Ga. App.) 1008.

§ 177. If, while helping to carry a timber, an employé stumbled and fell, and while down his fellow servants negligently dropped their end of the timber, and such negligence proximately caused the injury, defendant was negligent.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

§ 201. An employé *held* entitled to recover, though his injuries were caused by the concurrent negligence of a co-servant and a vice principal.—*Wade v. McLean Contracting Co.* (N. C.) 919.

§ 201. Where plaintiff's employer was present and gave the order, the execution of which caused plaintiff's injury, it was imputable to the employer, even though the physical act causing the injury was that of a co-employé acting in obedience to the order.—*Wade v. McLean Contracting Co.* (N. C.) 919.

\*A track layer in defendant's mine *held* not a fellow servant with the mine boss.—*Norton Coal Co. v. Hank's Adm'r* (Va.) 335.

§ 177. The doctrine of fellow servants *held* not applicable to an injury to a railroad employé by the unexplained turning of a rail on a car as plaintiff and his co-servants were unloading a rail from the car.—*Wilson v. Southern Ry. Co.* (Va.) 972.

**§ 8. — Risks assumed by servant.**

A master having provided a sufficient number of servants, except with reference to acts, the performance of which he cannot delegate, is not liable for injury to one fellow servant by the negligence of another.—*Georgia Coal & Iron Co. v. Bradford* (Ga.) 193.

§ 203. Assumption of risk by a servant is a matter purely of contract, and is governed by the canons of contract.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 203. Assumption of risk is a contractual incident implied by the law from the contract itself.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 217. Servant *held* to impliedly assume the risk of certain dangers.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 217. Unless an injured employé is an inspector, the master's means of knowledge of latent defects in machinery furnished are primarily to be considered as greater than those of the servant.—*Hubbard v. Macon Ry. & Light Co.* (Ga. App.) 1018.

§ 217. The duty of inspecting for defects which would not be disclosed by superficial observation is not imposed on a servant employed to operate a machine.—*Hubbard v. Macon Ry. & Light Co.* (Ga. App.) 1018.

\*In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent a collision with another train, plaintiff *held* to have assumed the risk of injury.—*Cheek v. Seaboard Air Line Ry.* (S. C.) 402.

\*A servant *held* not to assume the risk of injury by coming in contact with a wire.—*Latimer v. General Electric Co.* (S. C.) 438.

§ 203. Assumption of risk *held* to rest in the law of contract.—*Hall v. Northwestern R. Co.* (S. C.) 848.

\*In an action for injuries to a miner by the fall of slate from the roof of a haulway, plaintiff *held* not to have assumed the risk.—*Norton Coal Co. v. Murphy* (Va.) 268.

\*A motorman killed by jumping from a mine traction motor while it was descending a grade *held* to have assumed the risk.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

\*An employé may not assume that his employer has performed his duty of furnishing a reasonably safe place in which to work, where the employé has knowledge of facts or circumstances which would indicate to a reasonable man that the assumption was not justified.—*Norton Coal Co. v. Hank's Adm'r* (Va.) 335.

In an action against a railway company for the death of a brakeman struck by an overhead bridge, instructions *held* properly refused in view of Code 1904, § 1294k.—*Cheapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

§ 217. Risks assumed by a servant determined.—*Buena Vista Extract Co. v. Hickman* (Va.) 804.

§ 217. An employé, injured by falling into a tub in a tanning plant, *held* to have assumed the risk.—*Buena Vista Extract Co. v. Hickman* (Va.) 804.

§ 219. Assumption of risk *held* to rest on an agreement of the servant with the master.—*Buena Vista Extract Co. v. Hickman* (Va.) 804.

\*A reasonably safe place to work, with respect to the ventilation and accumulation of gases in a mine, after the owner has provided means of ventilation and employed a mine boss and fire boss, as required by Code 1906, §§ 400, 410, defined.—*Squillace v. Tidewater Coal & Coke Co.* (W. Va.) 446.

**§ 9. — Contributory negligence of servant.**

§ 227. Contributory negligence is a matter relating solely to torts, and is governed by the principles peculiarly applicable to that branch of jurisprudence.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

\*In an action for the death of a conductor, caused by the derailment of a car, evidence *held* to show that the proximate cause of the accident was the negligence of the company, and not the contributory negligence of the conductor.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

\*Ordinarily jumping on or off a moving car is such contributory negligence as bars a recovery for the injuries received.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

§ 248. That a railway flagman was boarding a car, when under the rules he should have been elsewhere, *held* not to relieve the company from liability for injury to him caused by a negligent coupling.—*Meacham v. Southern R. Co.* (N. C.) 879.

\*Point annotated. See syllabus.

§ 233. It is contributory negligence for an employé to pass between two cars when, by walking from 70 to 90 feet, he could have walked around the train, of which the two cars were a part.—Beck v. Southern Ry. Co. (N. C.) 883.

\*A servant *held* not guilty of contributory negligence in failing to take precautions to avoid contact with an electrically charged wire.—Latimer v. General Electric Co. (S. C.) 438.

§ 227. Contributory negligence of an employé defined.—Hall v. Northwestern R. Co. (S. C.) 848.

A mine motorman *held* guilty of contributory negligence barring recovery for his death, which was caused, while he was backing the motor with the trolley pole in front, by the pole leaving the wire, resulting in roof supports being knocked down and slate falling upon him.—Williams' Adm'r v. Norton Coal Co. (Va.) 342.

\*In an action against a railway company for the death of a freight brakeman struck by an overhead bridge, effect of his knowledge of the dangerous condition of the bridge stated.—Chesapeake & O. Ry. Co. v. Rowsey's Adm'r (Va.) 363.

§ 10. — Nature and form of remedy.

§ 250. An action by a servant for personal injuries presents a case of tort, in which the broken duty "flows from relations created by contract."—Brown v. Rome Mach. & Foundry Co. (Ga. App.) 720.

§ 11. — Pleading.

A petition for injuries to a servant *held* not subject to general demurrer for want of facts, but subject to special demurrer for failure to name the alleged agent or foreman by whom plaintiff was directed to pass under the scaffold that fell, and to plead the latter's duties.—General Supply & Construction Co. v. Lawton (Ga.) 203.

\*A petition in an action by a minor against his master *held* to state a cause of action.—Hobbs v. Small (Ga. App.) 91.

\*In an action for personal injuries received through a dangerous condition in place of employment, an allegation that the servant did not know of the defect is sufficient as alleging actual lack of knowledge; but freedom from implied knowledge can be alleged only in the form of a legal conclusion when the facts set forth circumstances relieving the plaintiff from such an imputation.—Taylor v. Virginia-Carolina Chemical Co. (Ga. App.) 470; Virginia-Carolina Chemical Co. v. Taylor, Id.

In an action for death of a servant, a count in a declaration merely alleging that deceased was a miner and was killed by defendant's unsafe ways, appliances, and machinery, etc., *held* fatally defective.—Clinchfield Coal Co. v. Wheeler's Adm'r (Va.) 269.

Allegations in an action against a railway company for the death of a brakeman struck by an overhead bridge *held* to sufficiently show the nature of negligence relied upon by plaintiff.—Chesapeake & O. Ry. Co. v. Rowsey's Adm'r (Va.) 363.

§ 256. A declaration for injury to an employé *held* sufficient.—Seal v. Virginia Portland Cement Co. (Va.) 795.

§ 258. A declaration for injury to an employé *held* sufficient, though it does not expressly state that the injury was due to defendant's negligence.—Seal v. Virginia Portland Cement Co. (Va.) 795.

\*Declaration in an action by a servant for injuries *held* good, without alleging the duties violated, where allegation sufficiently shows what the duties were.—Squillace v. Tidewater Coal & Coke Co. (W. Va.) 446.

§ 12. — Evidence.

In an action against a master for injuries to a servant by being jerked from the step of the pilot of an engine, evidence *held* to sustain a verdict against the railroad company.—Atlanta, K. & N. Ry. Co. v. Tilson (Ga.) 281.

\*In an action for injury to an employé, certain evidence *held* proper to show the competency or incompetency of fellow servants.—Merchants' & Miners' Transp. Co. v. Corcoran (Ga. App.) 130.

Evidence in an action for injury to an employé *held* to support a verdict in his favor.—Merchants' & Miners' Transp. Co. v. Corcoran (Ga. App.) 130.

§ 265. Where an employé was hurt by steam from a stationary engine in the power plant of an electric street railway company, Civ. Code 1895, § 2321, raising a presumption of negligence against railroad companies when damage is done by the running of a locomotive or other machinery, is not applicable.—Hubbard v. Macon Ry. & Light Co. (Ga. App.) 1018.

§ 281. Evidence, in an action against a railway company for injury to a flagman, caused by a violent coupling, *held* insufficient to establish contributory negligence.—Meacham v. Southern R. Co. (N. C.) 879.

§ 278. Evidence, in an action against a railway company for injury to a flagman caused by a violent coupling, *held* to show the company was negligent.—Meacham v. Southern R. Co. (N. C.) 879.

§ 274. To negative contributory negligence, an employé could testify that he did not cause the fall of a timber, which caused his injury, while he was helping to carry it.—Rushing v. Seaboard Air Line Ry. Co. (N. C.) 890.

§ 265. A servant, injured by an alleged defective appliance, in order to recover must show the defect, knowledge, or notice thereof to the master, and that the defect was the proximate cause of the injury.—Cotton v. North Carolina R. R. Co. (N. C.) 1093.

\*Evidence that a conductor of a train was killed while attending to his duties in the company's yard as the direct result of a misplaced switch *held* to make a prima facie case of negligence against the company.—Trimmer v. Atlantic & C. A. L. Ry. Co. (S. C.) 209.

In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent a collision with another train, the evidence *held* not to show a violation of the company's rules by the crew of the other train.—Cheek v. Seaboard Air Line Ry. (S. C.) 402.

\*In an action for death of a servant, defendant is not liable unless there is affirmative and preponderating proof of defendant's negligence.—Clinchfield Coal Co. v. Wheeler's Adm'r (Va.) 269.

\*In an action for death of a servant, evidence *held* insufficient to establish defendant's negligence, either in providing a defective or unsafe motor on which decedent was employed.—Clinchfield Coal Co. v. Wheeler's Adm'r (Va.) 269.

In an action for decedent's death while repairing tracks in a mine, a question to a witness *held* not properly limited.—Norton Coal Co. v. Hank's Adm'r (Va.) 335.

\*In an action for the death of decedent in a place where he had been assigned to work by defendant's mine foreman, plaintiff could prove that under defendant's rules it was the foreman's duty to warn employes of the known dangerous condition of the roof.—Norton Coal Co. v. Hank's Adm'r (Va.) 335.

\*Evidence in an action against a railway company for the death of a brakeman struck by

\*Point annotated. See syllabus.

an overhead bridge *held* to sustain a verdict for plaintiff.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

\*In an action against a railway company for the death of a brakeman struck by an overhead bridge, the burden was on the company to show that decedent was guilty of contributory negligence, unless such negligence appeared from plaintiff's evidence.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

*Res ipsa loquitur* doctrine *held* not applicable in favor of defendant in an action against a railway company for the death of a brakeman apparently caused by his being struck by an overhead bridge.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

§ 277. In an action against a railway company for injuries to one employed by freight conductor, evidence *held* not to authorize a recovery on the ground of the existence of the relation of master and servant.—*Taylor v. Baltimore & O. R. Co.* (Va.) 798.

§ 268. In an action against a railway company for injuries to a freight conductor, evidence of the custom of other railroads as to the authority of freight conductors to employ help *held* inadmissible.—*Taylor v. Baltimore & O. R. Co.* (Va.) 798.

\*The fire boss of a mine is not shown to be incompetent merely because of his want of knowledge of the use of an anemometer.—*Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 446.

### § 13. — Questions for jury.

§ 286. Where plaintiff clearly proved that he was injured by a latent defect in a machine, the question of the master's negligence was for the jury.—*Hubbard v. Macon Ry. & Light Co.* (Ga. App.) 1018.

§ 284. Under the evidence, in an action for injury to a railway employé caused by a timber falling while being carried, a nonsuit *held* properly denied.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

§ 285. In an action for injuries to a servant, evidence *held* to require submission of a master's negligence to the jury.—*Cotton v. North Carolina R. R. Co.* (N. C.) 1093.

\*In an action against a railroad company for the death of an employé, where negligence of the defendant is shown, the question whether such negligence or the negligence of the deceased caused the injury is for the jury.—*Trimmier v. Atlantic & C. A. L. Ry. Co.* (S. C.) 206.

\*In an action for injuries to a servant, the evidence of negligence of the master *held* sufficient to go to the jury.—*Latimer v. General Electric Co.* (S. C.) 438.

§ 288. Whether a freight conductor, injured while coupling cars, assumed the risk, *held* for the jury.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 288. Whether a freight conductor, injured while coupling defective cars, voluntarily operated them within Const. art. 9, § 15, *held* for the jury.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 289. Whether a freight conductor, injured while coupling cars by being caught between the buffers, was guilty of contributory negligence in going between the cars, *held* for the jury.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 289. In an action against a railroad company for injuries to a freight conductor while coupling defective cars, the refusal to grant a motion for a nonsuit *held* proper.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 289. A railroad company, creating by its negligence an emergency justifying a freight

conductor in going between cars to couple them, *held* not entitled to show that the conductor was negligent as a matter of law because of a slight miscalculation in the usual position of danger.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 289. A servant in entering the employment *held* to assume the risk of his own errors committed in his usual service.—*Hall v. Northwestern R. Co.* (S. C.) 848.

\*In an action for injuries to a coal miner by the falling of slate from the roof, plaintiff *held* not negligent as a matter of law.—*Norton Coal Co. v. Murphy* (Va.) 268.

### § 14. — Instructions.

Instruction *held* erroneous as intimating the opinion of the trial judge as to what had or had not been proved in violation of Civ. Code 1895, § 4334.—*Lay v. Nashville, C. & St. L. Ry. Co.* (Ga.) 180.

That the trial judge, in an action for injuries to a servant, used the term "ordinary care" in his charge, instead of "ordinary care and diligence," and did not use the expression "skill and diligence," *held* not to require a reversal, where the jury were not misled.—*Atlanta, K. & N. Ry. Co. v. Tilson* (Ga.) 281.

§ 288. A servant *held* not as a matter of law to have assumed the risk of continuing to work in the face of an increased hazard due to a sudden negligent act of the master.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

§ 289. Whether an apprentice moulder was guilty of contributory negligence so as to bar a recovery *held* for the jury.—*Brown v. Rome Mach. & Foundry Co.* (Ga. App.) 720.

\*In an action for the death of a conductor, occasioned by his jumping from a car jumping the track, an instruction *held* to properly present the issue of contributory negligence in jumping from the car.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

§ 295. An instruction, in an action for injury to a railway employé, *held* not subject to complaint by defendant.—*Rushing v. Seaboard Air Line Ry. Co.* (N. C.) 890.

In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent collision with another train, an instruction *held* not misleading.—*Cheek v. Seaboard Air Line Ry.* (S. C.) 402.

§ 295. In an action against a railway company for injuries to an employé, an instruction *held* not erroneous as making assumption of risk to depend on reasonable care.—*Hall v. Northwestern R. Co.* (S. C.) 848.

\*In an action against a railway company for death of a brakeman killed by an overhead bridge, an instruction embodying Code 1904, § 1294k, *held* not error.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

### § 15. Liabilities for injuries to third persons.

§ 329. In a suit for damages by an employé against a railroad and the engineer in charge of the train, the petition *held* subject to demurrer by the engineer.—*Southern Ry. Co. v. Cash* (Ga.) 823.

\*One contracting to cut for another timber into saw logs and deliver the same *held* an independent contractor.—*Gay v. Roanoke R. & Lumber Co.* (N. C.) 436.

\*Where a contract is for a lawful end, and there has been no negligence in selecting a suitable person in respect to it, and the person for whom the work is to be done is interested only in the ultimate result thereof, he is not liable to third persons for the negligence of the contractor.—*Gay v. Roanoke R. & Lumber Co.* (N. C.) 436.

\*Point annotated. See syllabus.

\*Punitive damages *held* allowable against the master for acts of servant, without proof of direction or ratification by master.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

**§ 16. Interference with the relation by third persons.**

Members of a labor union, either individually or as an association, have no right by force, menace, or intimidation to prevent others from working upon such terms as they are willing to accept, or to hinder by such means any person from employing laborers.—*Jones v. E. Van Winkle Gin & Machine Works* (Ga.) 236.

It is unlawful for any person or association to interfere with the business of another by menaces, force, or intimidation, so as to prevent others from entering into, or remaining in, his service.—*Jones v. E. Van Winkle Gin & Machine Works Co.* (Ga.) 236.

**MATERIALITY.**

Of evidence in criminal prosecutions, see Criminal Law, § 9.

**MAXIMS.**

Of equity, see Equity, § 1.

**MEASURE OF DAMAGES.**

See Damages, § 4.

For breach of contract of sale, see Sales, §§ 6, 7.

For breach of covenant, see Covenants, § 3.

On replevin, see Replevin, § 4.

**MEASURES.**

See Weights and Measures.

**MECHANICS' LIENS.**

**§ 1. Enforcement.**

\*A materialman who has furnished articles to a contractor cannot maintain a separate action against the landowner until he has first obtained a judgment against the contractor.—*Buck v. Tifton Mfg. Co.* (Ga. App.) 107.

\*A suit to enforce a mechanic's lien being a proceeding in equity, *held* that, where the court has once acquired jurisdiction, it may under its general power render a personal decree for the indebtedness sought to be secured by the mechanic's lien, though the right to that lien is not then established, and may appoint a commissioner to take the evidence and report whether complainants are entitled to a lien.—*Johnston & Grommett Bros. v. Bunn & Monteiro* (Va.) 341.

**MEDICINES.**

See Druggists.

**MEMORANDA.**

Required by statute of frauds, see Frauds, Statute of, § 3.

**MENTAL CAPACITY.**

Hearsay evidence, see Evidence, § 8.

Opinion evidence, see Evidence, § 11.

**MENTAL SUFFERING.**

As element of damages in general, see Damages, § 2.

Recovery for, caused by nondelivery of telegram, see Telegraphs and Telephones, § 2.

**MERGER.**

Of cause of action in judgment, see Judgment, § 6.

**MESNE PROFITS.**

In ejectment, see Ejectment, § 5.

**MINES AND MINERALS.**

Mineowners as employers, see Master and Servant, §§ 4-13.

**§ 1. Title, conveyances, and contracts.**

Defendant, having acquired title to certain land in which complainant owned the underlying minerals, *held* not entitled to set up the defense of laches against complainant's claim, unless complainant had delayed an unreasonable time after knowledge that defendant was claiming title to both the surface and underlying minerals.—*Steinman v. Jessee* (Va.) 275.

In a suit to quiet title to mineral rights in certain land, facts alleged in the bill *held* sufficient to excuse complainant's delay.—*Steinman v. Jessee* (Va.) 275.

Complainant's right to relief in a suit to quiet his title to minerals underlying certain land *held* not barred by laches.—*Steinman v. Jessee* (Va.) 275.

The right of the owner of the surface and of the minerals thereunder stated, where the minerals are separated from the land by conveyance or reservation.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

§ 55. Evidence *held* insufficient to show that defendant and its predecessors acquired title to coal under land with notice of plaintiff's rights thereto.—*Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.* (Va.) 954.

**§ 2. Operation of mines, quarries, and wells.**

Mining partners, operating oil leases, having divided the product of the business by giving to each his share in severalty, no lien exists on the product thus divided for advances by a partner; but the lien remains valid on the social property used in operating the leaseholds.—*Greenlee v. Steelsmith* (W. Va.) 459.

**MINORS.**

See Infants.

**MISREPRESENTATION.**

See False Pretenses; Fraud.

Affecting validity of release, see Release, § 1.

**MISTAKE.**

Ground for reformation of instruments, see Reformation of Instruments, §§ 1, 2.

**MITIGATION.**

Of damages, see Damages, § 2.

\*Point annotated. See syllabus.

## MODIFICATION.

Of contract, see Vendor and Purchaser, § 2.  
Of judgment or order on appeal, see Appeal and Error, § 23.

## MONEY RECEIVED.

§ 4. Where a single mortgage is taken for two separate amounts due different parties, *held*, upon a suit by one of the parties secured against the other for money had and received, that defendant could show that the mortgage was collected only as to the amount due him.—*Bass v. West Point Wholesale Grocery Co.* (Ga. App.) 1004.

§ 17. Declaration *held* to sufficiently set out a cause of action for money had and received, and properly permitted to be amplified by amendment.—*Bass v. West Point Wholesale Grocery Co.* (Ga. App.) 1004.

## MONOPOLIES.

Grants of privileges or immunities, see Constitutional Law, § 4.

## MORTGAGES.

Action between mortgagees under single mortgage for money received, see Money Received. Conclusiveness of judgment affecting parties to mortgages, see Judgment, § 7.

Conclusiveness of judgment of foreclosure, see Judgment, § 7.

Declarations of mortgagor as evidence, see Evidence, § 6.

Equity of redemption in land devised, see Wills, § 11.

Estoppel to assert equity of redemption, see Estoppel, § 1.

Interest of grantor in deed of trust as not subject to execution before redemption, see Execution, § 1.

Of devised property, see Wills, § 11.

Of personal property, see Chattel Mortgages.

Relation of landlord and tenant distinguished from mortgagor and mortgagee, see Landlord and Tenant, § 1.

Title given by as sufficient to support ejectment, see Ejectment, § 1.

### § 1. Requisites and validity.

\*Mortgage defined.—*Wilson v. Fisher* (N. C.) 622.

\*An agreement, at the execution of a mortgage, to surrender the equity of redemption for a fixed amount, *held* invalid.—*Wilson v. Fisher* (N. C.) 622.

\*Deed considered, and *held* an equitable mortgage.—*Wilson v. Fisher* (N. C.) 622.

\*Evidence *held* to show that the transaction was a loan and not an absolute conveyance.—*Wilson v. Fisher* (N. C.) 622.

\*A deed *held* under certain conditions to be a mortgage.—*Froidevaux v. Jordan* (W. Va.) 686.

### § 2. Construction and operation.

\*Failure of a register of deeds to properly index a mortgage against the name of one of the mortgagors *held* not to release the land of such mortgagor from the lien of the mortgage in favor of a subsequent purchaser.—*Eureka Lumber Co. v. Satchwell* (N. C.) 310.

\*That which is a mortgage in its inception *held* to remain a mortgage, unless changed by a new contract or subsequent parol agreement waiving mortgagor's equity.—*Froidevaux v. Jordan* (W. Va.) 686.

### § 3. Rights and liabilities of parties.

\*Mortgagee *held* entitled to set off permanent improvements against rents.—*Wilson v. Fisher* (N. C.) 622.

### § 4. Foreclosure by exercise of power of sale.

The mortgagee or the assignee of a bond, signed by two who, on the face of the mortgage, appeared to be co-principals, may not be required to defer collection of the debt till the debtors adjusted their liability between themselves.—*Eureka Lumber Co. v. Satchwell* (N. C.) 310.

§ 362. A sale of mortgaged property by a mortgagee under a power in the mortgage and a purchase by himself *held* void or voidable at the election of the mortgagor.—*Rich v. Morisey* (N. C.) 762.

§ 362. A mortgagee in exercising a power of sale in the mortgage is a trustee, and the rule prohibiting a trustee from purchasing the property held by him in trust and acquiring title as against the cestui que trust applies.—*Rich v. Morisey* (N. C.) 762.

### § 5. Foreclosure by action.

§ 564. Where property levied on under a mortgage *fi. fa.* is sold under Civ. Code 1895, §§ 5463, 5464, plaintiff in such *fi. fa.* cannot complain that on distribution of the funds from the sale the court awards a portion to the holder of an older mortgage creating a lien on the property sold, though it had not been foreclosed.—*Cincinnati Cordage & Paper Co. v. Dodson Printers' Supply Co.* (Ga.) 810.

§ 564. A sale on a mortgage *fi. fa.*, under Civ. Code, 1895, §§ 5463, 5464, divests all liens in the property sold, and they attach to the money raised by the sale.—*Cincinnati Cordage & Paper Co. v. Dodson Printers' Supply Co.* (Ga.) 810.

Measure of a mortgagee's recovery, on the mortgagor's default in delivering cotton, stated.—*Walker v. Venters* (N. C.) 510.

\*Only in rare instances may strict foreclosure be had.—*Froidevaux v. Jordan* (W. Va.) 686.

### § 6. Redemption.

§ 597. If the heir of a mortgagor whose property had been acquired by the mortgagee under an attempted mortgage sale, and who was devised part of it by the mortgagee, entered upon and accepted the land under the will knowing of the mortgage, and the attempted sale and that the mortgagee had devised it to her, she ratified the sale, and could not redeem.—*Rich v. Morisey* (N. C.) 762.

§ 597. The heir of a mortgagor whose land was taken by the mortgagee under an attempted mortgage sale *held* not as a matter of law to have ratified the sale by accepting part of the land as a devise from the mortgagee.—*Rich v. Morisey* (N. C.) 762.

§ 600. An heir upon redeeming land illegally sold under a mortgage given by her father, which she could have redeemed at his death, *held* required to pay his debts to which the land would have been subjected had it been redeemed at that time.—*Rich v. Morisey* (N. C.) 762.

§ 600. While an illegal mortgage sale will be set aside and redemption allowed, the one redeeming must account for the purchase money, at least to the extent that the land has been exonerated from the claims upon it.—*Rich v. Morisey* (N. C.) 762.

§ 617. In an action to redeem land purchased by a mortgagee at his own sale under the mortgage, after the mortgagor's death, evidence of the insolvency of the mortgagor when he died was irrelevant.—*Rich v. Morisey* (N. C.) 762.

\*Point annotated. See syllabus.

§ 619. In an action by the heir of a deceased mortgagor against the estate of the deceased mortgagee and his devisees of the land to redeem, where the right to redeem was adjudged, the court could order a reference to ascertain the status of the account between the parties, or could ascertain the facts from the pleadings and questions submitted to the jury.—*Rich v. Morisey* (N. C.) 762.

## MOTIONS.

Relating to pleadings, see Pleading, § 8.

*For particular purposes or relief.*

Arrest of judgment in civil actions, see Judgment, § 1.

Arrest of judgment in criminal prosecutions, see Criminal Law, § 26.

Change of venue in civil actions, see Venue, § 2.

Continuance in civil actions, see Continuance.

Direction of verdict in civil actions, see Trial, § 5.

Discontinuance of action, see Dismissal and Nonsuit, § 1.

Dismissal of appeal or writ of error, see Appeal and Error, § 8.

Dismissal or nonsuit on trial, see Trial, § 5.

New trial in civil actions, see New Trial, § 2.

New trial in criminal prosecutions, see Criminal Law, § 26.

Presentation of objections for review, see Appeal and Error, § 3.

Striking out evidence, see Trial, § 3.

Vacation of judgment, see Judgment, § 3.

## MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, § 1.

Annexation of territory as impairing obligation of contracts, see Constitutional Law, § 3.

Authority of officer to shoot in making arrest for violation of municipal ordinance, see Arrest, § 1.

Cumulative punishments under municipal ordinances, see Criminal Law, § 28.

Determination and disposition of cause on appeal or writ of error in action to restrain act of city, see Appeal and Error, § 22.

Dismissal of appeal from order dissolving order restraining act of city, see Appeal and Error, § 8.

Injunction affecting, see Injunction, §§ 3, 4.

Jurisdiction of justice of the peace of action for fine for digging up street as dependent on title to real estate being involved, see Justices of the Peace, § 1.

Laws impairing obligation of contracts, see Constitutional Law, § 3.

Mandamus, see Mandamus, §§ 1, 2.

Merger of offenses affecting jurisdiction of city court, see Criminal Law, § 1.

Notice of special assessment as denial of due process of law, see Constitutional Law, § 6.

Ordinances relating to intoxicating liquors, see Intoxicating Liquors.

Prohibition against wrongful exercise of jurisdiction of prosecution for violation of ordinance, see Prohibition, § 1.

Regulation of railroads, see Railroads, § 5.

Regulation of water rates, see Waters and Water Courses, § 3.

Review on appeal or writ of error of findings of court in action to restrain collection of taxes in territory annexed to city, see Appeal and Error, § 13.

Right of telephone company in street, see Telegraphs and Telephones, § 1.

Street railroads, see Street Railroads.

Transfer of criminal prosecutions for misdemeanors to city court, see Criminal Law, § 2.

Validity of law enlarging corporate limits of city, see Statutes, § 1.

Water supply, see Waters and Water Courses, § 3.

§ 1. Creation, alteration, existence, and dissolution.

§ 29. Priv. Laws 1907, p. 1292, c. 489, § 1, enlarging the corporate limits of the city of Fayetteville, and defining the boundaries of the annexed territory, *held* not void on its face for uncertainty of description of the boundaries.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

§ 29. The enlargement of municipal boundaries by annexing new territory and the consequent extension of the corporate jurisdiction, including that of taxation, *held* solely a matter of legislative discretion, in the absence of constitutional restrictions.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

§ 34. Under Priv. Acts 1907, p. 1292, c. 489, ratified March 11, 1907, annexing certain territory to the city of Fayetteville, *held* that all qualified voters, in both the old and the annexed territory, were entitled to register and participate in the election to ratify the annexing act.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

A municipal boundary located by commissioners and recognized by the public and Legislature *held* not to be overthrown by subsequent measurements not recognized by the Legislature, though tending to show some departure from the limits as specified in the charter.—*Marsha v. Richland County* (S. C.) 4.

§ 2. Legislative control of municipal acts, rights, and liabilities.

§ 64. Municipal corporations, in the absence of constitutional restrictions, are subject to the control of the Legislature in its discretion; the sole object of such control being the common good.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

§ 3. Proceedings of council or other governing body.

\*The book of ordinances kept by a municipality, containing a particular ordinance, *held* prima facie evidence of its passage.—*Stone v. Town of Tallulah Falls* (Ga.) 592.

§ 4. Officers, agents, and employes.

Under Act August 20, 1906 (Acts 1906, p. 176), establishing the city court of Buford, the solicitor of that court was not entitled to a mandamus against the mayor and council of the city to compel them to audit his accounts for costs due him in criminal cases which had terminated by acquittal, orders of nolle prosequi, or the sustaining of demurrers.—*Allen v. Pool* (Ga.) 31.

\*Charter of the city of Bluefield (section 10), requiring as a qualification of membership in the city council that the member shall have been a freeholder for one year, *held* not to contravene Const. art. 4, §§ 1, 4, 5, 8 (Code 1906, pp. lli-liv), as imposing an additional qualification.—*Kahle v. Peters* (W. Va.) 691; *Schoew v. Same*, *Id.*

\*Charter of the city of Bluefield (section 10), requiring a member of the common council to have been a freeholder for one year, *held* not as to such time limit unreasonable.—*Kahle v. Peters* (W. Va.) 691; *Schoew v. Same*, *Id.*

§ 5. Property.

\*Where the city of Savannah had title in fee to its streets and the mayor and aldermen in 1898 conveyed a portion of one of its streets in exchange for other land to be used as a street, any want of original authority was cured by confirmatory act of August 23, 1905 (Acts 1905, p. 595).—*Kehoe v. Rourke* (Ga.) 185.

That Act Aug. 23, 1905 (Acts 1905, p. 595), confirming a deed by the city of Savannah of a portion of one of its streets, did not provide for the assessments and damages, did not render it unconstitutional.—*Kehoe v. Rourke* (Ga.) 185.

\*Point annotated. See syllabus.

**§ 6. Public improvements.**

\*Municipal corporations changing the grade of its streets *held* not liable for consequential damages to abutting property in the absence of constitutional or statutory provision allowing it.—*Dorsey v. Town of Henderson* (N. C.) 547.

§ 469. An assessment for a street improvement according to the frontage, as directed by statute, is valid.—*City of Kinston v. Loftin* (N. C.) 1069.

**§ 7. Police power and regulations.**

\*Under the general welfare clause of the charter of Tallulah Falls (Acts 1889, p. 1003) that municipality *held* to have power to enact an ordinance prohibiting the running at large of hogs.—*Stone v. Town of Tallulah Falls* (Ga.) 592.

\*Under the general welfare clause of its charter a city had authority to prohibit the running at large of cattle.—*Geer v. Thompson* (Ga. App.) 500.

\*Where the General Assembly has brought within the police power any particular subject, municipalities *held* to have the power to deal therewith.—*Callaway v. Mims* (Ga. App.) 654.

Principles governing court in determining whether a municipal ordinance is invalid, because of a state criminal statute on the same general subject, declared.—*Callaway v. Mims* (Ga. App.) 654.

§ 604. Under the general welfare clause a city has authority to pass an ordinance prohibiting the running at large of cattle within its limits.—*Southwestern Sheep Co. v. Thompson* (Ga. App.) 1002.

**§ 8. Use and regulation of public places, property, and works.**

Where, after a conveyance by a city of a portion of one of its streets, the grantee therein enclosed the property a subsequent purchaser of abutting land after the obstruction and abandonment of the street was complete, and after the passage of Act Aug. 23, 1905 (Acts 1905, p. 595) confirming such conveyance would have no right to an injunction against such obstruction.—*Kehoe v. Rourke* (Ga.) 185.

The grant by the chairman of the street committee of the authority required by ordinance to trim shade trees to a principal *held* sufficient authority for all helpers.—*Johnson v. Rome Ry. & Light Co.* (Ga. App.) 491.

Provisions of ordinance requiring street committee to direct how the cutting and trimming of shade trees is to be done *held* merely directory.—*Johnson v. Rome Ry. & Light Co.* (Ga. App.) 491.

Where municipal authorities authorize and ratify the act of the street committee in changing the grade of a street, the act becomes the act of the municipality.—*Dorsey v. Town of Henderson* (N. C.) 547.

Courts *held* precluded from inquiring into the advisability of changing the grade of streets of a municipality.—*Dorsey v. Town of Henderson* (N. C.) 547.

Under Charter of Henderson, Laws 1889, p. 1002, c. 241, § 62, and Revisal 1905, § 2930, the town of Henderson *held* authorized to change the grade of its streets.—*Dorsey v. Town of Henderson* (N. C.) 547.

§ 696. The decision of a municipal corporation that the removal of trees was necessary for the proper use of a street will not be interfered with by the courts, unless the action was so unreasonable as to amount to an oppressive and manifest abuse of the discretion.—*Rosenthal v. City of Goldsboro* (N. C.) 905.

§ 696. The general power of a municipal government over its streets extends as well to the power to order removal of trees for the

preservation of city sewers laid in the streets as for their removal as an obstruction to travel.—*Rosenthal v. City of Goldsboro* (N. C.) 905.

\*A complaint in an action for damages for and the abatement of a nuisance occasioned by the obstruction of a street *held* to state a cause of action in favor of plaintiff as a private citizen.—*Gray & Shealy v. Charleston & W. C. Ry. Co.* (S. C.) 442.

Where a street is acquired by conveyance in fee or by condemnation, the abutting owner is presumed to have received compensation for all the servitudes to which the street was liable at that time.—*Wagner v. Bristol Belt Line Ry. Co.* (Va.) 391.

Exercise of charter authority by a city council in requiring a street railway line to be located east of the center of the street *held* not to be interfered with by the courts, in the absence of fraud or manifest abuse of power.—*Wagner v. Bristol Belt Line Ry. Co.* (Va.) 391.

**§ 9. Fiscal management, public debt, securities, and taxation.**

§ 863. The only limitation upon the indebtedness of municipal corporations is Revisal because no reply was filed, where the pleadings 1905, § 2977, which the Legislature may repeal in toto, or from the provisions of which it may except any particular municipality.—*Wharton v. City of Greensboro* (N. C.) 740.

§ 933. The Legislature *held* to have power to legalize an issue of city bonds, invalid when issued because making the debt in excess of the limit provided by Revisal 1905, § 2977.—*Wharton v. City of Greensboro* (N. C.) 740.

§ 979. Injunction is the proper remedy to prevent the collection of illegally levied taxes from citizens of territory annexed to a municipal corporation.—*Lutterloh v. City of Fayetteville* (N. C.) 758.

A town under Code 1904, § 1043, and its charter, *held* to have no power to impose a collateral inheritance tax.—*Town of Wytheville v. Johnson's Ex'r* (Va.) 328.

**MURDER.**

See Homicide, § 1.

**MUTUAL BENEFIT INSURANCE**

See Insurance, § 6.

**NAMES.**

Amendment of declaration as to names of parties, see Parties, § 2.

Designation of parties to action, see Parties, § 1.

In pleading, see Pleading, § 2.

Of partnerships, see Partnership, § 2.

The doctrine of idem sonans is unavailable to cure variations in the spelling of a name, unless the combination of letters and syllables produce the same sound as the true name.—*Steinman v. Jessee* (Va.) 275.

\*Where complainant's name in a published notice was misspelled, the name so misspelled *held* not idem sonans with complainant's true name.—*Steinman v. Jessee* (Va.) 275.

**NAVIGABLE WATERS.**

See Waters and Water Courses.

**NEGLIGENCE.**

Argument and conduct of counsel, see Trial, § 4.

Causing death, see Death, § 2.

\*Point annotated. See syllabus.

Direct or remote consequences, see Damages, § 2.  
 Measure of damages, see Damages, § 4.  
 Mitigation of damages, see Damages, § 2.

*By particular classes of persons.*

See Carriers, §§ 6, 7, 9, 10, 16; Railroads, §§ 5-9.

Bailees, see Bailment.

Employers, see Master and Servant, §§ 3-14.

Operators of steamboat, see Shipping, § 1.

Telegraph or telephone companies, see Telegraphs and Telephones, § 2.

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See Bridges, § 1; Electricity; Explosives; Highways, § 3; Railroads, §§ 5-9; Street Railroads, § 2.

Construction of railroad, see Railroads, § 3.

Demised premises, see Landlord and Tenant, § 4.

*Contributory negligence.*

Of person injured by defective bridge, see Bridges, § 1.

Of person injured by operation of railroad, see Railroads, §§ 7, 8.

Of servant, see Master and Servant, §§ 9, 12-14.

**§ 1. Acts or omissions constituting negligence.**

\*Where suit is brought in Georgia for personal injuries sustained in Alabama, the rights of the parties as to the merits are to be determined by the law of Alabama.—*Lay v. Nashville, C. & St. L. Ry. Co. (Ga.) 189.*

The same conduct may fulfill the standard of ordinary care as to a trespasser, and not fulfill it as to a person differently situated.—*Seaboard Air Line Ry. v. Chapman (Ga. App.) 488.*

Employees or licensees using an alleyway used by an owner for his business held entitled to recover for injuries from pitfalls placed thereon.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*Liability of an owner of land for injuries sustained to children trespassing thereon determined.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*A light and power company maintaining hot water wells on an alleyway owned and used by it in connection with its business held not liable for injuries sustained to a child falling into an insecurely covered well while trespassing on the premises.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*A complaint, in an action for injuries by falling into a hot water well maintained by a light and power company on an alley owned and used by it, held to show that plaintiff was a trespasser.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*An owner of cultivated lands or lots in town is not as a general rule required to guard every pathway or alleyway used for his own convenience against the intrusion of trespassers.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*An infant entering on premises without a legal right to do so held a trespasser.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*The inducement of one to enter on the premises of another, to hold the latter liable for injuries occasioned by pitfalls thereon, must be equivalent to an invitation.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

\*Actionable negligence held to exist only where one whose acts occasion an injury to another owes to the latter a duty he has failed to discharge.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

§ 11. Mere forgetfulness, however grievous the consequences, is not a willful or wanton neglect of duty.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

§ 11. "Wanton negligence" always implies something more than mere negligence.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

§ 11. "Wanton" defined.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

§ 11. "Willfully" defined.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

§ 11. "Recklessly and wantonly" defined.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

**§ 2. Proximate cause of injury.**

\*An accident is inevitable if the person in connection with whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another; and in such a case, the essential element of legal duty being wanting, the person cannot be held negligent.—*Roanoke Ry. & Electric Co. v. Sterrett (Va.) 385.*

§ 58. "Proximate cause" defined.—*Wilson v. Southern Ry. Co. (Va.) 972.*

**§ 3. Contributory negligence.**

In determining the negligence or contributory negligence of an intoxicated person, he will be judged as if sober.—*Seaboard Air Line Ry. v. Chapman (Ga. App.) 488.*

A person, who at the time of an injury was engaged in an unlawful act proximately causing the same, held not entitled to recover.—*Johnson v. Rome Ry. & Light Co. (Ga. App.) 491.*

§ 80. Contributory negligence held always good in defense of an action ex delicto.—*Brown v. Rome Mach. & Foundry Co. (Ga. App.) 720.*

§ 89. The concurrent negligence of a third person cannot be imputed to an injured person so as to preclude recovery, unless the injured person and the third person were so related in regard to the transaction that in law the negligent act of the third person was the act of the injured person.—*Contos v. Jamison (S. C.) 867.*

§ 89. The negligence of a lessor will not preclude recovery by his lessee in possession of a building against an adjoining proprietor whose negligent excavating caused the wall of the building to fall.—*Contos v. Jamison (S. C.) 867.*

**§ 4. Actions.**

\*Where one in the exercise of due care sustains an injury from a cause not probable where a building had been properly constructed, a jury may infer that the resultant injury was due to the original defective construction.—*Monahan v. National Realty Co. (Ga. App.) 127.*

\*Whether under a given state of facts the maxim *res ipsa loquitur* is to be applied is for the jury.—*Monahan v. National Realty Co. (Ga. App.) 127.*

That a person is doing some criminal act at the time he is injured will not, as a matter of law, prevent a recovery.—*Johnson v. Rome Ry. & Light Co. (Ga. App.) 491.*

§ 134. Evidence sufficient to rebut the presumption of negligence may be discredited by proof of physical facts and circumstances showing such testimony to be incredible.—*Georgia Southern & F. Ry. Co. v. Walker (Ga. App.) 720.*

\*The term "alleyway" held not of itself to imply that a strip has been dedicated to the public use.—*Briscoe v. Henderson Lighting & Power Co. (N. C.) 600.*

§ 119. To recover for a willful, reckless, and wanton omission of duty, plaintiff must offer evidence tending to give the omission the character alleged.—*Bailey v. North Carolina R. Co. (N. C.) 912.*

\*Point annotated. See syllabus.



It is not contributory negligence per se for one who is under the duty to protect property to take a manifest risk to save it, unless the risk was wanton or unreasonable.—Thompson v. Seaboard Air Line Ry. (S. C.) 396.

\*In an action for an alleged negligent injury, the declaration must state the facts relied on to establish negligence with reasonable certainty.—Cinchfield Coal Co. v. Wheeler's Adm'r (Va.) 269.

§ 134. Plaintiff, in an action for personal injury, need not prove his case beyond a reasonable doubt, but is only required to make out a prima facie case, and make it appear to be more probable that the injuries were the proximate result of defendant's negligence than from any other cause.—Milton's Adm'r v. Norfolk & W. Ry. Co. (Va.) 960.

§ 136. Where reasonable men might fairly disagree upon the existence of negligence, the question is for the jury, it being for the court only where the inferences from the evidence are certain and incontrovertible, so that fair-minded men would not differ in their conclusion.—Roanoke Ry. & Electric Co. v. Young (Va.) 961.

#### § 5. Criminal responsibility.

There can be no conviction for criminal negligence where the person injured was apprised of the danger, and, over defendant's protest, exposed himself thereto.—Carbo v. State (Ga. App.) 140.

Where a person who has been warned of a danger, and could have avoided injury therefrom by ordinary diligence, encounters the same, he assumes all risk, and a resulting injury is not criminally chargeable to another.—Carbo v. State (Ga. App.) 140.

One who has an object of danger on his premises owes no duty except as to those likely to be affected thereby.—Carbo v. State (Ga. App.) 140.

Criminal negligence is not shown against one who uses every means in his power for the safety of those whom it is alleged his negligence has affected.—Carbo v. State (Ga. App.) 140.

Criminal negligence implies not only knowledge of probable consequences which may result from the use of an instrumentality, but also wanton disregard of the probable effects thereof on others.—Carbo v. State (Ga. App.) 140.

### NEWLY DISCOVERED EVIDENCE.

Ground for bill of review, see Equity, § 4.  
Ground for new trial in civil actions, see New Trial, § 1.

Ground for new trial in criminal prosecutions, see Criminal Law, § 26; Homicide, § 6.

### NEW TRIAL.

Harmless error, see Appeal and Error, § 14.  
In criminal prosecutions, see Criminal Law, § 26.

Necessity of motion for purpose of review, see Appeal and Error, § 3.

Opening or vacating judgment, see Judgment, § 3.

Presumptions as to rulings on motion for on appeal or writ of error, see Appeal and Error, § 11.

Remand by appellate court for new trial, see Appeal and Error, §§ 24, 25.

Review of discretionary rulings on motion for, see Criminal Law, § 27.

Review of rulings on motion for as dependent on record on appeal or writ of error, see Appeal and Error, § 6; Criminal Law, § 27.

Review on appeal or writ of error of discretionary rulings on motion for, see Appeal and Error, § 12.

Scope and extent of review in general of rulings on motion for, see Appeal and Error, § 9.

#### § 1. Grounds.

In action on a bond and to set aside conveyance as fraudulent, answer *held* sufficient to raise the issue of defendant's liability on certain notes.—Garner v. Garner (Ga.) 81.

It was not error requiring a new trial to permit a witness to give his opinion of another's mental condition before giving the facts on which he based his opinion.—Sims v. Sims (Ga.) 192.

\*A correct abstract instruction *held* not ground for new trial, where it did not appear to have been probably harmful to the defeated party.—Dolvin v. American Harrow Co. (Ga.) 198.

\*A defendant against whom a verdict has been returned cannot complain that it was for a less amount than plaintiff was entitled to recover, if entitled to recover at all.—Dolvin v. American Harrow Co. (Ga.) 198.

\*A charge is not ground for a new trial, because not applicable to the issues, where it does not appear that it was probably prejudicial to the complaining party.—Dolvin v. American Harrow Co. (Ga.) 198.

\*Newly discovered evidence, merely tending to disprove some of plaintiff's testimony as to the extent of his damages, was insufficient to require a new trial.—Atlanta, K. & N. Ry. Co. v. Tilson (Ga.) 281.

Rejection of an amendment to answer *held* not to furnish proper ground of motion for new trial.—Turner v. Barber (Ga.) 587.

§ 41. Erroneous rejection of testimony *held* not cause for new trial, when the witness gave the same testimony in another part of his evidence.—Lee v. Winkles (Ga.) 820.

§ 102. New trial, because of newly discovered evidence, *held* properly denied for lack of diligence.—Dodge v. Cowart (Ga.) 987.

§ 65. Where, under the law and the facts, the verdict was not demanded, there was no abuse of discretion in granting a new trial for the first time.—Goodman v. Spurlin (Ga.) 1029.

\*A second verdict cannot be set aside merely because the judge may think that the preponderance of the evidence is in favor of the losing party.—Merchants' & Miners' Transp. Co. v. Corcoran (Ga. App.) 130.

\*It is error to grant a second new trial where two concurring verdicts have been returned on conflicting evidence.—Merchants' & Miners' Transp. Co. v. Corcoran (Ga. App.) 130.

§ 104. Cumulative newly discovered evidence is no ground for new trial.—Myatt v. Myatt (N. C.) 887.

§ 76. A new trial should not be granted merely because the trial judge would have found a less amount than that found by the jury, unless the opinion of the judge amounts to a clear conviction that injustice has been done by an excessive verdict.—Hall v. Northwestern R. Co. (S. C.) 848.

§ 76. If, upon a review of the evidence, it appears that the damages awarded by the jury are too large, the trial may in its discretion set aside the verdict and award a new trial.—McIntyre v. Smyth (Va.) 930.

#### § 2. Proceedings to procure new trial.

Exceptions to a decree cannot be made the grounds of a motion for a new trial.—Darsey v. Darsey (Ga.) 20.

Dismissal of motion for new trial for laches in failing to have the brief of evidence ap-

\*Point annotated. See syllabus.

proved, and because the judge was unable to say whether the brief presented was correct or not, *held* properly ordered.—*Gentry v. McBride* (Ga.) 81.

An assignment of error in a motion for new trial complaining of rulings on evidence *held* bad, where such evidence is not set forth.—*Fullbright v. Neely* (Ga.) 188.

\*Dismissal of a motion at the hearing *held* proper, where the brief of evidence was not submitted or filed within 40 days from date of order, as directed.—*Fulford v. Fountain* (Ga.) 526.

\*Respondent, on motion for new trial, *held* estopped from insisting on a dismissal, where the moving party presents a brief of evidence for approval pursuant to a consent order.—*City of Brunswick v. Davenport* (Ga.) 584.

§ 128. A ground of motion for new trial assigning error on the admission of a meaningless sentence in the testimony of a witness presents no point for adjudication.—*Lee v. Winkles* (Ga.) 820.

§ 118. Section 7 of the act establishing the city court of Waynesboro (Acts 1903, p. 176), relating to the time when a motion for new trial must be filed and passed upon by the judge, is directory as to the act of the judge, but is mandatory as to the movant.—*Hudson v. Williams* (Ga. App.) 1011.

§ 132. Where an order gave a movant for a new trial until the final hearing to file an approved brief of evidence, and at the hearing an agreed brief of evidence was presented, refusal to approve the brief was no ground for dismissal.—*Hudson v. Williams* (Ga. App.) 1011.

§ 156. Where an order provided that if a motion for new trial was not heard on a certain date it would be heard later by consent, and by agreement it was postponed, a motion to dismiss is without merit.—*Hudson v. Williams* (Ga. App.) 1011.

§ 162. An order granting a new trial unless plaintiff will remit a specified part from the verdict *held* an adjudication that the verdict is excessive by such amount, and that defendant is entitled to be relieved therefrom or have a new trial.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 161. The circuit judge in granting a new trial *held* authorized to require defendant to make secure the rights of plaintiff.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 161. An order for a new trial cannot be made conditional on the defeated party surrendering his right of appeal on the ground of error committed in the course of the trial.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 162. The power of circuit courts to grant new trials as authorized by Civ. Code 1902, § 2734, *held* to extend to the granting of new trials for excessive verdicts in tort for unliquidated damages.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 162. An order granting a new trial because the verdict is excessive *held* erroneous as imposing the condition that defendant shall tender the reduced amount within a specified time.—*Hall v. Northwestern R. Co.* (S. C.) 848.

§ 162. An order granting a new trial because of the excessiveness of the verdict *held* required to give defendant a new trial unless plaintiff will remit the amount found excessive.—*Jackson v. Southern Cotton Oil Co.* (S. C.) 854.

§ 162. Where the jury has awarded excessive damages, the court may on a motion for new trial put plaintiff on terms to abate the excess, if there is plain proof as to the correct sum which should be awarded.—*McIntyre v. Smyth* (Va.) 930.

## NEXT OF KIN.

See Descent and Distribution.

Right to select administrator, see Executors and Administrators, § 1.

## NOMINAL DAMAGES.

See Damages, § 1.

## NOMINATION.

For office, see Elections, § 8.

## NONSUIT.

Before trial, see Dismissal and Nonsuit.

On trial, see Trial, § 5.

## NOTICE.

Idem sonans of name in notice, see Names.  
Right of appellate court to take notice of jurisdictional defects on its own motion, see Appeal and Error, § 8.

*As affecting particular classes of persons.*

See Principal and Agent, § 3.

Bona fide purchasers, see Sales, § 4.

Sureties, see Principal and Surety, § 8.

*Of particular facts, acts, or proceedings not judicial.*

Delivery of goods shipped, see Carriers, § 5.

Dissolution of partnership, see Partnership, § 4.

Loss insured against, see Insurance, § 4.

Nonpayment or protest of bill or note, see Bills and Notes, § 2.

Removal of obstruction of private way, see Easements, § 2.

*Of particular judicial proceedings.*

Action or process, see Process, § 1.

Issuance of execution, see Execution, §§ 2, 5.

## NOVATION.

Requirements of statute of frauds, see Frauds, Statute of, § 2.

## NUISANCE.

Determination and disposition of cause on appeal or writ of error to abate a nuisance, see Appeal and Error, § 24.

Obstruction of street as, see Municipal Corporations, § 8.

Taking case or question from jury in suit to abate, see Trial, § 5.

§ 1. **Private nuisances.**

§ 3. The storing of dynamite on a railroad right of way *held* not a nuisance, and not to violate any duty to persons coming on the premises without a license.—*Fanning v. J. G. White & Co.* (N. C.) 734.

## OBJECTIONS.

Necessity for purpose of review, see Criminal Law, § 27.

## OBLIGATION OF CONTRACT.

Laws impairing, see Constitutional Law, § 3.

\*Point annotated. See syllabus.

## OBSCENITY.

\*The phrase "obscene and vulgar language," as used in Pen. Code 1895, § 396, directed against the use of such language in the presence of females, defined.—*Holcombe v. State* (Ga. App.) 647.

\*Language may be obscene, within Pen. Code 1895, § 396, though it has no reference to sexual intercourse.—*Holcombe v. State* (Ga. App.) 647.

\*Some words *held per se* obscene, within Pen. Code 1895, § 396.—*Holcombe v. State* (Ga. App.) 647.

\*Any gross reference to the private parts of a woman, or to any of the surrounding portions of her person, *held prima facie* obscene and vulgar, within Pen. Code 1895, § 396.—*Holcombe v. State* (Ga. App.) 647.

\*Certain indecent jest *held prima facie* obscene and vulgar, within Pen. Code 1895, § 396.—*Holcombe v. State* (Ga. App.) 647.

\*The phrase "in the presence of a female," as used in Pen. Code 1895, § 396, directed against the use of obscene language, defined.—*Holcombe v. State* (Ga. App.) 647.

\*"Obscene" defined.—*Holcombe v. State* (Ga. App.) 647.

\*The word "profane," in an indictment charging that defendant used profane and vulgar language in the presence of females, in violation of Pen. Code 1895, § 396, *held* surplusage, where the language set forth is as a matter of law obscene and vulgar.—*Holcombe v. State* (Ga. App.) 647.

\*Pen. Code 1895, § 396, directed against the use of obscene and vulgar language in the presence of a female, *held* not to stand upon the footing of statutes against public indecency.—*Holcombe v. State* (Ga. App.) 647.

\*Whether words are obscene, within Pen. Code 1895, § 396, *held* usually for the jury.—*Holcombe v. State* (Ga. App.) 647.

## OBSTRUCTING JUSTICE.

Variance between preliminary proceedings and accusation, see Indictment and Information, § 3.

§ 3. Threats alone are not sufficient to constitute the offense of obstructing officer in the execution of process, under Pen. Code 1895, § 306.—*Allen v. State* (Ga. App.) 1003.

## OBSTRUCTIONS.

Of easements, see Easements, § 2.  
Of highway, see Highways, § 3.  
Of process, see Obstructing Justice.  
Of street, see Municipal Corporations, § 8.  
Of water course, see Waters and Water Courses, § 1.

## OCCUPATION.

Of real property, see Use and Occupation.

## OFFER.

Of proof, see Trial, § 3.

## OFFICERS.

Authority to make arrest without warrant, see Arrest, § 1.  
Embezzlement, see Embezzlement.  
Mandamus, see Mandamus, § 2.

Mandamus to, as affected by power to perform act sought to be required, see Mandamus, § 1.  
Resisting officer, see Obstructing Justice.

### Particular classes of officers.

See Attorney General; Clerks of Courts; Judges; Justices of the Peace; Receivers.

Court officers, see Courts, § 2.

Municipal officers, see Municipal Corporations, §§ 4, 5.

School officers, see Schools and School Districts, § 1.

## § 1. Rights, powers, duties, and liabilities.

§ 110. Where a statute specifies a time within which a public officer is to perform an official act regarding the rights of others, it is merely directory, unless the designation of the time is a limitation on the power of the officer.—*Hudson v. Williams* (Ga. App.) 1011.

§ 110. Courts are astute to impeach and invalidate any transaction where an official has any personal interest in the matter decided by him.—*Venable v. School Committee of Pilot Mountain* (N. C.) 902.

## OILS.

Oil leases, see Mines and Minerals, § 2.

## OPENING.

Judgment, see Judgment, § 3.

## OPINION EVIDENCE.

In civil actions, see Evidence, § 11.

In criminal prosecutions, see Criminal Law, § 11.

## OPINIONS.

Of courts, see Courts, § 2.

## OPTIONS.

To purchase land, see Vendor and Purchaser, § 1.

## ORDER OF PROOF.

At trial, see Trial, § 3.

## ORDERS.

Review of appealable orders, see Appeal and Error.

### Orders of court.

Discontinuance of action, see Dismissal and Nonsuit, § 1.

New trial in civil actions, see New Trial, § 2.

Sale of lands by administrator, see Executors and Administrators, § 7.

## ORDINANCES.

Cumulative punishments under, see Criminal Law, § 28.

Municipal ordinances, see Municipal Corporations, §§ 3, 7, 8.

Regulating water rates, see Waters and Water Courses, § 3.

## OVERCHARGE.

By carrier, see Carriers, § 12.

## PALACE CARS.

See Carriers, § 18.

\*Point annotated. See syllabus.

## PARENT AND CHILD.

See Guardian and Ward; Infants.

Civil damages for sale of liquor to child, see Intoxicating Liquors, § 7.

Construction of contract to support parents, see Contracts, § 2.

Custody of children on divorce, see Divorce, § 2.

Loss of services as element of damages in action for death of child, see Death, § 2.

Right of action for wrongful death of child, see Death, § 2.

§ 3. A wife living with her husband is not liable for any contract of their minor child, in the absence of express assumption of liability.—*Leake v. J. R. King Dry Goods Co.* (Ga. App.) 729.

Code 1904, § 2902, held not to affect the common-law right of action of a personal representative or parent to recover for loss of services between the time of the injury and death, or the personal representative's right to recover, in an action for the breach of a contractual duty resulting in death, the damages to decedent's personal estate arising during his lifetime, or a parent's rights to recover for loss of services of a minor child to the time of his death.—*Stevenson v. W. M. Ritter Lumber Co.* (Va.) 351.

## PAROL AGREEMENTS.

To rescind written contract for sale of land, see Vendor and Purchaser, § 2.

## PAROL EVIDENCE.

In civil actions, see Evidence, § 10.

## PARTICULARS.

Bill of, see Pleading, § 7.

## PARTIES.

Competency as witnesses, see Witnesses, § 2.

Identity of parties in actions brought as affecting abatement, see Abatement and Revival, § 1.

Plea of defect of parties as constituting plea in abatement within laws relating to time of filing such pleas, see Abatement and Revival, § 2.

Scope and extent of review in general of rulings on motion to dismiss for misjoinder of parties, see Appeal and Error, § 9.

Substitution in action by receiver, see Receivers, § 1.

*In actions by or against particular classes of persons.*

See Corporations, § 3; Partnership, § 3.

*In particular actions or proceedings.*

See Cancellation of Instruments, § 2; Equity, §§ 1, 2; Mandamus, § 3; Partition, § 2; Specific Performance, § 4; Trespass, § 1.

Condemnation proceedings, see Eminent Domain, § 4.

For penalty for violation of regulations by carrier, see Carriers, § 1.

*Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.*

See Judgment, § 1.

Collateral attack on judgment, see Judgment, § 5.

Persons concluded by judgment, see Judgment, § 7.

*Review as to parties, and parties to proceedings in appellate courts.*

On appeal or writ of error, see Appeal and Error, § 2.

*To conveyances, contracts, or other transactions.* See Assignments, § 2; Fraudulent Conveyances, § 2.

Persons affected by estoppel, see Estoppel, § 1.

### § 1. Designation and description.

\*An individual, doing business in a trade-name, can in such name sue and be sued.—*Charles v. Valdosta Foundry & Machine Co.* (Ga. App.) 493.

### § 2. Defects, objections, and amendment.

§ 84. Where the petition shows that suit is brought against an individual for a partnership debt, objection may be raised by demurrer; otherwise by a plea in abatement.—*Bray v. Peace* (Ga.) 1025.

\*Where suit was brought by the Orr "Shoe" Company against the Dr. Bell & Lee "Shoe" Company, and the real plaintiff was the Orr "Stationery" Company and the real defendant the Dr. Bell & Lee "Drug" Company, held, the petition was amendable.—*Orr Stationery Co. v. Dr. Bell & Lee Drug Co.* (Ga. App.) 471.

\*If the name in which a suit is brought is not plaintiff's trade-name, the question should be raised by plea of misnomer, and not by demurrer.—*Charles v. Valdosta Foundry & Machine Co.* (Ga. App.) 493.

\*Objections to the legal capacity of a plaintiff to sue are waived if not taken by demurrer or answer.—*Trimmier v. Atlantic & C. A. L. Ry. Co.* (S. C.) 209.

That defendant may object to the capacity of plaintiff to sue, held, it must make a general appearance.—*L. D. Riley & Son v. Southern Ry. Co.* (S. C.) 509.

§ 95. Where a declaration was against M. doing business as M. & Co., held, that plaintiff was entitled to amend by inserting the names of the other members of the company.—*McIntyre v. Smyth* (Va.) 930.

## PARTITION.

Acceptance of deeds under as creating estoppel, see Estoppel, § 1.

Collateral attack on judgment, see Judgment, § 5.

Evidence of death of children of heirs in partition suit, see Death, § 1.

Former judgment as bar, see Judgment, § 6.

Merger and bar of causes of action by judgment, see Judgment, § 6.

Of devised estate, see Wills, § 11.

Opinion evidence, see Evidence, § 11.

Partition deed to husband and wife, see Husband and Wife, § 1.

Presumptions as to recording report, see Records. Proceedings for, before clerk of court, see Clerks of Courts.

Report of commissioners in partition as evidence in support of color of title, see Adverse Possession, § 3.

Taxation of costs, see Costs, § 1.

### § 1. Actions for partition—Right of action and defenses.

\*Land may be partitioned among life tenants for the purpose of allowing each to have his part during the term of such life interest.—*Watkins v. Gilmore* (Ga.) 32; *Gilmore v. Watkins*, Id.

§ 12. A wife cannot maintain a partition of the lumber into which timber, cut on land owned by herself and husband as tenants by entirety, has been sawed by a purchaser of the

\*Point annotated. See syllabus.

timber from the husband.—*Jones v. W. A. Smith & Co.* (N. C.) 1092.

§ 12. An estate in trees may exist independently of the land, so as to be the subject of partition.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 24. Partition is a matter of right, and not of grace or discretion.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

## § 2. — Proceedings and relief.

Where, in partition, the evidence failed to show any interest plaintiffs owned in common with the defendants, it was not error to grant a nonsuit.—*Tillman v. Griffin* (Ga.) 581.

Under Revisal 1905, § 2513, plaintiffs held not entitled to sue to vacate partition proceedings on the ground that they were made parties without their knowledge or consent.—*Hargrove v. Wilson* (N. C.) 520.

§ 116. The rights acquired in a partition, whereby a lot on which was a mill with water power was awarded to one, determined.—*Moore v. Parker* (N. C.) 1083.

There being no statute requiring a presiding judge in a partition suit to view the premises, his refusal to do so is not error.—*Parrott v. Barrett* (S. C.) 241.

The rule that, where land is recommended by commissioners to be divided among parties to a partition suit by metes and bounds at a certain valuation, a party may have a sale of the property by securing a higher bid held not to apply, where the Supreme Court, in remanding the case, had directed a different scheme of partition.—*Parrott v. Barrett* (S. C.) 241.

The Supreme Court, in remanding a partition proceeding for an erroneous rule of valuation of the property partitioned, may formulate a scheme of partition of the lands, as a direction to the lower court, which must be carried out, and not treated as a mere suggestion.—*Parrott v. Barrett* (S. C.) 241.

Where commissioners in partition, selected by the parties, were men of experience, intelligence, and character, who viewed the premises, and were unanimous in their conclusion, and there is nothing to show that their action was influenced by any unfair or improper motives, their valuation should be sustained, though some of the witnesses differed from the commissioners as to the valuation.—*Parrott v. Barrett* (S. C.) 241.

In order to overthrow the valuation made by commissioners in partition, it must be shown that it is so grossly incorrect and unequal as to justify an inference that the commissioners acted from an unfair and improper motive.—*Parrott v. Barrett* (S. C.) 241.

A grantee of an easement in lands by two of three tenants in common held a necessary party to a suit for partition, and entitled to have a decree taken without notice to it opened and its rights considered.—*Jeter v. Knight* (S. C.) 259.

In accounting to co-tenants, improvements are regarded as paid for pro tanto by the rents as they accrue, and hence, in partition proceedings between co-tenants, the statute of limitations does not bar rents and profits chargeable against a co-tenant claiming the value of improvements.—*Vaughn v. Lanford* (S. C.) 316.

While a co-tenant may recover the value of improvements placed upon land, it can only be after deducting therefrom the value of the use of the land.—*Vaughn v. Lanford* (S. C.) 316.

\*A court of equity will require co-tenants to do full justice to each other when the rights of others do not intervene, and, while improvements by a co-tenant will be allowed in parti-

tion, he must account for waste, and for rents and profits derived from the common property.—*Vaughn v. Lanford* (S. C.) 316.

\*Attorneys having lost in a contest with plaintiff in partition respecting their fees, costs incurred solely in that contest should have been taxed against them, in the absence of a contrary direction by the circuit court, based on equitable grounds.—*Cauthen v. Cauthen* (S. C.) 319.

\*In taxing costs in partition, held improper to hold in abeyance, taxation of costs incurred solely in a contest between plaintiff and attorneys, until the determination of another suit between plaintiff and the attorneys.—*Cauthen v. Cauthen* (S. C.) 319.

\*Costs in a partition suit, incurred solely in a contest between plaintiff and attorneys, held improperly taxed as general costs.—*Cauthen v. Cauthen* (S. C.) 319.

Costs of readvertising a sale in partition held improperly taxed against plaintiff, because he failed to pay in his whole bid in cash.—*Cauthen v. Cauthen* (S. C.) 319.

Code Civ. Proc. 1902, § 98, subd. 2, held not to preclude a suit by decedent's children to "partition" land over which the widow granted a railway right of way, as to the railway company, because more than two years before bringing the suit they discontinued an action against the railway company brought to "recover" the land.—*Foster v. Foster* (S. C.) 320.

In a partition suit, scope of evidence, to be considered on an issue whether plaintiff's interest passed from them on a former proceeding, stated.—*Foster v. Foster* (S. C.) 320.

§ 113. Where, in partition, the circuit court decided upon the report of commissioners, and the master to whom the question of dividing the property was referred, that the property should be sold, its ruling will not be disturbed.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 102. Where a part interest in the timber on a tract had been conveyed separately, the action of the trial court in partition in requiring the timber to be sold with the land will not be disturbed, there being nothing in the record requiring a different conclusion.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 102. While, in partition, when some of the parties own the timber on the land, equity may order the timber sold separately from the land, it is not bound to do so in all cases.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 77. Under the direct provisions of Civ. Code 1902, § 2437, partition should be made in kind when possible without injury to other parties in interest.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 79. In partition, the court having decided that a sale of the land and timber thereon together was necessary, some of the timber being owned separately, it was proper to order a reference as to the relative values of the land and timber.—*Rivers v. Atlantic Coast Lumber Corp.* (S. C.) 855.

§ 95. Acts 1885-86, p. 625, c. 466 (Code 1887, § 2565 [Code 1904, p. 1313]), making decree in partition sufficient without conveyance, is not retroactive in cases where the land was allotted to one not the owner.—*Wright v. Johnson* (Va.) 948.

## PARTNERSHIP.

Acknowledgment affecting limitation against firm, see Limitation of Actions, § 2.  
Amendment as to names of partners, see Partners, § 2.  
Mining partnerships, see Mines and Minerals, § 2.

\*Point annotated. See syllabus.

Objections to parties in action against partner on ground that action should have been against firm, see Parties, § 2.

Pendency of action against partnership for dissolution and accounting as ground for abatement of action between partners alone for dissolution, see Abatement and Revival, § 1.

Pleading grounds of abatement of action on partnership liability, see Abatement and Revival, § 2.

**§ 1. The relation.**

§ 37. Statement as to liability of defendant, where he erroneously informed a commercial agency that he was a member of a firm, and afterwards corrected the information, and plaintiff sold the firm on the first information.—*Rheinstein Dry Goods Co. v. McDougall* (N. C.) 1085.

**§ 2. The firm, its name, powers, and property.**

§ 68. Certain land *held* partnership property.—*Mann v. Paddock* (Va.) 951.

§ 68. By the English rule, partnership realty is converted into personality to all intents and purposes, but the general rule in this country limits the conversion to the purpose of the partnership.—*Mann v. Paddock* (Va.) 951.

**§ 3. Rights and liabilities as to third persons.**

§ 202. In a suit against an individual, *held* not error to refuse to entertain a plea offered by a firm of which the individual was a member.—*Bray v. Peace* (Ga.) 1025.

§ 216. It is no defense to a partner who has not raised the objection of nonjoinder by demurrer or plea to show that he has contracted the debt on behalf of the partnership, and that he has a partner not before the court.—*Bray v. Peace* (Ga.) 1025.

Testimony that an account against a firm was presented to a member, and he acknowledged its correctness, is *prima facie* proof thereof, and on a denial by the firm makes an issue for the jury.—*G. H. Dolvin & Co. v. Hicks* (Ga. App.) 95.

**§ 4. Dissolution, settlement, and accounting.**

\*Effect of publication of notice of dissolution of a firm as relieving the retiring partner for firm debts subsequently contracted, stated.—*Straus, Gunst & Co. v. Sparrow & Co.* (N. C.) 308.

Publication of a partnership dissolution notice in a local paper *held* insufficient to take the question of notice to a person having previous dealings with the firm to the jury.—*Straus, Gunst & Co. v. Sparrow & Co.* (N. C.) 308.

**PART PAYMENT.**

Within statute of frauds, see Frauds, Statute of, § 4.

**PART PERFORMANCE.**

Warranting specific performance, see Specific Performance, § 2.

**PASSENGERS.**

See Carriers, §§ 14-18.

**PAYMENT.**

See Compromise and Settlement.

As condition precedent to right to contribution, see Contribution.

Of taxes as qualification of electors, see Elections, § 1.

*Of particular classes of obligations or liabilities. See Costs, § 4.*

Claims against estate of decedent, see Executors and Administrators, § 5.

Compensation for property taken for public use, see Eminent Domain, § 2.

Insurance premium, see Insurance, § 1.

**§ 1. Application.**

\*Under Civ. Code 1895, § 3722, a creditor, in the absence of direction by the debtor, *held* entitled to apply payments made on a running account to the oldest items, so as to avoid the bar of limitations.—*Hobbs v. Crawford & Maxwell* (Ga. App.) 157; *Crawford & Maxwell v. Hobbs*, *Id.*

**§ 2. Pleading, evidence, trial, and review.**

§ 60. Plea of payment *held* insufficient.—*Groves v. Sexton* (Ga. App.) 731.

**PENAL STATUTES.**

Construction of, see Statutes, § 5.

**PENALTIES.**

Best and secondary evidence in action for, see Evidence, § 5.

Construction of statute providing for recovery, see Statutes, § 5.

Enforcement of penal laws in courts of another state, see Courts, § 1.

Illegal sale of fertilizer, see Agriculture.

For violation of regulations by carrier, see Carriers, § 1.

Harmless error in action for, see Appeal and Error, § 18.

Under contracts, see Damages, § 3.

**PERFORMANCE.**

Of contract, see Contracts, § 4.

Of covenants, see Covenants, § 2.

**PERJURY.**

**§ 1. Prosecution and punishment.**

\*An indictment for perjury may join, in a single count, separate material statements.—*McLaren v. State* (Ga. App.) 138.

\*On a trial for perjury it is not necessary to prove that defendant used the identical language charged, but it is sufficient to prove the substance only of the language used.—*McLaren v. State* (Ga. App.) 138.

\*It is not necessary under an indictment setting forth several distinct statements, that the elements of perjury should be shown as each.—*McLaren v. State* (Ga. App.) 138.

\*Evidence on a trial for perjury *held* to support a conviction.—*McLaren v. State* (Ga. App.) 138.

**PERSONAL INJURIES.**

*Particular causes or means of injury.*

See Assault and Battery, § 1; Explosives; Negligence.

Operation of railroads, see Railroads, §§ 6-8.

*Particular classes of persons injured.*

Employé, see Master and Servant, §§ 3-14.

Passenger, see Carriers, § 16.

Passenger on steamboat, see Shipping, § 1.

Traveler on highway, see Highways, § 3.

Traveler on highway crossing railroad, see Railroads, § 7.

\*Point annotated. See syllabus.

**Remedies.**

Applicability of instructions to case, see Trial, § 9.  
 Collateral attack on judgment, see Judgment, § 5.  
 Construction of instructions, see Trial, § 12.  
 Direct or remote consequences, see Damages, § 2.  
 Evidence of damages, see Damages, § 6.  
 Excessive damages, see Damages, § 5.  
 Harmless error, see Appeal and Error, § 16.  
 Jurisdiction of justice's court, see Justices of the Peace, § 1.  
 Measure of damages, see Damages, § 4.  
 Opinion evidence, see Evidence, § 11.  
 Pleading damages, see Damages, § 6.  
 Presumptions as to law of another state, see Evidence, § 2.  
 Province of court and jury in general, see Trial, § 6.  
 Requisites and validity of release, see Release, § 1.  
 Res gestæ, see Evidence, § 4.  
 Review of verdict on appeal or writ of error, see Appeal and Error, § 13.  
 Right of alien to maintain action for, see Aliens, § 1.  
 Separate counts in pleading, see Pleading, § 2.  
 Sufficiency of instructions, see Trial, § 8.  
 Taking case or question from jury, see Trial, § 5.

**PETITION.**

For improvement of drain, see Drains, § 1.

*In judicial proceedings.*

See Injunction, § 3; Mandamus, § 3.  
 In pleading, see Pleading, § 2.  
 In probate proceedings, see Wills, § 3.

**PHARMACISTS.**

See Druggists.

Persons entitled to allege unconstitutionality of statutes relating to, see Constitutional Law, § 1.

**PHYSICIANS AND SURGEONS.**

Liability of surgeon for making incision on dead body to ascertain cause of death, see Dead Bodies.  
 Physician's certificate as to witness' sickness as preliminary to admission of evidence taken at former trial, see Evidence, § 12.

**PICKETING.**

Restraining by injunction, see Injunction, § 2.

**PLEA.**

In civil actions, see Pleading, § 3.  
 In criminal prosecution, see Criminal Law, § 5.

**PLEADING.**

Admissions in pleading as evidence, see Evidence, § 6.  
 Applicability of instructions to pleadings, see Trial, § 9.  
 Rejection of amended pleading as ground for new trial, see New Trial, § 1.  
*Allegations as to particular facts, acts, or transactions.*  
 See Damages, § 6; Estoppel, § 1; Payment, § 2; Release, § 2; Statutes, § 6.  
 Grounds for abatement of action, see Abatement and Revival, §§ 1, 2.  
 Statute of limitations, see Limitation of Actions, § 2.

*In actions by or against particular classes of persons.*

See Corporations, § 3; Counties, § 5; Executors and Administrators, § 8; Husband and Wife, § 4.  
 Against both master and servant for negligence, see Master and Servant, § 15.  
 Telegraph company, see Telegraphs and Telephones, § 2.

*In particular actions or proceedings.*

See Cancellation of Instruments, § 2; Ejectment, § 3; Garnishment, § 3; Libel and Slander, § 2; Mandamus, § 3; Negligence, § 4; Replevin, § 3; Specific Performance § 4; Trespass, § 1.  
 Appointment of receiver of corporation, see Corporations, § 4.  
 Election contest, see Elections, § 4.  
 For abuse of process, see Process, § 2.  
 For accounting, see Account, § 1.  
 For breach of contract, see Contracts, § 4; Sales, § 6.  
 For breach of covenant, see Covenants, § 3.  
 For breach of warranty, see Sales, § 7.  
 For causing death, see Death, § 2.  
 For civil damages from sale of liquor, see Intoxicating Liquors, § 7.  
 For fires caused by operation of railroad, see Railroads, § 9.  
 For improvement of drain, see Drains, § 1.  
 For loss of or injuries to shipment of live stock, see Carriers, § 13.  
 For nondelivery of telegram, see Telegraphs and Telephones, § 2.  
 For personal injuries, see Carriers, § 16; Highways, § 3; Master and Servant, § 11; Railroads, § 7.  
 For price of goods, see Sales, § 6.  
 For wrongful discharge from employment, see Master and Servant, § 1.  
 Indictment or criminal information or complaint, see Indictment and Information.  
 On bill or note, see Bills and Notes, § 3.  
 On bond, see Bonds, § 1.  
 On insurance policy, see Insurance, § 5.  
 Pleas in criminal prosecutions, see Criminal Law, § 5.  
 Probate proceedings, see Wills, § 3.  
 To abate nuisance occasioned by obstruction of street, see Municipal Corporations, § 8.  
 To reform written instrument, see Reformation of Instruments, § 2.  
 To set aside execution sale, see Execution, § 5.

*Review of decisions and pleading in appellate courts.*

See Appeal and Error, § 2.  
 Harmless error in rulings on, see Appeal and Error, § 15.  
 Review of discretionary rulings on, see Appeal and Error, § 12.  
 Review of rulings on as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.  
 Scope and extent of review on appeal from judgment on pleading, see Appeal and Error, § 9.

**§ 1. Form and allegations in general.**

\*A pleading is to be construed most strongly against the pleader.—Smith v. Georgia R. & Banking Co. (Ga.) 673.

\*Ambiguous pleadings will be construed most strongly against the pleader on special demurrer.—Fowler v. Rome Dispensary (Ga. App.) 660.

§ 8. Facts relied upon to show fraud must be pleaded.—Groves v. Sexton (Ga. App.) 731.

§ 18. Reasonable certainty is all that is necessary to render pleadings exempt from attack by special demurrer.—Atlantic Coast Line R. Co. v. Davis & Brandon (Ga. App.) 1022.

\*An allegation in a bill for specific performance that a suit in ejectment was brought

\*Point annotated. See syllabus.

construed to mean that the suit was brought both for the land and the minerals under it, under the rule of construction against the pleader.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co. (Va.)* 320.

**§ 2. Declaration, complaint, petition, or statement.**

§ 46. An action may be properly instituted by employing the initials, instead of the full Christian name.—*Minchew v. Nahunta Lumber Co. (Ga. App.)* 716.

\*The requirements stated as to particularity and certainty necessary in complaints.—*Hughes v. Orangeburg Mfg. Co. (S. C.)* 404.

§ 53. A declaration by a servant for personal injury *held* not bad for inconsistency of the counts.—*Seal v. Virginia Portland Cement Co. (Va.)* 795.

**§ 3. Plea or answer, cross-complaint, and affidavit of defense.**

§ 106. Allegations in an unsworn answer *held* insufficient to meet the requirements of a plea in abatement.—*Bray v. Peace (Ga.)* 1025.

\*While defendant may file contradictory pleas, his defenses may be so related to one another that a finding in favor of one of them will estop him from further asserting the others.—*Southland Knitting Mills v. Tennille Yarn Mills (Ga. App.)* 532.

§ 88. A plea which purported to go to the whole declaration, but only answered a part of it, was bad, and was properly stricken.—*Staunton Mut. Telephone Co. v. Buchanan (Va.)* 928.

**§ 4. Demurrer or exception.**

Oral admissions of fact by a party or his counsel cannot be considered in passing on a demurrer to the pleadings or a motion to dismiss in the nature of a demurrer.—*Hicks v. Beacham (Ga.)* 45.

§ 225. Judgment on demurrer containing both general and special grounds filed to a petition *held* erroneous.—*Buchan v. Williamson (Ga.)* 815.

Where defendant files both a plea in abatement and a general demurrer, the judge may consider either first as he deems proper.—*McLaurin v. Fields (Ga. App.)* 114.

A debtor may demand by special demurrer a complete statement of each item of the indebtedness sued on.—*Hobbs v. Crawford & Maxwell (Ga. App.)* 157; *Crawford & Maxwell v. Hobbs, Id.*

The right to demand a complete statement of each item of the indebtedness sued on *held* waived by failure to interpose a special demurrer.—*Hobbs v. Crawford & Maxwell (Ga. App.)* 157; *Crawford & Maxwell v. Hobbs, Id.*

§ 221. The overruling of a general demurrer to a petition for injury to a servant *held* not to entitle the servant absolutely to recover if he proves his case as laid, on the ground that the overruling of the demurrer was res judicata that a cause of action was set out.—*McDuffie v. Ocean S. S. Co. (Ga. App.)* 1008.

\*A demurrer to a complaint admits the truth of the allegations of the complaint.—*Poythress v. Durham & S. Ry. Co. (N. C.)* 515.

\*The effect of sustaining a demurrer to defendant's pleading of estoppel was to leave the answer as if the estoppel had not been pleaded, since it was unnecessary to specially plead it.—*Scarborough v. Woodley (S. C.)* 405.

\*A demurrer to a declaration based on the declaration's failure to comply with a particular section, but not referring to that section, *held* insufficient under Code 1904, § 3271.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r (Va.)* 863.

§ 204. That one of several counts is defective does not warrant a demurrer to the whole declaration and dismissal of the action.—*Seal v. Virginia Portland Cement Co. (Va.)* 795.

**§ 5. Amended and supplemental pleadings and replender.**

It was not proper to set out a letter by amendment of a declaration in attachment merely because it might become admissible in evidence.—*Alabama Const. Co. v. Continental Car & Equipment Co. (Ga.)* 160.

Amendment of declaration in attachment *held* erroneously permitted.—*Alabama Const. Co. v. Continental Car & Equipment Co. (Ga.)* 160.

While defendant may file an answer to an amendment to a petition he is not required to do so, and his failure so to do does not authorize treating the allegations in the amendment as admitted.—*Brown v. Atlanta, B. & A. R. Co. (Ga.)* 186.

Even where a statute requires an action to be brought on relation of the state, a failure to bring it in such form is not ground for dismissal, but an amendment will be allowed.—*Robertson v. Atlantic Coast Line R. Co. (N. C.)* 413.

Under Code Civ. Proc. 1902, §§ 164, 167, 181, and circuit court rule 20, effect of section 167 stated, and defendants *held* not to have waived the right to demur by moving to make more definite and certain in a particular not affected by the amendment.—*Lawrence v. Lawrence (S. C.)* 9.

\*Where a proposed amendment to the answer would not have cured the defect therein, it was properly refused.—*Scarborough v. Woodley (S. C.)* 405.

§ 279. While the proper way to bring to a court's attention facts arising after filing of the complaint is by supplemental complaint, an order allowing a supplemental complaint to be filed *held* premature.—*Knight v. Union Mfg. & Power Co. (S. C.)* 789.

§ 248. Under Code Civ. Proc. 1902, §§ 191, 194, the complaint in an action for injuries to an employe *held* properly amended.—*Jackson v. Southern Cotton Oil Co. (S. C.)* 854.

§ 239. The power of the court, under Code Civ. Proc. 1902, § 194, to allow amendment by correcting a mistake in the name of a party, or in any other respect, defined.—*Taylor v. Atlantic Coast Line R. Co. (S. C.)* 1113.

§ 243. Amendments curing and making complete a faulty and incomplete statement of a cause of action are properly allowed.—*Taylor v. Atlantic Coast Line R. Co. (S. C.)* 1113.

§ 245. The limitation of the power to allow amendments to pleadings to conform them to the facts proved, as authorized by Code Civ. Proc. 1902, § 194, that the amendments shall not change substantially the claim or defense, *held* applicable only to amendments proposed while the court is hearing the evidence, or after it has heard it.—*Taylor v. Atlantic Coast Line R. Co. (S. C.)* 1113.

§ 248. An amendment alleging negligence, where the original complaint charged wantonness and recklessness, sets up a new cause of action.—*Taylor v. Atlantic Coast Line R. Co. (S. C.)* 1113.

§ 248. The power of the court to allow an amendment to a pleading by correcting a mistake as authorized by Code Civ. Proc. 1902, § 194, *held* conditioned on proof of a bona fide mistake.—*Taylor v. Atlantic Coast Line R. Co. (S. C.)* 1113.

A second declaration filed *held* not an amendment of the first, which should be treated as abandoned.—*Clinchfield Coal Co. v. Wheeler's Adm'r (Va.)* 269.

\*Point annotated. See syllabus.



§ 271. On demurrer to a pleading because not signed by counsel, it was within the discretion of the court to permit counsel to sign it, and thus remove the ground of objection.—*McIntyre v. Smyth* (Va.) 930.

#### § 6. Signature and verification.

§ 288. Good practice requires all pleadings to be signed by counsel.—*McIntyre v. Smyth* (Va.) 930.

#### § 7. Bill of particulars and copy of account.

Where one is sued for the amount of a debt of another alleged to have been assumed, a bill of particulars of the account is unnecessary.—*Bush v. Roberts* (Ga. App.) 92.

#### § 8. Motions.

Where an amendment to pleadings has been duly allowed, after the term has expired, the court cannot revoke the order of allowance and strike the amendment.—*Albany Phosphate Co. v. Hugger Bros.* (Ga. App.) 533.

\*A judgment on the pleadings for defendant setting up a counterclaim *held* proper.—*John Slaughter Co. v. Standard Sewing Mach. Co.* (N. C.) 599.

\*Rule as to filing of a motion to make pleading definite and certain, stated.—*Lawrence v. Lawrence* (S. C.) 9.

\*A motion to make a complaint more definite and certain is not a pleading nor an alternative remedy for a demurrer or answer.—*Lawrence v. Lawrence* (S. C.) 9.

\*An action by a passenger against a carrier for personal injury *held* one *ex delicto*, and so governed by Code Civ. Proc. 1902, § 186a, as to pleading and right of defendant to require an election.—*Taber v. Seaboard Air Line Ry.* (S. C.) 811.

\*Code Civ. Proc. 1902, § 186a, allowing pleading of all the acts of negligence, without right of defendant to require election, *held* to apply, though some of the acts occurred out of the state.—*Taber v. Seaboard Air Line Ry.* (S. C.) 811.

\*In an action by an employé for injuries, a motion to make the complaint more definite *held* properly overruled.—*Hughes v. Orangeburg Mfg. Co.* (S. C.) 404.

#### § 9. Issues, proof, and variance.

A receipt when offered in evidence *held* under the allegations of the answer relating thereto not objectionable as irrelevant because it did not refer to the matter in controversy.—*Austin v. Collier* (Ga.) 196.

A petition to recover for injuries against a railroad, wherein the facts set forth show liability from the relation of employer and employé, is sufficient to admit proof of such liability, though plaintiff claims that he was a passenger when injured.—*Southern Ry. Co. v. West* (Ga. App.) 141.

§ 372. The plea of not guilty puts in issue the credibility of the testimony, even if it is uncontradicted.—*American Nat. Bank v. Fountain* (N. C.) 738.

§ 381. Matter in justification must be pleaded.—*Puryear v. Ould* (S. C.) 863.

#### § 10. Defects and objections, waiver, and aid by verdict or judgment.

\*Under Civ. Code 1895, § 5045, an insufficient verification of a plea in abatement *held* an amendable defect, and it is too late to object thereto after issue joined.—*Wood v. United States Fidelity & Guaranty Co.* (Ga. App.) 97.

\*Under Civ. Code 1895, § 5047, the admission by defendant of a prima facie case in plaintiff to get the opening and closing argument *held* not to estop defendant from complaining of

prior rulings on demurrer.—*Albany Phosphate Co. v. Hugger Bros.* (Ga. App.) 533.

\*A party who submits to a ruling on the pleadings by filing an amendment waives his right to except on the ground that the amendment was unnecessary.—*Cowart v. Powell* (Ga. App.) 664.

§ 404. Under Civ. Code 1895, § 5046, where a want of jurisdiction is apparent on the face of the pleadings, it can be taken advantage of at any time by motion to strike.—*Geer v. Cowart* (Ga. App.) 1054.

The question of a variance between an affidavit for attachment and testimony cannot be raised by motion to nonsuit.—*Edward Bros. v. Erwin* (N. C.) 545.

### POLICE POWER.

Of municipality, see *Municipal Corporations*, § 7.

Regulating practice of pharmacy, see *Druggists*.

### POLICY.

Of insurance, see *Insurance*.

### POLITICAL RIGHTS.

Suffrage, see *Elections*.

### POLL TAXES.

Payment of as qualification of elector, see *Elections*, § 1.

### POSSESSION.

See *Adverse Possession*.

Of demised premises, see *Landlord and Tenant*, § 6.

### POST OFFICE.

Power of state to punish crime committed through mails, see *Criminal Law*, § 1.

### POWERS.

Creation by will, see *Wills*, § 9.

Of attorney, see *Principal and Agent*.

Of executor or administrator, see *Executors and Administrators*, § 3.

Of sale in mortgage, see *Mortgages*, § 4.

#### § 1. Creation, existence, and validity.

§ 9. No technical language need be used in the creation of a power.—*Powell v. Woodcock* (N. C.) 1071.

§ 9. A power of sale may be created by express words or by implication of law.—*Powell v. Woodcock* (N. C.) 1071.

#### § 2. Construction and execution.

§ 43. Exercise by life tenant of power of sale given by will *held* to convey a fee.—*Johnson v. Smith* (Va.) 958.

### PRACTICE.

Prosecution of actions in general, see *Action*, § 4.

In particular civil actions or proceedings.

See *Account*, § 1; *Account, Action on*; *Detinue*; *Ejectment*; *Habeas Corpus*, § 2; *Mandamus*, § 3; *Prohibition*; *Replevin*; *Trespass*, § 1.

\*Point annotated. See syllabus.

Accounting by executor or administrator, see Executors and Administrators, § 9.  
Condemnation proceedings, see Eminent Domain, § 3.

*Particular proceedings in actions.*

See Abatement and Revival; Appearance; Continuance; Costs; Damages, § 6; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; Parties; Pleading; Process; Removal of Causes; Trial; Venue. Nonsuit, see Trial, § 5.  
Revival of judgment, see Judgment, § 10.  
Verdict, see Trial, § 13.

*Particular remedies in or incident to actions.*  
See Attachment; Garnishment; Injunction; Receivers.

*Procedure in criminal prosecutions.*

See Criminal Law.  
For offenses against liquor laws, see Intoxicating Liquors, § 5.

*Procedure in exercise of special or limited jurisdiction.*

In equity, see Equity.  
In justices' courts, see Justices of the Peace, § 2.

*Procedure in or by particular courts or tribunals.*  
See Courts.

*Procedure on review.*

See Appeal and Error; Certiorari, § 1; Exceptions, Bill of; Justices of the Peace, § 3; New Trial.

## PREFERENCES.

Effect of insolvency of bank, see Banks and Banking, § 1.  
Effect of proceedings in bankruptcy, see Bankruptcy, § 1.

## PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 14-18.

## PRELIMINARY EXAMINATION.

On criminal charge, see Criminal Law, §§ 4, 14.

## PRELIMINARY INJUNCTION.

See Injunction, § 4.

## PRESCRIPTION.

Acquisition of rights, see Adverse Possession, § 1.

## PRESENTMENT.

Of bill or note, see Bills and Notes, § 2.

## PRESUMPTIONS.

As to regularity of administrator's sale, see Executors and Administrators, § 7.  
In civil actions, see Evidence, § 2.  
In criminal prosecutions, see Criminal Law, § 6; Homicide, § 4.  
On appeal or error, see Appeal and Error, §§ 11, 20.

## PRIMARY ELECTIONS.

See Elections, § 3.

## PRINCIPAL AND AGENT.

Admissions by agent, see Evidence, § 6.  
Embezzlement by agent, see Embezzlement.  
Performance of agreement to recommend agent, see Contracts, § 4.  
Proof as to liability of principal before establishment of agency, see Trial, § 3.  
Sales of liquor by agents, see Intoxicating Liquors, § 4.  
Set-off and counterclaim in action to recover for loss due to dishonesty of agent, see Set-Off and Counterclaim, § 2.  
Violation of Sunday laws by agent of carrier, see Sunday.

*Agency in particular relations, offices, or occupations.*

See Attorney and Client; Brokers.  
Corporate agents, see Corporations, § 3.

### § 1. The relation.

\*Where plaintiff bought goods from defendant for resale, and defendant recommended the employment by plaintiff of an agent to sell, the agent employed was the agent of plaintiff.—John Slaughter Co. v. Standard Sewing Mach. Co. (N. C.) 599.

§ 23. In an action against an alleged principal for the acts of his agent, evidence *held* sufficient to show the agency as to plaintiff, even though as between the alleged principal and agent such relation did not in fact exist.—McIntyre v. Smyth (Va.) 930.

### § 2. Mutual rights, duties, and liabilities.

Where it was claimed that a seller of a stock of goods before inventory sold a large quantity of the best goods to a company in which he was interested, which was thereafter incorporated, evidence of the incorporation, and that the seller had only a small interest, *held* relevant in rebuttal.—McCommons v. Williams (Ga.) 230; Williams v. McCommons, Id.

Plaintiffs by amending their petition during the trial so as to eliminate an allegation as to a parol license to defendant to sell certain goods *held* not to have thereby deprived defendant of the right to introduce evidence to prove his contention on such issue.—McCommons v. Williams (Ga.) 230; Williams v. McCommons, Id.

§ 69. A conveyance from the principal to the general agent is presumed fraudulent as a matter of law.—Smith v. Moore (N. C.) 892.

### § 3. Rights and liabilities as to third persons.

§ 99. A principal is bound by his agent's acts within the apparent scope of his authority.—McDonald v. Pearre Bros. & Co. (Ga. App.) 830.

§ 99. An agent authorized to do an act has apparent authority to do the things necessary to accomplish the authorized act.—McDonald v. Pearre Bros. & Co. (Ga. App.) 830.

§ 103. A commercial traveler authorized to receive and transmit orders had apparent authority to receive and transmit instructions to insure the goods ordered through him.—McDonald v. Pearre Bros. & Co. (Ga. App.) 830.

\*Plaintiffs *held* charged with knowledge of the retirement of a partner from the firm, and therefore not entitled to recover against the retiring partner for a debt of the firm subsequently contracted.—Straus, Gunst & Co. v. Sparrow & Co. (N. C.) 308.

\*If oral evidence was admissible to vary a written contract for a sale of goods by showing an oral agreement by the seller's agent, the burden *held* upon the buyer to show the agent's authority to make such agreement.—Dr. Shoop

\*Point annotated. See syllabus.

Family Medicine Co. v. J. A. Mizell & Co. (N. C.) 511.

If a distress warrant upon its face purported to be the act of P., as landlord, and the tenants upon whose property distress was made, as well as a magistrate making the levy, had no notice that P. was acting merely as agent, P. was estopped from claiming that he was a mere agent, in so far as the rights of the tenants are concerned.—Jones v. Parker (S. C.) 261.

\*Where a person sues out a distress warrant, and sends others to levy under it, he is liable for their misconduct while acting within the scope of their agency.—Jones v. Parker (S. C.) 261.

§ 194. In an action against an alleged principal, an instruction given at defendant's request as to existence of the agency held sufficiently favorable to defendant.—McIntyre v. Smyth (Va.) 930.

§ 194. In an action against an alleged principal, an instruction as to facts showing agency held correct.—McIntyre v. Smyth (Va.) 930.

§ 159. The act of an agent of the seller of an engine in testing it held within the scope of his authority, making the seller liable for damages from fire resulting from the agent's negligence.—Aultman & Taylor Machinery Co. v. Gay (Va.) 946.

## PRINCIPAL AND SURETY.

See Bonds.

Harmless error in granting relief to surety in vendor's lien proceeding, see Appeal and Error, § 14.

Liability of wife as surety, see Husband and Wife, § 2.

Liabilities on bonds for performance of duties of trust or office, see Receivers, § 2.

Parol or extrinsic evidence of relation, see Evidence, § 10.

Right of party to note to show that he is a mere surety as against bona fide holder, see Bills and Notes, § 1.

### § 1. Nature and extent of liability of surety.

A contract of suretyship is to be strictly construed in the surety's interest.—Board of Education of Miller County v. Fudge (Ga. App.) 154; Williams v. Board of Education of Miller County (Ga. App.) Id.

### § 2. Discharge of surety.

Where a mortgage on property of the principal debtor is taken simultaneously with the creation of suretyship, failure to have it properly probated within a reasonable time releases the surety.—Cordele Grocery Co. v. Thigpen (Ga. App.) 97.

§ 90. Equity of surety to be discharged when prejudiced by any act of the creditor held not to depend on the fact that it is inequitable in the creditor knowingly to prejudice the surety.—Smith v. First Nat. Bank (Ga. App.) 826.

§ 90. A surety on a note is discharged by a prejudicial act of the holder, notwithstanding he did not know of the suretyship when he took the instrument.—Smith v. First Nat. Bank (Ga. App.) 826.

§ 105. Surety held discharged by acceptance of the note of the principal debtor and another due at a later date for the same debt.—Smith v. First Nat. Bank (Ga. App.) 826.

§ 125. Under Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), the failure or refusal of the creditor to prove the debt in bankruptcy against the principal debtor held not to discharge the surety.—Jordan v. Farmers' & Merchants' Bank (Ga. App.) 1024.

§ 125. Under Civ. Code 1895, § 2972, mere nonaction by the creditor held not to release the surety.—Jordan v. Farmers' & Merchants' Bank (Ga. App.) 1024.

§ 126. Request by surety to creditor to collect debt must be in writing and in conformity to Civ. Code 1895, § 2974.—Jordan v. Farmers' & Merchants' Bank (Ga. App.) 1024.

### § 3. Remedies of creditors.

\*What would be a reasonable time for surety on contractor's bond to exercise his option to assume the contract on contractor's default held for the jury.—Thomason v. Keeney (Ga. App.) 470.

\*Reasonableness of notice to surety of contractor's default held for the jury.—Thomason v. Keeney (Ga. App.) 470.

\*Under a contractor's bond, held, that the surety should be given a reasonable time after contractor's default in which to exercise its option to assume and complete the contract.—Thomason v. Keeney (Ga. App.) 470.

\*Requirement in contractor's bond of immediate notice to surety of default by contractor held equivalent to a requirement of reasonable notice.—Thomason v. Keeney (Ga. App.) 470.

§ 143. In a suit on a note against three defendants, a plea by two of them that they were sureties, and setting up as a defense a total failure of consideration as to the principal, was improperly stricken.—Duggan v. Monk (Ga. App.) 1017.

§ 164. A creditor, who holds an execution against both principal and surety, may, at his election, proceed against either.—Jordan v. Farmers' & Merchants' Bank (Ga. App.) 1024.

## PRIORITIES.

Of claims against estate of decedent, see Executors and Administrators, § 5.

Of mortgages, see Chattel Mortgages, § 2; Mortgages, § 2.

## PRIVATE NUISANCE.

See Nuisance, § 1.

## PRIVATE ROADS.

Rights of way, see Easements.

## PRIVILEGE.

Effect on limitation, see Limitation of Actions, § 1.

Exemption from jury service, see Jury, § 2.

## PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see Witnesses, § 2.

## PRIVITY.

Between successive possessors holding adversely, see Adverse Possession, § 1.

## PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, § 1.

## PROBATE.

Of will, see Wills, § 3.

## PROCEDURE.

See cross-references under Practice.

\*Point annotated. See syllabus.

**PROCEEDS.**

Of mortgage foreclosure, see Mortgages, § 5.

**PROCESS.**

Effect of appearance, see Appearance.

Resistance or obstruction, see Obstructing Justice.

Service of as constituting commencement of action, see Action, § 4.

Setting aside judgment because of lack of service of process, see Judgment, § 8.

In actions against particular classes of persons.

See Corporations, § 3.

In particular actions or proceedings.

In criminal prosecutions, see Criminal Law, § 4.

Particular forms of writs or other process.

See Arrest; Execution; Garnishment; Injunction; Mandamus; Prohibition; Replevin.

**§ 1. Service.**

An order for publication of notice, as well as the statute authorizing it, must be strictly construed, in order to bind the party so served.—*Steinman v. Jesse* (Va.) 275.

**§ 2. Abuse of process.**

An action for malicious abuse of process lies on an improper use of the process after it issues, while malicious prosecution is for the malicious suing out of process without probable cause.—*Brantley v. Rhodes-Haverty Furniture Co.* (Ga.) 222; *Rhodes-Haverty Furniture Co. v. Brantley*, Id.

Evidence held to establish prima facie case for malicious abuse of process.—*Brantley v. Rhodes-Haverty Furniture Co.* (Ga.) 222; *Rhodes-Haverty Furniture Co. v. Brantley*, Id.

\*In an action for malicious abuse of process, consisting of employing process legally issued for an unlawful purpose, it is not necessary to allege or prove the termination of the action in plaintiff's favor but otherwise, if the abuse is in maliciously using legal process to institute a suit without probable cause.—*Brantley v. Rhodes-Haverty Furniture Co.* (Ga.) 222; *Rhodes-Haverty Furniture Co. v. Brantley*, Id.

A petition held to state a cause of action for malicious abuse of process.—*Brantley v. Rhodes-Haverty Furniture Co.* (Ga.) 222; *Rhodes-Haverty Furniture Co. v. Brantley*, Id.

**PROCESSIONING.**

Proceedings between tenants in common, see Tenancy in Common, § 2.

**PROHIBITION.**

Of traffic in intoxicating liquors, see Intoxicating Liquors.

**§ 1. Nature and grounds.**

§ 5. A police justice of a city held not to possess jurisdiction to impose a fine for digging up a street, where accused has set up a fee-simple ownership of the land though there is an absolute right of appeal.—*Martin v. City of Richmond* (Va.) 800.

§ 10. Prohibition lies to prevent a justice of the peace from exceeding his jurisdiction.—*Martin v. City of Richmond* (Va.) 800.

§ 10. Prohibition held to lie to restrain the police justice of a city from proceeding with a prosecution of defendant for digging up a street in violation of an ordinance.—*Martin v. City of Richmond* (Va.) 800.

\*Point annotated. See syllabus.

**PROOF.**

Of death, see Death, § 1.

**PROPERTY.**

Adjoining lands, see Adjoining Landowners.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 2, 6.

Licenses in respect to real property, see Licenses, § 2.

Measure of damages for deprivation of use of, see Damages, § 4.

Particular species of property.

See Mines and Minerals.

Logs or lumber, see Logs and Logging.

Transfers and other matters affecting title.

See Adverse Possession.

Dedication to public use, see Dedication.

Taking for public use, see Eminent Domain.

**PROSTITUTION.**

\*"Street walking" defined.—*Callaway v. Mims* (Ga. App.) 654.

**PROTEST.**

Of bill or note, see Bills and Notes, § 2.

To entry on public lands, see Public Lands, § 1.

**PROVINCE OF COURT AND JURY.**

In civil actions, see Trial, § 6.

In criminal prosecutions, see Criminal Law, § 21.

**PROXIMATE CAUSE.**

Direct or remote consequences of injury, see Damages, § 2.

Of injury, see Negligence, § 2.

Of injury caused by explosive, see Explosives.

Of injury caused by operation of railroad, see Railroads, § 7.

Of injury to passenger, see Carriers, § 16.

Of injury to servant, see Master and Servant, § 12.

**PUBLICATION.**

Of notice of partnership dissolution, see Partnership, § 4.

Service of process, see Process, § 1.

**PUBLIC DEBT.**

See Counties, § 3; Municipal Corporations, § 9; Schools and School Districts, § 1.

**PUBLIC IMPROVEMENTS.**

By municipalities, see Municipal Corporations, § 6.

**PUBLIC LANDS.****§ 1. Disposal of lands of the states.**

Where defendant entered an island as lying in New Hanover county, and plaintiffs filed a protest in the entry proceedings under a grant of the island lying in Brunswick county, whether it lay in one county or the other held determinable in the protest proceedings.—*Ullery v. Guthrie* (N. C.) 552.

**PUBLIC POLICY.**

Affecting right of action for wrongful death, see Death, § 2.

Affecting rule of stare decisis, see Courts, § 2.

## PUBLIC SCHOOLS.

See Schools and School Districts, § 1.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

Exercise of power of eminent domain, see Eminent Domain, § 1.

Liability of light company for injuries caused by negligence in general, see Negligence, § 1. Mandamus to compel performance of duties, see Mandamus, § 2.

Water companies, see Waters and Water Courses, § 3.

## PUBLIC USE.

Dedication of property, see Dedication.

Taking property for public use, see Eminent Domain.

## PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 3.

## PUNISHMENT.

See Criminal Law, § 28.

Review of discretionary rulings in fixing, see Criminal Law, § 27.

## PUNITIVE DAMAGES.

For injuries caused by act of servant, see Master and Servant, § 15.

Harmless error in instructions on, see Appeal and Error, § 14.

## QUALIFICATION.

Of members of council, see Municipal Corporations, § 4.

## QUESTIONS FOR JURY.

In civil actions, see Trial, § 5.

In criminal prosecutions, see Criminal Law, § 21; Homicide, § 5.

## QUIETING TITLE.

To mineral lands, see Mines and Minerals, § 1.

### § 1. Right of action and defenses.

The general rule that one must be the owner of property to maintain an action to remove a cloud from the title *held* to have no application in certain case.—Turner v. Barber (Ga.) 587.

### § 2. Proceedings and relief.

Where, in an action to restrain trespass and to cancel claim of title, one defendant disclaims title, and a third party was made defendant, and the suit proceeded against her, evidence of executions against the party disclaiming title was inadmissible.—Wiggins v. Brewster (Ga.) 40.

## RAILROADS.

See Street Railroads.

Applicability of instructions to case in action for injuries caused by operation of, see Trial, § 9.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.

Construction of deed to, see Deeds, § 3.

Diversion of surface waters by construction of, see Waters and Water Courses, § 2.

Exercise of power of eminent domain, see Eminent Domain, §§ 1, 2.

Harmless error in action for death caused by operation of, see Appeal and Error, § 16.

Opinion evidence in action for death caused by operation of, see Evidence, § 11.

Opinion evidence in action for injuries caused by construction of, see Evidence, § 11.

Opinion evidence in action for injuries caused by operation of, see Evidence, § 11.

Province of court and jury in prosecution for offense against Sunday law, see Criminal Law, § 21.

Restraining judicial sale of freight car, see Judicial Sales.

Review of verdict in action for death caused by operation of, see Appeal and Error, § 13.

Storing dynamite on right of way as nuisance, see Nuisance, § 1.

Sufficiency of instructions in action for injuries by fire caused by operation of, see Trial, § 8.

Sufficiency of instructions in action for injuries caused by operation of, see Trial, § 8.

Taking of property of in exercise of power of eminent domain, see Eminent Domain, § 2.

Violation of Sunday laws, see Sunday.

### § 1. Railroad companies.

§ 17. The authority of a railroad conductor *held*, ordinarily, to extend only to the control of the movements of his train and its employes.—Taylor v. Baltimore & O. R. Co. (Va.) 798.

### § 2. Right of way and other interests in land.

A petition to recover certain land conveyed to a railroad company for railroad purposes which it had permitted C. to use for private purposes *held* insufficient.—Harrold v. Seaboard Air-Line Ry. (Ga.) 326.

\*Where lands were conveyed to a railroad company for railroad purposes, the fact that only a small portion thereof was used for railroad purposes would not work a forfeiture of the lands not used.—Harrold v. Seaboard Air-Line Ry. (Ga.) 326.

§ 68. Deed of a railroad right of way *held* to convey only a right through that particular part of the grantee's land as was actually touched by the grantee's original main line.—American Spinning Co. v. Southern Ry. Co. (S. C.) 787.

### § 3. Construction, maintenance, and equipment.

In an action against a railroad company for damages to plaintiff's land from the construction of its road, judgment for plaintiff *held* erroneous.—Louisville & N. R. Co. v. Chapman (Ga.) 583.

\*The compensation for an easement in land taken by condemnation being for its use with due regard to the rights of the servient owner, recovery may be had for damages from the negligent construction of a railroad, though the right of way was acquired by condemnation.—Davenport v. Norfolk & S. R. Co. (N. C.) 431.

### § 4. Sales, leases, traffic contracts, and consolidation.

§ 134. A lessor railroad company *held* liable for the acts of its lessee done in the performance of the public duties of lessor.—McCulloch v. Southern Ry. Co. (N. C.) 1096.

§ 134. A lessor railroad company *held* not liable for the acts of its lessee done outside of its rights under the lease, and not in the performance of the public duties of lessor.—McCulloch v. Southern Ry. Co. (N. C.) 1096.

§ 134. Taking of land by lessee railroad company, which may be justified under charter of lessor, *held* lawful.—McCulloch v. Southern Ry. Co. (N. C.) 1096.

\*Point annotated. See syllabus.

**§ 5. Operation—Statutory, municipal, and official regulations.**

The blow post law (Civ. Code 1895, § 2222) does not apply to railroad crossings over ways not public highways.—*McCoy v. Central of Georgia Ry. Co. (Ga.)* 297.

In an action for intestate's death while attempting to stop a train to prevent a collision with a wagon, intestate *held* not to have lost the benefit of the statute requiring crossing signals by leaving the crossing some distance to stop the train.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

**§ 6. — Injuries to licensees or trespassers in general.**

\*One riding on the engine of a passenger train by invitation of the employes, without intending to pay any fare, *held* a trespasser, and his widow had no cause of action for his killing from the derailment of the train through defects in the track.—*Morris v. Georgia R. & Banking Co. (Ga.)* 579.

Constructive knowledge by an engineer of the presence of a trespasser, through the fireman's actual knowledge of his presence, *held* insufficient to raise a duty toward the trespasser.—*Seaboard Air Line Ry. v. Chapman (Ga. App.)* 488.

§ 276. A railway company is not liable for the death of a trespasser on one of its locomotives in the absence of willful or wanton negligence.—*Bailey v. North Carolina R. Co. (N. C.)* 912.

§ 276. One who boarded a switch engine in a switch yard without invitation, and in violation of the company's rule, was a trespasser, to whom the company did not owe the duty it owes its employes rightfully on the engine.—*Bailey v. North Carolina R. Co. (N. C.)* 912.

§ 281. That a switchman left a cross-over switch open from 5 to 15 minutes before a resulting wreck *held* not to show wanton negligence towards those on an engine, which afterwards stood near the switch.—*Bailey v. North Carolina R. Co. (N. C.)* 912.

**§ 7. — Accidents at crossings.**

As Shannon's Code Tenn. §§ 1574, 1575, do not apply to trains engaged in switching in railroad yards, *held*, that it was not error to instruct that a violation thereof would render the company liable, where there was no evidence that the injury complained of happened in the railroad yards.—*Alabama Great Southern R. Co. v. Hardy (Ga.)* 71.

A charge relative to Shannon's Code Tenn. §§ 1574, 1575, *held* erroneous as being an expression of opinion as to what would constitute due care on the part of a lookout on a locomotive.—*Alabama Great Southern R. Co. v. Hardy (Ga.)* 71.

A charge in an action based in part on Shannon's Code Tenn. §§ 1574, 1575, requiring a railroad to have a person on the locomotive always on the lookout, *held* not open to the criticism that it failed to take into account the relative negligence of the railroad and the person killed.—*Alabama Great Southern R. Co. v. Hardy (Ga.)* 71.

§ 350. In an action against a railroad for injury in a crossing accident, whether plaintiff was guilty of contributory negligence *held* for the jury.—*Inman v. North Carolina R. Co. (N. C.)* 878.

§ 350. Where the view at a railroad crossing is obstructed, or facts exist which tend to complicate the question as to whether sufficient caution was exercised, the question of contributory negligence is for the jury.—*Inman v. North Carolina R. Co. (N. C.)* 878.

§ 348. In an action against a railroad for injury in a crossing accident, the evidence *held* to sustain a finding that plaintiff was injured by defendant's negligence.—*Inman v. North Carolina R. Co. (N. C.)* 878.

\*A traveler exercising reasonable care in approaching a crossing *held* entitled to use whatever means are apparently necessary to avoid a collision with an approaching car.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

In an action against a railroad for injuries to a traveler at a crossing, an instruction applying the doctrine of sudden peril to the facts *held* not erroneous.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

An instruction, in an action against a railroad for injuries to a traveler at a crossing, relating to contributory negligence and the primary wrong *held* not erroneous and misleading.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

In an action against a railroad for injuries to a traveler at a crossing, an instruction *held* not erroneous in view of the issue submitted.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

In an action for injuries to a traveler at a crossing, an instruction *held* not erroneous under the evidence.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

\*An instruction in an action against a railroad for injuries to a traveler at a crossing *held* not to impose on the railroad too great a burden in establishing the defense of contributory negligence.—*Douglass v. Southern Ry. Co. (S. C.)* 15.

\*In an action for death of a pedestrian at a railroad crossing, deceased *held* negligent as a matter of law.—*Griskell v. Southern Ry. Co. (S. C.)* 205.

Where intestate's team was stalled on defendant's track and he got out and ran down the track to stop the train, it was not negligence per se to go on the track for that purpose.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

\*In an action for death of a traveler at a crossing, whether defendant's failure to give signals was negligence contributing to bringing intestate into the situation, which caused his death, *held* for the jury.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

In an action for intestate's death by being struck by defendant's train while attempting to prevent a collision with his team, the issue of punitive damages *held* properly submitted.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

In an action for intestate's death by being struck by a train while he was on the track endeavoring to stop it so as to prevent a collision with his wagon, evidence *held* insufficient to show contributory negligence in not leaving the track before he was struck.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

\*In an action for intestate's death by being struck by defendant's train, the evidence *held* insufficient to show negligence by defendant's engineer in failing to stop the train in time.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

\*In an action for intestate's death by being struck by a train while he was attempting to stop a collision with his team, all reasonable efforts to stop the train before it struck his team *held* rendered necessary by defendant's negligent failure to give crossing signals.—*Thompson v. Seaboard Air Line Ry. (S. C.)* 396.

\*In an action for intestate's death by being struck by a train while trying to stop it to prevent a collision, the company's negligence in failing to repair a bridge causing intestate's

\*Point annotated. See syllabus.

team to be stalled on the track *held* the proximate cause of his death.—*Thompson v. Seaboard Air Line Ry.* (S. C.) 396.

\*In an action against a railroad for death of the driver of a vehicle at a crossing, certain counts of the declaration *held* to each state a good cause of action.—*Norfolk & W. Ry. Co. v. Davis' Adm'r* (Va.) 337.

\*In an action against a railroad for death of one crossing the track, a complaint *held* defective in the absence of averments showing that, notwithstanding contributory negligence, defendant by ordinary care after discovering decedent's danger might have avoided the injury.—*Norfolk & W. Ry. Co. v. Davis' Adm'r* (Va.) 337.

\*In an action against a railroad for the death of the driver of a vehicle at a crossing, the complaint *held* to show contributory negligence on decedent's part.—*Norfolk & W. Ry. Co. v. Davis' Adm'r* (Va.) 337.

\*In an action against a railroad for the death of the driver of a vehicle at a crossing, defendant *held* not liable, in the absence of evidence that the trainmen failed to exercise ordinary care to avoid the accident after decedent left a place of safety and started on the crossing.—*Norfolk & W. Ry. Co. v. Davis' Adm'r* (Va.) 337.

\*In an action against a railroad for the death of the driver of a vehicle at a crossing, defendant's trainmen *held* entitled to presume that decedent would not go on the track.—*Norfolk & W. Ry. Co. v. Davis' Adm'r* (Va.) 337.

#### § 8. — Injuries to persons on or near tracks.

\*Plaintiff, injured by a train *held* guilty of contributory negligence barring recovery.—*Southern Ry. Co. v. Hogan* (Ga.) 64.

§ 367. Where neither the engineer nor fireman saw a person when he was struck, *held*, that there was negligence in not keeping a proper lookout.—*Thompson v. Aberdeen & A. R. Co.* (N. C.) 883.

§ 362. A railroad company is negligent in operating a train at night without a headlight.—*Thompson v. Aberdeen & A. R. Co.* (N. C.) 883.

§ 397. In an action for the death of a person on a railroad track, *held* error to exclude evidence that the track was habitually used as a way.—*Thompson v. Aberdeen & A. R. Co.* (N. C.) 883.

§ 400. Evidence in an action for death *held* sufficient to go to the jury on the question of whether decedent's death resulted from negligence of the railroad company.—*Thompson v. Aberdeen & A. R. Co.* (N. C.) 883.

§ 400. In an action against a railroad backing a train against a pedestrian at a place used by the public as a common walkway, the question whether lanterns in the hands of men standing on the car gave warning of the train's approach *held* for the jury.—*Allen v. North Carolina R. Co.* (N. C.) 1079.

§ 369. It is negligence for a railroad to back its train in the nighttime, along a place used by the public as a common walkway, without a light on the end of the train so as to give warning of its approach.—*Allen v. North Carolina R. Co.* (N. C.) 1079.

§ 383. The failure of a railroad, backing its train in the nighttime along a place used by the public as a common walkway, to have a light on the end of the train *held* not to relieve a pedestrian from the consequences of his negligence in failing to look and listen for trains.—*Allen v. North Carolina R. Co.* (N. C.) 1079.

The consent of the railroad that intestate should enter on its track to stop its train by signals to prevent a collision with intestate's wagon stalled at a crossing *held* to be presumed, in an action for intestate's death.—*Thompson v. Seaboard Air Line Ry.* (S. C.) 396.

§ 358. A bare licensee upon a railroad track takes upon himself all ordinary risks attached to the place and the business carried on there.—*Harlow's Adm'r v. Chesapeake & O. Ry. Co.* (Va.) 941.

§ 398. Evidence in an action against a railroad company considered, and *held* insufficient to show notice of the defective condition of one of its cars.—*Harlow's Adm'r v. Chesapeake & O. Ry. Co.* (Va.) 941.

#### § 9. — Fires.

§ 483. Where plaintiff was in possession of turpentine and resin, still remaining on pine trees, but had no title to the land, the measure of damages for the destruction of the turpentine and resin by fire is its market value.—*Atlantic Coast Line R. Co. v. Davis & Brandon* (Ga. App.) 1022.

§ 456. A steam railway company must exercise ordinary care to keep its tracks and right of way free from combustible materials.—*Atlantic Coast Line R. Co. v. Davis & Brandon* (Ga. App.) 1022.

§ 456. An action will lie for negligence in keeping combustible material on a right of way, though the engine from which the fire escapes was properly equipped and handled.—*Atlantic Coast Line R. Co. v. Davis & Brandon* (Ga. App.) 1022.

§ 465. The liability of a railroad company for damages from failure to keep its right of way clear of combustible materials is not defeated by the fact that adjacent landowners' fields are in a similar condition.—*Atlantic Coast Line R. Co. v. Davis & Brandon* (Ga. App.) 1022.

§ 472. Complaint against a railroad company for damages by fire *held* to state a cause of action at common law for negligence, and not under Civ. Code 1902, § 2135.—*Hutto v. Seaboard Air Line Ry.* (S. C.) 835.

§ 473. A person who stored cotton seed in a house erected on a railroad company's right of way under a certain agreement, without knowledge, express or implied, of such agreement, *held* not bound thereby.—*Hutto v. Seaboard Air Line Ry.* (S. C.) 835.

§ 490. Communication of fire by a railroad engine *held* sufficient to raise a presumption of negligence against the company.—*Hutto v. Seaboard Air Line Ry.* (S. C.) 835.

§ 482. Evidence *held* to authorize a finding that cotton seed destroyed by fire was upon the railroad company's right of way not unlawfully, but with its consent, so as not to fall within the exception of Civ. Code 1902, § 2135.—*Hutto v. Seaboard Air Line Ry.* (S. C.) 835.

§ 484. Evidence in an action against a railroad for destruction of property by fire *held* sufficient to go to the jury on the question of whether the fire was communicated from a locomotive.—*Hutto v. Seaboard Air Line Ry.* (S. C.) 835.

## RATIFICATION.

By inhabitants of act annexing territory to municipal corporation, see Municipal Corporations, § 1.

By municipal authorities of act of committee in changing grade of street, see Municipal Corporations, § 8.

\*Point annotated. See syllabus.

## REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, § 1.  
 Applicability of instructions to case, see Trial, § 9.  
 Construction of instructions, see Trial, § 12.  
 Self-serving declarations, see Evidence, § 7.

## REAL ESTATE AGENTS.

See Brokers.

## REASONABLE DOUBT.

See Criminal Law, §§ 6, 15, 22, 23.

## REBUTTAL

Evidence, see Trial, § 3.

## RECEIVERS.

For life estate, see Life Estates.  
 Of corporations in general, see Corporations, § 4.

### § 1. Actions.

§ 178. Allowing an amendment changing the plaintiff from the receiver to a creditor of the corporation, *held* to be in the court's discretion.—*Buist v. Williams* (S. C.) 859.

### § 2. Liabilities on bonds or undertakings.

§ 212. A surety of a special receiver appointed in vendor's lien proceedings, and authorized by the court to sell purchase-money bonds, became responsible for a proper accounting of the money received therefor by such receiver.—*Bowman v. Liskey* (Va.) 942.

§ 217. In a suit, by the surety of a special receiver appointed in vendor's lien proceedings to compel an accounting by the purchaser of bonds from such receiver which he was authorized by the court to sell, the evidence *held* to show that the purchaser paid a part of the purchase money of the bonds to the receiver on the understanding that he was to receive it back in payment of a personal indebtedness of the receiver.—*Bowman v. Liskey* (Va.) 942.

§ 217. In a suit by the surety of a special receiver appointed in vendor's lien proceedings, who was authorized by the court to sell a purchase-money bond for cash, against the purchaser of the bond to compel an accounting for its purchase price, the surety claiming that the purchaser did not in fact pay cash for the bond, the purchaser was entitled to credit for checks given the receiver and actually paid, but was liable for a purported payment thereon, which was applied to a personal debt due him from the receiver.—*Bowman v. Liskey* (Va.) 942.

## RECEIVING STOLEN GOODS.

\*On a trial in the superior court for receiving stolen property, *held* incumbent on accused to prove the value thereof, before he could rely thereon, in diminution of sentence.—*State v. Dixon* (N. C.) 615.

## RECORDERS COURT.

Establishment of, see Courts, § 2.

## RECORDS.

Of deeds, see Deeds, § 2.  
 Transcript on appeal or writ of error, see Appeal and Error, § 6; Criminal Law, § 27.

\*Point annotated. See syllabus.

§ 6. Upon being satisfied that a report of commissioners in partition found in private files was an original paper belonging to his office and should be recorded, the clerk of the county court was found to file and record it.—*Hill v. Lane* (N. C.) 1074.

§ 6. In the absence of a contrary showing, it must be presumed that the clerk of the county court duly recorded a report of commissioners in partition as required by an order of the court.—*Hill v. Lane* (N. C.) 1074.

## REDELIVERY.

Of property taken in replevin, see Replevin, § 2.

## REDEMPTION.

For mortgage, see Mortgages, § 6.

## REFERENCE.

See Arbitration and Award.

Review on appeal or writ of error of findings of referee, see Appeal and Error, § 13.

## REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

### § 1. Right of action and defenses.

§ 14. A mistake of law in putting words limiting a grantee's estate in the habendum instead of the premises of a deed *held* correctible by a court of equity.—*Condor v. Secrest* (N. C.) 921.

### § 2. Proceedings and relief.

§ 37. A defendant, in an action for the specific performance of a contract, may, by way of defense or counterclaim, invoke the aid of equity to reform the contract.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 37. A plaintiff, in an action for the specific performance of a contract, *held* entitled to ask the court to reform the contract and permit him to perform it as reformed.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 45. Evidence *held* to show that a stipulation in a contract for the sale of real estate was omitted by mistake from the written contract justifying reformation.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 46. The court *held* not entitled to withhold a case involving the right to reform a written instrument from the jury where there is more than a scintilla of evidence.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 47. A vendor praying for the reformation of his contract for the conveyance of real estate *held* required to waive the purchaser's forfeiture as a condition to obtaining relief.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 48. A contract for the conveyance of real estate construed, and *held*, that a provision inserted therein by the court by way of reformation was a covenant, and not a condition.—*Cuthbertson v. Morgan* (N. C.) 744.

§ 45. Evidence *held* to show that the placing of words limiting an estate conveyed, in the habendum instead of in the premises of a deed was a mistake of law of the draftsman and the parties, and not a mistake of fact of the draftsman.—*Condor v. Secrest* (N. C.) 921.

## REGISTRATION.

See Deeds, § 2; Records.

Of voters, see Elections, § 2.



**REHEARING.**

See New Trial.

**RELEASE.**

See Compromise and Settlement; Payment.  
From liability for rent, see Landlord and Tenant, § 3.

**§ 1. Requisites and validity.**

\*Petition *held* not to show incapacity to contract, or fraud, so as to authorize the setting aside of a release for personal injuries.—*Smith v. Georgia R. & Banking Co. (Ga.)* 673.

\*Release discharging carrier from a claim for damages for personal injuries *held* not to be repudiated on the ground that the agent agreed to obtain from the carrier an agreement for an additional amount, if the injuries proved more serious.—*Smith v. Georgia R. & Banking Co. (Ga.)* 673.

**§ 2. Pleading, evidence, trial, and review.**

\*A petition disclosing that the real cause of a complaint was supplement to a complete written release by parol promise *held* not saved from demurrer by certain other allegations.—*Smith v. Georgia R. & Banking Co. (Ga.)* 673.

**RELEVANCY.**

Of evidence in civil actions, see Evidence, § 4.  
Of evidence in criminal prosecutions, see Criminal Law, § 7.

**RELIGIOUS SOCIETIES.**

Disturbance of worship, see Disturbance of Public Assemblage.

**REMAINDERS.**

See Life Estates.

Creation by will, see Wills, § 7.  
Rights of remaindermen to prevent waste by life tenant, see Life Estates.

\*Remaindermen do not have their cause of action until the death of the life-tenant, and prescription does not begin to run against them until then.—*Brinkley v. Bell (Ga.)* 67.

A deed reserving a life estate gives the grantee no right to enter on the land during the life tenancy.—*Sessoms v. Tayloe (N. C.)* 424.

**REMAND.**

Of cause on appeal or writ of error, see Appeal and Error, § 25.

**REMEDY AT LAW.**

Effect on jurisdiction of equity, see Injunction, § 1.  
Effect on jurisdiction of equity to restrain opening of highway, see Highways, § 1.

**REMITTITUR.**

Of cause on appeal or writ of error, see Appeal and Error, § 25.  
So as to bring action within jurisdiction of justice's court, see Justices of the Peace, § 1.

**REMOVAL.**

Of executor or administrator, see Executors and Administrators, § 1.

**REMOVAL OF CAUSES.**

Change of venue or place of trial, see Venue, § 2.

**§ 1. Origin, nature, and subject of controversy.**

§ 23. An action *held* not to involve a question of the appropriation of property against the owner's will under the power of eminent domain, of which a federal court would not have jurisdiction so as to prevent a removal, but to involve solely a question of damages.—*McCulloch v. Southern Ry. Co. (N. C.)* 1096.

**§ 2. Amount or value in controversy.**

§ 74. The right to remove an action, where in a money judgment is demanded, to the federal court *held* determined by the sum demanded at the time the petition for removal is filed.—*McCulloch v. Southern Ry. Co. (N. C.)* 1096.

**§ 3. Proceedings to procure and effect of removal.**

§ 89. Under Act March 3, 1887, c. 373, § 1, 24 Stat. 554 (U. S. Comp. St. 1901, p. 510), the jurisdiction of a state court *held* to cease on the filing of a bond and petition for removal.—*McCulloch v. Southern Ry. Co. (N. C.)* 1096.

**REMOVAL OF CLOUD.**

See Quieting Title.

**RENT.**

See Landlord and Tenant, § 5.

Rights to between co-tenants, see Tenancy in Common, § 1.

**REPLEVIN.**

See Detinue.

**§ 1. Right of action and defenses.**

\*Rule as to propriety of replevin or claim and delivery as a remedy to recover possession of deeds, etc., stated.—*Bridgers v. Ormond (N. C.)* 422.

Plaintiff *held* not to have voluntarily surrendered personal property in controversy, so as to preclude him from maintaining claim and delivery to recover it.—*Taylor v. F. T. Mills & Son (N. C.)* 556.

**§ 2. Proceedings for taking and redelivery of property.**

\*It is not essential to an action to recover personalty that plaintiff resort to the provisional remedy of claim and delivery.—*Bridgers v. Ormond (N. C.)* 422.

**§ 3. Pleading and evidence.**

\*A petition setting forth the name of each article sued for and the value is sufficiently definite.—*Charles v. Valdosta Foundry & Machine Co. (Ga. App.)* 493.

A variance, if any, between allegations and proof, *held* to be disregarded under Revisal 1905, § 515, making immaterial any variance of the allegation in a pleading and the proof, where the adverse party has not been prejudiced.—*Andrews v. Grimes (N. C.)* 519.

The submission of the issue whether defendants, after an alleged sale of tobacco to plaintiffs, agree that the tobacco should remain on defendants' land as plaintiffs' property, *held* proper under the pleading.—*Andrews v. Grimes (N. C.)* 519.

In claim and delivery for tobacco sold to plaintiffs, evidence that plaintiffs had insured the tobacco immediately after the sale *held* competent.—*Andrews v. Grimes (N. C.)* 519.

\*Point annotated. See syllabus.

**§ 4. Trial, judgment, enforcement of judgment, and review.**

In replevin, the verdict directed by the court, for a less sum than the amount testified to by either witness as the value of the property, was not error.—*Charles v. Valdosta Foundry & Machine Co.* (Ga. App.) 493.

In replevin, the measure of plaintiff's damages was the value of the property at the time of wrongful taking, with interest, and not the amount plaintiff paid therefor and interest.—*Taylor v. F. T. Mills & Son* (N. C.) 556.

**REQUESTS.**

For instructions in civil actions, see Trial, § 10.  
For instructions in criminal prosecutions, see Criminal Law, § 23.

**RESALE.**

Of goods by seller, see Sales, § 3.

**RESCISSION.**

Cancellation of written instrument, see Cancellation of Instruments.  
Of contract, see Contracts, § 3.  
Of contract for sale of land, see Vendor and Purchaser, § 2.  
Of exchange of property, see Exchange of Property.

**RES GESTÆ.**

In civil actions, see Evidence, § 4.  
In criminal prosecutions, see Criminal Law, § 7.

**RES IPSA LOQUITUR.**

Application of doctrine in action for injuries to servant, see Master and Servant, § 12.  
Application of doctrine in action for negligence, see Negligence, § 4.

**RES JUDICATA.**

See Judgment, §§ 6, 7.

**RESTRICTIONS.**

In deeds, see Deeds, § 3.

**RESULTING TRUSTS.**

See Trusts, § 1.

**RETROSPECTIVE LAWS.**

See Statutes, § 5.

**RETURN.**

Of execution, see Execution, § 6.

**REVENUE.**

See Taxation.

**REVERSIONS.**

The possibility of a reverter, after the termination of a fee conditional, is not an estate.—*Vaughn v. Lanford* (S. C.) 316.

**REVIEW.**

See Appeal and Error; Certiorari; Criminal Law, § 27; Justices of the Peace, § 3.  
Bill in equity, see Equity, § 4.

**REVIVAL.**

Of judgment, see Judgment, § 10.

**RIGHT OF WAY.**

See Easements.

Of railroads, see Railroads, § 2.

**RIPARIAN RIGHTS.**

See Waters and Water Courses, § 1.

**RISKS.**

Assumed by employé, see Master and Servant, §§ 8, 13, 14.

**ROADS.**

See Highways.

Streets in cities, see Municipal Corporations, § 8.

**RULES.**

Of court as to dismissal on appeal or writ of error, see Appeal and Error, § 8.  
Of court as to procedure on appeal or writ of error, see Appeal and Error, § 6.  
Of water companies, see Waters and Water Courses, § 3.

**RULES OF COURT.**

See Courts, § 2.

As to procedure on appeal or writ of error, see Appeal and Error, § 24.

Waiver of errors on appeal or error, see Appeal and Error, § 19.

**SALES.**

Action for wrongful acts of agent in making sale, see Principal and Agent, § 2.  
Bulk stock laws as denial of equal protection of law, see Constitutional Law, § 5.  
Bulk stock laws as denying due process of law, see Constitutional Law, § 6.  
Conclusiveness of judgment for price of goods, see Judgment, § 7.  
Conditional bill of sale as documentary evidence, see Evidence, § 9.  
Creation of power of sale, see Powers, § 1.  
Harmless error in action for penalty for illegal sale, see Appeal and Error, § 18.  
Opinion evidence in action for breach of warranty, see Evidence, § 11.  
Parol or extrinsic evidence, see Evidence, § 10.  
Sale of goods on Sunday, see Sunday.

*Sales by or to particular classes of persons.*  
See Husband and Wife, § 2.

*Sales of particular species of, or estates or interests in, property.*

See Intoxicating Liquors.

Corporate stock, see Corporations, § 1.

Fertilizer, see Agriculture.

Realty, see Vendor and Purchaser.

\*Point annotated. See syllabus.

*Sales on judicial or other proceedings.*

See Execution, § 5; Judicial Sales.

Foreclosure proceedings, see Chattel Mortgages, § 3.

Of property of decedent under order of court, see Executors and Administrators, § 7.

Of trust property under order of court, see Trusts, § 3.

On foreclosure of mortgage, see Mortgages, §§ 4, 5.

**§ 1. Requisites and validity of contract.**

§ 40. That, on a buyer of coal telling him that he was buying it to burn brick, the salesman told him that the grade contracted for would burn brick, and was used for that purpose, does not tend to show fraud or deceit on the seller's part.—*Wooldridge v. Brown* (N. C.) 1076.

**§ 2. Construction of contract.**

\*Evidence *held* not to show a contract by defendant to deliver a cargo of salt to plaintiffs on any definite date.—*Sumrell & McCoy v. International Salt Co.* (N. C.) 619.

**§ 3. Performance of contract.**

Damages resulting from delay in shipment of goods sold *held* not waived as a matter of law.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

§ 161. Removal by the seller's agent of an engine from the car on which it was shipped *held* not a delivery to the purchaser.—*Aultman & Taylor Machinery Co. v. Gay* (Va.) 946.

**§ 4. Operation and effect.**

Under Civ. Code, 1895, § 3546, the loss of cotton sold and destroyed by fire falls on the buyer where the seller could not have collected the price if the cotton had not been destroyed, where it was sold at an agreed price per pound until weighed to ascertain the number of pounds.—*Deadwyler & Co. v. Karow & Forrer* (Ga.) 172.

\*Where the consideration for a sale is impossible to determine, there is no sale.—*Deadwyler & Co. v. Karow & Forrer* (Ga.) 172.

\*Where a bill of sale specified the property sold as named articles of machinery bought from the vendor, it is sufficient to put all persons dealing with the vendee on notice of the vendor's title.—*Charles v. Valdosta Foundry & Machine Co.* (Ga. App.) 493.

§ 201. A carrier does not become the consignee's agent, unless the goods are delivered in accordance with the consignee's instructions.—*McDonald v. Pearre Bros. & Co.* (Ga. App.) 830.

§ 201. Delivery of goods uninsured to a carrier which had been ordered shipped insured did not make the carrier the buyer's agent from the date of delivery.—*McDonald v. Pearre Bros. & Co.* (Ga. App.) 830.

§ 201. A seller *held* not entitled to recover the price of goods from the buyer which had been ordered shipped insured, when they were shipped uninsured and lost.—*McDonald v. Pearre Bros. & Co.* (Ga. App.) 830.

\*Where plaintiffs purchased tobacco from defendants, the tobacco to remain on defendants' land as plaintiffs' property, the title and right to possession passed upon the delivery and agreement, and the liability of plaintiffs accrued at that time, though the purchase money was not paid.—*Andrews v. Grimes* (N. C.) 519.

\*Where a seller delivers goods sold to a carrier, title passes on delivery; but, where the contract is to deliver the goods to the buyer, title does not pass until they are in his possession.—*Acme Paper Box Factory v. Atlantic Coast Line R. Co.* (N. C.) 557.

§ 233. Certain evidence *held* admissible in support of the title of a buyer as against a subsequent mortgagee.—*Leak v. Bank of Wadesboro* (N. C.) 733.

\*Under a contract of sale title *held* not to vest in purchaser till draft, with bill of lading attached, was paid.—*State v. Malony* (S. C.) 215.

**§ 5. Warranties.**

§ 261. Evidence *held* not to show a warranty of the quality of coal or its fitness for burning brick.—*Wooldridge v. Brown* (N. C.) 1076.

§ 261. While no specific form of words is essential to a warranty of soundness, the seller must, by some appropriate language, show an intent to make a warranty, and the buyer must understand that one is being given.—*Wooldridge v. Brown* (N. C.) 1076.

**§ 6. Remedies of seller.**

Evidence in attachment for the price of cars sold *held* sufficient to make out a prima facie case.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

Though there may have been a written contract, yet where suit was brought on an open account, and the evidence for the seller showed that he had fully performed, a nonsuit was properly refused.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

Under a declaration in attachment on an account for the price of cars, evidence *held* admissible to show that the cars were in defendant's possession shortly after the sale.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

§ 303. The seller of personal property may retain title as security for the price and contract for a mortgage lien on the property, and that, if the debt is not paid, he may proceed by foreclosure or trover.—*Mitchell v. Castlen* (Ga. App.) 731.

§ 318. Where a seller of personalty retains a mortgage lien for the price, with a provision that he may proceed either by foreclosure or trover, and he forecloses, he cannot thereafter maintain trover for any property which the officer failed to seize on foreclosure.—*Mitchell v. Castlen* (Ga. App.) 731.

\*In an action for breach of a contract to take certain springs manufactured by plaintiff, an instruction as to measure of damages *held* correct.—*Cleveland-Canton Springs Co. v. Goldsboro Buggy Co.* (N. C.) 637.

\*In an action for breach of a contract to take certain articles manufactured for defendant, the latter *held* required to plead certain defenses in order to rely on them.—*Cleveland-Canton Springs Co. v. Goldsboro Buggy Co.* (N. C.) 637.

§ 339. Statement of what a seller may recover, where he, on the refusal of the buyer to pay, treats the goods as the buyer's and retakes and resells them for him.—*Vanstony Clothing Co. v. Stadlem* (N. C.) 778.

§ 360. That a seller of coal knew the purpose for which coal was to be used does not entitle the buyer to a deduction from the price because of its inferior quality in the absence of a warranty.—*Wooldridge v. Brown* (N. C.) 1076.

In an action for the price of an engine sold to defendant, an answer *held* to state a good counter claim for damages.—*Standard Supply Co. v. Carter & Harris* (S. C.) 150.

**§ 7. Remedies of buyer.**

§ 445. Under the evidence, *held* it was a question for the jury whether a sale of a horse was with a warranty.—*Harriss v. Cannady* (N. C.) 771.

\*Point annotated. See syllabus.

§ 435. In an action for the price of coal, the buyer cannot show a warranty without pleading it.—*Woodbridge v. Brown* (N. C.) 1076.

\*Profits which one who installed a ginny hoped to make in a season *held* too speculative to constitute a measure of damages for failure to deliver machinery as contracted for.—*Standard Supply Co. v. Carter & Harris* (S. C.) 150.

\*An owner of a cotton ginny buying an engine to be delivered within a specified time *held* entitled, on the failure of the seller to deliver within the time fixed, to the value of the use of the plant for the period it is idle from the delay.—*Standard Supply Co. v. Carter & Harris* (S. C.) 150.

\*Measure of damages stated for failure to deliver articles contracted to be sold.—*Long Pole Lumber Co. v. Saxon Lime & Lumber Co.* (Va.) 349.

## SATISFACTION.

See Compromise and Settlement; Payment; Release.

## SCAFFOLDS.

Liability of employer for defects, see Master and Servant, § 4.

## SCHOOLS AND SCHOOL DISTRICTS.

Constitutionality of tax laws, see Taxation, § 1. Restraining action of school board in general, see Injunction, § 2.

### § 1. Public schools.

Act Aug. 23, 1905 (Acts 1905, p. 425), as amended by Act Aug. 21, 1906 (Acts 1906, p. 61), providing for local tax district schools, *held* not, in view of the constitutional amendment adopted in 1903, authorizing local taxation for public schools, in violation of Const. art. 8, §§ 3, 4 (Civ. Code 1895, §§ 5908, 5909).—*Henslee v. McLarty* (Ga.) 66.

Act Aug. 23, 1905 (Acts 1905, p. 425), as amended by Act Aug. 21, 1906 (Acts 1906, p. 61), providing for local tax district schools, *held* not, in view of the constitutional amendment adopted in 1903, authorizing local taxation for public schools, unconstitutional as establishing other political divisions than those recognized by the Constitution.—*Henslee v. McLarty* (Ga.) 66.

Money borrowed by the county board of education is not a part of the common school fund as defined by Pol. Code 1895, § 1384, to render sureties on the county school commissioner's bond liable in reference thereto.—*Board of Education of Miller County v. Fudge* (Ga. App.) 154; *Williams v. Board of Education of Miller County* Id.

Money borrowed by the county board of education is not a part of the common school fund as defined by Pol. Code 1895, § 1384, so as to render the county school commissioner liable on his bond in reference thereto, though he may, in an action of a different nature, be liable as an individual.—*Board of Education of Miller County v. Fudge* (Ga. App.) 154; *Williams v. Board of Education of Miller County*, Id.

\*Pol. Code 1895, § 1363, *held* not to authorize the borrowing of money by a county board of educators.—*Board of Education of Miller County v. Fudge* (Ga. App.) 154; *Williams v. Board of Education of Miller County*, Id.

\*Const. art. 5, § 1, providing that the state and county poll tax combined shall not exceed \$2, *held* not to apply to a special school district created pursuant to Revisal 1905, § 4115, but such school district is a "municipal corporation" as that term is used in Const. art. 7,

and subject only to the limitations contained therein.—*Perry v. Commissioners of Franklin County* (N. C.) 608.

§ 68. Revisal 1905, § 4129, prohibiting the establishment of a new school within less than three miles of some school already established in the township, does not prohibit repairs or building a new house on a site where a school has long been established.—*Pickler v. Board of Education of Davie County* (N. C.) 902.

§ 69. The action of the school committee as to rebuilding a schoolhouse and changing the site *held* not subject to judicial interference, except in cases of violation of law or misconduct on the part of the school committee.—*Venable v. School Committee of Pilot Mountain* (N. C.) 902.

§ 69. The fact that the brothers of two of the school committee contributed to the purchase of a new school site does not per se invalidate the action of the board changing the site.—*Venable v. School Committee of Pilot Mountain* (N. C.) 902.

§ 69. The fact that a member of the school committee purchasing land for a new school site contributed to the sum raised by the citizens to purchase the property *held* not to invalidate the transaction.—*Venable v. School Committee of Pilot Mountain* (N. C.) 902.

Under Act Feb. 19, 1907 (Laws 1907, p. 522), relative to sale of bonds of a school district, and the facts, *held*, that mandamus will not lie to the trustees of the district to give their signatures for lithographing bonds.—*Lanford v. Drummond* (S. C.) 10.

## SEARCHES AND SEIZURES.

Admissibility of evidence wrongfully obtained, see Criminal Law, § 9.

Under laws relating to intoxicating liquors, see Intoxicating Liquors, § 6.

## SECONDARY EVIDENCE.

In civil actions, see Evidence, § 5.

In criminal prosecutions, see Criminal Law, § 10.

## SEPARATE ESTATE.

Of married women, see Husband and Wife, § 3.

## SERVICE.

Of process, see Process, § 1.

## SERVITUDES.

See Easements.

## SET-OFF AND COUNTERCLAIM.

Procedure on in justice's court, see Justices of the Peace, § 2.

Set-off in action for price of goods, see Sales, § 6.

### § 1. Nature and grounds of remedy.

§ 8. The right of set-off, except as provided for by statute, is cognizable only in a court of equity.—*Geer v. Cowart* (Ga. App.) 1054.

### § 2. Subject-matter.

§ 22. Under Civ. Code 1895, §§ 3996, 4944, a claim ex delicto cannot be set off against a claim ex contractu.—*Geer v. Cowart* (Ga. App.) 1054.

\*In an action for loss by the dishonesty of an agent recommended to plaintiff by defend-

\*Point annotated. See syllabus.

ant, pursuant to an agreement to furnish a sales agent for machines bought from defendant for resale, a counterclaim for the price of the machines *held* admissible, under Revisal 1905, § 481, subsecs. 1, 2.—*John Slaughter Co. v. Standard Sewing Mach. Co.* (N. C.) 599.

\*In an action for a loss by the dishonesty of an agent recommended by defendant to plaintiff to sell machines bought from defendant for resale, an installment of the price of the machines falling due after the commencement of the action, is available as a counterclaim, under Revisal 1905, § 481, subsec. 1.—*John Slaughter Co. v. Standard Sewing Mach. Co.* (N. C.) 599.

## SETTLEMENT.

See Account Stated; Compromise and Settlement; Payment; Release.

By executor or administrator, see Executors and Administrators, § 9.

Of bill of exceptions, see Exceptions, Bill of, § 2.

## SEVERANCE.

Of action, see Action, § 3.

## SHADE TREES.

Necessity of compensation for destruction of, under power of eminent domain, see Eminent Domain, § 2.

Removal of by municipalities as obstructions on streets, see Municipal Corporations, § 8.

## SHERIFFS AND CONSTABLES.

Garnishment of constable's fees, see Garnishment, § 1.

Sheriff's return on execution, see Execution, § 6.

## SHIPPING.

### § 1. Carriage of passengers.

\*In an action for death of a steamboat passenger by drowning, evidence *held* sufficient to warrant the submission to the jury of the question whether, notwithstanding deceased's negligence, defendant could, by reasonable care, have prevented his death.—*Pate v. Tar Heel Steamboat Co.* (N. C.) 614.

## SIGNALS.

From approaching trains, see Railroads, § 5.

## SIGNATURES.

To pleading, see Pleading, § 6.

## SLANDER.

See Libel and Slander.

## SLEEPING CARS.

See Carriers, § 18.

## SOLDIERS.

Exemptions from license tax, see Licenses, § 1.

## SPECIAL LAWS.

See Statutes, § 2.

## SPECIFIC PERFORMANCE.

Construction of pleading, see Pleading, § 1.  
Right of defendant in action for to claim reformation of contract, see Reformation of Instruments, § 2.

### § 1. Nature and grounds of remedy in general.

\*While specific performance is not a matter of strict right, but rests in the discretion of the court, the relief will be granted in the absence of fraud or other reasons making performance inequitable.—*Jones v. Jones* (N. C.) 417.

### § 2. Contracts enforceable.

§ 41. Rule governing one's right to specific performance of a verbal contract to convey because of part performance stated.—*Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.* (Va.) 954.

§ 43. Facts *held* not to show such part performance of a verbal contract to convey as entitled the purchaser to specific performance.—*Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.* (Va.) 954.

§ 41. Equity will compel the specific performance of a parol contract to sell land where the contract is certain and definite, and there has been such part performance that neither party can be restored to his former position.—*Hoover v. Baugh* (Va.) 968.

§ 47. The acts performed upon land after taking possession under an oral contract to convey *held* to be capable of compensation in damages, so that specific performance was not necessary to give adequate relief.—*Hoover v. Baugh* (Va.) 968.

### § 3. Good faith and diligence.

§ 97. A subvendee of a part of the land agreed to be conveyed cannot compel specific performance by the original vendor, except upon payment of the whole amount due from the original vendee for the entire tract.—*Hoover v. Baugh* (Va.) 968.

### § 4. Proceedings and relief.

A conveyance pursuant to a contract for the sale of real estate *held* valid, though not made within the time fixed by judgment awarding specific performance.—*Jones v. Jones* (N. C.) 417.

§ 131. Where, in an action for the specific performance of a contract, plaintiff refuses to submit to a decree for reformation as prayed for by defendant, and refused to perform the contract as reformed, the court may dismiss the action.—*Cuthbertson v. Morgan* (N. C.) 744.

\*In a suit to enforce specific performance of a compromise agreement executed in 1883 to convey mineral rights in land, the contention that the doctrine of laches had no application *held* untenable.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co.* (Va.) 329.

In a suit to specifically enforce a compromise agreement executed in 1883 between complainants and defendant's predecessors, the complaint *held* not to show a good excuse for the unreasonable delay in seeking specific performance, and to state facts showing that the court would be liable to do injustice by enforcing the contract.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co.* (Va.) 329.

\*To obtain a specific performance of an agreement to convey land, complainant must aver the facts and circumstances entitling him to such relief by full, clear, positive, and distinct statements.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co.* (Va.) 329.

\*In a suit for specific performance of an agreement to convey land, an allegation that complainant and its predecessors in interest were at all times ready, able, and willing to carry out their part of the contract *held* insuffi-

\*Point annotated. See syllabus.

cient, where the admitted facts on the face of the bill contradicted such allegations.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co.* (Va.) 329.

In a suit brought after 1905 to enforce specific performance of an agreement to convey mineral rights in land, executed in 1883, the burden was upon complainant to give sufficient reasons why the suit was not brought sooner, and to state specifically the impediments to an earlier prosecution thereof.—*Clinchfield Coal Co. v. Clintwood Coal & Timber Co.* (Va.) 329.

\*A subpurchaser held not a necessary party to a suit by the original vendor against the original purchaser for specific performance; and so to be bound by the decree for sale for payment of the purchase money.—*Steinman v. Hagan* (Va.) 348.

§ 114. A bill for the specific performance of a contract to convey, which did not offer to perform the contract or ask for its enforcement, was bad on demurrer.—*Hoover v. Baugh* (Va.) 968.

## SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

## STARE DECISIS.

See Courts, § 2.

## STATEMENT.

By witness inconsistent with testimony, see Witnesses, § 4.

Of plaintiff's claim, see Pleading, § 2.

## STATES.

Attorney general, see Attorney General.

Courts, see Courts.

Decisions of courts of another state, see Courts, § 2.

Enforcement in state court of foreign statute giving action for wrongful death, see Death, § 2.

Enforcement of foreign decree of divorce, see Divorce, § 3.

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Power of state to punish crime committed through mails, see Criminal Law, § 1.

Presumptions as to law of another state, see Evidence, § 2.

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### § 1. Actions.

\*Dispensary commissioners and the manager thereof are officers of the state, and are not included in the word "persons," as used in Civ. Code 1895, § 3871, giving a parent a right of action against any person selling liquor to his minor son.—*Fowler v. Rome Dispensary* (Ga. App.) 660.

## STATUTES.

Laws abridging privileges and immunities, see Constitutional Law, § 4.

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Time for motion for new trial, see New Trial, § 2.

### § 1. Enactment, requisites, and validity in general.

\*Acts 1905, p. 425, being unconstitutional, a local election to authorize the levy of a tax in a school district did not warrant the assessment of such a tax, where the election was held under that act, but before the passage of Acts 1906, p. 61, making provision to cure the unconstitutional features of the first act.—*Jordan v. Franklin* (Ga.) 673.

§ 19. Priv. Laws 1907, p. 1292, c. 489, ratified March 11, 1907, entitled "An act to enlarge the corporate limits of the city of Fayetteville," and annexing certain territory, held not within Const. art. 2, § 14, relating to the mode of passage of bills, authorizing cities to impose taxes, and requiring such bills to be read three times and the votes recorded.—*Lutterloh v. City of Fayetteville* (N. C.) 753.

Rule respecting construction of statutes stated.—*Harvey v. Hoffman* (Va.) 371.

§ 64. The invalidity of a provision in Code Va. 1904, c. 78, §§ 1754-1766, regulating the practice of pharmacy, held not to affect the validity of the other provisions thereof.—*Bertram v. Commonwealth* (Va.) 969.

§ 64. A statute may be constitutional in part, though unconstitutional in part.—*Bertram v. Commonwealth* (Va.) 969.

### § 2. General and special or local laws.

\*Acts 1906, p. 121, providing for a change of county lines within the limits of incorporated towns and cities, held not in violation of Civ. Code 1895, §§ 5732, 5926.—*Manson v. City of College Park* (Ga.) 278.

§ 87. Code Va. 1904, §§ 1759, 1766, held not local, special, or private laws for the punishment of crime, in violation of the prohibition of Const. 1902, § 63, cl. 1 (Code 1904, p. ccxxiii).—*Bertram v. Commonwealth* (Va.) 969.

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**§ 1. Establishment, construction, and maintenance.**

Bristol city charter (Acts 1899-1900, p. 635, c. 611, § 49), authorizing the city council to designate the route of street railroads and the grade thereof, *held* not modified by Const. 1902, art. 4, § 58 (Code 1904, p. cccxii), nor Code 1904, § 12941, so as to prevent the city council from determining the location of a railroad within a street.—*Wagner v. Bristol Belt Line Ry. Co. (Va.)* 391.

\*The location of a street railway track east of the center of a street and nearer to complainant's abutting property, so that a vehicle could not stand between the track and the curb while a car was passing, *held* not an infringement of complainant's rights in the street.—*Wagner v. Bristol Belt Line Ry. Co. (Va.)* 391.

An abutting property owner *held* entitled to occupy the street in front of his property for a reasonable time, to take away or deliver persons or goods, as against the rights of a street railway company for the passage of cars.—*Wagner v. Bristol Belt Line Ry. Co. (Va.)* 391.

**§ 2. Regulation and operation.**

§ 114. In an action against a street railroad for injuries sustained in a collision, evidence *held* to sustain a verdict for plaintiff.—*Roanoke Ry. & Electric Co. v. Young (Va.)* 961.

**STREETS.**

See Highways; Municipal Corporations, §§ 5, 6, 8.

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Application of doctrine to injuries caused by operation of railroad, see Railroads, § 7.

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Recovery of possession by landlord, see Landlord and Tenant, § 6.

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**SUNDAY.**

Contract of employment void because made on Sunday as basis for criminal prosecution for defrauding employer, see Master and Servant, § 2.

Province of court and jury in prosecution for offense against Sunday law, see Criminal Law, § 21.

The superintendent of transportation having charge of a division on which a freight train is running on Sunday is the officer to be indicted for such violation.—*Westfall v. State (Ga. App.)* 558.

The right to continue to destination, when prevented by unavoidable delays from completing its trip within the schedule time, is not affected by a delay lasting so as to "kill" that schedule and require the delayed train to run on an extra schedule.—*Westfall v. State (Ga. App.)* 558.

Where a freight train is scheduled to reach its destination before 8 o'clock on Sunday morning, and is detained by unavoidable circumstances, it can continue to run until it reaches its destination without violating the law.—*Westfall v. State (Ga. App.)* 558.

§ 18. A contract between an employer and laborer for services *held* void if made on Sunday.—*Bendross v. State (Ga. App.)* 728.

§ 29. Under Revisal 1905, § 3844, prohibiting the running of certain trains on Sunday, effect of proof of a running stated.—*State v. Atlantic Coast Line R. Co. (N. C.)* 755.

§ 29. The time of committing the offense of running freight trains on Sunday contrary to statute being immaterial, a variance between the indictment and proof in respect thereto is not fatal.—*State v. Seaboard Air Line Ry. (N. C.)* 1088.

The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a work

\*Point annotated. See syllabus.

of necessity in a town, within the exception of the Sunday law. Cr. Code 1902, § 500.—*State v. James* (S. C.) 214.

Under Cr. Code 1902, § 500, which makes it an offense for a person to do work or business of his ordinary calling on Sunday, there can be but one entire offense on the same day, and the number of separate acts done does not increase the number of offenses.—*State v. James* (S. C.) 214.

## SUPERSEDEAS.

On appeal or writ of error, see Appeal and Error, § 5.

## SUPPLEMENTAL PLEADING.

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Of written instrument for cancellation, see Cancellation of Instruments.

## SURVIVORSHIP.

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## TACKING.

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## TAXATION.

Adjustment of taxes on creation of new county, see Counties, § 1.

Beginning of adverse possession under tax deed, see Adverse Possession, § 1.

Harmless error in rulings as to sufficiency of tax deed as color of title, see Appeal and Error, § 14.

Inspection tax on fertilizer, see Agriculture.

Payment of poll tax as qualification of elector, see Elections, § 1.

Restraining collection in general, see Injunction, § 4.

Review on appeal or writ of error of findings of court in suit to enjoin collection of tax, see Appeal and Error, § 13.

Tax deed as color of title, see Adverse Possession, § 1.

Validity of statutes relating to, see Statutes, § 1.

### Local or special taxes.

See Highways, § 2; Municipal Corporations, § 9; Schools and School Districts, § 1.

Assessments for municipal improvements, see Municipal Corporations, § 6.

### Occupation or privilege taxes.

See Licenses, § 1.

### § 1. Constitutional requirements and restrictions.

Act Aug. 23, 1905 (Acts 1905, p. 425), as amended by Act Aug. 21, 1906 (Acts 1906, p. 61), providing for the local tax district schools, *held not*, in view of the constitutional amendment adopted in 1903, authorizing local taxation for public schools, in violation of the constitutional requirement that taxation shall be uniform within the territorial limit of the property taxed.—*Henslee v. McLarty* (Ga.) 66.

### § 2. Liability of persons and property.

An act requiring one claiming land sold to the commonwealth for taxes in another's name to pay the taxes before being entitled to sue to recover possession of, or protect the land from injury by suit, would be beyond the Legislature's power.—*Harvey v. Hoffman* (Va.) 371.

### § 3. Levy and assessment.

\*If the assessment of land belonging to "James T." under the name of "Jane T.," and a note on the land book opposite the assessment, "not James T.," did not mislead "James T.," he may not avoid the sale of the land for taxation on the ground of the erroneous description.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

### § 4. Collection and enforcement against persons or personal property.

\*Equity *held* to have jurisdiction to enjoin enforcement of an unauthorized tax, notwithstanding the remedy at law under Code 1904, § 571.—*Town of Wytheville v. Johnson's Ex'r* (Va.) 328.

### § 5. Tax titles.

\*Laws 1901, p. 791, c. 558, § 20, requiring payment of the tax prior to attack of title by tax deed, *held not* to apply where the deed is void because the purchaser failed to give notice before expiration of time to redeem.—*Warren v. Williford* (N. C.) 697.

\*Tax deed *held* void, where the grantee did not comply with Laws 1899, p. 88, c. 15, §§ 63, 64, as to notice before expiration of time to redeem.—*Warren v. Williford* (N. C.) 697.

\*The power to issue a tax deed does not arise until after the expiration of the period allowed for redemption.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

In ejectment to recover land sold for taxes, whether the erroneous description of the owner on the land book, as "Jane T.," instead of "James T.," and a note on the book opposite the assessment that it was "not James T.," was sufficient to mislead the latter and prejudice his rights, *held* for the jury, and it was error to instruct that such mistake was immaterial.—*Yellow Poplar Lumber Co. v. Thompson's Heirs* (Va.) 358.

## TELEGRAPHS AND TELEPHONES.

Evidence of custom as to delivery of message outside free delivery limits, see Customs and Usages.

Harmless error in action for failure to deliver telegram, see Appeal and Error, § 14.

Liability for injuries from fire caused by electric wire, see Electricity.

\*Point annotated. See syllabus.

Opinion evidence in action for failure to deliver telegram, see Evidence, § 11.

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Telegrams as documentary evidence, see Evidence, § 9.

### § 1. Establishment, construction, and maintenance.

Express municipal assent to the occupation of a city street by a telephone company can only be shown by formal municipal action.—*Town of Pelham v. Pelham Telephone Co. (Ga.) 186.*

Parol statements of witnesses that certain improvements were made with the knowledge and consent of the municipal authorities, and that a telephone company had established its system in the streets by consent of the municipal authorities, held inadmissible to establish the rights of the company in such streets.—*Town of Pelham v. Pelham Telephone Co. (Ga.) 186.*

### § 2. Regulation and operation.

Where plaintiff contracted with a telephone company to furnish him the perpetual use of one of its telephones, the company to keep the telephone in good condition, and afterwards defendant bought all the rights which a prior purchasing company had acquired from the original telephone company, and with full knowledge of the rights of plaintiff tore down poles and removed the telephone, there was no privity of contract between the defendant and plaintiff, authorizing an action for damages.—*Southern Bell Telephone & Telegraph Co. v. Jacoway (Ga.) 640.*

\*The negligent failure of a telegraph company to deliver a message to the sendee held the proximate cause of the injury sustained by her.—*Suttle v. Western Union Tel. Co. (N. C.) 593.*

\*A sendee held entitled to recover for mental anguish occasioned by the failure of a telegraph company to promptly deliver a message.—*Suttle v. Western Union Tel. Co. (N. C.) 593.*

\*A telegraph company, undertaking to deliver a message at a time not within its office hours, held required to do so.—*Suttle v. Western Union Tel. Co. (N. C.) 593.*

\*A telegraph company, receiving a message for delivery, cannot disregard the knowledge of the facts which are apparent, and plead its own ignorance as an excuse for its failure to deliver the message.—*Suttle v. Western Union Tel. Co. (N. C.) 593.*

\*A telegraph company may prescribe reasonable office hours, but may waive them.—*Suttle v. Western Union Tel. Co. (N. C.) 593.*

There is no presumption that mental anguish resulted to a cousin of decedent by a telegraph company's failure to promptly deliver a death message, but the cousin, in order to recover for mental anguish, must prove special relations of tenderness existing between herself and deceased, of which the telegraph company had notice.—*Johnson v. Western Union Telegraph Co. (S. C.) 244.*

§ 60. Where defendant telegraph company offered evidence of inquiries made for plaintiff's address at the post office, evidence of a mail carrier that he knew where plaintiff lived was admissible.—*Martin v. Western Union Telegraph Co. (S. C.) 833.*

§ 37. Where the addressee of a telegram lived in a suburb of the city, to which the message was directed, but her residence was disclosed in the city directory, the telegraph company was negligent in not ascertaining it, and taking proper steps to deliver the message.—*Martin v. Western Union Telegraph Co. (S. C.) 833.*

§ 37. A telegraph company held liable for injuries caused by its failure to deliver a death message beyond its free-delivery limits, where no demand for extra delivery charges was made, nor

opportunity given to guarantee or pay them.—*Martin v. Western Union Telegraph Co. (S. C.) 833.*

§ 65. In an action for the nondelivery of a death message, the admission of evidence that, on plaintiff obtaining possession of her husband's body, it was in such a condition that she was not permitted to see it was not error.—*Martin v. Western Union Telegraph Co. (S. C.) 833.*

## TENANCY IN COMMON.

Between husband and wife, see Husband and Wife, § 1.

### § 1. Mutual rights, duties, and liabilities of co-tenants.

\*No lien or incumbrance for rents or profits arises in favor of one co-tenant against the share of another in land.—*Vaughn v. Lanford (S. C.) 316.*

### § 2. Rights and liabilities of co-tenants as to third persons.

§ 55. Where, on an application for processioning, it appears that the applicants and other persons not named in the application were tenants in common of the land, it was error to overrule a motion to dismiss on the ground that the other tenants were not parties.—*Carmichael v. Jordan (Ga.) 810.*

Effect of a widow's conveyance of a right of way over her husband's land, he leaving surviving children, stated.—*Foster v. Foster (S. C.) 320.*

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## TESTAMENTARY CAPACITY.

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## TIME.

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For particular acts in or incidental to judicial proceedings.

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### *Particular matters affecting title.*

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### *Particular species of property or rights.*

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### *Title necessary to maintain particular actions.*

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### *Liabilities of particular classes of persons.*

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Abuse of process, see Process, § 2.  
 Civil damages from sale of liquors, see Intoxicating Liquors, § 7.

Measure of damages, see Damages, § 4.

### *Remedies for torts.*

See Trespass, § 1; Trover and Conversion, § 1.

\*The rights of the parties to a cause of action for personal injury arising in another state are measured by the laws of that state.—Seaboard Air Line Ry. v. Chapman (Ga. App.) 488.

\*In a suit for a tort committed in another state, the courts will enforce and be governed

by the *lex loci delicti*.—Southern Ry. Co. v. Decker (Ga. App.) 678.

§ 22. Joint tort-feasors are jointly and severally liable, and may all be sued jointly, or two or more of them jointly, or either of them may be sued severally, by the injured party.—Staunton Mut. Telephone Co. v. Buchanan (Va.) 928.

## TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, § 1.

## TRADE-MARKS AND TRADE-NAMES.

Right to sue individual by trade-name, see Parties, § 1.

## TRADE UNIONS.

Interference with employment, see Master and Servant, § 16.  
 Restraining interference with employés, see Injunction, § 2.

## TRANSCRIPTS.

Of record for purpose of review, see Criminal Law, § 27.

## TRANSITORY ACTIONS.

See Venue, § 1.

## TREES.

See Logs and Logging.

Partition of rights in, see Partition, § 1.  
 Removal of as ground for compensation, see Eminent Domain, § 2.  
 Removal of by municipalities as obstructions on streets, see Municipal Corporations, § 8.

## TRESPASS.

Care required as to trespassers in general, see Negligence, § 1.

Ejection of trespasser, see Carriers, § 17.  
 Former judgment as bar, see Judgment, § 6.  
 Injuries to trespassers, see Railroads, § 6.  
 To the person, see Assault and Battery, § 1.

### *§ 1. Actions.*

A complaint *held* to state a cause of action for trespass, authorizing the jury, in assessing damages, to consider the malicious intent of defendant.—Brame v. Clark (N. C.) 418.

Every unauthorized and unlawful entry into the close of another is a trespass, from which the law infers some damage.—Brame v. Clark (N. C.) 418.

\*Plaintiff, with his grantor of land, who had retained a life estate, having conveyed standing trees of certain dimensions, *held* not required to prove title in an action for cutting other trees; defendants being in under their grantee of trees.—McKoy v. Cape Fear Lumber Co. (N. C.) 699.

§ 29. The right to recover for a trespass is personal to him owning the land at the time, and does not pass to his grantee.—Porter v. Aberdeen & R. F. R. R. (N. C.) 741.

§ 37. A grantor, under whose deed a trespasser undertakes to justify, *held* not a necessary or proper party to an action for the trespass.—McCulloch v. Southern Ry. Co. (N. C.) 1096.

## TRESPASS TO TRY TITLE.

See Ejectment.

\*Point annotated. See syllabus.

## TRIAL.

See New Trial; Witnesses.

Estoppel as question for jury, see Estoppel, § 1. Review of rulings on instructions as dependent on reservation in lower court of grounds of review, see Appeal and Error, § 3.

Trial of right to property levied on, see Attachment, § 2; Execution, § 4.

Weight of evidence in criminal prosecution as question for jury, see Criminal Law, § 15.

### *Proceedings incident to trials.*

See Continuance.

Entry of judgment after trial of issues, see Judgment, § 1.

Place of trial, see Venue, § 2.

Right to trial by jury, see Jury, § 1.

*Trial of actions by or against particular classes of persons.*

See Corporations, § 3; Partnership, § 3; Principal and Agent, § 3.

*Trial of particular civil actions or proceedings.*

See Assault and Battery, § 1; Cancellation of Instruments, § 2; Ejectment, § 4; Fraud, § 2; Negligence, § 4; Replevin, § 4.

Criminal prosecution, see Criminal Law, §§ 18-25.

For breach of warranty, see Sales, § 7.

For death of steamboat passenger, see Shipping, § 1.

For delay in delivery of goods shipped, see Carriers, § 6.

For diversion of surface waters, see Waters and Water Courses, § 2.

For loss of or injury to shipment of live stock, see Carriers, § 13.

For penalty for illegal sale of fertilizer, see Agriculture.

For personal injuries, see Carriers, § 16; Master and Servant, §§ 13, 14; Railroads, §§ 7, 8.

On bill or note, see Bills and Notes, § 3.

On insurance policy, see Insurance, § 5.

On stated account, see Account Stated.

Probate proceedings, see Wills, § 3.

Suits to set aside fraudulent conveyances, see Fraudulent Conveyances, § 3.

Suits to try tax titles, see Taxation, § 5.

To determine prescriptive rights, see Adverse Possession, § 3.

To recover money lost at gaming, see Gaming, § 1.

To reform written instrument, see Reformation of Instruments, § 2.

### *Trial of criminal prosecutions.*

See Criminal Law, § 16; Homicide, § 5; Larceny, § 2; Obscenity.

For offense against liquor laws, see Intoxicating Liquors, § 5.

### § 1. Dockets, lists, and calendars.

\*If mandamus is improperly brought before the judge at chambers, *held*, it should not be dismissed, but transferred to the court for trial at term.—*Coleman v. Coleman* (N. C.) 415.

\*Matters arising in the conduct of a trial are largely in the discretion of, and to be controlled by, the trial judge.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

### § 2. Course and conduct of trial in general.

That the court prefaced his admonition to the jury not to consider applause in the courtroom with the statement that he had been requested to give the same *held* not sufficient cause for a new trial.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

It is not error, after the evidence has been closed, and plaintiff moves for verdict on the ground that the settlement relied on by claimant was without consideration, for the court to

say: "Yes! it would be binding."—*Boswell v. Gillen* (Ga.) 187.

### § 3. Reception of evidence.

\*A party who offers testimony of a witness taken by interrogatories, some of which is beneficial to his adversary, cannot withdraw the interrogatories, where no objection has been made to their being received.—*Alabama Great Southern R. Co. v. Hardy* (Ga.) 71.

Though evidence admitted over objection may have been competent to raise an estoppel against a city, where it did not appear whether the court considered the testimony for that purpose or to show an express municipal grant, for which purpose it was incompetent, its acceptance is reversible error.—*Town of Pelham v. Pelham Telephone Co.* (Ga.) 186.

\*Where counsel asked a witness if he did not testify to certain matters on another trial of the same case, *held* not error to refuse to rule out the witness's answer: "Yes; that is what I am testifying to to-day."—*Sims v. Sims* (Ga.) 192.

\*Objection to the entire testimony of a witness *held* not well taken where admissible in part.—*Sims v. Sims* (Ga.) 192.

\*An objection to a batch of letters offered in evidence as a whole for irrelevancy was unsustainable where some of the letters were relevant.—*Dolvin v. American Harrow Co.* (Ga.) 193.

Where defendants admitted the execution of a note and assumed the burden of proof, the note could not be excluded when thereafter offered in rebuttal by plaintiff.—*Ford v. Parker* (Ga.) 526.

§ 69. After plaintiff had closed, and the judge announced he would direct a verdict against him, *held*, that there was no abuse of discretion in refusing to reopen the case.—*Stewart v. Mundy* (Ga.) 936.

\*Where the only objection to evidence is that it is irrelevant to a certain issue, it is not error to overrule the objection if it is relevant to any other issue.—*Monahan v. National Realty Co.* (Ga. App.) 127.

\*Though testimony may be incompetent, it need not be excluded unless the objection be specially raised.—*Monahan v. National Realty Co.* (Ga. App.) 127.

A motion to strike evidence, legal in part, *held* properly refused.—*Hobbs v. Crawford & Maxwell* (Ga. App.) 157; *Crawford & Maxwell v. Hobbs*, *Id.*

Where the admissibility of evidence is in doubt, the rule is to admit it and leave its weight and effect to the jury.—*Albany Phosphate Co. v. Hugger Bros.* (Ga. App.) 533.

§ 68. After the evidence has been closed, it is within the discretion of the judge whether the case shall be reopened for additional evidence.—*Leake v. J. R. King Dry Goods Co.* (Ga. App.) 729.

§ 68. Trial court's discretion in the matter of reopening a case for the introduction of additional evidence *held* not abused.—*Leake v. J. R. King Dry Goods Co.* (Ga. App.) 729.

§ 62. Where, in an action for nondelivery of a telegram, announcing the death of plaintiff's husband, defendant showed that the husband died from the excessive use of liquor and morphine, evidence in rebuttal that he did not use whisky and morphine was competent.—*Martin v. Western Union Telegraph Co.* (S. C.) 533.

§ 60. In an action by a purchaser of a draft against the acceptor, evidence of defenses against the drawer of the draft cannot be introduced until evidence that plaintiff is not the bona fide purchaser of the draft.—*Stouffer v. Erwin* (S. C.) 843.

\*Point annotated. See syllabus.

§ 60. The order of proof is within the discretion of the trial court, and the introduction of proof as to the liability of the principal before the agency had been established is not reversible error.—*McIntyre v. Smyth* (Va.) 930.

**§ 4. Arguments and conduct of counsel.**

\*Court *held* to have erred in failing to caution jury against considering any personal knowledge of plaintiff's character.—*Georgia Ry. & Electric Co. v. Dougherty* (Ga. App.) 158.

\*Notwithstanding a stated rule governing arguments by counsel, statements and reading of a constitutional provision by counsel, in an action for negligent injury, *held* not error.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

**§ 5. Taking case or question from jury.**

\*Where a party is not entitled to recover in any view of the evidence, a verdict is properly directed for the adverse party.—*Peavy v. Dure* (Ga.) 47.

It is error to direct a verdict unless no other verdict could be found.—*McLamb & Co. v. Lambertson* (Ga. App.) 107.

The quantum of damages beyond nominal *held* not involved in a motion to nonsuit.—*Edward Bros. v. Erwin* (N. C.) 545.

§ 140. An instruction *held* properly refused, as preventing the jury from passing upon the credibility of the witnesses.—*Hawk v. Pine Lumber Co.* (N. C.) 754.

§ 165. On a motion for nonsuit, *held*, that the evidence must be taken in its most favorable light to plaintiff.—*Thompson v. Aberdeen & A. R. Co.* (N. C.) 883.

§ 130. There being evidence tending to show that plaintiff's injury was caused by his employer's negligence, a motion for nonsuit was properly overruled.—*Wade v. McLean Contracting Co.* (N. C.) 919.

§ 165. On a motion to dismiss, the evidence must be construed most favorably to plaintiff.—*Otton v. North Carolina R. R. Co.* (N. C.) 1003.

\*A ground of motion for nonsuit *held* too general.—*State v. Malony* (S. C.) 215.

\*It being impossible to say there was no evidence of defendant's negligence causing damage to plaintiff, *held* it was not error to refuse to grant nonsuit, or to direct verdict.—*Taber v. Seaboard Air Line Ry.* (S. C.) 311.

\*In an action for damages for and the abatement of a nuisance, an instruction *held* not erroneous in view of the evidence.—*Gray & Shealy v. Charleston & W. C. Ry. Co.* (S. C.) 442.

§ 159. Nonsuit is properly refused where the evidence tends to sustain the complaint.—*Puryear v. Ould* (S. C.) 863.

§ 156. Where plaintiff demurred to the evidence, in which demurrer defendant was required to join, conflicting evidence of the demurrant must be rejected.—*Hot Springs Lumber & Mfg. Co. v. Sterrett* (Va.) 797.

§ 139. Where, on demurrer to the evidence, the evidence is such that a verdict might be found for the demurree, or where reasonably fair-minded men might differ about the question, the decision must be against the demurrant.—*Milton's Adm'r v. Norfolk & W. Ry. Co.* (Va.) 960.

**§ 6. Instructions to jury—Province of court and jury in general.**

\*A charge relative to the credibility of witnesses *held* properly refused.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

\*Under Civ. Code 1895, § 4334, making it reversible error for a trial judge to express an opinion on the facts, certain instructions *held*

properly refused.—*Southern Ry. Co. v. Grizzle* (Ga.) 177.

\*Where the question whether a deed and a power of attorney had been delivered was for the jury, *held* error to charge that the evidence was uncontradicted that the deed and power of attorney had been signed as to a four-fifth's interest, and that the only question was whether a conveyance of a remainder had been authorized.—*Fullbright v. Neely* (Ga.) 188.

\*Under the express provisions of Civ. Code 1895, § 4334, it is reversible error for the trial judge to give an instruction on the weight and effect of evidence.—*Garbutt Lumber Co. v. Prescott* (Ga.) 228.

\*In trover to recover certain notes, an instruction *held* erroneous as invading the province of the jury on the weight of certain evidentiary facts.—*Garbutt Lumber Co. v. Prescott* (Ga.) 228.

§ 191. In an action on a note by an indorsee, the defense being fraud by the payee and indorser, an instruction *held* reversible error, as assuming that plaintiff's evidence to show that he was a holder in due course was true.—*American Nat. Bank v. Fountain* (N. C.) 738.

\*There being no dispute in the testimony, *held*, an instruction is not open to objection of charging in respect to matters of fact.—*McCarty v. Piedmont Mut. Ins. Co.* (S. C.) 1.

Certain remarks of the trial judge in an action for injuries to a servant *held* prejudicial to defendant.—*Latimer v. General Electric Co.* (S. C.) 438.

Remarks of the trial judge in the course of the trial on the admissibility of evidence, or in refusing motions for nonsuit or for a directed verdict, are not generally within the inhibition of the Constitution against charging the jury as to matters of fact.—*Latimer v. General Electric Co.* (S. C.) 438.

§ 186. Under Const. art. 5, § 26, it is error, in an instruction, to read a contract offered in evidence, and comment thereon.—*Stouffer v. Erwin* (S. C.) 843.

§ 191. An instruction *held* not to assume a fact.—*Blue Ridge Light & Power Co. v. Price* (Va.) 938.

§ 200. In an action on a life policy, the refusal to give a charge stating the case made by the record on the issue of suicide of insured *held* proper.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 200. The court should content itself with giving the jury general principles of law; or, where it presents a hypothetical case, it should put before the jury all the facts bearing on the issue.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 189. It is proper for the court to tell the jury what is the law as applied to a hypothetical statement of facts, provided the statement fairly presents the case shown in evidence.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

**§ 7. — Necessity and subject-matter.**

\*A defense may be presented in the instructions most strongly by excluding from the jury all liability under plaintiff's claim with reference thereto.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

§ 203. In an action for conspiracy to slander, where the action was tried on the theory of conspiracy, but the special issues submitted to the jury were not on that theory, the trial court properly instructed as to the essentials of the action for conspiracy to slander; such instructions being necessary to prevent the jury from being misled by the form of the issues.—*Rice v. McAdams* (N. C.) 774.

\*Point annotated. See syllabus.

§ 206. In an action by the purchaser of a draft against the acceptor, *held* error to refuse requested instructions as to collusion between the original parties and notice of the purchaser of defense of the acceptor against the drawer of the draft.—*Stouffer v. Erwin* (S. C.) 843.

§ 8. — **Form, requisites, and sufficiency.**

§ 234. An instruction, in an action against a railroad for damage by fire, *held* erroneous as calculated to impress the jury that the emission of sparks raised a presumption of defendant's liability, and shifted the burden of proof to it, in the sense that, if it failed to show that there was no negligence, a verdict must be returned for plaintiff.—*Cox v. Aberdeen & A. R. Co.* (N. C.) 884.

\*An instruction in an action against a railroad for injuries to a traveler at a crossing *held* not misleading.—*Douglass v. Southern Ry. Co.* (S. C.) 15.

A charge, in an action for assault and battery, *held* not a charge on the facts.—*Jones v. Parker* (S. C.) 261.

\*In an action for death of a servant, an instruction not limiting plaintiff to the acts of negligence alleged, and requiring proof of a preponderating probability, *held* error.—*Clinchfield Coal Co. v. Wheeler's Adm'r* (Va.) 269.

\*Generally, where inconsistent instructions are given, the verdict should be set aside.—*Norton Coal Co. v. Hank's Adm'r* (Va.) 335.

§ 244. An instruction *held* not to call attention of the jury to part of the evidence.—*Blue Ridge Light & Power Co. v. Price* (Va.) 938.

§ 235. An instruction, in an action on a life policy, *held* to submit the issue of suicide of insured in a correct form, though other language would have been preferable.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 234. In an action on a life policy, an instruction submitting the issue of the suicide of insured, *held* open to objection.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 9. — **Applicability to pleadings and evidence.**

\*It was not error to fail to charge as to the character of a party, where there was no evidence concerning such character.—*McElwaney v. McDiarmid* (Ga.) 20.

\*A charge that, if the railroad company was willfully negligent, plaintiff could recover against it for her husband's death, though he may have been negligent, *held* error, requiring a new trial; there being no evidence to show willful infliction of the injury, and the language of the court being subject to the construction that, if the railroad company willfully omitted to comply with the crossing law (Civ. Code, 1895, § 2222), plaintiff could recover notwithstanding her husband's negligence.—*Southern Ry. Co. v. Grizzle* (Ga.) 177.

§ 252. It was error to give a charge, there being no evidence to authorize it.—*Southern Ry. Co. v. Bankston* (Ga.) 1027.

§ 253. Where plaintiff was injured by the concurrent negligence of a vice principal in giving an order and of a fellow servant in executing it, an instruction that, if plaintiff was injured by the misconduct of a co-employee, he could not recover, was properly refused.—*Wade v. McLean Contracting Co.* (N. C.) 919.

A charge on acts constituting no levy, in an action for assault and battery in levying under a distress warrant, *held* not objectionable.—*Jones v. Parker* (S. C.) 261.

\*A charge as to the authority of an officer's authority to levy a distress warrant to call others to his assistance *held* not erroneous.—*Jones v. Parker* (S. C.) 261.

\*In an action by a conductor against the company for injuries caused by the sudden stopping of his train to prevent a collision with another train, a requested charge *held* properly refused as not supported by the evidence.—*Cheek v. Seaboard Air Line Ry.* (S. C.) 402.

\*In an action to recover land, where a demurrer was sustained to defendant's plea of estoppel, an instruction that the court had struck out the plea of estoppel, and it was not before the jury for consideration, and had not been established by the evidence for that reason, improperly took from the jury the issue of estoppel.—*Scarborough v. Woodley* (S. C.) 405.

\*Under the circumstances, *held*, it was not necessary for the court to construe the bill of lading. The bill of lading, containing nothing affecting the issues, *held* not required to be construed for the jury, in an action for failure to properly re-ice a refrigerator car shipment.—*Geraty v. Atlantic Coast Line R. Co.* (S. C.) 444.

\*An instruction to take into consideration expense of making repurchases to take the place of goods contracted for and not delivered, in ascertaining damages for breach of the contract, *held* error under the evidence.—*Long Pole Lumber Co. v. Saxon Lime & Lumber Co.* (Va.) 349.

\*An instruction in an action against a railway company for the death of a brakeman struck by an overhead bridge *held* properly refused.—*Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.) 363.

§ 252. It is not error to refuse an instruction submitting an issue, where there is no sufficient evidence to warrant it.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 253. It is not error to refuse an instruction which ignores part of the evidence.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

§ 10. — **Requests or prayers.**

\*Error cannot be predicated on a failure to charge in specified language, where such charge would not be an accurate statement of the law.—*McElwaney v. McDiarmid* (Ga.) 20.

\*A request to charge *held* too general.—*McElwaney v. McDiarmid* (Ga.) 20.

\*It was not error, in giving requested charges, to add thereto the converse of the propositions contained in the charges.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

Requests to charge covered by the general charge are properly refused.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

\*Requested charges covered by a charge of the court are properly refused.—*Southern Ry. Co. v. Grizzle* (Ga.) 177.

\*Requested charges covered by the general charge *held* properly refused.—*Sims v. Sims* (Ga.) 192.

Where evidence is sought to be used for an improper purpose, or it is desired to limit its consideration, a ruling or proper instruction must be requested.—*McCommons v. Williams* (Ga.) 230; *Williams v. McCommons*, Id.

\*In an action for injury to an employé, omission to instruct *held* not error in the absence of a written request.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

\*The jury are presumed to be cognizant of the common phenomena of human experience, and, if their attention is desired to be directed thereto, a written request must be made.—*Merchants' & Miners' Transp. Co. v. Corcoran* (Ga. App.) 130.

§ 258. In an action on an account, a mere contention of plaintiff's counsel during the trial that there was an account stated by reason of defendant's failure to object within reasonable

time after it was rendered cannot be regarded as a request for an instruction on such issue.—*Davis v. Stephenson* (N. C.) 900.

\*One desiring more detailed instructions *held* required to request the same.—*McCarty v. Piedmont Mut. Ins. Co.* (S. C.) 1.

§ 260. Refusal to give an instruction is not error where the substance is given in the charge.—*Stouffer v. Erwin* (S. C.) 843.

\*Refusal to charge requests as offered *held* not error, where the court gives an instruction embracing all the questions covered by the requests, and states the law on those questions as favorably to the party asking them as it asked, or was entitled to.—*Long Pole Lumber Co. v. Saxon Lime & Lumber Co.* (Va.) 349.

§ 260. It is not error to refuse a requested charge substantially covered by the charge given.—*Life Ins. Co. of Virginia v. Hairston* (Va.) 1057.

\*The rejection of a correct instruction, sufficiently covered by another instruction given, will not constitute reversible error.—*Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 446.

Instructions, too general in terms, amount to mere abstract propositions, and should be rejected.—*Squillache v. Tidewater Coal & Coke Co.* (W. Va.) 446.

#### § 11. — Objections and exceptions.

\*A general exception to a charge in its entirety is sustainable only where the whole charge is erroneous.—*Boswell v. Gillen* (Ga.) 187.

#### § 12. — Construction and operation.

\*A charge in an action for injury to a locomotive engineer using the words "reasonable care" *held* not sufficient cause for new trial in view of other instructions.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

§ 295. Charge on the statute of frauds *held* not calculated to mislead the jury, when considered in connection with other charges.—*Averett v. Walker* (Ga.) 1046.

§ 295. An instruction on the burden of proof, in an action on a note, *held* not reversible error, in view of other instructions.—*Haines v. Smith* (N. C.) 1081.

§ 295. If, when instructions are construed together, they present the law fairly, error in an instruction considered apart will not authorize a reversal.—*Haines v. Smith* (N. C.) 1081.

\*Submitting by a correct instruction an issue not authorized by the evidence *held* harmless, in view of other instructions.—*Du Bose v. Atlantic Coast Line R. Co.* (S. C.) 255.

\*In an action to recover land, an instruction *held* not cured by a subsequent instruction.—*Scarborough v. Woodley* (S. C.) 405.

§ 295. A charge *held* not on the facts.—*Davis Bros. v. Blue Ridge Ry. Co.* (S. C.) 856.

#### § 13. Verdict.

\*A verdict for "the sum of ten thousand (10,000) and cost of suit" *held* to authorize the entry of a judgment for \$10,000.—*Central of Georgia Ry. Co. v. Mote* (Ga.) 164.

\*The illegality of a verdict for plaintiff for a certain amount against two defendants, to be equally divided between them, could not be cured by writing off one half and entering up judgment for the other half jointly.—*Glore v. Akin* (Ga.) 580.

\*Where a suit was brought jointly against two defendants for malicious prosecution, a verdict against them for a stated amount, "to be equally divided between them," *held* not legal.—*Glore v. Akin* (Ga.) 580.

\*Finding on matter not in issue, incorporated in verdict, *held* surplusage, and not to vitiate the verdict.—*Geer v. Thompson* (Ga. App.) 500.

§ 333. It is no objection to a verdict in a suit for injury to personalty that it is less than the lowest amount of damages proved by plaintiff, and higher than the highest amount shown by defendant.—*Minter & Radney v. Bush* (Ga. App.) 731.

\*The refusal to submit issues in the form presented by defendant *held* not error, in view of the issues framed.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

\*Where issues are sufficiently definite to afford each party opportunity to introduce all pertinent evidence and apply it fairly, the issues are, as a rule, unobjectionable.—*Dortch v. Atlantic Coast Line R. Co.* (N. C.) 616.

§ 340. Courts freely exercise the power of amending verdicts to correct manifest errors of form and substance, and make them conform to the intention of the jury.—*Cox v. High Point, R. & S. R. Co.* (N. C.) 761.

§ 339. Where, in an action for a money recovery, the verdict was, by consent, rendered to the clerk, and the verdict was defective because of the omission of the word "dollars," the judge should on the reassembling of the court call the jury together.—*Cox v. High Point, R. & S. R. Co.* (N. C.) 761.

§ 339. On the jury, in an action for a money recovery, returning in open court a verdict defective because of the omission of the word "dollars," the judge should call the omission to the attention of the jury.—*Cox v. High Point, R. & S. R. Co.* (N. C.) 761.

§ 333. In an action for wrongful death, the verdict *held* sufficient to authorize the rendition of the judgment.—*Cox v. High Point, R. & S. R. Co.* (N. C.) 761.

§ 333. The omission of the word "dollars," in a verdict for a money recovery, *held* not to affect the validity of the judgment.—*Cox v. High Point, R. & S. R. Co.* (N. C.) 761.

§ 352. While every issuable controverted fact must be found by the jury upon appropriate issues, the form of submitting the issues lies largely within the discretion of the court.—*Rich v. Morisey* (N. C.) 762.

§ 350. Refusal to submit tendered issues, evidential in their character, and not determining the true matter in dispute, *held* proper.—*Vanstory Clothing Co. v. Stadium* (N. C.) 778.

#### § 14. Waiver and correction of irregularities and errors.

\*The refusal of a nonsuit will not require a reversal, where the omitted evidence was afterwards supplied by either party.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

§ 419. Defendant waived his motion for nonsuit by introducing evidence and not renewing the motion at the close of all the evidence.—*Teal v. Templeton* (N. C.) 737.

Counsel *held* to have waived the right to raise the question on appeal that his requests were not charged.—*Jones v. Parker* (S. C.) 261.

### TRIAL OF RIGHT OF PROPERTY.

See Attachment, § 2; Execution, § 4.

### TROVER AND CONVERSION.

Province of court and jury, see Trial, § 6.

#### § 1. Actions.

It is a good defense to an action of trover for the recovery of cattle that they were legally impounded.—*Geer v. Thompson* (Ga. App.) 500.

\*Point annotated. See syllabus.



## TRUST DEEDS.

See Mortgages.

## TRUSTEE PROCESS.

See Garnishment.

## TRUSTS.

Conclusiveness of decree in proceedings to subject trust property to payment of debts, see Judgment, § 7.

Creation by will, see Wills, § 9.

Right of cestui que trust to plead usury in obligation entered into by trustee, see Usury, § 1.

### § 1. Creation, existence, and validity.

Under Civ. Code 1895, § 3149, a trust may be created for minors, and that a deed does not provide for any acts to be done by the trustee does not cause the legal title to pass to the beneficiaries.—Turner v. Barber (Ga.) 587.

§ 81. Implied trust in land *held* not to arise in favor of a wife within Civ. Code 1895, § 3159.—Stokes v. Clark (Ga.) 1028.

§ 81. On partition of land in which a married woman held an interest, payments made by the husband *held* presumably a gift, and not to create a resulting trust in his favor in the lands conveyed to him and the wife.—Sprinkle v. Spainhour (N. C.) 910.

§ 20. A deed, with an instrument executed by the grantee, held to create a trust.—Cunningham v. Cunningham (S. C.) 845.

Defendant *held* a trustee of the legal title to certain lands acquired under a commissioner's deed for complainant.—Steinman v. Jessee (Va.) 275.

\*Testimony *held* insufficient to impress an express trust on land in favor of a wife's heirs at law, especially where the husband and wife were married prior to the married woman's act of April 4, 1877 (Laws 1876-77, p. 333, c. 329), when, in the absence of stipulation to the contrary, the money of the wife when received by the husband became his absolute property.—Garrett v. Rutherford (Va.) 389.

\*The question is an open one in Virginia whether an express trust affecting real estate is valid unless in writing.—Garrett v. Rutherford (Va.) 389.

### § 2. Construction and operation.

A trust created in land in favor of one and her children remains executory during the minority of any of the cestui que trust.—Peavy v. Dure (Ga.) 47.

A trust declared in a deed *held* to be construed according to the terms of the deed and not according to a will.—Peavy v. Dure (Ga.) 47.

\*Deed *held* to create trust estate.—Turner v. Barber (Ga.) 587.

On a grant for the use of a wife and children, declaring that it is a provision for the family, any indications which support a reasonable construction of a life estate in the wife, with remainder to the children, will be followed, so that after-born children may take, and the life tenant may have sufficient income to support the children.—Talley v. Ferguson (W. Va.) 456.

Where land is conveyed in trust for the maintenance of a family, none of the beneficiaries has any separable interest, during the existence of the trust, which can be charged or aliened.—Talley v. Ferguson (W. Va.) 456.

\*Point annotated. See syllabus.

### § 3. Management and disposal of trust property.

The superior court has jurisdiction at chambers to authorize the sale by the trustee of the equitable estate of minors.—Peavy v. Dure (Ga.) 47.

§ 179. Statement of rule of accountability of trustee.—Cunningham v. Cunningham (S. C.) 845.

### § 4. Accounting and compensation of trustee.

§ 308. A trustee *held* accountable for value of cotton rents at time of their receipt.—Cunningham v. Cunningham (S. C.) 845.

§ 308. A trustee *held* chargeable with rent of land worked by him.—Cunningham v. Cunningham (S. C.) 845.

§ 311. Losses by trustee *held* to be in enterprises not within his duties, so that he could not have credit therefor.—Cunningham v. Cunningham (S. C.) 845.

§ 317. Statement of rights of trustee to commissions under Civ. Code, § 2590, in connection with sections 2560, 2561.—Cunningham v. Cunningham (S. C.) 845.

§ 329. Charging a trustee with the value of cotton rents at time of sale of cotton, instead of when it was received, *held* not ground for reversal, in the absence of a showing of difference in values at such times.—Cunningham v. Cunningham (S. C.) 845.

## TURPENTINE.

Right to, as appurtenant to timber, see Logs and Logging.

## ULTRA VIRES.

Acts of corporation, see Corporations, § 2.

## UNDERTAKINGS.

See Bonds.

## UNDUE INFLUENCE.

In procuring deed, see Deeds, § 1. Instructions relating to, in action for cancellation of deed, see Cancellation of Instruments, § 2.

## UNITED STATES.

Courts, see Removal of Causes.

## UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

## USAGES.

See Customs and Usages.

## USE AND OCCUPATION.

\*Under the express terms of Revisal 1905, § 1993, decedent, having occupied defendants' lands by their consent, but without reserved rent, was liable for a reasonable amount for the use and occupation.—Sessoms v. Tayloe (N. C.) 424.

If defendants' right to sue for decedent's use and occupation of their land with their consent, but without reserved rent, does not give a lien under Revisal 1905, § 1993, *held*, that defendants are confined to an action against the administrator.—Sessoms v. Tayloe (N. C.) 424.

## USURY.

### § 1. Usurious contracts and transactions.

§ 31. A bona fide sale of an account for wages earned *held* not within the prohibition of the act of August 15, 1908 (Acts 1908, p. 83), making it a misdemeanor to charge interest on a loan at a rate greater than 5 per cent. per month.—*Jackson v. State* (Ga. App.) 726.

§ 31. An absolute sale of personal property, no money being loaned and no interest charged and the purchase price in fact paid, *held* not within the act of August 15, 1908 (Acts 1908, p. 83), making it a misdemeanor to charge interest on a loan at a rate greater than 5 per cent. per month.—*Jackson v. State* (Ga. App.) 726.

§ 82. Statement of who, under Civ. Code 1902, § 1664, may plead usury.—*Cunningham v. Cunningham* (S. C.) 845.

## VACATION.

Of court, power of judge, see *Judges*, § 1.

Of particular acts, instruments, or proceedings. See *Judgment*, § 3.

Decree in partition, see *Partition*, § 2.

Sale on execution, see *Execution*, § 5.

## VALUE.

Limits of jurisdiction, see *Justices of the Peace*, § 1; *Removal of Causes*, § 2.

## VARIANCE.

Between pleading and proof in civil actions, see *Pleading*, § 9.

Between pleading and proof in criminal prosecutions, see *Indictment and Information*, § 6.

## VENDOR AND PURCHASER.

See *Exchange of Property*; *Sales*.

Harmless error in vendor's lien proceeding, see *Appeal and Error*, § 14.

Jurisdiction of city court of proceedings to enforce lien, see *Courts*, § 4.

Liabilities of sureties on bond of receiver, in lien foreclosure proceedings, see *Receivers*, § 2.

Reformation of contract, see *Reformation of Instruments*, § 2.

Requirements of statute of frauds, see *Frauds, Statute of*, § 2.

Specific performance of contract, see *Specific Performance*.

*Sales by or to particular classes of persons.*

Heir of devisee, see *Wills*, § 11.

*Sales on judicial or other proceedings.*

Property of infant under order of court, see *Infants*, § 1.

Sale on execution, see *Execution*, § 5.

Trust property under order of court, see *Trusts*, § 3.

### § 1. Requisites and validity of contract.

§ 18. A written option without consideration, for the sale of land, may be withdrawn before acceptance.—*Goodman v. Spurlin* (Ga.) 1020.

### § 2. Modification or rescission of contract.

§ 85. A written contract of sale of land may be rescinded and a rent contract substituted by parol.—*Lewis v. Cooley* (S. C.) 868.

\*Point annotated. See *syllabus*.

### § 3. Rights and liabilities of parties.

\*A request to charge that, where a deed is recorded, it "would be binding as to notice from date of record if he [the party sought to be bound] has actual notice of record," *held* properly refused.—*McElwaney v. McDiarmid* (Ga.) 20.

\*A purchaser is protected even if he has notice of a secret equity, where any one of his predecessors in title is a bona fide purchaser without notice.—*Peavy v. Dure* (Ga.) 47.

Certain equity in land *held* a secret equity which could not be asserted against a bona fide purchaser.—*Peavy v. Dure* (Ga.) 47.

§ 213. Property accepted in settlement of a bona fide debt from defendant in attachment, possession of which was taken prior to the attachment, *held* not subject thereto.—*Consignee's Favorite Box Co. v. Meers* (Ga. App.) 1000.

The relation of vendor and purchaser is for all practical purposes that of mortgagor and mortgagee with all the incidents thereof.—*Jones v. Jones* (N. C.) 417.

A judgment creditor *held* not chargeable with notice of an unrecorded deed previously executed by the judgment debtor.—*Ex parte City of Anderson* (S. C.) 513; *F. W. Wagener & Co. v. Brown Bros., Id.*

§ 242. Rule respecting proof of notice to a purchaser for value stated.—*Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.* (Va.) 864.

## VENUE.

Of action for causing death, see *Death*, § 2.  
Weight and sufficiency of evidence to establish, see *Criminal Law*, § 15.

### § 1. Nature or subject of action.

An action to gain possession of a deed deposited in escrow for delivery to plaintiff upon performance of certain acts *held* necessarily brought in the county where the land lies.—*Bridgers v. Ormond* (N. C.) 422.

### § 2. Change of venue or place of trial.

For the purpose of defendant's motion to remove a cause to another county, the allegations of the complaint must be deemed denied.—*Bridgers v. Ormond* (N. C.) 422.

## VERDICT.

Directing verdict in civil actions, see *Trial*, § 5.  
In civil actions, see *Trial*, § 13.

In criminal prosecutions, see *Criminal Law*, § 25.

Review on appeal or writ of error, see *Appeal and Error*, § 13.

Setting aside, see *New Trial*, § 1.

## VESTED RIGHTS.

Protection, see *Constitutional Law*, § 2.

## VETERANS.

Exemptions from license tax, see *Licenses*, § 1.

## VICE PRINCIPALS.

See *Master and Servant*, § 7.

## VIEW.

Of premises in partition, see *Partition*, § 2.

**VILLAGES.**

See Municipal Corporations.

**VOTERS.**

See Elections.

**WAGERS.**

See Gaming, § 1.

**WAGES.**

See Master and Servant, § 2.

**WAIVER.**

*Of objections to particular acts, instruments, or proceedings.*

See Account Stated; Appearance; Pleading, § 10; Trial, § 14.

By failure to demur, see Pleading, § 4.

Delivery of goods sold, see Sales, § 3.

Error waived in appellate court, see Appeal and Error, § 19.

Irregularities in issuance of execution, see Execution, § 2.

Proceedings in justice's court, see Justices of the Peace, § 2.

*Of rights or remedies.*

Forfeiture of insurance, see Insurance, § 3.

Redemption from mortgage, see Mortgages, § 6.

Right to appeal, see Appeal and Error, § 2.

Right to or capacity to sue, see Parties, § 2.

Under stipulations in insurance policy, see Insurance, § 1.

**WARDS.**

See Guardian and Ward.

**WAREHOUSEMEN.**

Carrier as, see Carriers, § 8.

**WARNING.**

Servant of danger, see Master and Servant, § 6.

**WARRANT.**

For arrest, see Arrest, § 1; Criminal Law, § 4.

**WARRANTY.**

Construction of covenants of, see Covenants, § 1.

On sale of goods, see Sales, §§ 5, 7.

**WASTE.**

By life tenant, see Life Estates.

**WATERS AND WATER COURSES.**

See Drains.

Mandamus to compel supply, see Mandamus, § 2.

Partition of water rights, see Partition, § 2.

Supplemental pleading in action for injuries from overflow, see Pleading, § 5.

**§ 1. Natural water courses.**

The question of reasonableness of use of waters by an upper riparian owner *held* to be for the jury.—*Mason v. Apache Mills* (S. C.) 399.

The fact of an increase or decrease in volume of water *held* not conclusive of unreasonableness

of upper riparian's use of the stream.—*Mason v. Apache Mills* (S. C.) 399.

As against the evidence as to the trespass, *held*, that it could not be contended that an injunction should not have issued, because the verdict was consistent with the conclusion that the trespass was only temporary.—*Mason v. Apache Mills* (S. C.) 399.

Statement of presumption as to what damages were covered by verdict in view of statement of counsel in argument.—*Mason v. Apache Mills* (S. C.) 399.

Statement of condition on which injunction should issue.—*Mason v. Apache Mills* (S. C.) 399.

§ 61. Making an injunction against the use of a stream conditional on plaintiff consenting that defendant may clean out the stream *held* not to require defendant to clean it out.—*Mason v. Apache Mills* (S. C.) 371.

§ 60. Under Civ. Code 1902, §§ 1465-1468, *held*, the duty of deciding, in the first instance, as to cleaning out a stream, is on the commissioners of health and drainage.—*Mason v. Apache Mills* (S. C.) 371.

\*A riparian owner cannot obstruct a natural stream in the improvement of his premises so as to injure adjoining land, however careful he may be in so doing.—*McGehee v. Tidewater Ry. Co.* (Va.) 356.

**§ 2. Surface waters.**

Where defendant railroad constructed its road-bed so as to cut off drainage ditches maintained by plaintiff, and conveyed the water through another ditch, it must construct the ditches so as to pass the water as effectively as before the change.—*Davenport v. Norfolk & S. R. Co.* (N. C.) 431.

In an action for diverting surface waters upon plaintiff's land by filling a depression in constructing defendant's station grounds, the question of whether defendant was reasonably prudent and careful to avoid injury to plaintiff's property should be submitted to the jury under proper instructions.—*McGehee v. Tidewater Ry. Co.* (Va.) 356.

In an action for diverting surface waters upon plaintiff's land, *held* error to hold as a matter of law that defendant was not bound to supply reasonably adequate means of escape for surface waters through its property.—*McGehee v. Tidewater Ry. Co.* (Va.) 356.

\*The common and civil law rules as to liability for diverting surface waters upon adjoining land stated.—*McGehee v. Tidewater Ry. Co.* (Va.) 356.

**§ 3. Public water supply.**

§ 203. An ordinance fixing water rates *held* to require the consumer to pay meter rates, provided the amount exceeded \$12 per annum, though it was more than the maximum flat rate specified for the service rendered.—*Charleston Light & Water Co. v. Lloyd Laundry & Shirt Mfg. Co.* (S. C.) 873.

§ 203. A public service water company may adopt reasonable rules for the conduct of its business, with which it is the duty of customers to comply.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 203. A water company's rule authorizing the cutting off of supply for nonpayment of bills for prior service, within 30 days, while reasonable as to persons under contract to pay the rents, is unreasonable as to a tenant refusing to pay rents due by a landlord or former tenant.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 203. Under a city water ordinance, the water company *held* entitled to charge a consumer

\*Point annotated. See syllabus.

reasonable meter rates, and that he was not entitled to service at a maximum flat rate.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 203. In the absence of adverse evidence, ordinance rates for meter water service are presumptively reasonable.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 203. Evidence held to require a finding that there was a bona fide dispute as to the accuracy of a water company's bill for water previously furnished, for nonpayment of which petitioner's supply was terminated.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 203. In mandamus by a water consumer to compel a resumption of the supply, it was sufficient for him to show that there was a bona fide dispute as to the correct amount due for prior services, because of which the supply was terminated.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

§ 208. A municipal water company held not authorized to cut off a consumer's supply, under its own rules, until the expiration of 30 days after the delivery of the bill for service which remained unpaid.—*Poole v. Paris Mountain Water Co.* (S. C.) 874.

## WAYS.

Private rights of way, see Easements.  
Public ways, see Highways; Municipal Corporations, § 8.

## WEAPONS.

Testimony of neither witness held negative, within the rule that the existence of a fact testified by one person is rather to be believed than that such fact did not exist because other witnesses testified that they did not see it.—*Hunter v. State* (Ga. App.) 466.

## WEIGHTS AND MEASURES.

\*Under the express provisions of Pol. Code 1895, § 1634, the legal weight of a bushel of sweet potatoes is 55 pounds.—*Fain & Stamps v. Ennis* (Ga. App.) 466.

## WILLS.

See Descent and Distribution; Executors and Administrators.

Construction and execution of powers, see Powers, § 2.

Construction and execution of trusts, see Trusts. Equitable conversion, see Conversion.

Executor's deed as color of title, see Adverse Possession, § 1.

### § 1. Testamentary capacity.

\*Acts 1876-77, pp. 333, 334. c. 329, §§ 1, 2, held not to authorize a married woman acquiring real estate prior to the passage of such act while sole to dispose of such property by will.—*Coleman v. Wood* (Va.) 388.

\*Independent of Acts 1876-77, p. 333, c. 329, a married woman had no power to dispose of her property by will.—*Coleman v. Wood* (Va.) 388.

§ 52. In probate proceedings, it is necessary to show, not only that the will was executed pursuant to the statute, but that it was the will of a capable testator.—*Hopkins v. Wampler* (Va.) 926.

§ 52. The due execution of a will being proved, it is presumed that it is the will of a capable testator.—*Hopkins v. Wampler* (Va.) 926.

§ 52. Where testator's sanity is put in issue by evidence, the burden is on proponent to show to the satisfaction of the jury his testamentary capacity, but the presumption of sanity obtains upon the trial of that issue until overcome by contestant's evidence.—*Hopkins v. Wampler* (Va.) 926.

§ 53. In a will contest, upon the issue of testator's sanity, it is competent to prove the manner in which he was treated by his family.—*Hopkins v. Wampler* (Va.) 926.

§ 55. In a will contest, proponent need establish the instrument as the last will of a competent testator only by a preponderance of the evidence, and it was error to require such proof by clear and convincing evidence.—*Hopkins v. Wampler* (Va.) 926.

### § 2. Requisites and validity.

\*Sufficiency of facts to meet requirement that holographic will must have been found among the valuable papers of decedent determined.—*Harper v. Harper* (N. C.) 553.

§ 116. Under Code 1904, § 2514, requiring nonholographic wills to be attested by two competent witnesses, the witnesses must be competent at the time of attestation.—*Bruce v. Shuler* (Va.) 973.

§ 116. At common law and under Code 1904, § 2529, beneficiaries under a will are not competent witnesses thereto.—*Bruce v. Shuler* (Va.) 973.

§ 116. Under Code 1904, § 2514, requiring nonholographic wills to be attested by competent witnesses, a beneficiary can only be considered as a witness under section 2529, which renders the devise or bequest to him void.—*Bruce v. Shuler* (Va.) 973.

§ 116. Effect of Code 1904, § 2529, relating to testamentary beneficiaries as attesting witnesses, stated.—*Bruce v. Shuler* (Va.) 973.

### § 3. Probate, establishment, and annulment.

A ground of the caveat to the probate of a paper offered as a will held demurrable as averring a conclusion only.—*Sims v. Sims* (Ga.) 192.

Grounds of the caveat to the probate of a will held demurrable.—*Sims v. Sims* (Ga.) 192.

Testimony as to the purposes for which decedent's safe was used held proper, in determining whether an instrument found in it was his will.—*Harper v. Harper* (N. C.) 553.

Language of a judge, in his decree in a will contest case, held not to indicate a holding which deprived contestants, who charged fraud and forgery, of their right to rely upon a failure of proponents to establish a prima facie case in the first instance.—*Thames v. Rouse* (S. C.) 254.

\*In a contest of a will on the ground of fraud and forgery, the burden of proving the due execution of the will is upon proponents; and, upon their making out a prima facie case, the burden of proving the fraud and forgery is upon those charging it.—*Thames v. Rouse* (S. C.) 254.

§ 329. In a will contest, an instruction that a proponent must prove by a preponderance of the evidence that the instrument offered was the true will of a capable testator, and nothing short of clear and convincing evidence will suffice, but which omitted to state the presumption in favor of testator's sanity, was erroneous and misleading.—*Hopkins v. Wampler* (Va.) 926.

§ 303. Though under Code 1904, § 2514, a will must be attested by two competent witnesses, its due execution can be proved by one witness, but he must prove all the statutory essentials to a due execution, including attestation by two competent witnesses.—*Bruce v. Shuler* (Va.) 973.

\*Point annotated. See syllabus.

**§ 4. Construction—General rules.**

The dispositions of a will will not be disturbed further than is absolutely necessary to give effect to a codicil.—*Thomas v. Owens* (Ga.) 218.

Under Civ. Code 1895, § 3324, the court in the construction of a will must seek the intention of testator, and give it effect.—*Thomas v. Owens* (Ga.) 218.

\*In the construction of a will, the court must ascertain and effectuate the testator's intention.—*In re Knowles' Estate* (N. C.) 549.

\*A testator is presumed to intend to dispose of all of his property.—*Harper v. Harper* (N. C.) 553.

\*In construing a will, testator's intent should be sought from the whole instrument.—*Harper v. Harper* (N. C.) 553.

§ 471. The courts in construing a will must, if possible, give effect to every provision in it, and not nullify any provision, unless manifestly repugnant to some other one, in which event they will give effect to the last provision.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

§ 448. The presumption is that a testator intended by his will to dispose of all his property.—*Powell v. Woodcock* (N. C.) 1071.

\*A will construed, and held not to attempt to devise a possibility of reverter.—*Vaughn v. Lanford* (S. C.) 316.

**§ 5. — Designation of devisees and legatees and their respective shares.**

\*Clause of a will, declaring that a son of testator had received his full share of the estate, held to exclude said son from any share under the will.—*Harper v. Harper* (N. C.) 553.

**§ 6. — Description of property.**

A will construed, and held to pass the fee simple of or testator's lessor interest in a plantation to a beneficiary as remainderman.—*Rue v. Connell* (N. C.) 306.

\*A testator's "estate" includes both realty and personalty.—*Harper v. Harper* (N. C.) 553.

A holographic will construed, and held, in view of references therein to testator's property and estate, to dispose of his entire property.—*Harper v. Harper* (N. C.) 553.

§ 559. The word "estate," as used in a will defined.—*Powell v. Woodcock* (N. C.) 1071.

§ 587. The word "estate," as used in the residuary clause of a will, held to include real estate.—*Powell v. Woodcock* (N. C.) 1071.

§ 564. A devise of property, with its increase in value by rents, to take effect on the death of a person named, is a devise of the rents during the lifetime of such person.—*Weathersbee v. Weathersbee* (S. C.) 838.

**§ 7. — Nature of estates and interests created.**

Will construed, and held not to pass to a remainderman a fee simple, but only a life estate.—*Potts v. Prior* (Ga.) 77.

An estate in fee, given to testatrix's sister, is not cut down to an estate for life by a bequest, in a codicil, for life to testatrix's sister of the income from her entire estate.—*Thomas v. Owens* (Ga.) 218.

\*A bequest in a codicil of the income of testatrix's entire estate to her sister for life held to carve out a life estate in the property given to the other legatees in the will as originally drafted.—*Thomas v. Owens* (Ga.) 218.

A will held not to pass a vested remainder.—*Staton v. Godard* (N. C.) 519.

§ 614. In a devise to one "during her natural life then to the heirs of her body, if any; if no children to her sisters," the words "heirs

of her body" held equivalent to the word "children," so as to vest in the devisee an estate for life.—*Johnson v. Smith* (Va.) 958.

**§ 8. — Conditions and restrictions.**

§ 656. A will construed, and held that conditions therein did not apply to income.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

**§ 9. — Estates in trust and powers.**

The authorization by testatrix of her executor and executrix to sell her property as deemed best held to create no estate in them, but to be the grant of a naked power.—*Thomas v. Owens* (Ga.) 218.

Authority to divide an estate in a designated way among legatees given legal estates held not to entitle the executor to possession and control of the estate intermediate the period of division.—*Thomas v. Owens* (Ga.) 218.

\*A request by testator, in a holographic will, to a bank "to be trustee of my children" followed by directions as to the disposition of his estate, etc., held an appointment of the bank to administer the estate as executor, and afterwards as trustee till the minor children should become of age.—*Harper v. Harper* (N. C.) 553.

§ 671. A will construed, and held to create a testamentary trust.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

§ 676. A trust by implication of law will be decreed when it is essential to carry into effect the provisions of a will, and, though no trust is created by the will, the court will have regard to the intention gathered from the entire instrument.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

§ 676. To constitute a valid declaration of testamentary trust, it must appear that such was the intention of testator, though specific language declaratory of a trust is not necessary.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

**§ 10. — Actions to construe wills.**

An action, including an issue of devisavit vel non and a proceeding to construe the will, held to present no jurisdictional irregularity.—*Harper v. Harper* (N. C.) 553.

§ 698. Under Const. 1868, the superior court held to possess jurisdiction of a suit by executors and trustees for the construction of the will of testator and for direction as to their duties.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

§ 698. The jurisdiction of the court of equity in matters of construction of wills grew out of its general control over trusts and trustees, and equity can only take jurisdiction when trusts are involved.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

§ 705. The court, in an action by executors and trustees for the construction of a will and for direction as to their duties in the premises, held entitled to provide for a fair division of certain commissions between trustees and a guardian.—*Haywood v. Wachovia Loan & Trust Co.* (N. C.) 915.

**§ 11. Rights and liabilities of devisees and legatees.**

Neither by pursuing the statutory method for partition, nor by agreement of life tenants, who were devisees under a will, can the testamentary scheme be set aside as to parties interested in the estate who were not parties to the partition or the agreement.—*Watkins v. Gilmore* (Ga.) 32; *Gilmore v. Watkins*, Id.

\*A beneficiary in a will held entitled to proceeds paid for real estate by a third person as against the objection that the gift to the beneficiary had been adeemed.—*Rue v. Connell* (N. C.) 306.

\*Point annotated. See syllabus.

\*The term "ademption" defined.—*Rue v. Connell* (N. C.) 306.

A will construed to give the widow the use of specific personal property during her life, and not merely the interest on the proceeds of its sale.—*In re Knowles' Estate* (N. C.) 549.

§ 718. A married woman holding the equity of redemption in land *held* not estopped to assert the claim to redeem as against other devisees by entering on part of the land under a devise from the mortgage.—*Rich v. Morisey* (N. C.) 762.

§ 718. The doctrine of election between inconsistent benefits under a will held not to apply where a mortgagee devised part of the mortgaged property to one holding the equity of redemption, especially where the devise was a *feme covert*.—*Rich v. Morisey* (N. C.) 762.

§ 847. The statute protecting a purchaser from an heir or devisee two years after the death of the ancestor or deviser without notice of an indebtedness against an action to collect a debt from the executor *held* not to apply to an action against an executor and devisees to redeem land of which decedent was mortgagee.—*Rich v. Morisey* (N. C.) 762.

\*Though a will showed an intention to exclude defendants from participation in other property than that expressly devised to them, it cannot prevent them from receiving as heirs any property not disposed of by the will.—*Vaughn v. Lanford* (S. C.) 316.

## WITNESSES.

See *Depositions*; *Evidence*.

Continuance for absence of, see *Criminal Law*, § 17.

Experts, see *Evidence*, § 11.

Misconduct of witness as ground for new trial, see *Criminal Law*, § 26.

Opinions, see *Evidence*, § 11.

Perjury, see *Perjury*.

Review on appeal or writ of error of discretionary rulings as to examination of, see *Appeal and Error*, § 12.

Review on appeal or writ of error of discretionary rulings as to testimony of expert witness, see *Appeal and Error*, § 12.

Review on appeal or writ of error of finding of fact as to ability of witness to testify, see *Appeal and Error*, § 13.

Testimony of accomplices, see *Criminal Law*, § 12.

To will, see *Wills*, § 2.

### § 1. Attendance, production of documents, and compensation.

Pen. Code 1895, §§ 1114-1118, considered, and a subpoena for defendant's nonresident witnesses *held* not required to be countersigned, either by the presiding judge or the solicitor general, and denial of a continuance on the ground that such a subpoena was not so countersigned was unwarranted.—*Ivey v. State* (Ga. App.) 565.

### § 2. Competency.

\*On a complaint for land, defendant was not a competent witness to testify that the deceased grantor of plaintiff had executed a deed of the land to him.—*Fullbright v. Neely* (Ga.) 188.

\*Defendant *held* incompetent to testify to transactions or communications between himself and the agent, since deceased, of plaintiff corporation, though in the presence of a third person.—*Dolvin v. American Harrow Co.* (Ga.) 198.

\*Communications to an attorney are not confidential, unless made to him in his capacity as such.—*Coker v. Oliver* (Ga. App.) 483.

\*The testimony of a witness is not to be excluded merely because he prefaces his state-

ment by an expression of unwillingness to commit himself absolutely to the accuracy of what he says.—*Holcombe v. State* (Ga. App.) 647.

\*Revisal 1905, § 1631, *held* not to prevent a witness, in an action to determine whether an instrument found in decedent's safe was his will, from testifying that witness had papers in the safe.—*Harper v. Harper* (N. C.) 553.

§ 143. Evidence of declarations of a decedent *held* not inadmissible under Revisal 1905, § 1631, relating to testimony where one party to transaction is dead.—*Condor v. Secrest* (N. C.) 921.

\*Testimony of defendant in an action by an executor on notes given decedent *held* incompetent as in reference to a transaction between defendant and decedent.—*McCandless v. Mobley* (S. C.) 260.

§ 144. Decedent's wife, on suing to establish loss or destruction of a deed whereby he conveyed to her land claimed by his devisee, was an incompetent witness.—*Smith v. Lurty* (Va.) 789.

§ 112. Under Code 1887, § 3345 (Code 1904, p. 1768), the grantor of defendants in ejectment was a competent witness in their favor.—*Wright v. Johnson* (Va.) 948.

### § 3. Examination.

\*An opportunity for a thorough cross-examination should be allowed.—*Alabama Const. Co. v. Continental Car & Equipment Co.* (Ga.) 160.

\*Discretion of the trial judge in controlling the right of cross-examination will not be reviewed unless abused.—*Fouraker v. State* (Ga. App.) 116.

\*Refusal to allow certain question *held* not an undue restriction of the right of cross-examination.—*Hagood v. State* (Ga. App.) 641.

§ 267. Questions *held* properly excluded as an effort to cross-examine one's own witness.—*Myatt v. Myatt* (N. C.) 887.

### § 4. Credibility, impeachment, contradiction, and corroboration.

\*Evidence of contradictory statements by a witness sought to be impeached is not affirmative proof of the contents of such statements.—*Luke v. Cannon* (Ga. App.) 110.

\*Foundation for impeachment of witness by contradictory statement *held* not properly laid.—*Luke v. Cannon* (Ga. App.) 110.

\*Under Civ. Code 1895, § 5292, a witness cannot be impeached by proof of contradictory statements until his attention has been directed to the time as well as the place of making them.—*Luke v. Cannon* (Ga. App.) 110.

\*To entitle a party to impeach his own witness, certain facts *held* required to appear.—*Luke v. Cannon* (Ga. App.) 110.

\*A witness sought to be impeached by previous contradictory statement *held* entitled to make certain explanation.—*Georgia R. & Electric Co. v. Dougherty* (Ga. App.) 158.

\*Proof of reputation for chastity may be offered to discredit the testimony of a witness, but the jury may believe such witness to be truthful.—*Cripe v. State* (Ga. App.) 567.

§ 360. A party whom it is sought to discredit as a witness by proof that he is fully able to pay the costs notwithstanding he has filed a pauper affidavit *held* entitled to rebut such proof.—*Leake v. J. R. King Dry Goods Co.* (Ga. App.) 729.

§ 361. A witness whose impeachment has been attempted may be sustained by the testimony of witnesses who admit that his general character is bad, but that they will believe him on oath.—*Taylor v. State* (Ga. App.) 1048.

\*Point annotated. See *syllabus*.

§ 362. A jury has the right to believe a witness, though he may have been impeached by proof of general bad character or contradictory statements.—Taylor v. State (Ga. App.) 1048.

In an action for injury to land, *held* competent by way of direct impeachment of plaintiff to ask him whether any one else owned the timber thereon.—Gay v. Roanoke R. & Lumber Co. (N. C.) 436.

\*Certain questions *held* proper cross-examination for the purpose of laying a foundation for impeaching witnesses.—Pate v. Tar Heel Steamboat Co. (N. C.) 614.

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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	60	177	143	60	449	364	60	863	459	60	1031	539	61	633	61	485	741
8	80	104	146	60	455	365	60	863	460	60	1063	542	61	637	61	481	741
15	60	103	151	60	450	365	60	865	461	60	1036	542	61	643	61	492	747
15	60	104	153	60	461	370	60	860	466	60	1069	546	61	646	61	491	748
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18	60	107	170	60	531	375	60	861	469	60	1062	555	61	656	61	541	756
22	60	153	191	60	554	377	60	1051	472	60	1041	559	61	661	61	543	756
27	60	160	213	60	456	382	60	993	474	61	1	563	61	666	61	536	761
31	60	174	218	60	529	383	61	5	476	61	12	564	61	671	61	546	764
37	60	146	222	60	539	391	60	1049	479	61	14	564	61	672	61	538	764
43	80	157	224	60	571	394	60	997	483	61	23	570	61	675	61	539	766
43	60	164	225	60	851	398	60	1060	489	61	115	573	61	677	61	530	770
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63	60	198	265	60	541	414	61	1	507	61	13	591	61	691	61	533	782
67	60	262	273	60	835	421	60	1056	507	61	127	596	61	694	61	534	782
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79	60	263	307	60	572	430	60	1048	523	61	120	600	61	709	61	716	791
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83	60	189	338	60	563	434	60	1060	524	61	121	607	61	716	61	699	807
87	60	268	343	60	1006	435	60	1048	525	61	122	607	61	716	61	722	815
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106	60	264	350	60	851	446	60	1042	534	61	122	610	61	733	61	599	850
113	60	258	350	60	1000	447	60	998	534	61	131	610	61	733	61	721	861
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